**Cook Islands - A Small Island Developing State - The Causes and Consequences of Corruption in the Public Sector – 1978 to 2018.**

**A Thesis Presented in Fulfillment of the Requirements**

**for the Degree of Doctor of Philosophy**

**June 2024**

**Brief Biography** -Paul Allsworth DipAMS, CFE. MBA.



Paul has more than 30 years’ experience in the Cook Islands public and private sector. Paul has held a number of senior roles, including as Director of Audit (Auditor General) of the Cook Islands Audit Office for 15 years. A former Chairman of PASAI and a Governing Board member of INTOSAI, during his term as Director of Audit.

Significant career achievements when Paul accepted the Jorg Kandutsch Award on behalf of the Audit Office from INTOSAI, for the most outstanding National Audit Office in the PASAI region. Paul represented the Cook Islands to the United Nations Office in Vienna for the application of the United Nations Convention Against Corruption (UNCAC) membership. He also led the initiative to ICANZ for the Cook Islands to achieve ATO status for Audit Office staff to train and study to become full ACA/CA status.

Paul has worked and served under seven former Prime Ministers and Ministers of Finance. He held the post of Head of Secretariat for the Public Accounts Committee of Parliament, Acting Secretary of the Ministry of Internal Affairs and is currently the Review and Compliance Manager of the Cook Islands Football Association (CIFA). He was appointed a Director on the Business Trade and Investment Board and the Liquor Licensing Authority.

Paul holds the chiefly title of Terea Mataiapo under Te Maeu o te Rangi Teikamata Ariki from the Ngati Te Akatauira tribe of Nukuroa. Paul is a past President of the Koutu Nui, a sub- chief group of the House of Ariki. A former Chef de Mission, Paul passion in sports led him to manage national teams to Regional, Commonwealth and Olympic Games. Paul is known for his passion in traditional culture, leadership, and anti-corruption. He is currently the Chairman of Citizens Against Corruption Inc, an NGO formed in 2021. He is a Management Tutor with the University of the South Pacific, Avarua Centre, for over 10 years.

Paul obtained Diploma’s in Accounting and Management Studies and a Master in Business Administration (MBA) from the University of the South Pacific. He holds memberships from the NZ Institute of Internal Auditors, the NZ Institute of Directors and is a Certified Fraud Examiner from the Association of Certified Fraud Examiners, ACFE. On 21st June 2024, Paul gained Associate level membership into the prestigious Chief of Staff Association.

Building a strong work culture around good governance, Indigenous people and communities is fundamental and close to his vision and approach.

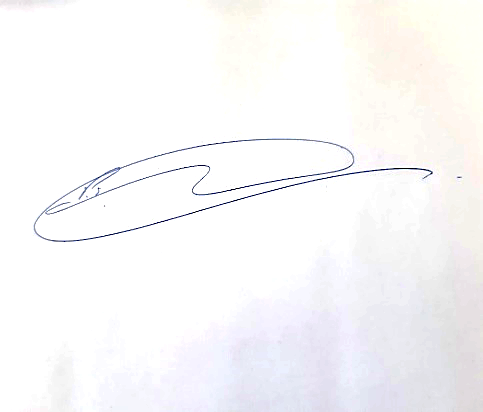
**School of Social and Human Studies**

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**Declaration and Statement of Original Authorship**

The work contained in this thesis has not been previously submitted to meet requirements for an award at this or any other higher education institution. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made.

**Signature**: 

**Date: 9 July 2021**

**Ethics Approval**

This PhD ethics application was submitted to the AIU Academic Committee addressed to Dr Edward Lambert, Academic Advisor. This was approved on 19 December 2021.

**Acknowledgements**

Te inangaro nei au i te akameitaki i taku vaine akaieie koia ko Tania Akai no tana turuturu e te irinaki i roto iaku, no teia apiianga teimaa e te rangatira tu.

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I would also like to put on record, the following important people in my life and throughout my educational journey, who have taught me, nurtured me, cultivated me, guided me, advised me and above all, cared and encouraged me in one way or another, from the very beginning;

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* Nikao Side School, Rarotonga – Teachers and Principal, the late Terry Lambert and Tom Tixier. John Herrmann, a former Director of the University of the South Pacific, Rarotonga Campus, Cook Islands.
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* The late Richard Dick Chapman, former Public Service Commissioner. My first Government job was working with Dick, as Assistant Investigating Officer.
* The late Richard McDonald, former Director of the Office of Audit & Inquiries. Mentor and inspirator.
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* Jim Ditchburn, former Collector of Inland Revenue and Acting Director of the Office of Audit & Inquiries.
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* The late Pohiva Tui’onetoa, former Auditor General of Tonga and former Prime Minister of the Kingdom of Tonga (the grandfather of PASAI).
* The late Nga Valoa, former Clerk of the Parliament of the Cook Islands.
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* The late John Kenning, President of the Cook Islands Rugby League Association.
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* Professor of Management, Dr Briscoe, USP Suva, Fiji.
* Professor Jim McMaster, Head of the Master in Business Administration (MBA) Program – Cook Islands USP Centre Campus.
* Norman George, former Deputy Prime Minister, former Speaker of Parliament, senior Solicitor and executive member of Citizens Against Corruption (CAC) Inc.
* The following former Ministers of Finance and Prime Minister’s during my tenure of employment as Assistant Investigator, Investigator, Auditor, Senior Auditor, Executive Officer, former Director of Audit and Inquiries and former Director of the Office of Public Expenditure Review and Audit (PERCA), Head of Secretariat of the Public Accounts Committee of Parliament and Acting Secretary of the Ministry of Internal Affairs.
* Hon Sir Geoffrey Henry, KBE (former Minister of Finance and Prime Minister)
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* Hon Dr Robert Woonton (former Prime Minister)
* The late Hon Papa Mama Pokino (Minister of Finance)
* The late Hon Dr Joseph Williams (former Prime Minister)
* Hon Tangata Vavia (former Minister of Finance)
* Hon Tapi Taio (former Minister of Finance)
* The late Hon Dr Sir Terepai Maoate KBE (former Minister of Finance & Prime Minister)
* The late Hon Jim Marurai (former Prime Minister)
* Hon Henry Puna (former Prime Minister)
* Hon Mark Brown (current Minister of Finance & Prime Minister)

Last but not the least, I would like to acknowledge my many friends and work colleagues from all walks of life, who have contributed to my professional development, social and cultural network, for providing advice, information and words of wisdom, that enabled me to grow as a youth, student, father, coach, cultural leader, consultant, tutor and manager.

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* The Cook Islands Football Association (CIFA). Meitaki maata to the former President of CIFA, Lee Harmon for your friendship and support.

**Dedication**

I humbly dedicate my PhD to my parents, the late Ivan Francis Allsworth (Korean War Corporal, 16th Field Regiment of the Royal New Zealand Artillery, awarded the Presidential Unit Citation) and the late, Te Maeu o te Rangi Pokoati. Equally important, are my grandparents, (toku ngametua angai) who raised and nurtured me to where I am today. The late, Reverend Honorable Raui Pokoati and Ngamatekino Moana Taimata. You are forever in my heart with cherished memories.

**Bible Verse**

**Proverbs 4:7** ‘Wisdom is the principal thing; therefore, get wisdom and with all thy getting, get understanding’.

As for me and my house, we will serve the Lord – **Joshua 24:15**

**Pee or Traditional Cook Islands Chant**

I have written this pee otherwise known as a traditional chant, to express my inner feelings for my people, my homeland and the love for my grandparents, who nurtured and raised me.

**KUA ANAU IA AU I TE PIRIĀRANGI,**

**KUA IRIIRI IA TOKU TOTO,**

**E KUA OKI KI TE AKAU ROA,**

**ARANGA TU AKE EI MARAMA NO TE KOPU TANGATA,**

**TAMARIKI KI TE AO,**

**E INA ANGA ROURU**

**AKAIRO TO TEI MOE,**

**TE ATUA TE ARATAKI I AKU.**

**I WAS BORN IN THE NIGHT OF DAY,**

**MY BLOOD IS MIXED,**

**I HAVE RETURNED HOME,**

**TO FIND WISDOM FOR MY PEOPLE,**

**MY CHILDREN ARE BORN,**

**MY HAIR IS NOW GREY,**

**MY ELDERS HAVE PASSED,**

**GOD IS MY GUIDE.**

**Abstract**

The objective of my thesis is to comprehensively research the causes and consequences of corruption in the Cook Islands public sector for the years 1978 to 2018. Criminal cases and published audit reports relating to corruption, on a selected case-by-case basis, have been researched and analyzed. Data from this research was then utilized to arrive at specific conclusions with lessons learnt and recommendations. Corruption in the public sector is viewed as the major obstacle to economic development (Kaufman,1997). To my knowledge, there have been no studies on the causes and consequences of corruption in the Cook Islands public sector.

What is the definition of corruption? The anti-corruption strategy the World Bank announced in September 1997 defined corruption as the “use of public office for private gain”. Forms of corruption vary, but can include bribery, lobbying, extortion, cronyism, nepotism, parochialism, patronage, influence peddling, graft, misappropriation and embezzlement. In a sense, the World Bank definition of corruption is broad and over-arching. This definition covers both petty and material misuse of public funds, public property and public assets.

Corruption erodes trust, weakens democracy, hampers economic development and further exacerbates inequality, poverty, social division and the environmental crisis. Exposing corruption and holding the corrupt to account can only happen if we understand the way corruption works and the systems that enable it.

Corruption is also the abuse of authority and power that follows the violation of established codes of conduct and ethics. For the purposes of this research, corruption is generally defined as the ‘abuse of public office for private gain’.

This thesis researches and reviews the key causes and consequences of corruption from within the Cook Islands public sector from the context of the **Fraud (corruption) triangle** model implemented by United States criminologist, Dr. Donald Cressey in the 1970’s (refer to Figure 1). The fraud triangle outlines the three preconditions that lead to higher instances of occupational fraud. These are;

1. **Motivation** - pressure or incentive to commit the fraud.
2. **Opportunity** – the knowledge and ability to carry out the fraud.
3. **Rationalization** - greed and justification of dishonest actions.

This research scrutinizes and analyses the diverse types of corrupt activities committed by former members of Parliament, Cabinet Ministers and public officials, utilizing the ‘fraud triangle model’. I have, for the purposes of my thesis, introduced a fourth enabling element, which attaches itself, metaphorically, to the Cressey fraud triangle. I have identified this traditional symbolism as the ‘**Te Toki e te Kaa Rakau’,** translated, the stone adze mallet interweaving the fraud triangle, depicting the unethical cultural influences and the environment, as one of the enabling and major contributing factors of the causes of fraud and corruption in the Cook Islands. (refer to figure 2).

The ‘Toki’ represents the stone adze, a warrior’s choice of weapon, in times of battle. It is tied together by the hardened dried coconut fibers called the ‘Kaa’, which represents the many threads of unethical cultural influences by the perpetrator from and within the community and the environment. The ‘Rakau’ is the strong timber mallet, cut from the durable toa and tamanu, that resembles the strong arm of the law, origins of the tree and its foundation, representing the perpetrator and the person caught up in the corrupt activity. The ‘Toki e te Kaa Rakau’, once amalgamated with the Cressey fraud triangle, will on impact, provide maximum force and magnetism that compels the perpetrator to exert and apply cultural pressure and environmental stimulus, that ultimately leads to corrupt practices.

Cultural and traditional influences from the environment, are aligned and connected through blood lines, families, close friends and relationships. This kinship and communal relationship, in a way, underlies the patriarchal duties and obligations, one has to the ‘kopu tangata’ or extended families. The threads that link and binds them together is represented by the kaa or dried coconut fibers, tying the toki (stone adze) and the rakau (timber mallet) together.

The importance of this research, links specific white-collar corruption cases that have been before the Courts, highlighting various cases of abuse of position, misuse of public funds, conspiracy, theft and gross mismanagement. Information on white-collar crimes is publicly available with the Cook Islands Ministry of Justice and recorded on-line with the Pacific Islands Legal Information Institute (PacLII) website. To my knowledge, this information has not been previously analyzed in a detailed and comprehensive manner, in terms of the Cook Islands context.

The information analyzed has been categorized into chronological segments commencing from 1978 to 2018, in order to gain valuable insights into the specific occupational corruption clusters by the perpetrators. This public information discloses what criminal and civil offences were committed, how it was perpetrated and the consequences of their respective actions. This research has analyzed and disclosed the probable causes of cases utilizing the Cressey ‘fraud triangle’ model, together with the fourth element of, unethical cultural influences and the environment using the Toki or warrior’s traditional stone adze, woven and tied with dried coconut fibers, the Kaa Rakau, depicting its cultural significance. Other fraud models have been noted for comparison and relevance.

**Caption of Judges Gavel.**



**Thesis Approach**

This research plans to detail the steps and approach in the following format, through the following chapters;

1. Cook Islands History and Colonial Background.
2. Research Methods and Analysis.
3. Literature Review.
4. The Cressey Fraud (Corruption) Triangle.
5. The 4th Contributing Element – Te Toki e te Kaa Rakau – Symbolizing the Unethical Cultural Influences and the Environment.
6. Corruption Cases within the Research Period.
7. Regional and International Initiatives addressing Corruption in the Pacific.
8. Consequences of Corruption - Reviewing the effects of corruption by public officials on government agencies, civil societies, and island communities.
9. Conclusions and Recommendations – A summary of anti- corruption strategies, identifying areas to improve prevention, detection, risk mitigation and effective governance and anti-corruption policies and procedures.
10. References
11. Appendices

**Significance of Research Thesis**

Although there are numerous Pacific publications and articles relating to corruption and anti-corruption literature in the region, there are no detailed writings and research, in this specific field, examining the causes and consequences of corruption, per se, in the Cook Islands Public Sector.

From my experience, working in the field of public administration, governance and anti-corruption for over 30 years in the Cook Islands Public Sector, this particular field of study, has always been a ‘highly taboo and sensitive area’ to talk about, discuss, debate and even report on, due to cultural sensitivities in small island communities.

‘Exposing corruption affects the reputation of countries, governments, business communities, investors and individual leaders.’ (G Hassall: Law, Culture and Corruption in the Pacific Islands, March,2019) Key probing questions are;

* What are the invisible linkages and causal factors that enable and instigate the perpetrators to carry out such corrupt actions?
* Why do perpetrators commit such corrupt offences? Are there both intrinsic and extrinsic elements inherent in all or some of the perpetrators carrying out acts of corruption, dishonesty and gross mismanagement?
* Are there other elements such as, motivation purely for self-interest or political advantage, or is it due to an unethical cultural environmental setting, that influences and compels perpetrators to carry out such acts?
* How will the conclusions, lessons learnt and recommendations from this research thesis be beneficial to national, regional and international forums and institutions?

The significance of this research will, in my view, provide some clarity and exposure surrounding the circumstances, why ‘public officials’ carry out corrupt practices, utilizing Cressey’s fraud triangle model together with the traditional Cook Islands metaphorical “Te Toki e te Kaa Rakau” symbolism, which I have developed, as a fourth enabling element, focusing on the unethical cultural and traditional influences and the environment.

The key findings and conclusions from this research will infer relevant issues in mitigating corrupt practices, and in the medium to long term, provide possible solutions from lessons learnt to;

* Reviewing the Cook Islands governance structure in terms of the criminal and civil laws of the Cook Islands.
* Introduce best practice for codes of conduct and ethical behavior.
* Introduce best practice legislation, policies and procedures.
* Improve and strengthen internal financial control systems.
* Review possible ways to combat unethical human behavior in order to maximize human resources productivity and performance.
* Review and re-introduce an apolitical Public Sector based on merit, to remove influences of political nepotism and cronyism.

Throughout the research period, various Governments have introduced incremental improvements of Public Sector policies and procedures, through various reform legislation. The introduction of robust policies and procedures that builds on a stronger internal control environment. However, it is noted, that in the majority of the corruption cases researched, the reform process did not detract and deter the perpetrators in carrying out white - collar crimes and corruption, in the Public Sector.

The thesis evaluates the consequences of corruption, both from the perpetrator’s perspective and from the negative impacts on families, tribal clans, and society as a whole.

The research findings and conclusions, provides possible solutions and recommendations to enhance and strengthen public financial management systems in the Public Sector, with a view to improving efficiency and effectiveness within the machinery of Government and Parliament.

At the same time, it provides a list of protective measures from experiences and lessons learnt, which may lead to additional best practices and approaches, in order to better protect public funds and assets.

This research thesis has important theoretical and practical implications and outcomes that impacts on the administration of public resources, in terms of curbing corruption in the Cook Islands Public Sector, society and to some extent, the Pacific Islands.

**Table of Contents**

Title Page 1

Personal Biography 2-3

Declaration and Statement of Original Authorship 4

Ethics Application 4

Acknowledgements 5-8

Dedication 8

Bible verse 9

Pee or Traditional Cook Islands Chant 9

Abstract 10-12

Thesis Approach 13

Significance of Research Thesis 14-15

Table of Contents 16-17

List of Figures 18

List of Tables 18

Chapter 1 - Cook Islands History and Colonial Background 19-27

Chapter 2 - Research Methods and Analysis 28-81

Chapter 3 - Literature Review 82-91

Chapter 4 - The Cressey Fraud (Corruption) Triangle 92-102

Chapter 5 - The 4th Contributing Element – ‘Te Toki e te Kaa Rakau’ 103-118

Chapter 6 - Corruption Cases within the Research Period 119

Case 1 – Albert Henry Fly-In Voters and Corruption 120-196

Case 2 – Italian Loan Inquiry 197-234

Case 3 – Michael Benns Fraud and Secret Commission 235-243

Case 4 – Basilio Kaokao Theft and Falsifying 244-246

Case 5 – Tepure Tapaitau Breach of the Electoral Act 247-259

Case 6 – Edward Drollett Fraud and Secret Commission 260-268

Case 7 – T Matapo vs R Wigmore Treating 269-281

Case 8 – Peri Vaevaepare Misuse of Public Funds 282-288

Case 9 – Albert Numanga Falsifying and Theft 289-291

Case 10 – Nationalization of the Fuel Industry 292-305

Case 11 – Importation of Soft Drinks by CITC 306-312

Case 12- T Crocombe vs Collector 313-351

Case 13- T Crocombe vs Collector Appeal 352-363

Case 14 - T Bishop Corruption 364-382

Case 15 – T Browne vs Toka Hagai Treating 383-416

Case 16 – T Browne vs Toka Hagai Appeal 417-462

Chapter 7 - Regional and International Initiatives to address Corruption in the Cook Islands and the Pacific 463-478

Chapter 8- Consequences of Corruption 479-485

Chapter 9 - Summary of Conclusions and Recommendations 486-491

References 493-498

Appendices 499-510

Survey Questionnaire

**List of Figures**

Figure 1 – **Cressey Fraud (Corruption) Triangle**

Figure 2 **– Te Toki e te Kaa Rakau Model**

Figure 3 **– The New Fraud Pentagon Model**

Figure 4 **– The Unification of the Cressey Fraud Model and the Te Toki e te Kaa Rakau Concept**

Figure 5 **– The Iceberg Principle or Theory**

Figure 6 – **The Iceberg Cultural Theory**

Figure 7 **– The Consolidated Firewall and Safety Net Software**

**List of Tables**

Table 1 – **Survey Participants Information**

Table 2 – **Sources of Cases Researched**

Table 3 – **List of Cases Researched**

**Chapter 1 COOK ISLANDS HISTORY AND COLONIAL BACKGROUND**

The London Missionary Society missionaries were not the first to discover the islands, Captain Cook arrived in 1773 and 1777 navigating and mapping most of the group, surprisingly, he never sighted Rarotonga and he only personally set foot on the tiny uninhabited atoll of Palmerston. Originally named the Hervey Isles after a British Lord, Lord Hervey, a century later a Russian Baltic German Admiral Adam Johannn von Krusenstern, who published the Atlas de’Ocean Pacifique, renamed the Hervey Islands to the Cook Islands in honour of Captain Cook in 1823.

In 1888, British protection was declared over the southern islands of the Cook group. Makea Takau Ariki, signed the treaty in the Taputapuatea palace grounds accepting the Cook Islands status as a British protectorate on 26 October 1888. In 1890, Frederick Joseph Moss became the first New Zealand - appointed British Resident. This was due mainly to fears that France may seize the Islands first.

Having installed a number of progressive measures for considerable degree of native self-government, Moss eventually fell afoul of a variety of local interests. Failure to implement new legislation setting up a Federal Court and a subsequent inquiry finding that his position had become untenable led to his replacement by Lieutenant- Colonel Walter Gudgeon in September 1898.

Gudgeon was a New Zealand judge of the Native Land Court, sitting notably in the King Country. He was also a judge of the Validation Court and a trust commissioner under the Natives Lands Frauds Prevention Act 1881. This work enabled him to pursue a long-standing interest in maori language and history. In 1892 he was one of the founders of the Polynesian Society.

Seddon intimated that Gudgeon’s real task was to annex the islands to New Zealand, and Gudgeon, whose belief in his ‘manifest destiny’ has led him to dream of one day being ‘Governor of Fighi’, accepted his mission with alacrity.

In April 1900 the Rarotonga ariki consented to annexation, but to Great Britain, not New Zealand. A quickly arranged visit ‘for health reasons’ by Seddon, who made lavish and mostly unfilled promises of aid, and some fast talking by Gudgeon persuaded the ariki to agree to be annexed to Great Britain and federated with New Zealand. In reality, the island became New Zealand territory. After annexation by New Zealand in June 1901, Gudgeon was awarded a CMG and became Resident Commissioner and remained in Office until August 1909.

As resident commissioner, chief justice of the high court of the Cook and other islands Land Trust Court, Gudgeon was veritable ‘Pooh-Bah of the Pacific’ responsible only to New Zealand Prime Minister, Richard Seddon. He rendered impotent the ariki council, and appointed to key positions several friends and relatives who proved to be corrupt.

After establishing a prison camp on an isolated island, he invested in land there and then sentenced men to hard labour for crimes such as the theft of a pair of shoes. His own nephew got two years for embezzling government funds which Gudgeon had to pay; after serving his time, he (Gudgeon’s nephew) was appointed (prison) gaoler. Some minor offenders were forced to serve as indentured laborers in French Polynesia (Tahiti).

Convinced that the Cook Islands Maori were a dying race, Gudgeon saw little reason to intervene in what he took to be the process of natural selection. Until 1909 the islands medical resources comprised an uninhabitable hospital and a single doctor who put off patients with his gruff manner and devoted most of his energies to his plantation.

Lepers were quarantined on isolated atolls and left to fend for themselves. Education beyond basic mission schooling in the vernacular, was not considered necessary. The only senior school, which taught mainly in English, was first made fee-paying and then closed. George Hogben’s efforts to establish scholarships to New Zealand schools were thwarted.

Gudgeon hoped to bring into being through the operations of his Land Court, a settler society; the Maori destiny was to labour in its plantations and homesteads.

By 1097, the Europeans occupied a fifth of Rarotonga’s fertile land; by 1909 the value of exports had increased five-fold in a decade. But there proved to be little land available for sale and less willingness to lease land to Europeans. The Union Steam Ship Company’s shipping monopoly made the export of perishable fruit bot expensive and uncertain. In 1909, the increasingly cantankerous Gudgeon was retired by (NZ) Prime Minister Joseph Ward, according to Gudgeon, because of his lapsed Catholicism. He died in Auckland on 5 January 1920.

In 1821, Reverend John Williams and two Raiatea London Missionary Society missionaries, Papehia and Vahapata arrived in Aitutaki to preach the gospel. Rev John Williams left the pair in Aitutaki under the protection of the paramount chief, Tamatoa Ariki.

In Gudgeon’s, ‘A Journal of My Residence in the South Seas’ in policy, the only criticisms of (Frederick Joseph) Moss are of the manner and fact of his introduction of island councils for self-government, his failure to secure passage of the Federal Court Bill and the lack of increased revenue and the material fabric of colonial government.

Administratively, Moss is accused of a variety of fraudulent activities, benefiting to the point of illegality one particular commercial company, employing and favoring one ‘Jimmy te Pou’ and committing a variety of minor piccadilloes. The Moss administration inquiry report (characterized by Gudgeon as ‘ingeniously colorless) found him guilty of error, want of judgement and overbearing conduct but not of corruption, fraud or dishonesty.

The first Cook Islands Act as an enactment of the New Zealand Parliament to provide for the administration of the Cook Islands was passed in 1901.Then in 1915, a Cook Islands Act was passed. The Cook Islands Act 1915 established the High Court and also declared the common law of England as applied in the Cook Islands except where inconsistent with the Cook Islands Act 1915 and “inapplicable to the circumstances” of the Islands.

In 1962 New Zealand asked the Cook Islands legislature to vote on four options for the future: independence, self-government, integration into New Zealand or integration into a larger Polynesian federation. The legislature decided upon self-government.

Following elections in 1965, the Cook Islands transitioned to become a self-governing territory in free association with New Zealand. This arrangement left the Cook Islands politically independent, but officially remaining under New Zealand sovereignty. This political transition was approved by the United Nations. The Constitution of the Cook Islands in 1965 declared Her Majesty the Queen in right of New Zealand as Head of State of the Cook Islands and vested in her the executive authority of the Cook Islands. The Cook Islands was vested with a Head of State in common with New Zealand.

New Zealand is tasked with overseeing the country’s defense. The Cook Islands, Niue and Tokelau with its territories and the Ross dependency, make up the realm of New Zealand. After achieving autonomy in 1965, the Cook Islands elected Albert Henry of the Cook Islands Party as its first Prime Minister. He led the country until 1978 when he was accused of vote-rigging and corruption. He was succeeded by Tom Davis of the Democratic Party.

**The INTOSAI Journal** published an article – Government Auditing in the South Pacific Region – A Cook Islands Perspective, by the former Director of Audit and Chairman of PASAI, Paul Allsworth. This article provides a historical background on the issues and challenges facing small island state Audit Offices (April 2003).

*Governmental Auditing in the South Pacific Region:*

AOK ISLANDS PERSPECTIVE

**PAUL R. S. ALLSWORTH**

DIRECTOR OF AUDIT, COOK ISLANDS, AND CHAIRMAN OF SPASAI

I am privileged to have the opportunity to share with you some issues and challenges confronting small and isolated audit offices in the South Pacific. For the purpose of this article, I will focus my comments on the perspective of a small island state. The Cook Islands comprises 15 small islands scattered over an area of some 2 million square kilometers of ocean, with a total land area of 240 sq. km. It is flanked to the west by Tonga and Samoa and to the east by Tahiti and French Polynesia. The Cook Islands is divided into a northern group with seven islands and a southern group with eight islands. It has the second largest exclusive economic zone in the world but is one of the least populated countries in the South Pacific, with a population of under 20,000.

**History**

Until 1987, the Cook Islands Treasury Department maintained an internal audit function that focused primarily on the integrity of the Treasury Department’s centralized imprest system, the supply and sale of liquor, stamps, and cash counts. During this period, the internal audit function, which had four local staff, uncovered major fraud involving the supply and sale of liquor and cash losses in government-run post offices. This fraud resulted from poor internal controls and a lack of review and monitoring. In 1987, the Office of Audit and Inquiries, the Audit Office’s predecessor, was established under the Public Money and Stores Act. During this period, the Cook Islands government delegated responsibility for the external audit function to the New Zealand Office of the Auditor General.

Prior to 1995, the Cook Islands economy experienced an economic collapse due to a bloated public service leading to over expenditures. The government was forced to downsize and restructure the public service, which resulted in a reform process. The under- performance of various government-owned assets contributed to the economic collapse and, consequently, privatization saw the sale of various assets, including the government’s failing flagship hotel. The reform process introduced the Public Expenditure Review Committee and Audit Act (PERCA) in July 1996 to help ensure financial management oversight and improve accountability and transparency. As a result of this legislation, the Office of the Audit and Inquiries was replaced by the Audit Office, which has functioned under the PERCA Act from the time of its origin. The external audit function carried out by the New Zealand Office of the Auditor General and private- sector chartered accounting firms was transferred to the Cook Islands Government Audit Office, which took on full responsibility for external audit in 1996, when, for the first time, the Director of Audit position was localized. The Director of Audit rendered his first auditor’s opinion on the Crown Financial Statements for the year ended June 30, 1998. Since then, the Audit Office has been fully responsible for providing auditor’s opinions on the financial statements of the Crown and all of its Ministries and Crown Agencies.

**Legislation**

After the public sector reform program began in 1995-96, the Ministry of Finance & Economic Management (MFEM) Act was enacted, which required strict financial management controls and replaced line- item budgeting with output budgeting. The PERCA Act of 1996 was also designed to ensure adequate oversight and monitoring of compliance with the MFEM Act.

The Cook Islands Audit Office exists as a constitutional safeguard to maintain the financial integrity of the country’s parliamentary system of government and to assist government in the effective, efficient, and economic use of resources. The Audit Office assists Parliament in strengthening the effectiveness, efficiency, and accountability of the instruments of government.

The Audit Office is independent of the executive branch of government. Its statutory mandate is enshrined in the Constitution of the Cook Islands, under Article 71, and in the Office of Public Expenditure Review Committee and Audit Act 1995/96, Part 3. The Director of Audit performs the functions assigned to him by law, with the assistance of staff and persons he appoints according to the terms of Section 21 and 24 of the Office of Public Expenditure Review Committee and Audit Act 1995/96.

**Staffing and Training**

The Audit Office has experienced marked growth since its inception 7 years ago. The size of the audit staff has nearly tripled and local staff have attained formal tertiary qualifications and received ongoing training through the South Pacific Association of Supreme Audit Institutions (SPASAI). SPASAI training programs have received adequate funding as a result of the efforts of the INTOSAI Development Initiative (IDI) and financial assistance from Asian Development Bank (ADB). Both institutions are committed to promoting good governance in the region.

Continuous professional development and staff training have continued to be a high priority for the Office, which has assisted in funding staff to take accounting and law courses through the extension services of the University of the South Pacific. In February 2001, the Audit Office hosted the 7th SPASAI Congress in Rarotonga. The Congress included a performance auditing workshop for auditor generals in the region.

**Financial Accounting and Reporting Practices and Audit Methodology**

Since the reform program was initiated, the standards for reporting accounting information from Ministries and other reporting units to the Ministry of Finance and Economic Management have improved considerably. The transformation from the cash basis of accounting to the accrual basis under generally accepted accounting practices has been completed. In the 1998/99 financial period, out of the 30 entities, five qualified audit opinions and one disclaimer of opinion were issued. In the 1999/2000 financial period, three qualified audit opinion and one disclaimer of opinion were issued. However, delays in the timely preparation of financial statements and, the Audit Office’s subsequent audit continue to be an area of concern.

In December 2002, MFEM issued a comprehensive set of governmentwide accounting and financial reporting policies and procedures.

At present, the majority of Audit Office staff resources are directed toward the conduct of financial statement audits to ensure that the public financial statements of the Crown and its separate reporting units are fairly presented. However, the Office undertakes special reviews targeted at specific problems ranging from internal control structure issues to allegations of criminal wrongdoing in the public service. The Audit Office functions as a safeguard to maintain the financial integrity of the country’s parliamentary system of government.

**Future Challenges**

The recruitment and retention of qualified accountants and auditors is the most significant challenge the Audit Office faces today. Many of the Cook Islands’ most talented and ambitious young people have left the country to pursue educational and career opportunities in larger South Pacific countries, such as Australia and New Zealand.

The Office also faces expanding workload management problems caused by understaffing. Quite simply, additional staff are needed to deal with the increased number of required financial audits and the Office’s need to begin service performance audits in order to fulfil its legislative mandate. The lure of more attractive rates of pay in the private sector enhances recruitment problems.

To obtain the increased funding necessary to hire additional staff, the Audit Office will have to convince the government that the incremental costs associated with each new staff member hired would be more than offset by cost savings derived through additional audits conducted, especially service performance audits.

Presently, the Ministries and other reporting entities do not adequately report on the nonfinancial elements most commonly included in general purpose financial reports, i.e., the inputs, outputs, and outcomes directly related to service performance. The Audit Office will be encouraging reports on service performance that disclose the degree to which the reporting entity has met its service objectives of supplying goods and/or services. Once these reporting mechanisms are in place, the Audit Office will need to have additional staff to conduct related audits.

By undertaking service performance auditing, the Audit Office plans to become increasingly involved in ensuring the effective, efficient, and economic use of government resources. The performance audits will allow us the opportunity to evaluate the government’s return on investment in terms of outputs and outcomes derived from the investment of public funds.

The Audit Office recognizes the need to solicit expert assistance from overseas to ensure that Audit Office staff receive appropriate training and are informed, on a regular and continuing basis, of changes and emerging issues related to international accounting standards and generally accepted accounting practices. While several Chartered Accounting firms practice in the Cook Islands, there may be issues concerning whether they themselves have had the time or opportunity to become fully knowledgeable with respect to current accounting changes and emerging issues.

Environmental auditing, information technology auditing, fraud and forensic auditing, and public debt auditing are also areas of concern and high priority for future staff resource allocations.

The Cook Islands Audit Office is currently challenged in meeting its statutory obligations under the PERCA Act with its existing level of resources. Declining revenues are available to the government due to external factors. The resulting decreasing budget appropriation, in turn, compromises the Audit Office’s mandate.

These challenges lay out an ambitious agenda for the Cook Islands Audit Office. Other SAIs face similar challenges in carrying out their mandates. This makes it all the more imperative that as we celebrate INTOSAI’s 50 anniversary this year, we continue to share our experiences and collaborate with one another to address our common challenges and promote accountability and transparency in government around the globe.

**Chapter 2 RESEARCH METHODS AND ANALYSIS**

Much of the researched information and materials have initially come about due to the researcher’s (P Allsworth) knowledge of the historical background and outcomes of the white-collar crime cases examined in this thesis. Having that specific inside knowledge in the majority of stated cases, brings about a higher degree of purpose and validity.

To better predict the conditions that lead to a high risk of fraud, anti-fraud professionals and researchers frequently rely on the concept called the “fraud triangle”. Drawing on criminological research from Edwin Sutherland and Donald R. Cressey, Steve Albrecht coined the term to model conditions that lead to a higher risk of fraud. According to Albrecht, the fraud triangle states that “individuals are motivated to commit fraud when three elements come together;

1. Some kind of perceived pressure or motivation,
2. Some perceived opportunity, and
3. Some way to rationalize (greed) the fraud as not being inconsistent with one’s values”.

Today, the fraud triangle is widely used by anti-fraud professionals to explain conditions that could motivate individuals or companies to engage in fraud.

Therefore, the research methods and analysis for this thesis, fundamentally utilizers, the qualitative research approach. Qualitative research is the approach to data collection, analysis and report writing, which differs from the traditional quantitative approaches. Carrie (2007). Research is the process of collecting, analyzing and interpreting data in order to understand a phenomenon (Leedy & Ormrod). The research process is systematic in that defining the objective, managing the data and communicating the findings, within established frameworks and in accordance with existing guidelines. The frameworks and guidelines provide researches with an indication of what to include in the research, how to perform the research and what types of inferences are probable based on the data collected. Carrie (2007).

The term paradigm is described as essential collection of beliefs shared by scientists, a set of agreements about how problems are to be understood, how we view the world and thus go about conducting research. (Creswell JW 2003). These paradigms contain a basic set of beliefs or assumptions that guide our inquiries for particular research. In view of this, authors like Myers and Avison (Myers M D, Avison D 2002) have stated that for defining valid research, the most recommended method is to follow the research paradigm.

This is essential because by selecting a specific paradigm, the researcher does not dwell in his own philosophical know-how and gets a better stance, choosing in relation to other alternatives. There are mainly four paradigms that have been widely used in information system research, these include Positivism, Interpretive, Advocacy and Pragmatism. (Wilcocks LP, Mingers J, 2004).

I have selected two paradigms that, in my view, best describes the gathering and analysis of information, appropriate for this specific research thesis. These are the interpretive and the pragmatic paradigms. The supporter of interpretive paradigm believes on the deep understanding of a concept and explores the understanding of the world in which they live. They develop subjective meanings of their experiences or towards certain objects or things. This paradigm is also called constructivism, social constructivism or qualitative research paradigm. Interpretive research believe that true knowledge can only be obtained by deep interpretation of a subject.

The pragmatism paradigm, on the other hand, is to find the weaknesses in the study and strengthen it by using the mix method approach. The supporter of this paradigm believes that true knowledge can be obtained by using the mixed method approach (Johnson RB, Onwuegbuzie AJ, 2004). Instead of the method being important, the problem is most important and researches should use all approaches to understand the problem statement (Tashkkori A, Teddlie C, 1998). Pragmatism is not affiliated to any system or philosophy. The researchers are free to use both quantitative and qualitative approaches, the essential is to find the best techniques and procedure of research that solves the problem statement.

As this research thesis is unique, in that there has been no research undertaken in the Cook Islands, on this subject matter. However, the general population and community are well aware and publicly informed through various media channels, of the “reported incidents of public officials being charged and convicted of fraud and corruption” over many decades of public administration.

The research design and methodology therefore are reliant in obtaining historically stored electronic information and data, relating specifically to white-collar crimes committed during the research period. From this data and information, research findings and Court decisions were analyzed using the Cressey fraud triangle model, together with the “Te Toki e te Kaa Rakau” element. This intra-fusion signifies the 4th element, representing cultural influences and the environment.

Qualitative research can also be described as an effective model that occurs in a natural setting that enables the researcher to develop a level of detail from being highly involved in the actual experiences (Creswell, 2003). The researcher was involved in most of the identified cases reviewed.

The research methods and analysis adapted for this thesis are based on the following criteria’s;

1. The sourcing and extraction of actual Court decisions surrounding white collar crimes arising from public sector officials in the Cook Islands Public Service for the research period. This was obtained by accessing public records in the Cook Islands Ministry of Justice and Court related information held on-line by the Pacific Islands Legal Information Institute, PACLII.
2. Access to published audit reports from the Cook Islands Audit Office and the Cook Islands Parliament library, relating to special investigations and reviews that involve fraud and corruption cases for the research period.
3. Where files could not be located from Court, PACLII and other sources, access was granted by exploring the archive shelves of the Cook Islands News Ltd.
4. The use and adaptation of various fraud and corruption models, as a guiding principle, in the review of the possible causes of fraud and corruption in the reported cases of white-collar crimes committed within the research period. The utilization of the Cressey fraud triangle (D. Cressey 1953) in this research is a major focal point that underpins the probable causes and motivations of why people commit such crimes. As the researcher, I have adapted the Cressey Fraud Triangle model, together with the symbolical, “Te Toki e te Kaa Rakau” (traditional adze, threaded with dried coconut fibers) symbolizing the cultural influences within the Cook Islands environment.

Models and modelling are often used for visual support when solving problems, to predict actions or events, to make decisions and to communicate (Welch, 1998).

**Survey Questionnaire Design**

1. I designed the survey questionnaire based on my auditing and investigations knowledge and experience of the thesis subject matter. Based on the assurance of confidentiality of the participant’s identity, key information was requested and summarized.
2. The distribution, collection and analysis of a survey questionnaire (refer appendix 1) was carried out from a range of prominent community individuals, that had a high level of public interest, awareness and knowledge of the thesis subject matter. There are three parts to the survey questionnaire.

Part 1 introduces the researcher.

Part 2 includes the participants details, with no names.

Part 3 includes 26 open ended questions.

The collection of empirical evidence provides, in one way or another, through primary sources such as documentations, surveys and interviews. Survey participants were chosen from the community, due to their standing and knowledge of the thesis subject matter. Participants occupations includes, Directors, Solicitors, a Pastor, Chartered Accountant, Chief Executive Officer, Secretary, Consultant, Master Carver and Traditional Leader, Retired School Principal and a Head of Ministry (refer table 1).

The survey strategy is popular in social sciences and associated with deductive research approach. (Mark S, Philip L, Adrian T Research Methods, 2009). In this research strategy, information is collected by utilizing a pre-designed questionnaire.

The survey questionnaires were distributed using the convenience sampling approach. This approach defines a process of data collection from population that is close at hand and easily accessible to the researcher. Convenience sampling allows the researcher to complete interviews and get responses in a cost -effective way, however they (the researcher) may be criticized from selection bias because of the preference and difference of the target population. The researcher confirms selection bias and knowledge of the target population; however, the researcher remains independent of the information provided. Twenty (25) survey questionnaires were distributed and fifteen (14) or 56% were returned and analyzed.

**Table 1 - Survey Participants Information**

**ID Code Occupation Background Gender Status Qualifications**

**01 Director Governance Male Employed CA**

**02 Director Judiciary/Business Male Retired LLB**

**03 Solicitor Judiciary Male Employed LLB**

**04 Pastor Church Male Employed BA**

**05 Chartered Acct Finance Female Employed CA**

**06 CEO Finance Male Employed MBA**

**07 Secretary Church Male Employed MA**

**08 Director Business Male Employed Bus Cert**

**09 Consultant Finance Female Retired BCom**

**10 CEO Business Female Employed MA**

**11 Master Carver Business Male Employed MA**

**12 Solicitor Judiciary Male Employed LLB**

**13 Former Principal Education Male Retired Dip Ed**

**14 Head of Ministry Judiciary Male Employed Post GradDip**

**Results from Participants Survey Questionnaires.**

Each of the participants survey results, using their coded identification numbers, are summarized as follows;

**Q1 – Do you believe that the virtues of honesty and integrity are important?**

* All participants agreed that the virtues of honesty and honesty are important – Yes, 100%

**Q2 – Explain why these virtues important?**

* The virtues & honesty are important for trust and knowing the difference between right & wrong.
* These align with my personal principles and values.
* It is fundamental to the existence of an ordered and functional society which establishes a level playing field for everyone.
* High standards lead to a strict code of ethics, integrity and accountability to enrich democracy and good governance.
* If one values sound relationships, honesty and integrity have to be the foundation.
* Doing the right thing is a reflection of character and principles not qualification or experience. When honesty and integrity is of great importance to a person’s character, they will do the right thing.
* Key factor in maintaining social and professional relationships.
* Basic to the teachings of the Bible.
* Corruption big or small will increase if not dealt with according to the law.
* 1. Honesty and integrity are amongst values that were instilled by parents as important to people of good character and to ensure a good family atmosphere. 2. As I grew older, I learned that one could trust people who also valued honesty and integrity. 3. The rule of law is based on uprightness and integrity, which helps to ensure a peaceful and prosperous society.
* It may not be as bad as other Pacific countries but it happens. Also, Pa Enua (insert, Outer Islands) is worse in that corruption is at the departmental level for example, the Mayor or Executive Officer of an island sometimes takes the Public Works, or the agriculture staff to help build his house or plant his crops. On Rarotonga, there is tighter controls but abuse has come at Board level of from some Government agencies who can authorize spending and who dispense projects.
* It helps make society a just/fair place to live.
* As a former school administrator, I share the view with many of my colleagues that too often too many bosses or people in control are failing in the performance of their duties as a result of over emphasis on qualification or educational achievement rather than CHARACTER.
* The character of the person spells out all the other important qualities (virtues & ethics) that one has to offer. The most highly educated applicant that gets appointed to a position only lasted a short time before being terminated as a result of theft of organizational funds or an immoral issue.
* Without these virtues this community will be chaos.

**Q3 – Do you believe corruption is a serious matter in the Cook Islands public sector? Yes or no, explain why or why not?**

* All participants with the exception of one, agreed that corruption is a serious matter in the Cook Islands – 95%
* Corruption is everywhere and it is in the Cook Islands also. Yes, it is a serious matter and if it is not addressed, the people will lose confidence and trust in the Public Service and will not respect it any more.
* Yes, corruption should be a serious matter in every country.
* The Cook Islands is a very small – minute- society and people are inter-related and those in Government will naturally favor and support those of their tribe, family, church and political It may not be as bad as other Pacific countries but it happens. Also, Pa Enua (insert, Outer Islands) is worse in that corruption is at the departmental level for example, the Mayor or Executive Officer of an island sometimes takes the Public Works, or the agriculture staff to help build his house or plant his crops. On Rarotonga, there is tighter controls but abuse has come at Board level of from some Government agencies who can authorize spending and who dispense projects. Some have known to help their own families, for example, Cook Islands Investment Corp, Ministry of Financial Economic Management and companies like the one that owned Pacific Schooners, the Taunga Nui (insert, private shipping vessel), and Civil Contractors Ltd (CCL) it is a small pool of people who had the power to allocate contracts and funds to their own companies – then they try to legitimize it by delivering the work afterwards and in some cases a whole year after the funds had been disbursed for their services. Basically, it is just not fair. These are public funds. Why are there some privileged companies who can get special treatment, or a helping hand to get out of a dire situation, while the rest of the country has to earn money the normal way.
* The present Cook Islands government has won 3 elections through bribery, selective aid assistance and infrastructure developments roads, political employment of public servants, gifts and cash payments.
* I don’t know. I do not have solid evidence. My evidence is what I read in the newspaper or hear in conversation. My reaction is that I believe corruption is a serious matter and we need to investigate the situation re corruption.
* Small Island States is prone to corruption due to the close associations and affiliations and limited resources which prompts people to act out of principles when faced with difficult decisions.
* I concur with the recent Transparency International review of 7 small pacific island countries on country perceptions of corruption. In comparison in the global context, we don’t suffer the damaging impacts of corruption associated with poor and poorly governed countries.
* Yes, regular publicity by the media therefore bad reflection on the country.
* Yes, same as above.
* Yes. 1. I believe that public servants should work according to a Code of Conduct that says they should treat all their “clients” (that is the people whom they meet in the course of their work) with the same politeness and efficiency. 2. But in the Cook Islands, I am often told, “it is who you know” which is really unfair”. Many people rely on family or political connections in order to pull strings and get better or quicker service. This applies to all the important sectors, for example, Justice, especially Police, Health, Education, and public sector employment practices. 3. If people perceive that deception and dishonesty enables them to progress better in their job, they can be persuaded to abandon integrity and honesty and adopt careless or even criminal work practices.
* Because many appointments/approvals are politically influenced and although there is a criminal law much of this type of corruption is not criminal offending. Further there is no independent body (corruption commission) with oversight and enforcement authority to deal with this type of corruption.
* Yes. Corruption in the Cook Islands public service is prevalent or widespread. Transparency and accountability which are integral to good governance are a lip-service although often talked about but in reality, not practiced. It sits without purpose within the pages of administrative manuals.
* The Cook Islands have limited assets. Any finance (public) should be wisely used. The other factor is the nation’s budget have been helped by Aid.

Note, according to a CI News poll in 2022 before the national elections, corruption was rated the #1 concern by electors, before health, education and the economy. (Source: CI News website).

**Q4 – What do you perceive are the major types or forms of corruption in the public sector?**

* Major types or forms of corruption perceived as abuse of power & position.
* Misuse of public funds & assets.
* Party favoritism and misuse of government funds favoring family affiliation in the allocation of government services and support and benefits.
* Selective public projects created closer to the elections.
* Employment not based on merit but on political enticements.
* Manpower in critical government departments filled with pro-government staff, for example, Police, Agriculture and Public Works, Infrastructure.
* The redirection of money for purposes not intended. Using money for personal matters.
* Nepotism, Bribery, Conflicts of Interest and Collusion.
* Maladministration brought about by poor training, awareness and code of ethics.
* The one similar to the pending Tapaitau (insert, current Deputy Prime Minister) and Puna (insert, Head of Ministry) cases.
* There are many forms of corruption. I don’t have the knowledge to pick the major ones in the C.I.
* 1. Different treatment of “clients” based on their political or family connection to the public servant.
* 2. Hiring workers based on their political or family affiliations.
* 3. Lack of investigation by the Police of complaints or misdemeanors/crimes based on their political and family affiliations with regard to the complainant.
* 4. Incorrect charges being laid. I have heard that mothers or girlfriends have taken the blame for accidents/crime that were caused/ committed by their sons/boyfriends.
* 5. Promotions within the pay scales not based on merit. When somebody is passed over for promotion because of political or family connections, it demotivates that worker, who may vote with their feet and go overseas in the hope of being treated more fairly and being able to advance based on their merits.
* 6. Study scholarships or training opportunities awarded because of political or family connections to students/ workers who would not normally be eligible – sometimes such awardees take twice as long as usual to gain their qualification.
* MISUSE of POWER, AUTHORITY, RESOURCES and MONEY.
* Misuse of political power, authority, resources and money.
* Corruption is currently present in all functions of government or public sector in relation to misappropriation of funds (theft of public funds), allocation of resources is politically motivated without sense of purpose or priorities, for example, millions of dollars awarded to minute island communities on development for political gain, misuse of property and vehicles and the list goes on.
* Misuse of public funds, misuse of position and misuse of political power.

**Q5 – What do you perceive are the major reasons for corruption in the public sector?**

* Major reasons for corruption are pride and hungry for power.
* Lack of understanding and lack of training in integrity and ethics.
* Opportunity and rationale of the individual.
* Personal values do not align to the values expected of a public servant.
* Greed and arrogance and the sense of importance and power.
* The obtainment and hunger for political power – the leaders of the ruling party are poor incompetent business people that cannot survive privately – they need political power and public funds to survive and prosper.
* For political gain and family pressures.
* Low wages, leaders don’t lead by example and lack of internal controls and checks and balances.
* At the political level, politicians feel more entitled than other members of the community and government officials not getting advice and holding them to account.
* Maybe greed, nepotism, favoritism, need to secure votes for public offices.
* Easy to get away with it.
* 1. Following family norms, that is the example of the parents.
* 2. Career benefits from acceptance of “how to play the game” in the education and employment field.
* 3. Trading favors done in order to gain benefits in another area of life.
* 4. Monetary gain. It is rumored that a certain Principal Immigration Officer resigned and went overseas in a hurry because of being caught out in accepting bribes.
* Lack of morals. GREED. Opportunistic behavior. Lack of respect for their oath, position and our country.
* Lack of independent oversight.
* Major shortcomings in the formation of one’s character. Having the wrong people appointed to the position that provides the opportunity to deceive or exploit a situation. Appointment of someone who has no ability to define right from wrong. Opportunist and greed, etc.
* Attitude to responsibility, short period in being self- government cultural influence – What’s government money is family money.

**Q6 – In your view, what are the best ways to address corruption in the public sector?**

* Training & awareness in ethics & integrity.
* Accountability and transparency of the public sector.
* All entities spending public funds should be held accountable for how they spend the funds.
* Importance of Parliamentary scrutiny.
* Have an effective watchdog or check and balances and have an imported head of Audit and Police and Public Service Head. We already have this in our Judges.
* For the wider community to be fearless and vigorously push for transparency and accountability.
* Sound management practices to be used. Annual audits and reviews to address the topic.
* Raising awareness and educational programs.
* Stricter penalties and regulations.
* Establish Oversight Committees.
* Strengthen leadership, improve training and awareness, broaden education and awareness in the general public about how governance is supposed to work. At the education level, primary and secondary – civil governance education curriculum.
* Transparency, accountability, regular publicity, open government, culprits must be held accountable and pay for their actions.
* Up to date with Audit, harsh penalties, termination of employment and banned for future government employment.
* 1. Follow the ILO conventions which the Cook Islands has acceded to, and incorporate such ILO conventions into Cook Islands legislation.
* 2. Publish clear written policies which implement legislation and which any member of the public can access.
* 3. Publish clear written staff guidelines or handbooks that are reviewed at regular intervals by the Public Service Commissioner together with relevant staff and the Cook Islands Workers Association.
* 4. Require transparency in relation to availability of jobs and promotions by requiring internal workplace publication and/or eventual public accessibility.
* 5. Keep government websites up to date and ensure that new information is accessible for download by the public.
* Hire a tough and independent Public Service Commissioner. All Heads of Ministries, Mayors, Executive Officers, MP’s and Ministers should undergo a Fit and Proper Persons Assessment. If you don’t pass then you lose your position. The Prime Minister and Ministers need to have some integrity to step down if they do wrong like we see in NZ and the UK, on the tv. If you dishonor your position, step down. But no, they hang in there because they have had the taste of POWER.
* Establish independent oversight with enforcement powers.
* If we cannot address the top of the organization, we are destined to fail in all attempts. It is vitally important that we establish the mechanisms of “Good Governance” through legislation and live by it. Role modelling is an effective way of influencing subordinates to follow suit. Establish policy guidelines for disciplinary action for those who may breach the requirements and stand by it.
* Heavy penalties for being guilty of corruption. Shorter Parliament terms. More aggressive monitoring and regular reviews.

**Q7 – Do you believe that MPs and government officials have signed Code of Conduct & Ethics in the workplace?**

* Yes, all participants except one agreed that there should be a signed Code of Conduct for MPs & officials – 95%
* Yes. Why isn’t this a thing. Why is our country almost 60 years old and we don’t have something like this?
* Yes. People differ from one another in their character. There are the ones that have the integrity and the one’s that pretends to have it. A good functioning “Code of Conduct” will hold MPs bounded by law to abide and at the same time, spell out disciplinary measures to be applied even to the extent of forced resignation or termination of a MP pending on the seriousness of the breach.
* No. Jail them.

**Q8 – Explain why such ethical codes are important in the workplace?**

* For the protection of MPs and officials.
* There will always be MPs & officials who will force workers to do things they are not supposed to do.
* With signed codes of conduct, this will hold them to account for what they are doing is corrupt.
* Sets the minimum standards expected.
* So, there is a guide and a set of rules and be able to punish for failure to comply.
* Only the few honest ones will honor it.
* Discipline, serving the public interest, honesty and integrity cannot be replaced or substituted.
* I see Cook Islanders as valuing relationship as a key in any situation. A good relationship is established and is to be maintained. The person in leadership is expected to help out, assist. They will not be wanting to say, ‘no’. If there are no rules and regulations in place it makes it easier for the leader to dip into Funds that he/she shouldn’t be touching.
* Members of Parliament are the highest level of leadership position and therefore must lead by example and demonstrate the highest level of ethical conduct.
* Senior government officials do as part of their contracts – these instruments ensure that individuals are aware of their social and governance obligations to society.
* Ethical codes catch what the criminal law does not.
* Good for transparency and open government as mentioned above. Also, good when carrying out evaluation of their performance.
* It will reduce corruption but not eliminate it. The codes should also spell out penalties.
* 1. Many who enter Parliament, especially from the private sector, are unaware that they are unaware that they are answerable to the public for their actions as Members of Parliament. Part of their induction process should require them to led through the Code of Conduct and Ethics developed for Members of Parliament.
* 2. Similarly, Government officials will have requirements commensurate with their pay-grade. They need to be tutored on its importance, not merely given a Code of Conduct to read in their spare time.
* 3. By signing the Code of Conduct & Ethics, they confirm that they have read and understood what is required of them.
* So that you don’t carry out unethical and corrupt practices.
* Ethics is like being closer to God.

**Q9 – Have you personally come across an unethical or corrupt issue within the public sector?**

* Yes, it was to do with a government minister abusing his position and power. The matter was reported and it was dealt with.
* Yes. Matter was reported to those charged with governance to discharge their responsibility.
* Too many and some in my book False Start in Paradise.
* Yes. When the Police fails to investigate a complaint of corrupt acts by the Prime Minister and his Ministers. When the Police fails to prosecute the PM for drunken driving causing injury, when Ministers steal cash from government projects.
* No. Not applicable.
* Yes. Relationships at work that leads to favorable treatment and benefits. Appointments due to personal relationships and not merit.
* Yes. Maladministration and misuse of public funds. Investigated and made complaint to the Police once I was confident a criminal offence had been committed.
* Yes. No tendering of projects, some are given due to favoritism or nepotism. The law has picked up on some of those untoward practices, such as the pending Tapaitau (insert, Deputy Prime Minister) and Puna cases.
* Yes. An immigration issue, never resolved but the individual was later fired for other offences.
* Yes. 1. I was the complainant in a dispute where I was being intimidated and harassed at home at night-time. When I called the Police, the investigating constable made out I was making a fake complaint, they hid their Police ID number so I could not note it and complain of their disregard.
* 2. To try to resolve the lack of investigation by the Police, I met with a former Police Chief, who told me what the procedure should have been when the complaint was made. I then wrote a letter to the editor of the Cook Islands News, stating that an independent Police Complaints Tribunal was needed.
* 3. To protect me, my family arranged for a ‘night watchman’ and I told everyone who would listen about the protective arrangement and the reasons why it was in place. Eventually public/community opinion turned against the perpetrator and after 1 year, we were able to do without the night watchman.
* No, just hear about it.
* No, but I have heard of many instances from good authority. Most remain unresolved.
* Yes. A staff member working under my predecessor stole some money from a minor’s savings account and the matter was brought to the awareness of the Boss who chose to use organizational funds to repay the missing funds and had his niece transferred to another workplace just prior to my appointment to the sector. Being notified by colleagues, I pursued for the immediate recovery of funds and established a policy document in relation to handling of school funds that stamped out the practice for the entire duration of my tenure. The policy paper clearly stipulates that exploiting the welfare of minors entrusted in your care would not be tolerated meaning for the involvement of the Police and termination of employment.
* Yes. Misuse of public funds, stealing, travelling and getting multiple allowances and regularly absent from Office.

**Q10 – Have you come across any employee or employer who was involved in any unethical or corrupt activity, if yes, explain what took place and how it was resolved?**

* Yes, physically abusing people and the person involved was reported to Police and dismissed.
* Yes. Most involved favoring family and unfairly holding back those from another family or political party or island.
* In the private sector - No.
* Yes. Within the Church – the membership confronted the person involved. Remuneration was asked for. In the workplace – Dealt with by the Police and Court. I became involved at the sentencing then parole stage.
* Yes. One comes to mind is the appointment of the former CEO of the Ministry of Finance in Samoa, who was related to the Auditor-General and the Prime Minister. Despite the CEO being considered suitable for the role, the fact he was closely related to two key positions in government, posed a conflict in his role and compromised the integrity of the Office and its work and that of the Auditor-General. Such positions should be considered with independence as pivotal to its success and upholding the integrity of the Parliamentary system.
* Yes. Seven cases of stealing, from a few hundred dollars to thirty thousand dollars. Six offenders sacked, the seventh and biggest offender resigned and left the island before action could be taken. No amount (insert, of money) was recovered.
* No. Just hear about it.
* Yes, most remain unresolved.
* Yes. A colleague stole a substantial amount of funds from the organization and with my predecessor finding out he chose to shut down the concerned sector of the operation and of course with the entire workforce aware of the matter. Had the staff concerned transferred and matter forgotten. I took over the organization and was notified of the situation. I negotiated directly with the offender to repay the funds rather than face prosecution and not recovering the funds.

**Q11 – In your view, what do you believe drives some people to commit unethical or corrupt practices in the public sector?**

* Thinking they are invisible and undisciplined.
* Personal values do not align to code of conduct of the public sector.
* Greed, anger and jealousy.
* Greed, a born crook, in their DNA.
* Pressure to meet expectations of politics, family, community and church.
* Financial pressures, opportunity due to lack of controls, lack of scrutiny and oversight in our system and processes. No accountability and transparency in our systems and processes.
* Stupidity, poor ethic culture, no accountability mechanism in place, cultural acceptance in a poor organization.
* As in 5 above. Greed, nepotism, favoritism, need to secure votes for public offices.
* Mainly greed = want something but not willing to work for it.
* 1. Doing a favor for a mate or someone higher up in the food chain in exchange for future benefits(s).
* 2. Direct benefit from monetary bribes or in-kind benefits (treating).
* 3. A feeling of power that they can force others to do what they want.
* Trying to please other people. Or else, being under pressure from friends and family who are demanding that you help them. An example of this is the Pacific Schooners and the Taunga Nui, (insert private shipping vessel). Both were given huge amounts of money in advance for services to be delivered in the future. It is no doubt that the owners of these two companies were begging a particular Minister for help. Seeing an opportunity coupled with GREED. A classic example is the CCL (insert, Civil Contractors Ltd) company which was created during COVID using the father- in law of a member of Parliament as one of the owners. The father-in law lives on one of the furthermost islands, is retired and is pretty old so obviously the people who did this knew it was wrong and tried to find a way around it.
* The knowledge that there is no independent oversight with enforcement powers. It is the same rationale applicable to why people do not behave criminally - there are real sanctions.
* First and foremost a lacking in one’s character, meaning in the absence of those virtues that makes one a good person. Someone who is corrupt within his/her character already possess greed as well as the motivation to exploit a situation whenever the opportunity arises. Corruption is often fed by a desire to personally gain whether monetary or property. Often a materialistic person that wants to be seen as someone who really isn’t.

**Q12 – What measures do you believe needs to be implemented in the public sector to minimize and try to combat corrupt practices from occurring?**

* Is to hold those who are corrupt to account.
* Reinforce the importance of having the right values.
* Principally based ethical leadership.
* It has to be a wholesale effort, it will not work with only a few. The problem has expanded to all sectors of the Public Service and to combat the problem, it has to include all sectors and at all levels from top to bottom.
* Effective laws (legislation) and enforcement.
* If in leadership, to be aware when asking someone for help to give them the freedom to say, “No”. Don’t put them under pressure where to save face they have to be dishonest.
* Ethical codes across the public services. Training and educational programs to establish an ethical culture in the workplace. Leaders who lead by example and model the right behavior. Higher penalties and sanctions. Establish Oversight and scrutiny institutions.
* Educational and awareness of anti-corruption measures in place. Enforcement of no-compliance. Senior officials being held accountable for managing anti-corruption measures.
* Tighten up laws around those issues, including severe penalties if caught and proven to be at fault.
* 1. Improved legislation based on UN International Labour Organization and human rights principles to govern employer behavior in both the public and private sector.
* 2. Community meetings to explain this legislation in plain English and making it available to download from a website.
* 3. Establishing a complaints mechanism with clear guidelines on how to investigate and report in a timely manner. This is particularly important where migrant workers complain about working very long hours or not receiving a day off.
* 4. Occasional unannounced inspection of conditions of work by teams made up of Cook Islands Workers Association (CIWA) and relevant Government labor monitors.
* MFEM (insert, Ministry of Financial Economic Management) need to tighten their fund allocation process. They should put in place policies to tighten this process. Same goes for any other agency or department that has spending power.
* Establish an Independent Corruption Commission powers to prosecute and sanction.
* Have all sectors of government departments formulate and establish Quality Management Systems (QMS) to ensure there is a shared understanding amongst all workers of the goal and aspirations of the organization. The Instructional Manual should clearly indicate guideline procedures that ascertain common practice – set rules on what one can do or cannot do. Disciplinary action to be executed for anyone in breach of the regulations. Have these documents accessible to staff and to ensure that staff do understand and are in volved in the formulation of such policies as well as regular annual reviews process.

**Q13 – If you were an employer and in the process of interviewing and recruiting staff, how would you ask important questions such as integrity, personal values and honesty? This relates to trying to employ honest staff.**

* Ask them questions in regards to honesty and integrity and what do they value most in work place.
* Ask what are their values and how have they demonstrated these values in the past.
* Keep it simple and down to earth – empathy and see it from their perspective.
* Ask if they have previous criminal convictions for dishonesty (not traffic). Place some trick questions – “if you found a bundle of bank notes lying on the floor dropped by a customer, what would you do?
* Yes. Would be asking these questions to see if using referees.
* Ask about how they will behave and react in different work scenarios. Seek real life examples and cases. Character references from former employers.
* Standard interview questions asked, accessible on the net, more impartiality, reviewing references and check previous colleagues. Review face-book and twitter accounts for evidence of appropriate behavior.
* Follow up on their backgrounds and involvements elsewhere. Get confirmation from community leaders and former employers.
* I am not aware about any questions that would eliminate future crime.
* You can’t really. Because sometimes you hire people who are honest and they turn dishonest. In my experience, many employees who steal money from a company haven’t always been that way, but are experiencing some financial difficulties so instead of approaching others like their boss to ask for money, or else take out a small loan, they resort to stealing.
* Has your integrity or honesty ever been in question?
* At first, I would like to know his/her interests in the job. I will question the applicant on, for a start with his/her personal interests or hobbies in relation to participation with his/her community. Most questions I would ask would be based on the information that the applicant has relayed in his/her application where I could weigh out direct responses to information that I possess to ascertain sincerity and personal qualities.
* Corruption in the public service sometimes is opportunistic. Noone can force anyone to be honest.

**Q14 – Finding out the attitude and behavior of a potential employee is difficult. How would you go about trying to find out before an interview?**

* I don’t think so it’s a good idea.
* Reference check.
* Study their CV and contact those who knew them as employees or co-worker.
* Do a little homework, check background, sports clubs, mates or close relatives, even schools.
* Asking around.
* Reference checks are vital to ascertaining someone’s behavior and conduct. Psychometric testing will reveal certain attributes.
* I ask my other employees.
* 1. For a school leaver, I would ask their school reports for the year before they left, because teachers will often write in that report about attitudes of the student.
* 2. For somebody already in the workforce, I would phone the two referees noted on the Job Application to get some background about attitude and reliability.
* Best you hire people you know. Or if you know they come from a decent family. Also, pretty much those who have reached Form 6 or 7 should have a conscience. You can ask if they go regularly to church too because church people should not steal really but they do.
* Refer to past employers and referees.
* I will be required to closely study the applicant’s application form, which should express his/her motivations and aspirations towards the desired job or career. Study his/her CV which should offer past work record or particular skills and experiences and how this may be related to my expectations in terms of how he/she would fit into the position on offer. Find out what the applicant’s interests are and selection of friends and associates. Involvement in service organizations, interests and hobbies. Talk to some of his/her assessors, a Police Vet Report will show whether or not a person has a criminal record.
* Normally one can judge some other persons character through the words they speak.

**Q15 – Would you report a staff member, a close friend or a family member in the workplace, who has misappropriated funds from the workplace due to financial struggles or other reasons?**

* All participants except one, responded yes – 95%
* Yes, it’s important because the qualification can speak for the type of person that is applying for the job.
* It is the right thing to do.
* It depends on the circumstance. I will try and remedy the problem and get them to recant and make good what they have stolen and make drastic changes to their life and ways otherwise I would report them. I think the best thing is to try and get them to realize the problem and damage they have done and try and help them to remedy and correct their ways and if there is no positive response, I would report them to the authorities.
* No exception! One act of dishonesty will lead to repeats!
* Yes. Once the trust is broken, I would not want the person to continue in the position. But in the process of terminating, I would be trying to be discreet not to ruin the person. I would not be able to write a reference or be a future referee.
* Yes. I would report them but after speaking to them first and asking them to do the right thing so they will own up.
* Yes. I am a professional, my personal integrity is upstanding.
* Yes. If it’s not reported, then it can become infectious and probably also become the norm over time.
* Yes, it all depends how bad it is, if minor usually the termination of employment is the best.
* 1. Yes, I would report somebody who had misappropriated funds from the workplace, but I first encourage that person to own up to it themselves. I would offer to go with them when they reported the misappropriation.
* 2. If they refused to go, then I would have to go ahead, otherwise I would risk guilt by association, that is the employer would assume I was in on it.
* 3. If the reason for the misappropriation was gambling addiction, it is better that the person be found out and start to receive help before matters get worse, for example, they lose their home.
* If I was the boss, I will ask them the reason, then ask them to pay it back. Because reporting them to the Police can have two effects – the Police won’t do anything which happened to us once when a person we wanted charged was the daughter of a Policeman, and secondly, if they do go to jail over such a petty crime, it ruins their name, they also lose a part of their life having to serve time and they get a criminal record. But if it’s a big amount or if they have been doing it for a period of time, I would definitely report them.
* The answer to financial struggle is not a justification for misappropriation. The penalty should match the degree of the offending – financial struggle is a mitigating factor in assessing penalty.
* Yes. Get to know the fact that life is a struggle with so many challenges and there is no excuse to do wrongdoing. From day 1 I would make sure that all colleagues fully understand the rules, regulations and guidelines relating to personal and professional conduct both in the workplace and in the eye of the public. I usually start by instructing colleagues that “your failure is not going to be mine” you chose to commit to wrongdoing and I would suddenly become your worst enemy. I exist to succeed and am unprepared to sacrifice all I have to anyone who chose to do wrongdoing.
* No but a few will. I don’t want to be involved.

**Q16 – What is your perception of leaders in government holding high positions such as Heads of Ministry, CEO, Board members, MPs and Cabinet Ministers?**

* Most are good leaders but a minority spoils it for the rest.
* Responsibility to be accountable for their actions and demonstration of good values.
* I have not kept up with what is going on and at my age I am not really interested but my intuition is that we have not improved in the management of our countries affairs and that there is a sense of arrogance by those in authority as to their rights and authorities as if it were divinely given. I would say that there is still something like 30-40% of our public servants who are doing their best and genuinely working hard but sadly the bad eggs have greater effect on the final outcome of the services provided. Sadly, we have nil audit of government services and if there is no audit there is no consequence for wrongdoing and if there is no consequence for wrongdoing it will expand to the extent that those who demands accountability and honesty are hounded out of the service and are ostracized and punished. We are not in a good place and when we have those holding the highest office who are prosecuted and continue to work for government then our level of accountability and responsibility has hit the bottom.
* Each one carries the burden of honesty and integrity, some have it and others don’t. It depends who the person is, watch their lifestyle, if living above their means, then the red flags are flashing.
* I respect them and see them as leaders I have to work with. My position is one of neutrality. I don’t have the information to perceive any other position. And I don’t go seeking it in conversation. In my negotiations I would be avoiding anything that would suggest favoritism or being underhand.
* Some leaders are extremely ethical and motivated by the right things, and some are only in politics for themselves, which will lead to corruption when the opportunity arises.
* Politics is for the common good, leaders who choose this path really want to make a difference, if they are in it for any other reasons then family preferences and personal gain will be the motivator and not the common good.
* Each is a separate individual, their behavior, values and principles vary. My perceptions will be based upon our assessment of these attributes.
* There are good ones, there are also some I wonder how they got there in the first place! Again, nepotism, favoritism, etc.
* The majority are probably not corrupt, but there will always be a few that are, based on Court cases.
* I think that nobody should consider themselves above the law, but also all humans are subject to temptation. Those holding high positions in government need to have the Code of Conduct explained to them, together with any consequences.
* Cabinet Ministers – Higher level of integrity/ honesty required because of potential impact of their decision making on the economy and lives of many. Need to disclose any private company interests; if there is a conflict of interest, then step away from the decision making if a conflict of interest arises.
* Members of Parliament – As per their new Code of Conduct.
* Board Members – Board members do (or used to do) a Directors Course as part of their induction process. In the private sector, the law regarding directors has changed so that their personal assets may be called upon to discharge any debts resulting from reckless behavior. But the warrant for a Board member usually absolves them from problems that arise because they made decisions without full knowledge, that is, they didn’t know.
* CEO – Head of Ministry – High level of integrity & honesty required because they need to lead by example and fulfill their job description.
* In relation to corruption? Most people are generally good. There are a few bad apples. The current corruption in the country only centers around 6 people. The case in Court at the moment involves 3. The other 3 which centers around projects have never been picked up because it’s likely they have covered their tracks, or they have not actually committed a crime just afforded themselves some special privileges.
* Overall good. In relation to corruption? Again, overall good.
* Most if not all of these leadership positions are politically appointed and obviously either staunch supporters or families to members of the governing Party. Educational qualifications and performance capabilities does not matter in most appointments in Cook Islands society. “It’s who you know rather than what you know”. A classic example in support of what I have stated is the public humiliation leading to government proceedings in regard to theft charges against the DPM (insert, Deputy Prime Minister) and two Heads of Ministries, especially within a very short term of their tenure. Appointment of the 2 Heads of Ministries were made along family ties as they are related to the PM (insert, Prime Minister).
* In such a small setting or community such as the Cook Islands, where everyone knows one another, it is very easy to recognize corrupt practices by government officials, is made along the lines of political affiliations, family ties (nepotism) and personal exploitation of subordinates such as favoritism and sexual relationships within the workplace. Furthermore, those who carry out such corrupt practices do not have any conscience. No shame at all, no desire to distinguish between right and wrong. I am in charge and I am free to act in the manner I have regardless of how anyone ese perceives it. These corrupt practices have become widespread in the administration therefore it has become a joke that is readily accepted where very few people would make a stand against it.
* Our leaders endorsed with the abilities to be good leaders but all are prone to corruption. I was a public servant and I left because of excessive corruption.

**Q17 – In a small country such as the Cook Islands, families are an integral and important part of the community. Do you believe that close family members, say, a relation to an MP, Cabinet Minister or a Head of Ministry, should be employed in high positions, because of their political connections and affiliations?**

* No, they should be employed on merit not politics.
* No, employment should be on merit.
* What is needed is clear transparency. This way those who are clearly qualified and suited for positions should be appointed or contracts granted. Sadly, this is not the case and the granting of contracts of government are not transparent and corruption is a consequence.
* No, but in the Cook Islands there is no reward for those Ministers to act with honesty and integrity.
* When I was a Minister my electrician brother suffered a lot – I never gave him work or placed him on Boards (the CIP did later) I was harsh and cruel to members of my family – no one thanked me and recognized me for this. That I want my church perceived as honest to the gospel of Jesus Christ. That it is seen as an institution of integrity.
* The country is small and the pool of leaders is limited. I feel that one could not ban the above group from these positions. I would be strict on avoiding conflict of interest.
* Public sector positions should be appointed due to merit and suitable person for the job. In small island states, family and political connections and affiliations is normal and bound to happen because of small populations. Where it can be helped, conflicts of interests should be declared and managed accordingly so it does not pose a risk to the organizations and the Government.
* I would expect that family members holding high positions are selected on the basis of merit vs connections.
* Already covered in previous sections. At the end of the day, positions should go to the right people with the right qualifications and experience.
* No, all Government employment should be on merit.
* No, I believe that those in higher positions should be hired on merit, that is, they have the skills and other requirements that fit the job description. I believe that dissatisfaction with the current system drives many of our young qualified people overseas.
* Yes and no. If they deserve the position and acquired it through proper means then that’s ok. However, if they were just given the position such as one of the mayor’s and his daughter who has no qualification but pretty much runs the islands, well what can you say.
* No. Appointments should be on merit.
* There is a clear line between personal (family) life and professional responsibilities and duties. However, there is no such thing or consideration given for conflicts of interest in our administration in regard to decisions and practice pertaining to the awarding of employment, promotions, distribution of resources and use of government property.
* Any citizen should be employed if they fit the position regardless family or not. But not politically or family influenced decision.

**Q18 – Would you agree that employment on merit, such as relevant skills, qualifications and work experiences, should be more important than any political or family connection or affiliation?**

* All participants agreed and said Yes – 100%
* Absolutely, employment on qualifications and merit is the ideal, no alternative.
* Yes, of course.
* Appointments will have to be based on merit if the focus is to be directed towards performance. An appointee without the necessary skills is destined for failure in terms of achieving expected outcomes. Nevertheless, too often we see the opposite in terms of appointments and promotions to top level positions here in the Cook Islands where nepotism is often the case.
* A job belongs to the one qualified for it.

**Q19 – Our culture and cultural environment influencers and impacts on the way we do things, how we engage, who we employ and undertake various tasks in the workplace. Do you believe cultural practices has a part to play when staff and employees in general, engage in corrupt practices? For example, a gift is traditionally seen as a gesture of goodwill. But in modern day management, it could be seen as a bribe? Does culture influence people’s behavior? Explain your comments?**

* Yes, culture can influence people’s behavior unless it is specified in law that goodwill gesture is not a crime but a tradition or culture. An example of this is during election, people will gather at the candidate’s home for breakfast and this is classed as corruption because it is seen as a payment to the voter to vote the candidate, unless it is included in the Electoral Act that it is a culture to eat together before voting takes place.
* There is a conflict at times as mentioned in the question. Important to make decisions about sensitive expenditure in regards to the following principles; justified business purpose, persevere impartiality, be made with integrity, is moderate and conservative and managed with proper authority.
* You cannot use culture and any other excuse as a camouflage for corruption – corruption and those in situations where culture is a factor then they ought to know that they have to be more careful – there is an old adage – “Justice must not only be done but be seen to be done” that is, clear transparency is important where culture is involved. A lot of corruption in our country is committed under the excuse of culture.
* There can be no conflict or confusion – give to Caesar what belongs to Caesar. You cannot gift what does not belong to you. Everything in moderation. Food is our normal way to say thank you to someone – feed them or shout them.
* Culture has to be acknowledged and used prudently. My suggestion would be to be transparent. And the community will not be slow in approving or disapproving as to what is reasonable.
* Good question, gifts are part of our culture and it can be practiced while still being corrupt free. Every gift should be declared and registered and how it is used should be for the benefit of the organization not the individual.
* Culture can often be used to justify corrupt practice. Culture is often hard to define as each individual has a slightly different cultural lens. Gift giving between parties is useful to cement impartial business relationships. However, when personal benefit is accrued, it transcends into ‘corruption’.
* Culture has an important role to play. For example, I can’t see anything wrong with a gift of a woven mat or fan, but a gift of a few thousand dollars or a vehicle or a free trip especially getting close to an election?
* We all know what is right and what is wrong. Culture is usually an excuse to get off the hook.
* Yes, I believe that culture does influence the behavior of people, but I also think cultural practices change and evolve over time. So, what was practiced over 40 years ago may not be practiced now. Before that people did not vote for their representatives, colonial official ruled them. Voting for your government representative has only been in place since about 1960. Another example of culture evolving is that prior to the missionaries, land was gained by warfare between the chiefs. Nowadays, our society has evolved to where violence is not acceptable and land is requested from the family and the alienation is recorded by the Land Court. If there is a challenge as to who should hold a chiefly title, disputes are taken to the Courts where a compromise is worked out – in the case of Tinomana (insert High Chief) in 1992, it was decided that the title would rotate among the 4 kopu ariki (insert, chiefly tribes).
* No, we should adapt to modern work practices. All gifts need to be declared and they are given to the company not to you. If Bill Clinton can hand back all the gifts he received while in Office then why can’t we? Those gifts are given to your position, not to you.
* Yes, it does but there is often a fine line between cultural practice and ethical misconduct. More often than not cultural practice is used to disguise what is in reality ethical misconduct.
* There is a fine line between culture which is a beautiful aspect of our people and corruption. They are entirely two different entities although nowadays it is often used to cover-up for corrupt practice. Those of us Cook Islanders who are culturally oriented or emersed has no difficulty in distinguishing culture, in terms of expressing aroa (gratitude) from bribery, which is a corrupt act. However, in the present day when the Court is involved, a non-Cook Islands judge may not be able to see things similarly as we perceive.
* Yes, yes and yes.

**Q20 – How would you rank accountability, that is making staff, people and government accountable for their actions? Explain your comments.**

* Accountability is ranked 7 out of 10 and this is taken from the Ministry of Corrective Services as we have the framework for integrity and ethics. Accountability plays a major part in integrity and ethics.
* A lot of work to be done in this space. Cook Islands public accountability cycle is not operating as effectively as it should. Refer to recent Public Accounts Committee reports.
* Accountability is fundamental when one is in the public service. One is using government, that is the people’s money, and there are rules which must be observed a 100%. Therein lies many of our woes in the Cook Islands where many in government often think that government money belongs to them because they voted in the government in power so it is Our government and Our money and We decide what is Right and what is Wrong. This attitude is often in senior Politically appointed people in high positions – regrettably. Sadly, when we have a small country and minute number of voters by any standard it personalizes the voter attitude as to their rights to do what they want after all “it’s my Government and I put then there”. A voter in a 100 voting constituency can say that with some authority compared to a voter in a constituency of over 100,000 voters.
* Each action and decision must be justified with solid legal support – follow the rules, ensure it is legally justified.
* Accountability presumably maintains honest and integrity which is what- the people want to see.
* Accountability is of prime importance to ensuring people are being held accountable for their actions and conduct.
* Important. Personal accountability means personal responsibility and liability for your actions.
* Paramount. The law must be above, not people above the law.
* There are plenty of room for improvement.
* A government contract usually contains a paragraph that protects the employee if they make an incorrect decision because they relied on incomplete information supplied, that is, they made a decision in the course of their work which had a negative impact but they are not held personally liable. But in the Cook Islands, if public opinion increasingly demands that the person should not retain their job because of a perceived fault, then very often there is either a resignation or re-assignment to a different job.
* It’s important.
* Vital because without accountability there is no responsibility.
* Though it is much talked about in the workplace, during professional development sessions or often during public address mad by government officials but the fact of the matter is – its most of the time lip service. Treasury’s books and so as many departments record keepings are years behind in terms of official auditing. Accountability should be self-driven instead of being demanded for by the employer or the public although it is vitally important to see that it is in place within the system. It is a means of having to come out clean in terms of personal performance pertaining to what’s expected of you as a public servant.
* Engage the full force of the Court, the law to help reduce corruption, maybe it becomes a minor issue in the future.

**Q21 – How would you rank transparency, that is having an open person, staff or government? Explain your comments.**

* Again, I speak from the Ministry of Corrective perspective and everything is transparent. MOCS meets monthly advising staff what is happening in the Ministry and Government.
* Right levels of transparency and accountability is important in the public sector.
* Someone who knows and follows the rules. Most of the crooks do not follow the rules and uses their ignorance as excuses for not following them. But more than ever we see more and more corruption committed by people in high office – when you get that then the level of corruption has escalated to one of arrogance.
* Transparency is a concept of open governance. It does not mean you surrender confidentiality. Privacy is important as a matter of preserving sensitive private issues not open to the public – none of the public business! There must be a limit to transparency.
* I would rank it very highly. I would expect a favorable response from the public if they perceived their leaders were transparent.
* Transparency is the other side of the coin, you can’t be accountable and not be transparent, they go together.
* Important – Another pillar that stands with accountability.
* There is room for improvement.
* I believe that the Nordic countries have the most transparent government practices, that is, Norway, Sweden, Denmark & Finland. They also happen to be the most prosperous countries in terms of the Human Development Index. Rather than working in an adversarial manner used by the Westminster system, their practice for contentious issues is to establish a Parliamentary Committee which receives submissions from all interested parties, which contribute to the development of policy which tries to capture the essence of the submissions. The hard work of policy and ensuring legislation is carried out by multi-partisan Committees working together by consensus and those interested comment on any revisions. By the time the policy and legislation is presented to Parliament, it is a rubber-stamp process because all the debating has taken place in the Committee. I like this process because it is very open and allows for public and community engagement.
* It’s better to foster a workplace that has been open communication as that way staff will feel more comfortable to seek help in the workplace rather than resort to corrupt practices. Job separation is a good practice too. Don’t give someone too much power. And put the people you trust to handle money.
* Vital because without transparency there will be a lack of accountability.
* Transparency plays a significant role in terms of ensuring that accountability is adhered to within the administration. However, I would certainly say that we in the Cook Islands would rate very poorly in this aspect. The public has a right to know and to freely access public information as one would wish. What’s there to hide if one is honest in performing his/her duties. Transparency is critical in terms of monitoring performance outcomes.
* Procedures in place already but not well monitored.

**Q22 – The Church and a person’s religious beliefs plays an integral role in a person’s character. In your view, does this part affect a person’s motives and objectives in carrying out unethical and corrupt practices? Explain your comments.**

* As for me the Church plays an integral part in my character to be ethical. As for the others, many go to Church and at the same time carrying unethical and corrupt practices.
* No, it is dependent on the individual’s personal beliefs.
* Hypocrisy is well and truly alive amongst the church people especially those in Public Service.
* Surely the fear of God will stop corruption – unethical conduct should never be tolerated by the Church, but it happens. The two can never be combined, it is a no no!
* I would be of the opinion that many Cook Islanders do not apply their religious beliefs to the workplace. What happens in church belongs to church only.
* Not necessarily, religious beliefs doesn’t make one honest, it is a personal choice and personal character and values and beliefs one lives by.
* You can be a deacon at church and still be dishonest with the church funds, etc.
* People’s religious beliefs vary. Because a person goes to church does not mean he/she will not sin!
* Yep. The genuine Christians are the ones who can easily push away unethical and corrupt practices when they come knocking. There are also Christians who like wearing 2 coats and they are the problematic ones.
* The church may in a small way prevent corrupt practices, but most corrupt people are seen in church every Sunday.
* Just as it is difficult to judge a prospective employee, it is also difficult to judge how well a person follows the teachings of their religion (be it Christian or otherwise). I have seen very un-Christian behavior by deacons of the Protestant Church, including theft of money from collections and food donated for church projects, so I do not think a person’s stated religious necessarily makes them a better person and better able to resist unethical and corrupt practices.
* People go to church are supposed to have good character. Obviously, many people are hypocrites. The Cook Islands condones hypocrites too. They forgive too easily. They don’t punish, they condone the behavior of others. You can see this on the Police face-book. When someone’s relative is being written about, their family come to support them and they attack anyone who says anything bad about their corrupt family member.
* I have never known a person to claim justification for unethical and corrupt practices based on religion. To do so would amount to a complete misunderstanding of the religion.
* Most of us Cook Islanders believe the church plays an important role in forming our values and ethics (character) and for many years the church as well as followers tried to separate their faith from political affiliation and influence. However, in more recent times, the church has become a smoke screen where corrupt politicians often hide behind to convince and portray to the public their innocence or honesty. It is common nowadays for politicians to quote verses from the Bible as part of their public addresses.
* Church as far as corruption is concerned is not an issue – no influence on a person’s character.

**Q23 – Dr Donald Cressy, a distinguished criminologist from the United States, in the 1970’s, implemented the fraud (corruption) triangle, on why people commit occupational wrongdoing and fraud. These are;**

**1 Motivation – a perceived un-shareable financial gain.**

**2 Opportunity – a perceived opportunity to commit fraud or a corrupt practice.**

**3 Rationalization/Greed – justification to themselves why their fraud is justified and okay. Do you agree with Dr Cressey’s analysis? Explain your comments and any other influencers or attributes other than the above, why people behave in such a manner?**

* I do agree with Dr Cressey’s analysis as I have seen many people coming through the Court system based on these three reasons. I think one of the main reasons is that they commit this as a means of survival.
* Yes, I agree with Dr Cressey’s analysis.
* Sorry too hard – there are far too many reasons why people commit crime or steal – there are obvious and less obvious reasons.
* Yes, I agree. Motivation in 1 above clearly the self -created reason and to justify the wrong done. Opportunity – seen bank notes on the floor when no one else is around. Greed – this is the common reason, biting more they can chew.
* Yes. I would agree fully with the first and third suggestions. And in the Cook Islands I would not think people would support fraud or corrupt practices.
* Yes, I believe these are the three reasons why people commit fraud or act corruptly.
* Yes, it’s a good framework to explain corrupt activity. However, there are other factors involved – the ability to be undetected or won’t get caught, that is there are no oversight mechanisms.
* Yes, I agree with Dr Cressey’s analysis. Nothing else to explain apart from the above.
* Yes, I agree with Dr Cressey’s analysis.
* 1. Motivation – People are motivated to commit fraud or corrupt practice for reasons other than financial need. Cressey’s analysis might explain 75% but I think 25% people with different motives is a significantly large figure. As I said earlier, there is sometimes a feeling of power, that the laws don’t apply to the perpetrator. I think it is also true that those very rich people who do not wish to pay the requisite income tax for their income class are not evading tax because of financial need. It is said about the very rich that they feel they never have enough money.
* 2. Opportunity – Sometimes it is the realization that there is no oversight that makes the person think about committing fraud or malpractice. Other times, it is the legislative loophole that a person just cannot resist using, because they like to be tricky. Opportunities could be reduced by more sophisticated oversight.
* 3. Rationalization/Greed – I agree that many justify their actions by statements like “anybody else would have done the same thing” or “white collar crime does not hurt anybody”. But if taxes are not paid, then the social safety net does not receive enough funds and many people cannot receive their benefits of good health, education or good diet. I believe many people carry out fraud or other crimes so they will be admired for their notoriety.
* Yes, I agree. I never heard of Dr Cressy before so it’s good to know that I am on the same page as him.
* Yes, I agree with Dr Cressey’s analysis.
* Yes, I agree with Dr Cressey’s analysis. People adhere to corruption when they are weak in their character. They certainly lack the ability to understand that one cannot get away with it. There are systems of checks and balances that will catch up with you eventually – it’s just a matter of time. I certainly agree with Dr Cressey’s theory. A corrupt person would already have the elements of greed and motivation (hunger) with his/her character and provided the opportunity offered through his employment presents, he/she will act.
* 1. Partly 2. Our culture has a dominant influence. Why? Mine is yours, yours is mine.

**Q24 – In order to curb corruption in the public sector or the community, what actions would you implement to tackle these major issues? How would you go about it?**

* Ministry of Corrective Services have put in place an integrity and ethical framework, which includes our vision, mission, values, code of conduct, policies, procedures and process. These get reviewed every 12 months for improvement.
* Reporting corruption to the appropriate authorities.
* Clearly set out the rules to ensure that staff are fully aware and understand them and also that they know the consequences of breaking them.
* Tough laws to be passed, heavy penalties, regular publicity, set up Disciplinary Authority for the Police, Customs and all government Revenue Agencies to be managed by experienced professionals not political stooges.
* Codes of conduct and annual audits and reviews.
* Education – community governance – how society works – roles of different sectors of society. Expectations of government officials – awareness of society ‘due diligence’ – public finance, audit, police – causes of corruption and preventative measures.
* Power must be accorded to those charged with the responsibility of keeping things under control. Is PERCA (insert, the Public Expenditure Review Committee and Audit) still existing or is it easily influenced by Government Ministers.
* Undetected crimes lead to more crimes. The best way of reducing corruption is to improve ways to detect it at an early stage.
* 1. Real protection of whistle- blowers through legislation. 2. Prosecute the worst perpetrators of corruption, with a jail sentence to accompany the fine. 3. Establish an impeachment process through the Courts for MPs who have gained by taking Government contracts without disclosing their conflicts of interest.4. American criminologist also looked at lifestyles of perpetrators – they queried how somebody with a recorded income of $X could live a life that might on the face of it cost $Y 9more). So how can a public servant on $X salary manage to service a mortgage loan over 6 motel units which costs $Y per annum? 5. I am reminded of the 80-20 rule, also known as the Pareto Principle, used mostly in business and economics, which states that 80% of outcomes results from 20% of causes. It is relatively easy to account for middle income taxes paid by wage and salary earners, based on monthly reports which employers must provide according to the law. So, an overall audit would probably suffice of those taxpayers to ensure the trend is in the right direction. If Revenue Management (insert, Tax Office) were to closely audit the wealthiest 20% of taxpayers, they might well come up with 80% of the corruption. I say this because it is common knowledge that on one island in the Cook Islands, supporters of a MP can charge their groceries in a certain store and never have to pay for it. If we were to include turning a blind eye to drug dealing as a corrupt activity, then that is an area that should be looked at closely.
* There needs to be punishment. Because if you don’t punish them, they will think it’s ok, and may do it again.
* See above regarding establishing an independent oversight and enforcement agency.
* We have to have in place; 1. Efficient up to date legislation by government. 2. Establish effective Quality Management Systems in place that ensures the existence of accountability and transparency. 3. Clear policy for dealing with offenders. 4. Assurance of a pro-active Police force in terms of receiving complaints from the public and carrying out of an investigation leading to prosecution. Having no consequences condones the act of corruption. 5. Making sure that Audit is independent and functional in the performance of its duties. 6. Investigate the possibility of establishing a SFO (insert, Serious Fraud Office) independent of government in the performance of its duties. 7. Establish a strict Code of Conduct to keep corrupt politicians under control or scrutiny.
* Shoot them. Heavy penalties.

**Q25 – Are there any other comments, either specifically or in general, you want to elaborate on corruption, public maladministration in the public sector or other relevant subject matters on governance?**

* I have no further comments to make and thank you for this opportunity given to me to complete the survey. Meitaki maata.
* There is a danger that with more corruption, the level of accountability starts to drop and the more it drops the worse it gets – corruption is endemic in many countries and we are already falling down to a sad level. Worse, the government which is responsible for policing this especially in the Public Service is itself compromised by not having an outsider with no political and family connections and who can make informed and credible decisions where public servants are involved especially where politicians are involved. Without transparent check and balances in place the level of corruption in the Cook Islands must be high and it will get worse if the entities charged with accountability are failing miserably in discharging their responsibilities.
* It cannot be stopped or prevented while the present Government is in power – the most corrupt ones are at the leadership level. We need a new breed of tough politicians to emerge. There needs to be a new social norm. Currently, we have a corrupt consumption social clan, we are no longer exporting, we live on imports, we are eating our way into oblivion – “give me food and I will vote for you”!
* Establish an ethical culture within the public service starting from the very top. Leaders should lead by example, and demonstrate behavior and conduct and all others will follow. You can’t expect your employees to arrive to work on time or come to work if you yourself don’t show up on time or come to work as an example.
* Build broader awareness amongst general public about society’s expectations of citizens. Causes of corruption and anti-corruption measures in place would be a big step up toward addressing and minimizing corruption. Nothing worse than “ignorance’ and misunderstanding’ to solve issues of corruption.
* Learn from experiences of others outside of your borders.
* Corruption in the public sector or government at present is of great concern. We would certainly have better living standards where everyone would prosper together as a country if this matter is addressed to stamp out all elements or aspects that contribute to the act of corruption.
* Culturally, I would say give them a chance to learn. Way of life. Our integrity is off- balance by our culture.

**Summary of Major Findings from Participants Survey**

Out of the 14 participants, 10 or 71% gave their respective surveys in person and all willingly discussed the importance of the research and asked where would this study led to or end up? My reply was that there would be significant findings from historical cases that may lead to more questions than answers. I stressed that disclosing the possible causes of corruption within the public sector may provide lessons learnt and possible solutions for future research analysis that may be adaptable and conducive to good governance in public administration systems.

The qualitative research approach using a survey questionnaire provided direct answers to questions about both the complex nature of corruption from the participants point of view and its relationship with the thesis subject matter.

**Key survey findings are as follows;**

* All participants agreed that the virtues of honesty and integrity are important – leading to a strict code of ethics, integrity and accountability to enrich democracy and good governance.
* All agreed (93%) with the exception of one that corruption is a serious problem in the Cook Islands public sector. This supports the general public poll undertaken by C I News before the 2022 general elections that corruption was the number one concern before the economy, health, education and infrastructure.
* The major types and forms of corruption in the public sector are nepotism, bribery, conflicts of interest, collusion, misuse of political power, authority and resources. Employment not based on merit but on political affiliations. Lack of investigations by the Police and possible Police corruption, was raised.
* The major reasons for corruption in the public sector are greed and arrogance and a sense of importance and power. Lack of training in integrity and ethics. The obtainment and hunger for political power. Low wages, leaders don’t lead by example and lack of internal controls and check and balances. Lack of morals and greed. Nepotism, favoritism and the need to secure votes for public offices. Lack of independent oversight.
* The best ways to address corruption in the public sector is to raise public awareness and introduce an educational program in the schools.
* Introduce strict penalties and regulations for offenders of corrupt practices.
* Establish an Independent Oversight Office with enforcement powers.
* Improve accountability and transparency in the public sector.
* Empower the importance of Parliamentary scrutiny in the review of reports.
* Have an effective watchdog for better checks and balances and have an independent (insert, non-Cook Islander) Director of Audit, Police Commissioner and Public Service Commissioner. We already have this in our Judges. Hire a tough independent Public Service Commissioner. All Heads of Ministries, Mayors, Executive Officers, MPs and Ministers should undergo a Fit and Proper Persons Assessment. If they don’t pass then you lose your position. The Prime Minister and Ministers need to have some integrity to step down if they do wrong like we see in New Zealand and the United Kingdom. If you dishonor your position, step down. But no, they hang in there because they have had the taste of POWER.
* What drives some people to commit unethical or corrupt practices in the public sector are financial pressures, opportunity due to lack of controls, lack of scrutiny and oversight in our systems and processes. No accountability and transparency in our systems and processes. The knowledge that there is no independent oversight with enforcement powers. It is the same rationale applicable to why people do not behave criminally – there are real sanctions.
* Personal values do not align to code of conduct of the public sector. Pressure to meet expectations of politics, family, community and church. First and foremost a lacking of one’s character, meaning in the absence of those virtues that makes one a good person. Someone who is corrupt within his/her character already possess greed as well as the motivation to exploit a situation whenever the opportunity arises. Corruption is often fed by a desire to personally gain whether monetary or property.
* What measures needs to be implemented in the public sector to minimize and try to combat corrupt practices from occurring is to implement

ethical codes across the public services. Training and educational programs to establish an ethical culture in the workplace. Leaders who lead by example and model the right behavior. Higher penalties and sanctions. Establish an Independent Corruption Commission with powers to prosecute and sanction. Effective legislation and enforcement. Educational and awareness of anti-corruption measures in place. Enforcement of no-compliance. Senior officials being held accountable for managing anti-corruption measures.

* The perception of leaders in Government holding high positions such as Heads of Ministry, CEO, Board members, MPs and Cabinet Ministers is that most are good leaders but a minority spoils it for the rest. Responsibility to be accountable for their actions and demonstration of good values. Some leaders are extremely ethical and motivated by the right things and some are only in politics for themselves, which will lead to corruption when the opportunity arises.
* Cabinet Ministers, Members of Parliament, Board members and Heads of Ministry, all require a high level of integrity and honesty. The current corruption in the country (insert, visible) centers around 6 officials. The case in Court at the moment involves 3, two Heads of Ministry and the Deputy Prime Minister. Our leaders endorsed with the abilities to be good leaders but all are prone to corruption. I was a public servant and I left because of excessive corruption!
* Our culture and cultural environment impact on the way we do things, how we engage, who we employ and undertake various tasks in the workplace. Culture does influence people’s behavior which leads to corrupt practices. Yes, it does but is often a fine line between cultural practice and ethical misconduct. More often than not, cultural practice is used to disguise what is in reality ethical misconduct. You cannot use culture and any other excuse as a camouflage for corruption – corruption and those in situations where culture is a factor then they ought to know that they have to be more careful – there is an old adage – “Justice must not only be done but be seen to be done” that is clear transparency is important where culture is involved.
* A lot of corruption in our country (insert, the Cook Islands) is committed under the excuse of culture. Culture can influence people’s behavior unless it is specified in law that goodwill gesture is not a crime but a tradition or culture. There is a conflict at times, important to make decisions about sensitive expenditure in regards to the following principles; justified business purpose, persevere impartiality, be made with integrity, is moderate and conservative and managed with proper authority.
* Culture can often be used to justify corrupt practice. Culture is often hard to define as each individual has slightly a different cultural lens. Gift giving between parties is useful to cement impartial business relationships. However, when personal benefit is accrued, it transcends into corruption. There is a fine line between culture which is a beautiful aspect of our people and corruption. They are entirely two different entities although nowadays it is often used to cover up for corrupt practice.
* Those of us Cook Islanders who are culturally oriented or immersed and have no difficulty distinguishing culture, in terms of expressing ‘aroa’ (gratitude) from bribery, which is a corrupt act. However, in the present day when the Court is involved, a non-Cook Islands judge (insert, from NZ) may not be able to see things similarly as we perceive.
* The Church and a person’s religious beliefs plays an integral role in a person’s character. This part also affects a person’s motives in carrying out unethical and corrupt practices. The Church plays an integral part in my character to be ethical. As for the others, many go to Church and at the same time carrying out unethical and corrupt practices. Hypocrisy is well and truly alive amongst the Church people especially those in the Public Service. Not necessarily, religious beliefs does not make one honest, it is a personal choice and personal character and values and beliefs one lives by. You can be a deacon at Church and still be dishonest with the Church funds. There are also Christians who like wearing 2 coats and they are the problematic ones. In more recent times, the Church has become a smoke screen where corrupt politicians often hide behind to convince and portray to the public their innocence or honesty. It is common nowadays for politicians to quote verses from the Bible as part of their public addresses.
* Dr Donald Cressy implemented the fraud (corruption) triangle, a theory on why people commit occupational fraud in the workplace. The 3 elements are, motivation or pressure, opportunity and rationalization or greed. The majority of participants surveyed agreed that these are the three reasons why people commit fraud or act corruptly. I have seen many people coming through the Court system based on these three reasons. I think one of the main reasons is that they commit this as a means of survival. Motivation is clearly a self- created reason and to justify the wrong done. Opportunity – seen bank notes on the floor when no one else is around and Greed – this is the common reason, biting more they can chew.
* This is a good framework to explain corrupt activity. However, there are other factors involved – the ability to be undetected or won’t get caught, that is, there is no oversight mechanisms. Opportunities could be reduced by more sophisticated oversight. People adhere to corruption when they are weak in their character. They certainly lack the ability to understand that one cannot get away with it. There are systems of checks and balances that will catch up with you eventually – its just a matter of time. A corrupt person would already have the elements of greed and motivation with his/her character and provided the opportunity offered through his/her employment presents, he/ she will act.
* To curb and tackle corruption in the public sector, what actions would you implement? All participants strongly supported the eradication of corruption in the public sector. Government must implement an independent oversight agency and strong enforcement. Tough laws to be passed, heavy penalties, regular publicity, set up a Disciplinary Authority for the Police, Customs and all government revenue agencies to be managed by experienced professionals not political stooges. Investigate the possibility of establishing a SFO (insert, Serious Fraud Office) independent of government in the performance of its duties. Establish a strict code of conduct to keep corrupt politicians under control or scrutiny.

**Table 2 - Sources of cases researched and analyzed from the Ministry of Justice and Lands, the PACLII website, the Cook Islands News and other sources.**

**Case # Year Subject Matter Source of Information**

1. 1978 Albert Henry Fly-in Voters PACLII
2. 1979 Sheraton Hotel Inquiry TA
3. 1995 Michael Benns CIN
4. 2000 Basilio Kaokao PACLII
5. 2002 Tepure Tapaitau PACLII
6. 2003 Edward Drollett PACLII
7. 2004 T Matapo vs R Wigmore PACLII
8. 2005 Peri Vaevaepare PACLII
9. 2009 Albert Numanga NZSFO
10. 2010 Nationalization of the Fuel PACLII
11. 2011 CITC Soft drinks Classification CIAO
12. 2011 Collector vs T Crocombe PACLII
13. 2012 Collector vs T Crocombe PACLII
14. 2016 Teina Bishop PACLII
15. 2018 T Browne vs Hagai PACLII
16. 2018 T Browne vs Hagai PACLII

**Sources;** PACLII – Pacific Islands Law Information Institute, TA – Tim Arnold, former Commission of Inquiry Member, CIN – Cook Islands News Archives, NZSFO – New Zealand Serious Fraud Office, CIAO – Cook Islands Audit Office

The researcher requested and was given access to the only daily newspaper company in the Cook Islands, the Cook Islands News. The researcher reviewed the Cook Islands News database for news articles relevant to the thesis subject matter, that had been published and electronically stored within their archives system for the research period. The owner of Cook Islands News, John Woods, expressly stated, “I will be glad to help with your PhD. Yes, we can give you access to our archive but, in fact, it works better for me if you, as a university student, you can use your library card to access our archive via the Knowledge Basket, a searchable news database we support and supply”.

This type of review is associated with content analysis study. Leedy and Ormrod (2001) define this method as, a detailed and systematic examination of the contents of a particular body of materials for the purpose of identifying patterns, themes or biases (p.155) Content analysis review forms of human communication including books, newspapers and films as well as other forms in order to identify patterns, themes or bias. The researcher is exploring verbal, visual, behavior patterns, print themes or bias.

The procedural process for the content analysis study is designed to achieve the highest objective analysis possible and involves identifying the body of material to be studied and defining the characteristics or qualities to be examined (Leedy & Ormrod, 2001). The findings from this important database are as follows;

1.**Ministry of Justice and Lands – Release of Criminal and Civil Information**.

The legislation falls under the jurisdiction of the Ministry of Justice and Lands. This legislation provides the authority through the Secretary of Justice and Lands, to release all criminal, civil and land information, unless it is specifically prohibited by the Court for privacy purposes. Once the information is approved for release by the Presiding Justice of the High Court, the Secretary of Justice and Lands, then makes this information available to the general public.

2. **The Pacific Islands Legal Information Institute or PACLII** based in Suva Fiji, is a faculty of the University of the South Pacific School of Law. PACLII electronically collects legal information from all Pacific Islands. For the Cook Islands, this information is made available from the Ministry of Justice and Lands, and systemically tabulates this information as follows;

* **Country** – Cook Islands
* **Courts** - United Kingdom Privy Council -Decisions for the Cook Islands Criminal Court
* Cook Islands Court of Appeal
* Cook Islands High Court
* Cook Islands High Court – Land Division
* **Law Reports and Other Collections** – Collections of Cook Islands Judgements 1976-1996
* Cook Islands Court Rules
* Cook Islands Constitution
* **Legislation** – Cook Islands Consolidated Legislation, Cook Islands Sessional Legislation, Cook Islands Subsidiary Legislation
* Standing Orders of the Parliament of the Cook Islands
* New Zealand Legislation for Cook Islands
* United Kingdom Legislation for Cook Islands
* Under each category of Courts, the database is broken down into;
* Decisions in alphabetical order and decisions in year, month and date.

3.**The Cook Islands News**, as part of its scrutiny of public interest cases, the Cook Islands News has direct access to Court information through its Court Reporter. Once the Court Justice approves the information for public release, the Court will issue this information to the general public. The Cook Islands News reporter and Editor, has access to this information and will present such in print media in the newspaper edition.

**Legislative Research**

The enabling authority legislations that directly manage, impact and affect corruption, fraud and mismanagement of public funds and resources in the Cook Islands. It is noted that the Cook Islands does not have a dedicated and independent Office that manages corruption and serious fraud.

1. **Supreme legislative authority** – Cook Islands Constitution, that governs the three branches of Government under the Executive, Parliament and the Judiciary.
2. **Criminal legislation –** Cook Islands Crimes Act 1969 and the Secret Commissions Act 1994-95.
3. **Electoral legislation** – Cook Islands Electoral Act and Amendment.
4. **Public administration legislation** - The Ministry of Finance and Economic Management Act, the Public Service Act and the Office of Public Expenditure Review Committee and Audit Act.
5. **Public Information and Access** – The Official Information Act (OIA) 2008
6. **Crimes Act 1969** and Amendment.
7. **Secret Commission Act** 1994-95
8. **Electoral Act** and Amendment 2007
9. **MFEM Act** 1995-96
10. **PSC Act** 1995-96
11. **PERCA Act** 1995-96
12. **OIA** 2008
13. **Police Act** 2012
14. **Proceeds of Crime Act** 2003
15. **Ombudsman Act** 1984

An overview of the enabling legislations provides the insight into the statutory powers, policies and procedures.

**The Cook Islands Constitution**

* Part I – Government of the Cook Islands
* The Head of State
* The House of Arikis of the Cook Islands
* Part II – The Executive Government of the Cook Islands
* Cabinet
* The Executive Council
* The Seal of the Cook Islands
* Part III - The Parliament of the Cook Islands
* Part IV – The Judiciary
* Part IVA – Fundamental Human Rights and Freedoms
* Part V – The Public Revenues of the Cook Islands
* Part VI – The Cook Islands Public Service
* Part VIA – Miscellaneous Provisions
* Part VII – Transitional Provisions
* First Schedule – Names and Constituencies
* Second Schedule – Crimes Disqualifying for Election to Parliament
* Third Schedule – The Cook Islands Ensign
* Fourth Schedule – The National Anthem of the Cook Islands

**Cook Islands Crimes Act 1969** – this original legislation is currently being reviewed and amended in Parliament. It has many outdated provisions that requires amendment. The amended Crimes Bill is before Parliament.

* Part I – Jurisdiction
* Part II – Punishments
* Part III – Matters of Justification or Excuse
* Part IV – Parties to the Commission of Offences
* Part V – Crimes Against Public Order
* Part VI – Crimes Affecting the Administration of Law and Justice
* Part VII – Crimes Against Religion, Morality and Public Welfare
* Part VIII – Crimes Against the Person
* Part IX – Crimes Against Reputation
* Part X – Crimes Against Rights of Property
* Part XI – Threatening, Conspiring and Attempting to Commit Offences
* Part XII – Procedure
* Part XIII – Miscellaneous Provisions
* An Act to provide a Criminal Code relating to offences, defences and procedures (27 January 1970)

The Crimes Act has wide investigation powers however prosecution is principally undertaken by the Crown Law Office.

**Secret Commissions Act 1994-95** is an Act to provide for offences in relation to secret commissions (21 April 1995). This legislation was enacted following the Michael Benns, Cook Islands Liquor Supplies Ltd, theft and fraud convictions with an overseas business partner. This legislation was later applied in the Drollett and Friend fraud case.

* Interpretation
* Persons deemed to be Agents
* Gifts according to custom tradition
* Gifts to agent without consent principal an offence
* Acceptance of gifts by agent an offence
* Duty of agent to disclose pecuniary interest in contract
* Giving false receipt or invoice to agent an offence
* Receiving secret reward for procuring contract an offence
* Aiding and abetting offences
* Offences by persons acting on behalf of agents
* Penalty on conviction

The Secret Commission legislation has been effective since its introduction.

**The Electoral Act 2004** an Act to make provisions for the election of members of the Parliament of the Cook Islands, 14 June 2004.

* Interpretation
* Part 1 – Electoral Office and Bearers
* Part 2 – Parliament, Constituencies, Qualifications of Electors, Candidates and Tenure of Office of Members
* Part 3 – Registration of Electors
* Part 4 – Nominations
* Part 5 – Voting
* Part 6 – Counting of Votes
* Part 7 – Offences at Elections
* Part 8 – Disputed Elections
* Part 9 – By Elections
* Part 10 – Accountability for Campaign Receipts and Expenditure
* Part 11 – Miscellaneous Provisions

**The Electoral Amendment Act 2007**, 15 August 2007, introduced amendments in the following areas to cater for ‘party hopping or vaka jumping”.

* Part 9A – Party Integrity
* 105A – Definitions
* 105B – Consequence of Member Ceasing to Support Political Party
* 105C – Notice from Parliamentary Leader of Party
* 105D – Form of Statement to be made by Parliamentary Leader

The Electoral Act and Amendment legislation is functioning adequately for members of Parliament. It caters for both civil and criminal electoral offences.

The Executive, through Parliament introduced three reform legislations for the efficient and effective administration of the Public Service.

**The Ministry of Finance and Economic Management Act 1995-96** on 26 July 1996. The Act included;

1. To establish effective economic, fiscal and financial management and responsibility by Government.
2. To provide accompanying accountability arrangements, together with compliance with those requirements.
3. To require Government to produce;
4. Statements of economic policy
5. Confirmation of adherence to fiscal disciplines prescribed under this Act
6. Budget policy statements
7. Economic and fiscal forecast and updates
8. Financial management information
9. Comprehensive annual reports.

* Part I – Ministry of Finance and Economic Management
* Part II – Economic Financial and Fiscal Policy
* Part III – Fiscal Responsibility
* Part IV – Budget Process
* Part V – Reporting Requirements
* Part VI – Statement of Responsibility
* Part VII – Appropriations
* Part VIII – Authorization of Expenditure
* Part IX – Public Funds
* Part X – Trust Money
* Part XI – Public Money Outside Cook Islands
* Part XII – Loans and Securities
* Part XIII – Information and Compliance
* Part XIV – Offences and Sanctions
* Part XV – Miscellaneous

The MFEM Act, is predominantly a finance mechanism for Government which has multiple provisions for the management of public resources. The Financial Secretary has powers to refer criminal offences to the Police Commissioner.

**The Public Service Act 1995-96** was repealed by the Public Service Act 2009 on 16 July 2009. Key parts include;

* Part 1 – Preliminary Provisions
* Part 2 – Public Service Commissioner and Office of the Public Service Commissioner
* Part 3 – Heads of Departments
* Part 4 – Values and Code of Conduct
* Part 5 – Public Service
* Part 6 – Appeals
* Part 7 – Miscellaneous Provisions Relating to Public Service
* Part 8 – State Services
* Part 9 – Transitional Provisions and Consequential Amendments

The PSC Act caters for the human resources management of the Public Service under the Office of the Public Service Commissioner. The Public Service Commissioner has powers to refer criminal offences to the Police Commissioner.

**The Public Expenditure Review Committee and Audit Act 1995-96** was amended, by the 2020 Amendment Act, on 4th May 2020. The Act to establish a Public Expenditure Review Committee and an Office of the Public Expenditure Review Committee and Audit and to provide for their objectives, functions and powers. This includes;

Part I – Preliminary

Part II – Public Expenditure Review Committee

Part III – Office of the Public Expenditure Review Committee and Audit

Part IV – General

Both the Director of Audit (PERCA) and the Chairman of PERC have specific powers to review and investigate and to forward any criminal offences to the Police Commissioner and to the Crown Law Office.

**The Official Information Act (OIA) 2008** to make official information more freely available and to establish procedures for the achievement of those purposes on 18 February 2008. The Act also repealed the Official Secrets Act 1951, which the Cook Islands had adopted from New Zealand.

The OIA includes;

* Part 1 – Purpose and Criteria
* Part 2 – Requests for Access to Official Information
* Part 3 – Publication of, and Access to, Certain Documents and Information
* Part 4 – Right of Access to Personal Information
* Part 5 – Review of Decisions
* Part 6 – Review by Independent Consultant
* Part 7 – Miscellaneous Provisions

The OIA is administered by the Ombudsman’s Office, who has wide powers to review and request for public information relating to complaints of public officials. The powers of the Ombudsman are limited to the review of maladministration by public officials to higher authorities.

**Police Act 2012** – An Act to repeal the Police Act 1981 and to revoke the Police Regulations 1983, provide for effective governance and administration and consolidate the law relating to the establishment and regulation of the Cook Islands Police Service including their powers and duties. 8 December 2012.

Part 1 – Preliminary matters

Part 2 – Organization and Governance

Part 3 – Employment of Police

Part 4 – Powers and Operations

Part 5 – Protections and Obligations

Part 6 – Offences

Part 7 – International Policing

Part 8 – Maritime Policing

Part 9 – Complaints Against Police

Part 10 - Miscellaneous

Government in 2020, through Cabinet and Parliament, amended the Police Act to increase the retirement age prescribed in the Police Act to enable the Prime Minister, who is also the Minister of Police, to appoint the preferred candidate as the incoming Police Commissioner.

**Proceeds of Crime Act 2003** – An Act to provide for the confiscation of the proceeds of serious offences, was effective 7 May 2003.

Part 1 – Preliminary

Part 2 – Forfeiture Orders, Pecuniary Penalty Orders and Related Matters

Part 3 – Facilitating Investigations and Preserving Property

Part 4 – Monitoring Orders

Part 5 – Disclosure of Information held by Government Departments

Part 6 – Currency Reporting and Suspicious Currency Movements

Part 7 – Miscellaneous

The Proceeds of Crime Act is an effective legislation, adapted and introduced from New Zealand to cater for serious fraud and corruption crimes committed by public officials.

**Ombudsman Act 1984** – An Act to provide for the appointment of an Ombudsman to investigate administrative decisions or acts of Departments Government and certain other organizations and to define the Ombudsman’s functions and powers, effective 26 September 1984.

Part 1 – Ombudsman

Part 2 – Functions of Ombudsman

Part 3 – Miscellaneous

Government in 2020, through Cabinet and Parliament, amended the Ombudsman Act to increase the retirement age prescribed in the Ombudsman Act to enable the Minister responsible for the portfolio, to appoint the former Speaker of Parliament as the incoming Ombudsman.

**Political appointments**

One of the major structural and administrative weaknesses in the public sector legislations highlighted above that relates to managing corruption in the Public Service, is the appointment by the portfolio – Ministers, Minister of Finance and/or the Prime Minister, of Heads of Ministry and Crown Agency Heads that lead these institutions. This also applies to anti-corruption coordination Committees such as the Public Expenditure Review Committee, the Financial Intelligence Unit and the Government’s Anti-Corruption Committee, whose Chair-persons and memberships are all political appointments.

In my view, independence and unrestricted from political influence and interference are the key components of a functioning integrity system in the Public Service. Te Kawa Mataaho, a New Zealand Public Service Commission article (2020) on merit - based appointments – appointing the most suitable candidate for the role states;

This principle is reflected in the legislation through a requirement to “give preference to a person who is best suited to the position” when making appointments. Giving preference to the candidate most suited to the role arose as a safeguard against appointments made based on political affiliation or patronage. Merit – based appointments matter because they;

* Maintain procedural fairness for all candidates
* Improve Public Service performance by selecting the best candidate for the job, regardless of personal views or relationships
* Maintain public confidence in Public Service’s ability to act impartially and to serve successive governments by supporting the principle of political neutrality. This helps to preserve the capability and institutional retention of the Public Service.

**Anti – Corruption Model for the Cook Islands**

From my experience working in the auditing and anti-corruption field over many years, multi-purpose public administration, enforcement, investigation and compliance agencies in the Cook Islands Public Service, in my view, are not effective intervention agencies charged to combating corruption. Political interference and the lack of instituted independence, provides the basis for weak institutions unable to deliver efficient, effective and comprehensive investigation and prosecutions.

These anti-corruption functions are scattered across many agencies and there is not one single agency or body that signifies and has the powers that is responsible solely for fighting corruption. A specialized anti-corruption agency, in my view, is required, when current structural and operational deficiencies within the existing institutional framework does not allow for effective anti-corruption measures and repressive actions against corruption.

**The Need to Establish a Dedicated Anti-Corruption Agency for the Cook Islands**

There are various anti-corruption agency models throughout the Commonwealth and OECD countries. Known models are commonly identified with the following;

* Hong Kong Independent Commission against Corruption
* Singapore Corrupt Practices Investigation Bureau
* Independent Commission against Corruption in New South Wales, Australia
* United Kingdom, Serious Fraud Office
* New Zealand, Serious Fraud Office and the
* Fiji Independent Commission against Corruption

A number of other agencies, for example in South Korea, Thailand, Argentina, Ecuador, Botswana, Lithuania, Latvia and Poland have adopted elements of the Hong Kong and Singapore strategies. The underlying rationale for establishing a dedicated anti-corruption agency is based on the current arrangements that existing multi- administration agencies such as PSC, MFEM, PERCA and the Ombudsman, do not have the technical capabilities, resources and independent mandate, free of political interference, to tackle corruption, efficiently and effectively.

A dedicated anti-corruption agency should be independent, fully resourced and reports directly to Parliament and not to a Minister. Establishing a small economical anti-corruption agency, similar to the New Zealand Serious Fraud Office model with its own legal mandate, functions, operations and processes with inter-agency co-operation is the alternative. Financial, procedural and operational procedures together with qualified, forensic, technical and professional staff is an important factor for the success of an anti-corruption stand-alone, one stop shop type of agency.

The Cook Islands Anti-Corruption National Strategy was established in 2022 and as the Chairperson of Citizens against Corruption (CAC), a non-government incorporated society, I provided a written submission to the Government Anti-Corruption Committee (ACC) for the National Anti-Corruption Strategy. My public submission is enclosed as follows;

**NATIONAL ANTI-CORRUPTION STRATEGY (NACS)**

**Key Recommendations**

1. Implement enabling reform legislation for NACS.
2. Utilize international best practice from UK, Canada, Australia, New Zealand and other Commonwealth Anti-Corruption Agencies.
3. Introduce robust anti-corruption policies and procedures based on 2 above.
4. Establish an Independent Anti-Corruption statutory body, similar to the NZ Serious Frad Office and FICAC – the Fiji Independent Commission Against Corruption.
5. Seek Parliamentary appropriation for the Independent Anti-Corruption statutory body. This body should be managed by an external qualified legal practitioner. (Not a Cook Islander)
6. Disband the current Anti-Corruption Committee of Heads of Ministries and Crown Agencies, appointed by policy by the Minister.
7. Repeal the PERCA Act with relevance to changing the appointment of the Director of Audit from the Minister to Parliament. All other Auditor General positions in the Commonwealth are appointed by Parliament.
8. Amend the PERCA Act to repeal the PERC section of the Act. This is to remove the PERC appointments by the Minister and their functions. The new Independent Anti-Corruption body will take over this role.
9. Implement the NACS structure and objectives.
10. For the NACS to be fully effective, it must be independent, with statutory powers and shall not be influenced by any political person, such as a Cabinet Minister, Member of Parliament, Head of Ministries, Crown Servant or any Crown agency.
11. The new Independent Anti-Corruption body shall regularly report its activities to Parliament and shall have the powers to directly engage prosecution in consultation with the Police and Crown Law.
12. Implement an Independent Police Complaints Authority. This is for both internal and external Police grievances and disputes. This situation is similar to New Zealand and other Commonwealth countries.

Presentation to officials of the United Party by the Chairman of Government’s Anti-Corruption Committee, Garth Henderson, (Financial Secretary), Nikki Rattle, (Ombudsman), Ben Ponia, Chief of Staff for the Prime Minister and others.

**Chapter 3 LITERATURE REVIEW**

Although the thesis subject matter is a universal phenomenon, its application and disclosure in the Cook Islands jurisdiction has been limited. There has been no prior research into this specific area, per se, therefore the researcher, for relevancy and purposes of the thesis proper, have looked to Pacific authors in this specific domain. The researcher is of the view, that a micro and Pacific regional focus will disclose similar patterns of maladministration within the socio-economic and cultural conditions of white-collar corruption in the public sector. This close-to-home Pacific review, will try to assess in general, findings and outcomes through the lens of Pacific authors, specialized in this field, that outlines important research trends, strengths, weaknesses and identifying potential gaps in knowledge.

**Pacific Authors**

I have selected the following distinguished and accomplished Pacific authors, as leading academic writers in this particular field of research.

The late Professor Papa Ron Crocombe, Peter Lamour, Graham Hassall and Manuhuia Barcham.

**The late Professor Ron Crocombe**

Ronald Gordon Crocombe was a Professor of Pacific Studies at the University of the South Pacific for 20 years. He completed an MA from Victoria University of Wellington and a PhD in history at the Australian National University (ANU) in 1961. His work on land use and tenure in Cook Islands society was considered groundbreaking at the time and is still used as a standard text in South Pacific land tenure studies.

He was made Emeritus Professor in 1989. During his time as the Director of the Institute of Pacific Studies at the University of the South Pacific, Ron Crocombe focused on publishing works of Pacific Islanders by proactively encouraging Pacific Islanders by whatever means he could. He developed the approach of publishing books on important topics with chapters written by as many as twenty different authors as a way to encourage the rapid growth in confidence and publications of as many Pacific Island authors and academics as possible.

Over 1,700 Pacific authors were published by the Institute of Pacific Studies. In the week before his death, he had been inducted as a fellow of the Atenisi University in Tonga. His reputation was such that he was described as the “father of Pacific Studies”. He mentored many students and academics and was warmly regarded. (Fiji Times: Father figure of ‘Pacific Studies’ passes away. Retrieved 2009-06-22)

**Posthumous Honors**

In August 2010, a Festschrift conference was held at the University of the South Pacific in Rarotonga to commemorate Crocombe’s lifetime work. Speakers included family and colleagues, including the poet, Albert Wendt. On 13 February 2014, a book was launched as a tribute to Crocombe’s life, work and academic impact. It contains contributions from academics he worked with, taught and influenced. The book was edited by his wife, Marjorie Crocombe and colleagues Rod Dixon and Linda Crowl.

As previously noted, it was the late Professor Papa Ron Crocombe, who influenced and inspired me to pursue my PhD studies in this specific area. As the former Auditor General (Director of Audit) of the Cook Islands, he would on several occasions, whilst returning home to Rarotonga, make an effort to see me at the Audit Office. We would talk about general Pacific politics and more importantly, he would express his concerns about the maladministration and poor governance in the government administration, of the Cook Islands. Then we would dwell on corruption cases in the public domain, that involved senior officials and politicians.

Papa Ron was always providing advice on ways to prevent and combat corruption in the public sector. He would stress the need for a leadership code for members of Parliament and codes of conduct and ethics for public officials. On his last visit to the Audit Office, before he sadly passed away, he gave me a book, titled, Fighting Corruption in Asia: Causes, Effects and Remedies. He said to me, “find the time to read it, there’s some interesting stuff in there”. I am forever grateful for his kind words of encouragement and wisdom. Papa Ron, in my view, particularly disliked corrupt public administrations and officials and he always mentored, wrestled with, lived and wrote for Pacific Culture and Justice.

**Cook Islands Politics**, The Inside Story, published by Polynesian Press, Auckland, New Zealand in association with the South Pacific Social Sciences Association, Suva, Fiji. First published in 1979. Papa Ron, amongst 21 other authors, authored four articles in this controversial book. These are;

1. Forces Shaping the Arena
2. Nepotism
3. Money and All That, and
4. The Saga of Tension

Excerpts from Forces Shaping the Arena and Nepotism reveal political chaos and turmoil in most parts from 1967 to 1979.

**Forces Shaping the Arena** – Ron Crocombe writes, “Sir Albert Hery was aware of the moves and told me early in 1978 that they were one of the two reasons for his calling the election, which was not due until the end of 1978, early in the year. “My canoe is getting old,” he said, “and so is Tom’s (Tom Davis). I can see a fast catamaran coming up from behind that will swamp us both. If I don’t sink it, it will sink us.

Early in 1978 Dr Davis leadership was challenged by Mr Iaveta Shot, a lawyer who had just entered parliament as member for Takitumu in a by-election. It was a brilliant win in an electorate thought to be a Cook Islands Party stronghold. In the euphoria of the victory, he was proposed as leader of the Democratic Party. But Mr Short accepted the status quo and has firmly supported Dr Davis.

Then in the 1978 election Dr Davis and Mr Short both lost their seats owing to the voters flown in at the expenses of the Cook Islands Party. Dr Pupuke Robati, Deputy leader of the Democratic Party, retained his seat and was made leader of the Opposition, but Dr Davis was retained as leader of the Democratic Party. With the court ruling in July 1978 voiding seats obtained by bribery and corruption, Dr Davis regained his seat and became Premier of the Cook Islands.”

**Nepotism** – Ron Crocombe writes, “Sir Albert Henry and his family are frequently accused of nepotism. It was a significant election issue for the Democratic Party and the Unity Movement. The final night of the Cook Islands Party’s campaign for the 1978 election illustrated that there was indeed a prima facie case of nepotism. All the Henrys in parliament are ministers and have been for all the time they have been associated with the Cook Islands Party.

During the 1978 election campaign Mr Fred Goodwin, a candidate for the Democratic Party, stated in a radio broadcast that when the Minister of Justice, the Hon. Tupui Henry, had been charged with assault (in 1977) Mr Goodwin was Superintendent of Police. Sir Albert, then Minister of Police, called Mr Goodwin to his office and asked him to “do everything possible” to avoid his son being prosecuted for the offence. Mr Goodwin declined. Sir Albert refuted the allegation and made critical comments in reply. Mr Goodwin stated publicly that if Sir Albert “went too far” he would reveal a number of other improper actions by him.

In the assault case referred to, the Police proceeded and Tupui Henry was convicted and fined. About 1973, Mr Howard Henry, Tupui Henry’s son, was charged with manslaughter. He had killed a woman and seriously injured a man while intoxicated in charge of a vehicle. A relieving Judge, Judge Rothwell, was scheduled to hear the case. Before doing so he was called to the Premier’s office and asked by Sir Albert to show special consideration. The Judge returned to his chambers and issued a very strong public statement condemning political interference in the judicial process. He also wrote a scathing letter to the government about problems of political interference.

The case was then heard by Judge Fraser. Mr Henry pleaded guilty and was given a particularly light sentence: a fine and probation. The handling of this case was one of the factors that led to the resignation of Mr Tangata Nekeare, the then Superintendent of Police, in protest. He has earlier told me personally as he had told many others that the greatest police problem in the Cook Islands was actual and attempted political interference. Mr Nekeare was a man of outstanding integrity.

Why then, if the public accepts that the family has been privileged, have they tolerated the situation? Clearly, many have for years opposed it, and extreme political favoritism was one of the reasons given by both Dr Manea Tamarua for his resignation from Deputy Premiership in 1967 and by Hon. Mana Strickland for his resignation from the post of Minister of Education in 1968. Likewise, when Dr Joseph Williams resigned as Minister of Health and Education and Mr William Estall from being Minister of Agriculture and Mr Raui Pokoati from the ruling party just before the 1978 elections, all gave nepotism as significant reasons for their dissatisfaction. Other very senior members of the party also privately express strong disapproval of the nepotism, though they value Sir Albert highly and are prepared to put up with it in order to retain his leadership. More crudely, some believe that he has the political skills to retain the Premiership whether they like it or not, and that is the price they have to pay.

But what caused this talented man, who had displayed much more concern for principle at some other stages of his career, to deteriorate so far? He seems to have been driven by ambition for both power and glory. He fed on public adulation. And his record shows that he was never strong on ethics. But history may show that he was destroyed even more by the ambitious of some arrogant but mediocre members of his family, and that in trying to meet pressures from them, he sacrificed the unity and welfare of the Cook Islands people.

Sir Albert is intelligent, innovative and energetic. He is a visionary rather than an idealist (that is he is strong on visions and weaker in adhering to ideals). Highly skilled in speaking and in politics, he has many strengths and potential for greatness. His main weakness seems always to have been in ethics. This is not to suggest he is without principles or ethical standards, but his record does show rather consistently that he is prepared to ‘re-interpret’ water down or totally abandon these rather readily to satisfy his ambitions for power. If he had the ethical strengths of Ratu Sir Kamisese Mara of Fiji, or Michael Somare of Papua New Guinea or Peter Kenilorea of the Solomons or Robert Rex of Niue or Toalipi Lauti of Tuvalu or various other Pacific leaders, he would undoubtedly have led the Cook Islands to great achievements and himself to a position of honor today and in the future, within the Cook Islands and beyond. His actual record has tarnished the image not only of his own people, but of Pacific people as a whole.” Papa Ron loved the Cook Islands.

**The late Professor Ron Crocombe’s books and contributions include;**

* Cook Islands Culture – Akonoanga Maori (translation, Maori Culture)
* The South Pacific
* The New South Pacific
* The Pacific Islands and the USA
* The Cook Islands
* Asia in the Pacific Islands: Replacing the West.

**Peter Lamour**

Peter Lamour originally worked in the Lands Department in Solomons Islands and his PhD compared land policies in Melanesia. Peter undertakes comparative research on Pacific Islands government and politics. He edited a number of books by Pacific Islanders for the Institute of Pacific Studies at the University of the South Pacific (USP) and taught at the University of Papua New Guinea in the 1980s.

He has been at the School of Asia Pacific Studies at the Australian National University since 1994 and became Professor of Public Administration and Policy at USP in 2011. His book Foreign Flowers (University of Hawaii 2005) looked at the imposition and adoption of foreign institutions in the Pacific. His book, Interpreting Corruption (University of Hawaii 2012) looks at how corruption is defined, discussed and dealt with in the region. (Profile, University of the South Pacific, Fiji)

**Peter Lamour’s books and contributions include;**

* Interpreting Corruption, Culture and Politics in the Pacific Islands
* Corruption and Anti-Corruption
* Corruption and Governance in the South Pacific
* Governance and Reform in the South Pacific
* Models of Governance and Public Administration
* Guarding the Guardians: Accountability and Anticorruption in Fiji’s Cleanup Campaign
* National Integrity Systems in Small Pacific Island States (co-author with Manuhuia Barcham)
* Foreign Flowers – Institutional Transfer and Good Governance in the Pacific Islands
* Market, Bureaucracy and Community

**Graham Hassall**

Graham Hassall is a Pacific Islands specialist with a focus on public governance, leadership, peace, development with a focus on small islands states in global governance. Since obtaining his PhD fieldwork in 1986, Graham has visited almost all Pacific Island countries and territories, engaging and training a range of development and intergovernmental agencies across the region, and maintained a regional network of scholars, diplomats, public servants, journalists and community leaders.

Skilled in International Relations, Report Writing, Non-Governmental Organizations, Community Engagement and Policy Analysis. Graham is a strong legal professional with a Doctor of Philosophy focused in Pacific History from the Australian National University. (Source: Victoria University and Australian National University website).

**Graham Hassall’s books and contributions include;**

* Asia – Pacific Constitutional Systems
* Law, Culture and Corruption in the Pacific Islands
* The People’s Representatives: Electoral Systems in Asia Pacific
* Government and Public Policy in the Pacific Islands
* The Powers and Functions of Executive Government
* The United Nations and the Pacific Islands and many other books and articles.

**Manuhuia Barcham**

A talented designer, futurist, coach and leader, Manuhuia has helped clients such as the Australian Federal Government, Transparency International and the URS Corporation become more innovative, strategic and sustainable through a blend of strategic analysis and the optimization of operational performance. The focus is on complex change initiatives, new product/service design and deployment and digital analog transformations.

With over 20 years of experience working on design, strategy and innovation issues, providing advice innovation and broader strategic design, implementation and foresight issues to some of the world’s largest and most powerful organizations including the United Nations and the World Bank. Manuhuia gained a PhD, Politics and International Relations from the Australian National University. (Source: Linkedln and Wikipedia)

**Manuhuai Barcham’s books and contributions include;**

* Corruption: Expanding the Focus
* Corruption in Pacific Island Countries
* National Integrity Systems in Small Pacific Island States
* Cleaning up the Pacific: Anti-Corruption Initiatives
* Other books and publications range from Design Practice, Indigenous Story Telling, Decolonizing Agenda, Migration and Development, Urban Maori, Economic Reform and many others.

I am most fortunate to obtain the services of a distinguished Maori and Pacific author and acclaimed academic such as Dr Manuhuia Barcham, to review my PhD research thesis.

Summary of key extracts by the above authors relevant to this research on the subject of corruption in the Pacific.

**Ron Crocombe** – Excerpt from **Nepotism in the Cook Islands.**

Crocombe reviews the power and influence of the Henry family in government, which started with Albert Henry as Premier, his son Tupui Ariki a Cabinet Minister, sister, Margaret Story, first Speaker of the legislative assembly, nephew Geoffrey, Cabinet Minister and later, became Prime Minister. The Premier’s daughter, Louise Graham, was appointed private secretary and was the major link between the Premier, Cabinet Ministers, government departmental heads and the public. The Henry’s dominance in Cook Islands political life became overbearing from the 1960s spanning several decades.

**Graham Hassall** – Excerpt from **Good Governance and Political Development.**

“Despite such extensive development activity, Pacific Island legislatures have failed to perform the roles expected of them. Common criticisms are that members of Parliament”;

* Act principally in their own interests and in the interests of their own constituency rather than in the interests of the nation as a whole;
* Benefit personally through their close access to decision-making processes;
* Are slow to pass necessary, intricate or technical legislations;
* Fail to reform inadequate or outdated legislation;
* Fait to adequately inspect the activities of the Executive branch and therefore fail to make the Executive accountable and check its misuse of power;
* Focus on gaining positions of power, particularly Executive power.

Throughout the region, issues of effective governance (including accountability and the adherence of law) and equity (especially provision of services to outer regions) remain critical.

**Peter Lamour** - Excerpt from **Law, Culture and Corruption in the Pacific Islands.**

“Whereas a legal text analysis focuses on questions of law, the cultural and political context is also important. Who is speaking of corruption in the Pacific? And for what purposes? What definitions are applied and who developed them? Exposing corruption affects the reputation of countries, governments, business communities, investors and individual leaders. One might say all this is merely a matter of law and its application, but in small island states that feel vulnerable under the relentless forces of globalization, national pride and reputation are valued highly, and preference may be given to addressing corruption internally rather than through international scrutiny.”

**Manuhuia Barcham** - Excerpt from **Cleaning up the Pacific: Anti-Corruption Initiatives.**

Despite possessing relatively well-developed domestic legislative and policy frameworks, corruption continues to be a problem for the Island States of the Pacific. The lack of effectiveness can be traced back to issues of capacity. This is not to argue, however, that capacity issues are the only constraints on the effective operation of anti-corruption efforts. A lack of political will or a lack of ‘fit’ between introduced institutions and practices and local context may all play a part in the suboptimal performance of anti-corruption operations in the Pacific region. One of the key issues regarding the relationship between good governance and corruption is access to good data. Global indices such as the Public Expenditure and Financial Accountability (PEFA) framework, Global Integrity’s Public Integrity Index, the World Bank’s Governance Indicators, the World Economic Forum’s Executive Opinion Survey, Transparency International’s Corruption Perception Index and Freedom House’s work on political and civil liberties and freedom of the press, all provide useful data for measuring the relative success of anti-corruption activities.

**Research Conclusion**

The late Papa Ron Crocombe, Graham Hassall, Peter Lamour and Manuhuia Barcham are distinguished Pacific authors that have written and spoken on various subjects ranging from culture, history, public administration, corruption, politics and Pacific society socio-economic environments. They have also voiced their concerns about corruption in the Pacific and have used specific examples unique to each island state and region.

International organizations that specialize in collecting, analyzing and reporting corruption world-wide and in the Pacific, such as Transparency International, the World Bank and the United Nations, have in general, noted that corruption disrupts and affects the efficiency and effectiveness of public administration.

As the Cook Islands is a small island member state, the issues and problems of corruption are more profound and catastrophic in a smaller close-knit, traditional communal society.

What is clear and significantly alarming is that all authors have exemplified and demonstrated that corruption is a serious problem in the Pacific. The detailed issues and cases of corruption are evident and published from all regions of the Pacific, from Micronesia, Melanesia and Polynesia.

Figure or Map of Pacific here.

**Chapter 4 THE CRESSEY FRAUD (CORRUPTION) TRIANGLE MODEL**

During and towards the end of my tenure as Director of Audit of the Cook Islands Audit Office, from 1996 to 2011, amongst undertaking financial audits, the Office was involved in carrying out special review investigation audits. Special reviews audits were either based from a public complaint about some irregularities in the Government Departments or it arose out of a “red flag situation” during a department’s financial audit.

Over my 30 years career in the Public Service, it always intrigued and fascinated me why ‘certain public officials’ commit offences such as theft of public monies, misappropriation of public funds, bribery and corruption and in some instances, planning and carrying out complex fraudulent transactions hoping that their wrongdoings would not be found out? What struck me was that these ‘individuals’ were ordinary law - abiding citizens and well known in the community. Besides that, they all held senior positions of trust, were intelligent, highly respected in the community and had many years of work experience.

I have completed hundreds of annual financial audits over the years, as these were routine or the ‘run of the mill’ type of audits in the various entities of Government. The special review audits, especially those with a fraudulent and corrupt nature, were vastly different. I would say, it tested the technical skills and experience of forensic auditing in trying to unravel key questions such as;

* what happened?
* how it happened?
* why it happened?
* And who was involved?

Over the years, a majority of the special review reports would end up with the Police prosecutors and the Crown Law Office. During this time, many of the charges, hearings and sentencing was undertaken by visiting Judges from New Zealand. From time to time, I was called, as an expert witness where special review audit reports from the Audit Office, detailing the corrupt activities in various offences, was utilized as evidence for the prosecution. On 30 April 2008, on behalf of the Association of Certified Fraud Examiners (ACFE), I was awarded the CFE designation. This was presented by the late Cook Islands Prime Minister, Hon Sir Terepai Maoate, KBE and former Minister of Finance, Hon Tangata Vavia.

Why people commit fraud was first examined by Donald Cressey, a criminologist from the United States in 1950’s. His research was about, what drives people to violate trust and commit fraud. As a member of the Association of Certified Fraud Examiners (ACFE), the definition of fraud has been widely defined in various literature by scholars and experts. A common definition of fraud, means wrongful or criminal deception intended to result in financial or personal gain or a person or things intended to deceive others, typically by unjustifiably claiming or being credited with accomplishment or qualities.

A more detailed definition of fraud according to Kalubanga et al (2013) is an act or course of deception, an intentional concealment, omission or perversion of truth to;

1. Gain unlawful or unfair advantage.
2. Induce another to part with some valuable items or surrender a legal right or
3. Inflict injury in some manners.

The Merriam Webster Dictionary of Law (1996) as quoted in Manurung and Hadian (2013), fraud can be defined as “Any act expression, omission or concealment calculated to deceive another to his or her disadvantage specifically, a misrepresentation or concealment with reference to some fact material to a transaction that is made with knowledge of its falsity. And or, in reckless disregard of its truth or falsity and worth the intent to deceive another, that is reasonably relied on by the other, who is injured thereby”.

A fraudster is an egoistic, someone who is intelligent, experienced and knowledgeable about controls but has a low personal ethics. An egoistic person refers to someone who is “driven to succeed at all cost, self-absorbed, self-confident and narcissistic (Duffield and Grabosky, 2001). While a low personal ethic person refers to someone who is morally bankrupt and does not see anything wrong in going against the norms of the society.

The Institute of Internal Auditors (IIA), of which I am a member, defines fraud as (IIA, 2019), any illegal act characterized by deceit, concealment, or violation of trust, and Garner (2004) defines it as a knowing representation of the truth or concealment of a material fact to induce another to act to his or her detriment.

In addition, occupational fraud is generally conceived as the fraud committed by an employee against his/her employer, by taking advantage of assets and resources, which do not belong to him or her. Despite the fact there are various definitions, the general meaning is the same. Occupational fraud is an attack from within, from the persons entrusted, with power and resources for private gain.

The causes of fraud are summarized in an axiom known as the Fraud Triangle model, largely developed from the work of Dr Donald Cressey. The three elements of the fraud triangle are;

1. Motive or pressure.
2. Opportunity and
3. Rationalization and greed.

Dr Cressey concluded that individuals commit fraud when the three elements are present:

* Motivation - a financial need that cannot be shared.
* Opportunity – a perceived opportunity for illicit gain or gain improper access to funds and assets.
* Rationalization – a personal justification of the act to themselves (greed).

Figure 1 below illustrates the **Cressy Fraud (Corruption) Triangle** model and when combined and merged together with the cultural and traditional **‘Te Toki e te Kaa Rakau’** concept, it forms the basis of my research in this thesis.

**Figure 1 – The Cressy Fraud Triangle**

**MOTIVATION**

**OPPORTUNITY GREED**

**Source:** D. Cressey (1953)

The three elements of fraud summarized above by Dr Donald Cressy (1953) are commonly presented in a diagram shown in figure 1. The top element of the diagram represents the motive or pressure to commit the fraudulent act while the two elements at the bottom are opportunity and greed or rationalization. Over the years, Cressy’s ideas have become well-known as the Fraud Triangle Theory. Dr Cressey’s (1950) research was based on 250 real cases of individuals who accepted a position of trust in good faith and they violated that trust.

Dr Cressy (1950) found that trust violators when they conceive of themselves as having a financial problem which is non-shareable, have knowledge or awareness that this problem can be secretly resolved by violation of the position of financial trust and are able to apply to their own conduct in that situation which enable them to adjust their conceptions of themselves as trusted persons with their conceptions of themselves as users of the entrusted funds or property.

It is worth noting that Cressey found three constituent elements of fraud;

* The element of motivation/ pressure which arises from financial and personal difficulties.
* The element of opportunity which arises from internal controls weaknesses that will allow the problem to be secretly conducted and concealed, and
* The rationalization and greed which are simply mind games that will allow the fraudster to feel comfortable with his/her actions or even as a victim of the unfortunate situations.

In respect to the element of opportunity or the weaknesses in the internal control environment that will allow the perpetrator to obtain illegal benefits without being caught, it has been demonstrated by empirical studies that the most frequent internal control weakness contributed to fraud was the lack of internal controls by 32% (ACFE,2020). Interesting to note also, empirical evidence suggests that the existence of a code of conduct reduces the medial loss of fraud by 51% (ACFE,2020).

Dr Cressey’s fraud theory was widely supported and used by audit professionals and standards setters as a tool for detecting fraud. In 1987, the Commission of the Treadway Committee reviewed both alleged and proven instances of fraudulent financial reporting and issued a report that supports Dr Cressey’s findings.

Results revealed that;

“Fraudulent financial reporting usually occurs as a result of certain environmental, institutional or individual forces and opportunities. These forces and opportunities add pressures and incentives that encourage individuals and companies to engage in fraudulent financial reporting and are present to some degree in all companies. If the right, combustible mixture of forces and opportunities is present, financial reporting may occur”. (1987 p.23).

In 2002, SAS No. 99 supported the use of Dr Cressey’s fraud triangle by mentioning that; ‘Three conditions generally are present when fraud occurs. First, management or other employees have an incentive or are under pressure, which provides a reason to commit fraud. Second, circumstances exist, for example, the absence of controls, ineffective controls, or the ability of management to override controls – that provides an opportunity for a fraud to be perpetrated. Third, those involved are able to rationalize committing a fraudulent act’.

‘Some individuals possess an attitude, character, or set of ethical values that allow them to knowingly and intentionally commit a dishonest act. However, even otherwise honest individuals can commit fraud in an environment that imposes sufficient pressure on them. The greater the incentive or pressure, the more likely an individual will be able to rationalize the acceptability of committing fraud’. (AU316.06, para. 07).

In 2009, the International Auditing Standards Board (IASB) issued a revised version of International Standard on Auditing 240 (ISA 240): The Auditor’s Responsibilities Relating to Fraud in an Audit of Financial Statements which stated that ‘Fraud, whether fraudulent financial reporting or misappropriation of assets, involves incentive or pressure to commit fraud, a perceived opportunity to do so and some rationalization of the act’. (refer, para 3).

The auditing standards also provided examples for the three fraud risk factors;

1. Motivation, incentive or pressure to commit fraudulent financial reporting may exist when management is under pressure, from sources outside or inside the entity, to achieve an expected and perhaps unrealistic earnings target or financial outcome.
2. A perceived opportunity to commit fraud may exist when the trust violator is in a position of trust or has knowledge of specific deficiencies in internal control.
3. The standard also mentioned that individuals may be able to rationalize committing a fraudulent act.

I have researched other fraud theory models and have found that two such models are expanded versions of the Cressey fraud triangle. The fraud diamond theory was introduced in 2004 by Wolfe and Hermanson, in which they added another variable known as ‘capabilities’ to the fraud triangle. According to Wolfe and Hermanson (2004) cited in Kassem and Higson (2012), many frauds would not have occurred without the right person with the right capabilities implementing the details of the fraud.

In other words, the potential fraud perpetrator must have the skills and ability to commit fraud. According to Wolfe and Hermanson (2004) cited in Abdullahi and Mansor (2015), ‘opportunity opens the doorway to fraud and incentive (pressure) and rationalization leads a person towards the door’. However, ‘capability enables the person to recognize the open doorway as an opportunity and to take advantage of it by walking through, repeatedly’.

**Figure 2: The Fraud Diamond Theory**

**MOTIVATION**

**OPPORTUNITY CAPABILITY**

**GREED**

**Source:** Wolfe and Hermanson (2004)

Although, Cressey’s fraud triangle was supported and used by audit regulators, (ASB and IAASB) critics have argued that the model cannot solve the fraud problem alone because two sides of the fraud triangle, pressure/ motivation and rationalization cannot be easily observed (Dorminey et al 2010 as cited in Kazsem and Higson 2012).

Again, the fraud diamond theory by Wolfe and Hermanson (2004) also has its shortcoming, though the fraud diamond theory added the fourth variable ‘capability’ to the fraud triangle and filled the gap in other theories of fraud, the model alone is an inadequate tool for investigating, deterring, preventing and detecting frauds (Gbegi and Adebisi, 2013).

This is because an important factor like personal ethics of the fraud perpetrator was totally ignored in the two theories. A primary study was collected from a sample of respondents consisting of 21 external auditors, 17 internal auditors, 23 fraud investigators from the Economic and Financial Crime Commission (EFCC), 18 fraud investigators from the Independent Corrupt Practices Commission (ICPC) and 16 Police fraud investigators from the Nigerian Police Force, who were selected for the study.

The study suggests another model called the ‘Fraud Pentagon Model’. Thus, for better understanding why people commit fraud, personal ethics of an individual is a key issue. This new model has been able to provide the missing link in Cressey’s Fraud Theory and Wolfe and Hermanson’s Fraud Diamond Theory. Hence, the new Fraud Pentagon model captures this important variable and should be regarded as an extension of the above theories.

The New Fraud Pentagon Model is illustrated below;

**Figure 3: The New Fraud Pentagon Model**

**MOTIVATION**

**OPPORTUNITY GREED**

**PERSONAL ETHICS CAPABILITY**

**Source:** Kassem, R and Higson, A.W 2012. The new fraud triangle model. Journal of Emerging Trends in Economics and Management Science (3), pp.191-195.

It is against this backdrop of fraud theories and models, that I have introduced and applied the **‘Te Toki e te Kaa Rakau’** concept, which attaches the cultural symbolic stone adze to Cressey’s fraud triangle. This signifies a fourth contributing element of, unethical cultural influences and the environment.

In my view, due to the smallness of the Cook Islands community, the close inter-relationships amongst its people, the socio-cultural dynamics, based on the communal values and welfare system of kinship and Christianity, the ‘Te Toki e te Kaa Rakau’ concept, conveniently fuses with the Cressey fraud triangle theory. In the Cook Islands, basically, nearly everyone is related through genealogical bloodlines, through their respective matakeinanga (tribes), cultural and social relationships and affiliations.

To say that everyone in the Cook Islands is related to each other, may not be far from the truth. Each of the island tribes have their own ‘ariki’ and chiefly system, with each clan having sub-chiefs or the ‘Ui mataiapo, Ui rangatira and Ui kavana structure’. The tribal linkages through the “matakeinanga” or tribal clans, have a profound collateral lineage relationship amongst and between tribes of similar and different locations, within the Cook Islands. For example, as a mataiapo from the Ngati Te Akatauira tribe, under Te Maeu o te Rangi Teikamata Ariki of Nukuroa, otherwise known as Mitiaro, I have direct and indirect ties to multiple tribes or matakeinanga, throughout the southern group of the Cook Islands. This is also connected to some tribes on Rarotonga, through marriage and adoption.

As President of the Koutu Nui, a sub-chief’s group, from 2012 to 2021, it became more apparent to me that, communities with close matakeinanga tribal links, such as the Ngaputoru ariki’s, with its mataiapo, rangatira, kavana and kopu tangata, have a much closer kinship relationship in all daily facets of community life. It is this close embedded relationship that influences their traditional and cultural inter-relationships amongst tribal members and the community throughout the Cook Islands. Examples of this kinship and cultural relationship in small and close communities, are unfortunately disclosed in several cases of corruption in my research thesis.

It is specifically ascending from this unique-tribal and cultural relationships and connections, that the traditional and symbolic **‘Te Toki e te Kaa Rakau’** concept portraying the 4th element of unethical cultural influences and the environment, attaches itself, metaphorically, to the Cressey fraud corruption triangle, in my thesis.

**Research Conclusion**

Dr Cressey’s fraud theory has been at the center piece of debate of why perpetrators commit fraud and corrupt practices and has been widely used by regulators, fraud examiners and experts, professionals and academics. This work has been conceptualized as the ‘fraud triangle’. The key elements of the fraud triangle are motivation, opportunity and rationalization/greed.

Opportunity arises when the perpetrator sees a way to use their position of trust to solve a financial problem, knowing they are unlikely to be caught. Motivation or the pressure to commit fraud is personal and internal to the perpetrator. Rationalization on the other hand, is the reasoning and justification to commit the fraud. Cressey believed that most fraudsters are first-time offenders with no criminal record. In all of the cases illustrated in this research thesis, this is true. Cressey goes on to say, they see themselves as ordinary, honest people who are caught up in a bad situation. This enables them to justify the crime to themselves in a way that makes it acceptable and vindicated.

Researchers in the audit literature defined differently the components of the fraud triangle and over a period of time, gave different examples for each. Wolfe and Hermanson (2004) added capabilities to the fraud triangle and labeled it the fraud diamond theory. Then, Kassem and Higson (2012) added personal ethics to the fraud diamond theory and called it the new fraud triangle model.

What is important to note is that all fraud models stem from the Cressey fraud triangle model and that audit practitioners should consider all fraud models to better understand why fraud occurs. In my view, no model is superior than the other, and that all models are relevant and should be integrated when considering all the necessary factors contributing to the occurrence of fraud.

The next chapter then leads me to introduce the 4th contributing element connected to the Cressey fraud triangle theory and that is the, **‘Te Toki e te Kaa Rakau’** concept (or the symbolized stone adze threaded with dried coconut fibers holding the timber rod) signifying the unethical cultural influences and the environment, insofar as the Cook Islands society is concerned.

**Chapter 5 - The 4th Contributing Element – Te Toki e te Kaa Rakau concept, symbolizing the unethical cultural influences and the environment.**

Understanding, utilizing and adapting Donald Cressey’s fraud triangle to the corruption cases in the context of my Cook Islands research, brings a realization of incompleteness, in terms of Cressey’s three essential fraud elements of motivation, opportunity and greed. This missing gap is, in my view, ably compensated by the occurrence of the perpetrator’s unethical cultural influences and its environmental and conditions setting. This traditional symbolism, I have labelled, the 4th contributing element, signifying **‘Te Toki e te Kaa Rakau’** that metaphorically connects to the Cressey fraud triangle. Te Toki resembles a traditional stone adze. The Kaa, resembles the coconut fibers used for tying it together. The Rakau, resembles the timber rod cut out from the ‘toa’ or ironwood tree or a similar durable tree such as ‘tamanu’ or mahogany, signifying strength, vitality and power.

Whilst the Cressey fraud triangle model, the Wolfe and Hermanson fraud diamond theory and the new fraud pentagon model are all relevant applications as to the reasons and justifications behind each act of corrupt activity, it negates the reality of small Pacific Island communities, such as the Cook Islands, that have strong traditional, christian and cultural kinship relationships, that portrays traits and signs of unethical cultural influences from a Pacific Islands environmental setting.

Illustrated below is the Unification of the Cressey Fraud Triangle and the symbolized cultural Te Toki e te Kaa Rakau concept.

**MOTIVATION**

**Cultural Influence & Environment**



**OPPORTUNITY GREED**



**Figure 4:** The unification of the Cressey model and the Te Toki e te Kaa Rakau concept. **Source:** D Cressey (1953) & P Allsworth (2023).

What figure 4 illustration signifies, are that key elements of fraud are relevant and applicable, regardless of geographical locations. They are however more significant and profound, in my view, in smaller and closely related communities, such as the Cook Islands. The merging of the Cressey fraud model together with the Te Toki e te Kaa Rakau, signifying the 4th contributing element of unethical cultural influences and the environmental factors that are unique to small and close-nit kinship communities. These are the basis and one of the major contributing research disclosures in my research.

I will now focus on the relevance of culture in the context of governance and corruption. I refer to a major publication, **‘Valuing Culture in Oceania’** by the Secretariat of the Pacific Community, authors Lorena Gibson, Manuhuia Barcham, Bronwyn Douglas and Trisia A Farrelly.

**Common Oceanian Cultural Values**

Given the amount of cultural diversity within Oceania, it is no surprise that there is a great deal of variation between the value systems of different Oceanian cultures (Crocombe 2005:302, cited in Huffer 2006:50). Different cultural values result in distinct practices regarding land use and inheritance and political systems. For example, Tonga‘s monarchy is quite different from Samoa‘s *matai* system and family relationships (including notions of *tapu* and gender roles).

Despite Oceania‘s cultural diversity, much has been written about a common set of Oceanian values. Government organizations and academics have developed their own notions of common cultural values. For example, New Zealand‘s Ministry of Pacific Island Affairs‘ *Pacific Consultation Guidelines* states that we must be sensitive to Pacific values and that Pacific people: tend to be motivated by individual benefit within a wider value of communications; are likely to see mutual help as bringing future security more effectively than individual policies; like to take time to properly understand and come to a consensus view; emphasize spiritual dimensions and see the church and pastor as very important; highly value reciprocity and give and expect thank you gestures; and may pay greater respect to the authority and value status specific in their nation. (New Zealand Ministry of Pacific Island Affairs).

A summary of values frequently listed as common to Oceanian cultures is:

* Obligation, reciprocity and human responsibility
* Kinship, church and community
* Solidarity, loyalty and commitment
* Collectivity, cooperation and shared leadership
* Attachment to land and sea, movement and embeddedness
* Respect, humility and generosity
* Upholding of human dignity
* Love, harmony and peace.

It is important to be aware of the problems that arise in applying a common set of values to such diverse groups of people. One immediate problem is that there is nothing uniquely or inherently Oceanian about these values –– a large number of cultural groups throughout the world identify with many or all of these values. Another concern is that even within one culture, different members of that cultural group might have different values and relationships with one another depending upon their age, gender, socio- economic background, and other factors.

Sources: Huffer 2006; Powles 2006; e-mat2006; Ministry of Pacific Island Affairs; Meleisea 2004; Taufe’ulungaki 2004; Konai H Thaman 2004.

In Oceania, the good governance literature has focused on corruption in recent years as one point of concern. Huffer (2005:118) writes that the governance agenda came to Oceania in the 1990s as a polite way of dealing with corruption. Donors and international agencies working in Oceania have taken up the governance agenda, says Huffer, because of concerns about the regions lack of sustained economic development (particularly, its lack of consistent growth); its rising political instability; the increasingly visible mismanagement of public funds in many countries; and an upsurge in the so-called ideology of traditionalism (2005:118).

Like the concept of culture, understandings of corruption are context-specific. Nevertheless, people are able to agree that corruption occurs within Oceania (as it does everywhere) and that it tends to be found in the following sectors: police, customs and ports; forestry, fisheries and mineral and petroleum extraction; health, education, and retirement funds; land and titles administration and access to public office; tendering, offshore banking, and trade in the tokens of sovereignty (passports, internet domain names) (Barcham 2007:8–9).

Different regions within Oceania experience different forms of corruption, island states in Polynesia and Micronesia, for instance, do not have the same types of corruption that accompany large-scale logging and mineral and petroleum mining in Melanesian countries (Barcham 2007:vi). However, economic and natural resources are clear areas of shared concern in the region.

One useful way to explore how culture is linked to governance in the Pacific, is by looking at the way it has been used to explain corruption in Oceania (Larmour 2006). In discussions of culture and corruption, the most commonly listed problems include gift-giving (including gifting money to churches), bribery and nepotism (Larmour 2006, Barcham 2007). From a Western perspective, cultural traditions are considered an obstacle to good governance and corruption is a key issue in overseas aid programs.

Organizations such as AusAID, NZAID and the European Union operate bilateral anti-corruption activities in Oceania as part of good governance programs (Barcham 2007). The following five international instruments help provide a framework for anti-corruption efforts by Pacific Island countries:

1. The UN Convention Against Corruption.
2. The UN Convention Against Transnational Organized Crime and its Protocols.
3. The ADB/OECD Anti-Corruption Initiative for Asia-Pacific, the OECD Anti-Bribery Convention.
4. The OECD‘s Financial Action Task Force.
5. The Asia/Pacific Group on Money Laundering with which the task force is closely affiliated.

An important new area of work on corruption and good governance is one that takes culture seriously and recognizes the potential of harnessing traditional cultural practices to achieve transparency, accountability, equity and efficiency in decision-making processes. Discussing terrorism and failed states in Oceania, Greener-Barcham and Barcham (2006:74) noted that there have been increasing calls for a fusing of local cultural values and traditional governance systems with these state structures or parallel to these state structures to create more robust governance mechanisms.

One of the key findings in Barcham's (2007) study on corruption in Pacific Island countries was that traditional societies in Oceania have traditional accountability structures from which much could be usefully taken in constructing effective anti-corruption programs in the region.

This taking culture seriously approach should not be seen as merely a return to cultural relativist excuses for corrupt activities. Rather it should be seen as an opportunity to utilize the best of both worlds in anti-corruption activity and in doing so help academics and policy-makers understand why some programs of reform succeed where others fail. In distinguishing how these traditional cultural practices lead to corruption, we need to acknowledge that it is not the practice of say gift-giving itself that is inherently corrupt but rather that the structures of the modern state have provided a source of previously unimaginable power and wealth and so provided opportunities for some elites to exploit these opportunities in pursuit of their own interests.

The point to note is that in defining how and when traditional cultural practices such as gift -giving become corrupt there are a number of issues at play, including: intent, scale and the public or private nature of the gift. Traditional cultural value systems in the Pacific will not just go away, thus work is required to explore how traditional and modern systems can be used synergistically to provide robust anti-corruption tools and frameworks.

In Oceania, the good governance literature has focused on corruption in recent years as one point of concern. Huffer (2005:118) writes that the governance agenda came to Oceania in the 1990s as a polite way of dealing with corruption. Donors and international agencies working in Oceania have taken up the governance agenda, says Huffer, because of concerns about the region‘s lack of sustained economic development (particularly, its lack of consistent growth); its rising political instability; the increasingly visible mismanagement of public funds in many countries and an upsurge in the so-called ideology of traditionalism (2005:118).

Corruption is generally understood to mean the misuse of entrusted power for private gain (Barcham 2007). However, as Peter Larmour and Manuhuia Barcham found when they were commissioned by Transparency International to survey National Integrity Systems in 12 Pacific Island states, understandings and practices of corruption vary greatly within Oceania. For example, none of the 12 country reports found an exact translation for the word corruption in local languages;

In Kiribati for example there were several words with proximate meanings but people used the phrase *te corruption*. In Tonga the closest word was *angakovi*, referring to unkindness. In Marshall Islands the opposite *was kien jimwe inmoi* which translated as uprightness (Larmour 2006:9).

Like the concept of culture, understandings of corruption are context-specific. Nevertheless, people are able to agree that corruption occurs within Oceania (as it does everywhere) and that it tends to be found in the following sectors: police, customs and ports; forestry, fisheries and mineral and petroleum extraction; health, education, and retirement funds; land and titles administration and access to public office; tendering, offshore banking, and trade in the tokens of sovereignty (passports, internet domain names) (Barcham 2007:8–9).

Different regions within Oceania experience different forms of corruption, island states in Polynesia and Micronesia, for instance, do not have the same types of corruption that accompany large-scale logging and mineral and petroleum mining in Melanesian countries (Barcham 2007:vi). However, economic and natural resources are clear areas of shared concern in the region. This is reflected in the objective of the good governance pillar of the Pacific Plan: Improved transparency, accountability, equity and efficiency in the management and use of resources in the Pacific (Pacific Islands Forum Secretariat 2007:3).

Radcliffe and Laurie (2006:244–245) argue that viewing culture as a creative, flexible resource provides a way of drawing on traditional social structures to offer new and appropriate solutions to development problems: culture can be the basis for innovative forms of social organization and meanings that can be adapted over time as they represent a dynamic template for action. This is in line with the findings from Barcham‘s 2007 study and suggests that traditional and modern systems (values and governance) can be used synergistically to create culturally appropriate strategies for development in Oceania.

This section has shown how culture impacts on governance in the region. Culture provides a valuable resource through which Pacific peoples use to organize themselves and to engage with introduced governance systems such as the state.

Often, the impact of culture on governance in the region is phrased in terms of its negative impact on good governance. However, as the discussion on corruption above has shown the impact of culture on governance need not necessarily be negative but what is required is a more nuanced [sensitive?] approach to how the issue of culture impacts on governance systems in the Pacific.

**The Determinants of Corrupt Activities**

The Cressey fraud triangle, the fraud diamond model, the new fraud Pentagon model and the theoretical adaptation of the 4th element, ‘Te Toki e te Kaa Rakau’ a symbolized concept, all describe the various possible determinants of fraud and corruption.

The key fraud determinants are the opportunities, motivations, pressures, rationalizations and greed intentions, capabilities, and personal ethics. The 4th adapted element of unethical cultural influences and the environment, brings an added dimension, through the lens of the ‘Te Toki e te Kaa Rakau’ concept.

It is noted that each of the models and concepts have similar and unique features depending on the type of fraud committed, the objective and target of the fraud, the degree of intensity, and the scale and complexity of the fraud. What is missing are the human needs from the perspective of the perpetrator or fraudster, which may not be apparent and disclosed at the time of the fraud.

What comes to mind with regard to serious and complex fraud and corruption cases are the similarities with the Iceberg theory or theory of omission. This is a writing technique coined by American writer, Ernest Hemingway. Hemingway once said, “If it is any use to know it, I always try to write on the principle of the iceberg. There are seven-eighths of it under water for every part that shows. Anything you know you can eliminate and it only strengthens your iceberg. It is the part that doesn’t show”.

This theory suggests that we cannot see and detect most or all of a corrupt activity, it’s information and data. I draw the same analogy that the majority of serious offences and complex fraud and corruption cases committed, can be seen as icebergs, with the symptoms being the tip of the iceberg and the underlying causes being submerged, hidden away and invisible.



**Figure 5:** The Iceberg Principle or Theory

**Source:** Wikipedia, Ernest Hemingway

The perpetrators will take advantage of their planned transgressions in various ways. The attainment and accessibility of their unlawful activity, may be due to various motives, such as poor internal controls, weak oversight systems and procedures, collusion amongst key senior officials involved or a complete breakdown in the segregation of duties around the approving and processing of public funds.

Determined and motivated perpetrators will cease the opportunity to basically ‘get what they want’ and then attempt to conceal the manipulation, misappropriation, conspiracy, forgery, bribery, theft, secret commission or other related offences with the specific transaction(s).

Breaking and disclosing the hidden part of the iceberg, in these circumstances, and in most cases, excluding a confession, in my view, can only be unlocked and disclosed by trained, skilled forensic and qualified professionals such as forensic auditors, tax examiners, legal experts and criminal prosecutors. I would say the following in Cook Islands Maori, relating to the iceberg theory.

Tei runga ua i te enua te ka kite ia, translation – One can only see what’s on the surface and on the land.

Te maataanga, kua ngaro tei reira, translation – The majority is hidden and out of sight.

The ‘Te Toki e te Kaa Rakau’ concept symbolizes the cultural influences closely connected to local environmental conditions in small island communities. This unification binds together, metaphorically, with the Cressey fraud triangle, to portray key cultural influences unique to small closely knit and related local communities, such as the Cook Islands.

In my view, cultural influences that are closely connected to local environmental conditions, plays a significant role that closely aligns itself with the Cressey fraud triangle. This re-alignment is what connects the Cressey fraud triangle to the ‘Te Toki e te Kaa Rakau’ concept in my research.

Cultural influences that are closely connected to local environmental conditions are as follows;

* Behaviours and cultural practices – visible and that can be seen.
* Perceptions, attitudes, beliefs and values – invisible and unseen.
* Education, ideologies, religion, socio-economics, communal settings, demographics – invisible and unseen.

Shared and common behavioral traits identified amongst the cases reviewed, reveal compelling cultural influences that relate to environmental conditions in the areas of family ties, political affiliations, cultural and business acquaintances and community relationships. These and other related factors can together, trigger the motivation, opportunity and rationalization (greed) leading up to the offences and corrupt activities committed. This aspect will be covered separately under each case of my research analysis.

Based on the iceberg principle, the iceberg cultural theory was developed by Edward T. Hall (1976) Cultural Iceberg Model. Hall developed the analogy of culture. Hall stated, that ‘if the culture of a society was the iceberg, then there are some aspects visible, above the water, but there is a larger -portions hidden beneath the surface”.

**What does this mean?**

According to Hall, the external or conscious, part of culture is what we can see and is the tip of the iceberg and includes behaviours and some beliefs. The internal or subconscious, part of culture, is below the iceberg and surface of a society and includes some beliefs, values and thought patterns that underlie specific behavior.

**What can we do?**

Hall suggests, ‘that the only way to learn the internal culture of others is to actively participate in their culture’. As a cultural leader, an experienced auditor and a certified fraud examiner, I have lived, mixed and seen the cultural dynamics, influences and environmental conditions at play, in the Cook Islands. These cultural factors, in my view, plays a critical role in persuading and influencing perpetrators to commit fraudulent and corrupt activities.

Graham Hassall, in “Law, Culture and Corruption in the Pacific Islands” (2019), states, “So is corruption best understood as a problem of law, culture or ethics? The cultural argument suggests that there are practices that were traditionally accepted which modern law has failed to appreciate or accommodate”.

Traditions of gift-giving, for instance, have been put forward as traditional ‘reciprocity relationships’ which do not include or imply an intent to corrupt. (M. Pitts, Crime, Corruption & Capacity in Papua New Guinea, Asia Pacific Press, 2002) and (S Ioane, Turmoil in Paradise 1983).

Electoral candidates, when interacting with communities during electoral campaign periods, are said to face traditional obligations to ‘bear gifts’ which are signs of hospitality rather than inducements for votes. (P Lamour, Culture and Corruption in the Pacific Islands, ANU 2006).

A review of the Tiki Matapo vs Robert Wigmore electoral bribery case of 2004, Judge Kingston referred to the Electoral Act 2004 s 88 states;

‘I believe this cynical use of power to be one of the very corruptions that S.88 of the Act requires this Court to address’.

S.88 of the Act provides:

"Every person commits the offence of bribery who in connection with any election:

* (a) directly or indirectly gives or offers to any elector any money or valuable consideration or any office of employment in order to induce the elector to vote or refrain from voting; or
* (b) directly or indirectly makes any gift or offer to any person in order to induce that person to procure or endeavour to procure the return of any candidate or the vote of any elector; or
* (c) upon or in consequence of any such gift or offer, procures or endeavours to procure the return of any candidate or the vote of any elector; ..."

Gift-giving and offerings to electors cannot be used leading up to and during elections, as these undertakings will be interpreted as bribery under the Act.

Hall states, ‘When one first enters a new culture, only the most overt behaviors are apparent. As one spends more time in that new culture, the underlying beliefs, values and thought patterns that dictate that behavior will be uncovered’.

Of the 16 cases examined for this research, I have actively participated in 9 or 56 % of the cases, in one way or another, knowing the perpetrator(s) in my former role as the Director of Audit of the Cook Islands Audit Office.

Hall further states, “what this model teaches us is that we cannot judge a new culture based only on what we see when we first enter it. **We must take the time to get to know individuals from that culture and interact with them. Only by doing so, can we uncover the values and beliefs that underlie the behavior of that society”.**



**Figure 6:** The Iceberg Cultural Theory

**Source**: Edward T Hall (1976)

From years of experience as an investigator, auditor and certified fraud examiner, I noted two specific scenario’s that I would like to highlight and draw attention to, that is likened to both the iceberg and cultural iceberg theory. For the purposes of this research, I have labelled this the **‘Iceberg of Rarotonga’**. This analogy is similar to the Iceberg theory but with a cultural design and significance.

The Iceberg of Rarotonga symbolizes society and the community life on the island of Rarotonga, where people go about their daily lives, working, planting, fishing, meeting, feasting, dancing, singing and in general, enjoying the island way of life. This scenario depicts, what’s happening on the surface of the Iceberg of Rarotonga.

However, beneath the surface of the floating iceberg of Rarotonga, therein lies, concealed allegations and manifestations of unethical behavior leading to unscrupulous conduct and ultimately, corrupt practices. There are two parts to this metaphorical approach to this rationality.

The first part relates to people and individuals. An individual’s competencies, that is, their respective knowledge and skills, are clearly visible in the work that they carry out. However, their behavior, attitudes, values and personal traits are not fully visible but hidden within themselves, beneath the iceberg.

These traits and unethical behaviors materialize from time to time, depending on the conditions and favorability of all three key elements of opportunity, motivation and greed as portrayed by the Cressey fraud triangle. The unethical cultural influences and environmental factors influencing and linking these elements together, is symbolized by the ‘Te Toki e te Kaa Rakau’ in unison with the Cressey fraud triangle.

The second part relates to the differences between what is visibly seen and what is not visibly seen, that is, other critical elements, beneath the surface of the ‘Iceberg of Rarotonga, concealed and hidden away. There are various examples in the corrupt cases disclosed in this research, which relates to the question, what is actually taking place, leading up to the unethical cultural and environmental conditions and settings of the alleged allegation(s) and offence(s) beneath the surface?

**Specifically, for my research, this reveals itself, in the following cases;**

* The **Albert Henry** fly in voter political scandal. The targeted Cook Islands Party voters in New Zealand were only told to pay $20.00 each. However, the actual cost of the Ansett charter flights was A$290,000.00 or NZ$323,639.90 was not known until the investigation and criminal charges were laid in the Cook Islands High Court. The plan to finance the campaigns was only known to a privileged few, involved in the conspiracy, and that the funds was approved by Finbar Kenny, a United States based businessman, a known friend of Albert Henry, who was a director of the Cook Islands Development Company Limited, who had advanced the funds from the Cook Islands Philatelic Bureau, through intermediary Jim Little, a local Director. The advance was deemed to be public funds. Details are fully disclosed in the next chapter.
* **Michael Benns**, the former Manager of the government owned “Liquor Bond Store”, who was on a moderate local salary, was living up the lifestyle, owned expensive assets and lived well beyond his means. It was later disclosed that secret commissions were channeled into his private bank account through a subsidiary co-offender in Auckland, New Zealand. This was how Michael Benns was financing his lifestyle, unseen and unnoticed from the Cook Islands taxpayers for many years.
* The **Basilio Kaokao** (Mauke Post Office) and Albert Numanga (CI Tourism Office in Auckland) cases show similar patterns of fraud. Both held senior positions of trust, were on moderate salaries but had access to cash and assets that were misappropriated from concealed public accounts. Several years had passed when these discrepancies were eventually disclosed after detailed investigations by the Audit Office and the New Zealand Serious Fraud Office.
* Former Minister Hon. **Tepure Tapaitau**, was paid a Crown salary as a member of Parliament and at the same time, was also receiving other payroll expenses as Consultancy services. This discrepancy was disclosed after a routine financial audit of the Office of the Prime Minister. This was a clear breach of the Civil List Act and as a result, he lost his seat as a member of Parliament.
* The former Chief of Staff of the Office of the Prime Minister, **Edward Drollett** had outsourced accounting services to a colleague in the private sector that later paid him secret commissions. This fraudulent activity was only disclosed after a routine financial audit showed higher than normal accounting fees charged compared to market rates at the time. An internal audit report and forensic analysis was carried out by fraud experts from the New Zealand Serious Fraud Office (NZSFO).
* Former Minister, Hon. **Peri Vaevaepare**, misused aid supported project funds for renovations on his private residence. Project funds are deemed to be public funds. This anomaly was disclosed after a Project staff member complained to the Audit Office and an investigation disclosed the matter for a Police investigation. He was charged and convicted under the Crimes Act.
* The former Minister of Marine Resources, Hon. **Teina Bishop** dealings with Huan Fishing company disclosed a significant cash loan was obtained for Crown fishing licenses. This was later attributed to the sale and purchase of the Samade hotel property in Aitutaki. The offences were only disclosed following a citizen’s complaint and investigation by the NZSFO. Other examples are discussed in detail under each relevant case.

From the surface and land, so to speak, things may appear to look normal, in terms of the initial public transactions by the perpetrator during and after committing the alleged offences. However, through investigation and disclosures by auditors, forensic examiners, the Police and Crown Law prosecutors, the hidden transactions and offences, as depicted by the Iceberg, the Iceberg cultural theory and the Iceberg of Rarotonga finally surfaces and becomes transparent, as evidence produced by the prosecution and this eventually becomes public knowledge.

**Research Conclusion**

In 1953, Donald Cressey published his research in a book called “Other People’s Money”. He divided the non-sharable financial problems into six categories;

* Difficulty in paying back debt.
* Problems resulting from personal failure.
* Business reversals – uncontrollable business failures, such as recession.
* Physical isolation – the trust violator is isolated from people who can help him.
* Status gaining – living beyond one’s means and
* Employer-employee relations – employer’s unfair treatment.

Cressey found that, ‘In the interviews, many trust violators expressed the idea that they knew the behavior to be illegal and wrong at all times and that they were merely kidded themselves into thinking that it was not illegal’.

Over the years, Cressey’s theory has become well known as the ‘fraud triangle’ as shown in Figure 1. The top side represents a pressure or motivation to commit the fraudulent act, the second side represents a perceived opportunity or chance and the third side stands for rationalization (Wells, 2011).

Based on these components that was founded in a totally foreign environment such as the ‘Big Apple’ (USA) where Donald Cressey was raised, educated and lived, compared to the small isolated island community in the middle of the Pacific, the Cook Islands. The unethical cultural influences and pressures from the local island environment, ascribes the linking of the fraud triangle with the metaphorical ‘Te Toki e te Kaa Rakau’**.** This multi-cultural infusion offers numerous opportunities, motivations and reasoning for community leaders, politicians, senior officials and bureaucrats to commit various violations and offences.

Camouflaging and in some ways concealing such violations and offences is, in my view, perfectly summarized by Edward T Hall (1976), in his adaptation of the **Iceberg Cultural Theory**. Hall stated, ‘that if a culture of a society was the iceberg, (Iceberg of Rarotonga) then there are some aspects visible, above the water, but there is a larger – portions hidden beneath the surface’.

The cases researched in this thesis, supports Halls cultural iceberg theory, that the actual offences committed were in the beginning, invisible or hidden beneath the surface. However, after audit and forensic detection and disclosure, the invisible becomes visible and transparent. Murdoch H (2008) argued that pressures to commit the fraud can be financial, non-financial, political and social pressure. Non- financial pressure can be derived from a lack of personal discipline. While, political and social pressure occurs when people feel they cannot appear to fail due to their status or reputation.

However, Rae and Subramaniam (2008) saw ‘pressure relates to employee motivation to commit fraud as a result of greed or personal financial pressure and opportunity refers to the weakness in the system where the employee has the power or ability to exploit, making the fraud possible, while rationalization as a justification of fraudulent behavior as a result of an employee’s lack of personal integrity or other moral reasoning’.

**Chapter 6 CORRUPTION CASES WITHIN THE RESEARCH PERIOD**

It is important to note that my research has obtained actual written cases and judgements that are of a fraudulent and corrupt nature from the Pacific Islands Legal Information Institute (PacLII) and as two of these cases could not be located on PacLII, I have had to search amongst the archive files held by the Cook Islands News and from a former (Sheraton Hotel) Commission of Inquiry member.

As stated earlier, I have been personally involved in 9 of the 16 cases (56%) reviewed, as the former Director of Cook Islands Audit Office. The cases selected are those of a fraudulent and corrupt nature that fall under the category and scope of this research and the basis of my thesis.

**Table 3 - List of cases researched** and analyzed are as follows;

**Case # Year Subject Matter Corrupt Activity**

1. 1978 Albert Henry Fly-in Voters Political corruption & misuse of public funds
2. 1979 Sheraton Hotel Inquiry Unauthorized procurement & mismanagement
3. 1995 Michael Benns Misuse of public funds & falsifying.
4. 2000 Basilio Kaokao Theft of public funds
5. 2002 Tepure Tapaitau Breach of Electoral Act
6. 2003 Edward Drollet Secret Commission payments
7. 2004 T Matapo vs R Wigmore Electoral Act - Treating & bribery offences
8. 2005 Peri Vaevaepare Misuse of public funds
9. 2009 Albert Numanga Theft of public funds & falsifying
10. 2010 Nationalization of Fuel Supply - Gross negligence & mismanagement
11. 2011 CITC Soft drinks – Imports Customs levy classification, conflict of interest
12. 2011 Collector vs T Crocombe Tax assessment & conflict of interest
13. 2012 Collector vs T Crocombe Successful appeal
14. 2016 Teina Bishop Conspiracy to defraud & corruption
15. 2018 T Browne vs Hagai Electoral Act - treating & bribery offences
16. 2018 T Browne vs Hagai Successful appeal

**Case 1**

Date: 24 July 1978

**Subject: Albert Henry Corruption and Fly-In Voters Bribery Case**

Electoral petitions in respect of the election for the constituency of Te-Au-O-Tonga, Takitumu and Puaikura.

**Introduction**

In the matter of elections of the Legislative Assembly of the Cook Islands for the constituencies of Te-Au-O-Tonga, Takitumu and Puaikura which were filed in the High Court of the Cook Islands pursuant to Section 74 of the Electoral Act before Chief Justice Gavin Donne.

The allegations made against the respondent candidates and their agents are many and varied, and are summarized as follows;

1. The corrupt practice of bribery relating to free or subsidized air travel, opportunities to meet family, relatives and friends, and to receive gifts and food and use the public moneys corruptly in connection with the said gifts.
2. The corrupt practice of bribery relating to the advance of $329,000.00 by Sir Albert Henry and his agents to other persons.
3. The corrupt practice of bribery in relation to gifts or offers to public servants.
4. The corrupt practice of bribery in respect of offers to loan money or make gifts to electors.
5. The corrupt practice of treating in relation to the provision of meat, drink, entertainment or other provision to persons who travelled from New Zealand by air on chartered airplanes for the purpose of voting.
6. The corrupt practice of undue influence in relation to alleged threats against voters.
7. General corruption of a widespread and general nature including the corrupt use of public money.

**General Findings of Fact**

Having considered the evidence in its totality, I (CJ Donne) am satisfied the following facts have been established:

Late in 1977 the Premier of the Cook Islands, Sir Albert Henry and his Cook Islands Party executive decided to seek an early dissolution of the Legislative Assembly and to "go to the country" in a General Election to be held early in 1978. Consequent upon this Dr. J. Williams, then a Member of Cabinet, formulated two memoranda incorporating a plan for the conduct of the proposed election by the Cook Islands Party, one which he intituled "Project G.E." and the other "Suggestions for E. Day". They were classified by him as "Confidential".

Before the Assembly was dissolved on the 12th of January 1978, these memoranda were considered by the Parliamentary Caucus of the Cook Islands Party, Dr. Williams being required to explain them to the Members. The Premier was not present at that meeting but, he had already been supplied with copies of these documents and, on his instructions, Dr. Williams retrieved the copies after the meeting from all except the Cabinet Ministers each of whom retained his copies.

On the 12th of January 1978 Sir Albert having given consideration to the cost of the election campaign to be waged, wrote a letter to a Mr Finbar Kenny, a citizen of the United States of America being at that time in Honolulu, seeking financial assistance for the campaign. Mr Kenny (and his company The Cook Islands Development Company Limited) and the Cook Islands Government are partners in the joint venture project known as the Cook Islands Philatelic and Numismatic Bureau.

In his quest for finance Sir Albert advised Mr Kenny that his Party proposed to seek aircraft for charter to carry his party supporters to Rarotonga to vote. That letter was handwritten and was delivered in Honolulu to Mr Kenny by the Honourable Mr G.A. Henry. In the result Mr J.W. Little who is Mr Kenny's representative in Rarotonga and the Managing Director of the Cook Islands Development Company Limited received instructions in January to make available an advance against the Philatelic Bureau revenue. The basis for this advance will be considered later in this determination.

Being assured of finance, Sir Albert Henry travelled to New Zealand by aircraft on the 25th of January 1978 for the stated purposes of a health check and consultations with New Zealand authorities on proposed international fishing agreements. While in New Zealand he took the opportunity of addressing Cook Islanders in Tokoroa, Wellington and Auckland. His first meeting was in Tokoroa. It was chaired by Mr Charles Eleazara, a coordinator for the Cook Islands Party in that town, and among the topics raised by Sir Albert was the provision of free plane flights to Rarotonga for voters. From Tokoroa, Sir Albert proceeded to Wellington where in the course of his talks he was advised of an application to permit the landing at Rarotonga Airport of two charter flights by Air Nauru aircraft, the charters being organised by the supporters of the Democratic Party. On the 30th of January 1978 he addressed a meeting of Cook Islanders at Porirua during the course of which he told his listeners of his plans to charter aircraft to fly voters to the Cook Islands free of charge. Sir Albert, who was accompanied by his son and daughter, Mr Hugh Henry and Mrs Graham, Mr Charlie Carlson a Cook Islands Party executive from the Cook Islands, and his physician Dr Koteka, then returned to Auckland where on the 3rd of February 1978 he addressed a meeting of Cook Islanders at Freemans Bay. Again, the intention to provide free flights was explained by him to the audience.

Sir Albert returned to Rarotonga on the 3rd of February 1978. It seems clear that on the New Zealand trip he had succeeded in organising campaign committees and organisers. In Tokoroa the party organiser was Mr Eleazara, in Wellington Messrs. Sam Samuel and Turi Karati were chosen, while in Auckland Messrs. Charlie Strickland, Vaka Akatika, Tapa Ford, Tiario Tuki and Umeki Teaupaku constituted an organising committee. They were to be joined later by Messrs. Charlie Carlson and Mata Taruia from the Rarotongan branch of the Party.

Sir Albert with his wife again left Rarotonga on the 8th of February 1978 on a trip which took him to New Zealand, Melbourne, and Honolulu. The fares amounting to $5,730.00 were paid in cash which Sir Albert had received by way of an advance from the Philatelic Bureau. He had also received personally on the previous day from the Bureau the sum of $2,500.00 which I infer was to cover his personal expenses for the trip. In Melbourne Sir Albert arranged with Ansett Airlines of Australia to charter 3 Boeing 727-200 aircraft to operate 6 return flights from Auckland to Rarotonga for the purpose of transporting voters to the poll at Rarotonga.

The quoted charter fee was A$290,000.00. No written agreement was completed as it was necessary for further details to be finalised. Mr Little accompanied Sir Albert to Melbourne, but took no part in any of the negotiations relating to the chartering of aircraft. From Melbourne the party proceeded to Honolulu where Sir Albert reported to Mr Kenny the result of his Ansett negotiations after which he returned to Rarotonga on the 18th of the month and announced on his arrival that he had secured the aircraft.

The Cook Islands Party opened its political campaign at Rarotonga on the 27th of February 1978. All the candidates (in particular the Respondent candidates in these proceedings) were present. At this meeting Sir Albert announced the plans to send Mr. Charlie Carlson and Mr Mata Taruia to Auckland to "help our people who are coming by plane to vote". Mr Carlson also spoke announcing that "this man is flying to New Zealand on Wednesday to prepare those people in New Zealand who are ready to come to Rarotonga and vote C.I.P."

On the 6th of March 1978 a private company called Cook Islands Government New Project Company Limited was incorporated at Rarotonga under the Companies Act 1970. It had a capital of $1,000.00 divided into 1000 shares of $1.00 each, 999 of which was subscribed by the Cook Islands Government Property Corporation a government statutory corporation of Rarotonga, and one share being subscribed by a Mr. Charles Maxwell Turner who at that time was employed as an assistant to the Advocate General. The directors of the company are Sir Albert, Messrs. G.A. Henry, G.F. Ellis and A.P. Short all of whom are members of Sir Albert's Cabinet. Sir Albert has said in evidence that all the share capital was in fact paid by him. In this event, such payment would create a debt due to him by the Cook Islands Government Property Corporation and Mr Turner, the shareholders of the company.

The Memorandum of Association of the new company was executed on the 3rd of March 1978. On the 24th of February 1978 Sir Albert requested from the Philatelic Bureau an advance to Government of $4,000.00 for the purpose of establishing this company. This sum was duly advanced and it is highly probable it was in part applied by Sir Albert in payment by him of the share capital of that company. The next payment step in the history of this company is the opening of an account in its name by Mr C.M. Turner with the Commercial Bank of Australia at Queen Street, Auckland, New Zealand. On the 10th of March an initial deposit of $200.00 was lodged in the account.

On the 13th of March 1978 Sir Albert as Premier of the Cook Islands, wrote to the Director of the Philatelic Bureau as follows (It should be noted the Director is Mrs G. Little, the wife of Mr J. Little):

"OFFICE OF THE PREMIER OF THE COOK ISLANDS  
Rarotonga, Cook Islands

13 March 1978

The Director

Philatelic Bureau

RAROTONGA

Dear Madam,

Further to my letter of 24 February 1978, the Cook Islands Government New Projects Company Ltd, wishes to assist in the financing of a major project for the Cook Islands. Substantial finance will be required and I would be pleased if you would forward to me a cheque in external funds for $NZ327,000 made out to the above company. This sum of $NZ327,000 is to be regarded by the Philatelic Bureau as an advance to the Government of the Cook Islands against 1978 philatelic revenue that will become payable to the Government.

Yours faithfully

A.R. Henry

Premier

On receiving the cheque and being aware of its amount which was $337,000, not $327,000 as mentioned in the said letter, Sir Albert probably as a result of advice he had received from his solicitors in Auckland, arranged for a cheque payable to himself drawn on the account of "Cook Islands Government New Projects Co. Ltd" to be signed by Mr G.A. Henry and Mr A.P. Short who were by authority given on behalf of the company dated the 7th of March 1978 authorised to draw cheques on that account. Mr Short acknowledged the enormity of his task in his farewell speech to Sir Albert at the Rarotonga Airport when the Premier was departing for Auckland on the 14th of March.

The next day in New Zealand, the 16th of March 1978 (New Zealand time) Sir Albert paid into the account of the Cook Islands Government New Projects Company Limited the cheque for $337,000 he had received from the Philatelic Bureau. I am satisfied that Sir Albert in doing what he did was giving effect to a scheme which had been devised in Rarotonga with Mr Turner and I shall consider this aspect later. It is probable that Mr Collinge the legal advisor for the Cook Islands Party, was unaware of the plan until he was apprised of it by Mr Turner on his arrival in Auckland on the 7th of March 1978.

Sometime before the 14th of March 1978, Mr Turner and Mr Collinge gave consideration to certain provisions of the Public Moneys Act 1969 and were inclined to the view that they could apply to the transactions planned involving the Cook Islands Government New Projects Company Limited. On the 14th of March Mr Turner sought an opinion thereon from Mr D.A.R. Williams a well- known Auckland barrister from whom the Advocate General had frequently sought advice. It should be recorded that Mr Williams was not given details of the planned transactions but was simply asked for his advice on the narrow question of whether the Public Moneys Act would apply to funds held by the Cook Islands Government New Projects Company Limited.

Mr. Williams discussed the matter with Mr Turner on March 14th and later on the 16th of March recorded his opinion in writing expressing his view that this company was by virtue of its shareholding in effect an agency of the Cook Islands Government, that any money handled by it was public money, and that the provisions of the Public Monies Act 1969 and in particular Part IV thereof, to which reference will also be made later, applied.

The position on the 16th of March 1978 was that the Ansett charter arrangements were completed and the money for the charter was to be paid to the Ansett account at the Australia and New Zealand Bank, Auckland Branch on or before the 20th of March. Mr Glasgow deposed, and I accept his evidence, that while the written agreement made on the 21st of March 1978 fixes a date for payment on the 22nd of March there had been an earlier agreement for payment on the 20th.

The Philatelic Bureau cheque for $337,000 had been paid into the New Projects Company account. Mr Williams' opinion was received. On that day also the Ipukarea Development Company Limited with a capital of $100.00 was formed, the shareholders being Messrs. Charles Strickland, Hugh McCron Connal, Teremoana Pamatatau and Munokoa Samson each subscribing to 25 shares of $1.00 each. The company was to be registered next day by Mr Collinge.

The implications of Mr Williams' opinion and the progress of the scheme was on that day discussed by Sir Albert with Mr Collinge, Mr Turner and probably others and I have no doubt that it required revision as a result of the view of the lawyers as to the effect of the Public Moneys Act 1969 thereon. It is also probable that when the possibility of that Act's applicability was first mooted, it was decided as a precaution to obtain in Rarotonga the cheque from Messrs. Henry & Short to which reference has already been made.

The next day the 17th March 1978 as a result of the discussions the previous day, Sir Albert lodged the cheque for $335,000 drawn on the Cook Islands Government New Projects Company account in an account which he opened in his own name at the Bank of New South Wales. Mr Turner on the same day made arrangements with the Australia and New Zealand Bank, Auckland Branch, to open an account in the name of Ipukarea Development Company Limited and deposited a cheque for $335,000 drawn by Sir Albert on his newly opened account with the Bank of New South Wales, Auckland Branch.

An extension of time for payment of the charter fees having been granted by Ansett Airlines, a formal agreement in writing was entered into on the 21st March 1978 under which Ipukarea Development Company Limited agreed to pay to Ansett Airlines next day $A290,000 for which the latter was to provide six return flights to Rarotonga, four on the 26th March and two on the 30th March (New Zealand time).

On the 22nd March 1978 a cheque drawn on the Ipukarea Development Company Limited account was paid to "A.N.Z. Bank (for account Ansett Airlines Australia)" and was signed on behalf of the company by "C. Strickland" and "T. Pamatatau". The cheque was for $323,639.90 which was apparently the New Zealand equivalent of the Australian charter fee of $A290,000 plus the appropriate draft fee. The Reserve Bank of New Zealand on that day approved of the transfer to Australia of the amount paid.

Meanwhile in Tokoroa, Wellington, and Auckland the Cook Islands Party organisers and committees had been organising the flights to Rarotonga. In late February or early March, it had been decided by the Party that there should be a sum of $20.00 paid by those who went on the flights. This was to be a charge for the food and drinks supplied on the journey. In all other respects the flight was to be provided free of charge. The news of these free flights around the Cook Islands communities and the requests for consideration as passengers were numerous, meetings were held in Tokoroa under the direction of Mr Eleazara, and also in Wellington chaired by Mr Turi Karati and Mr Sam Samuel.

These three gentlemen undertook the task of organising the flights in their respective areas. In Auckland, Mr Charles Strickland, Mr Sam Crummer, Mr Charlie Carlson, Mr Mata Taruia, Mr Tapa Ford, Mr Vaka Akatiki and Mrs Parau Taruia appear from the evidence to be the persons mainly concerned with arranging the flight lists. These activities which are the subject of further findings by me recorded below resulted in the six planned Ansett flights taking place as arranged. At the Auckland International Airport on the flight days were the Auckland organisers for the Cook Islands Party who had prepared boarding lists for the flight. As each passenger came forward on the calling of his name, he was given a pass worded as follows:

"No.

COOK ISLANDS PARTY

Name:

Plane: 1, 2, 3, 4, 5, 6

Paradise Tours. Auckland - Raro - Auckland

The six flights brought to Rarotonga 445 voters who are known to have voted in the three constituencies with which we are concerned - 308 voting in Te-Au-O-Tonga, 77 in Takitumu and 60 Puaikura. Some others from the planes apparently voted in other constituencies.

The evidence also establishes that there were two charter flights of Air Nauru aircraft which brought voters to Rarotonga. These were arranged by Cook Islanders living in New Zealand who supported the Democratic Party. In each case the full charter fare of $245.00 was paid for by the passenger.

On the 30th March 1978 the General Election was held resulting in the Respondent candidates being elected in their respective constituencies.

In so far as the scheme to "fly-in" voters is concerned, I have no doubt that the Respondent candidates were aware of all aspects of it. They knew that it involved electors from New Zealand flying in chartered aircraft each being required to pay $20.00 only in relation to such flights. They were also aware that the leader of their political party, Sir Albert Henry, was assuming the main responsibility for arranging the necessary finance for the project and for the setting up of the requisite organisations and organisers to select the passengers for each flight, and they each agreed to leave those tasks to Sir Albert and those chosen by him to bring the project to fruition.

They were aware that the flights were being made available only to the supporters of the Cook Islands Party. In fact, the whole scheme relating to the "fly-in" voters was revealed by the Premier at various political meetings at which all the Respondent candidates were present. They never disassociated themselves from it. They without a doubt accepted this scheme and in the very nature of it they were the beneficiaries at the Polling Booths because of it.

**The Aircraft Charter Scheme**

The main allegations contained in the petitions are those of bribery, treating and general corruption. I propose to deal separately with these complaints but, before I do so I give consideration to the point raised by the Petitioners as to the reason for the decision of the Cook Islands Party to charter the aircraft. The Petitioners say that the chartering of the aircraft was part of the Party's election campaign plan which was formulated by Dr. Williams and that as this was so, this fact can with the other allegations, support a finding of corrupt motive.

The Respondent candidates’ evidence is that the move was prompted by the information received that the Democratic Party was sponsoring two charter flights. Sir Albert Henry at page 79 (lines 17 - 20) of the Notes of Evidence is recorded as saying in answer to his counsel's question:

"Q. I want now Sir Albert to bring you back to the point from which I asked you to digress. You had reached a point where you had returned from Wellington to Auckland and told your supporters that you would endeavour to get the plane.

1. Yes, and only then did I think about it and it was getting pretty late."

Sir Albert had previously said that while in Wellington the Civil Aviation Department had advised him that an application had been made to land two flights at Rarotonga of Air Nauru aircraft. I am satisfied that the decision by the Cook Islands Party to charter aircraft for its own supporters had been taken much earlier than this. Sir Albert had told Mr Kenny in his letter to him in early January of his intention to obtain aircraft (see Notes of Evidence page 80 Lines 10 - 4 to 25 - 6). Indeed, the proposal (as opposed to the details of it) was known in New Zealand before his visit there late January.

In his address in Tokoroa before his visit to Wellington he mentioned it. Turning to the memoranda of Dr. Williams, I was referred to the one intituled "Suggestions for E Day" and in particular to Section F thereof reading "Cook Islanders in New Zealand must vote". In that section he recommends the chartering of aircraft and stresses the need to bring Cook Islanders from New Zealand as they "will influence the outcome of the election". He also emphasises that "we must ensure that we bring only those people who will vote for us" and that "those voters must be told the party candidates they must vote for". This memorandum was prepared approximately at the end of December 1977. The motive for preparing it is, I feel, expressed in paragraph 7 on page 5 thereof which reads:

"The future of the Cook Islands Party is dependent on the election. If we win the Party will live forever, if we lose the Party is dead."

Now, this memorandum together with the other intituled "Project CE" was considered by the Cook Islands Party Caucus and the Premier in early January 1978. It is relevant to note that in the former document are other suggestions:

(a) The need for the Premier to go to New Zealand for a routine medical check taking with him a strong team for meetings in various cities through the Cook Islands society.

(b) Arrangements for T Shirts, poster printing etc.

(c) The need to announce within a week the increases in salaries and wages.

(d) The establishment of a Young C.I.P. Movement.

It was suggested that it was a mere coincidence that these and other steps recommended in the memorandum were in fact carried out. I cannot accept that and when consideration is given to the speech of the Honourable Mr Akaruru at the final campaign meeting of the Cook Islands Party on the 28th March, I am drawn to the conclusion that the Williams' suggestion concerning the chartering of aircraft to bring voters from New Zealand to the Cook Islands was incorporated by the Cook Islands Party organising committee as part of the Party's campaign from the beginning. After quoting from the Williams memorandum which he had and, in particular, Section F which refers to the flying in of voters, Mr Akaruru said:

"Dr Williams, why very quickly forget your proposal to the Cook Islands Party organising committee. To go back and criticise for we have done exactly and according to what you have suggested."

These words I consider admit of no other interpretation than that the Cook Islands Party organising committee had adopted the Williams' suggestion.

**Bribery**

As has been said in the *Mitiaro* decision just read, the common law definition of "bribery" is no longer applicable in the Cook Islands (see page 35 thereof). The statutory definition must therefore be considered, the applicable provisions in this case being Section 69(a) which reads:

"Every person commits the offence of bribery who, in connection with any election:

(a) directly or indirectly gives or offers to any elector any money or valuable consideration or any office or employment in order to induce the elector to vote or refrain from voting."

The law as to the provision of travelling expenses for a voter is summarised in Halsbury's Laws of England 4th Edition, Volume 15, para. 770 at page 421:

"The unconditional payment, or promise of payment, to a voter of his travelling expenses is not bribery, but the payment or promise of payment to a voter of his travelling expenses on the condition, express or implied, that he would vote for a particular candidate is bribery."

The leading case on this topic is *Cooper v Slade* [[1858] EngR 546](http://www.worldlii.org/int/cases/EngR/1858/546.html); [(1858) 6 H.L. Cas. 746](http://www.paclii.org/cgi-bin/LawCite?cit=%281858%29%206%20HL%20Cas%20746?stem=&synonyms=&query=1978%20CKHC%201); [10 E.R. 1488.](http://www.paclii.org/cgi-bin/LawCite?cit=10%20ER%201488?stem=&synonyms=&query=1978%20CKHC%201) This case concerned an allegation of bribery under the statute 17 & 18 Vict. c102 Section 2 which provision is substantially in the same terms as Section 69(a) of the Electoral Act 1966 (supra). The allegation arose out of a letter which was sent to a voter in the following terms:

"Sir - The Mayor having appointed Wednesday next for the nomination, and Thursday for the polling, you are earnestly requested to return to Cambridge and record your vote in favour of Lord Maidstone and F. W. Slade, Esq., Q.C.

Yours truly

Charles Balls

Chairman

Your railway expenses will be paid."

The voter accordingly went to Cambridge and voted. Afterwards he received the sum of eight shillings, the expenses to which he had "bona fide" been put by his journey. The Court held that the promise and payment constituted bribery. On page 780 (lines 8 - 17) Wightman J. said:

"If the words of the section are taken literally, a promise of money to a voter to induce him to vote at an election, though without specifying or intending that he should vote for a particular candidate, would be within the definition of bribery in the second section; but giving a reasonable construction to the Act, it must, I apprehend, be understood to mean, that to constitute the offence of bribery the promise must be to induce the person to whom the promise is made to vote for a particular candidate."

At page 782 (lines 13 - 18) Coleridge J. stated:

"This, then, was a promise of money in order to induce a voter to vote; and whether the payment of travelling expenses, per se, be legal or not, I am clearly of opinion that to promise to do so, in order to induce a voter to vote, is within the second section of the statute."

Lord Cranworth in his judgment page 786 (lines 3 - 20) said:

"On the first point, I confess that, though undoubtedly from the earliest time of my recollection this has been a matter under discussion, I never have been able to entertain any doubt but that the giving of money to a person to come and vote for a particular candidate at a particular election is giving to him money within the meaning of this section, and within the meaning of previous sections which are to the same effect as the present. The section is, "That every person who shall directly or indirectly give any money to any voter in order to induce the voter to vote or refrain from voting, shall be guilty of bribery." Now surely, if I say to a person, "If you will come to Cambridge and vote for me, I will give you money, being the amount of whatever expenses, you may pay for coming there to vote", that is giving money to the voter for the purposes of inducing him to vote, it is giving money to him to indemnify him for something which, but for giving the money, he would have to pay out of his own pocket.”

Lord Wensleydale stated at page 790 (lines 1 - 7):

"I had no difficulty in giving my opinion as to the construction of the Act; I thought that, according to the meaning of the Act, a promise of a sum of money, although that money might be only the fair and reasonable expenses of the voter coming to the poll, if made in order to induce any voter to vote, or refrain from voting, was within the Act of Parliament."

and again, at page 791 (lines 4 - 13):

"With respect to the first proposition that was laid down, that every payment of expenses, though fair and reasonable, to a voter in order to induce him to vote, that is, every payment upon condition expressed or implied that he should be paid his expenses if he voted for a particular candidate, is bribery within the meaning of the Act of Parliament, appears to admit of no doubt at all; and there has been no difference of opinion upon it anywhere. The Judges of the Court of Exchequer Chamber were all of that opinion."

In an Australian case, *Woodward v. Maltby* [[1959] VicRp 100](http://www.austlii.edu.au/au/cases/vic/VicRp/1959/100.html); [1959 V.R. 794](http://www.paclii.org/cgi-bin/LawCite?cit=1959%20VR%20794?stem=&synonyms=&query=1978%20CKHC%201) concerning a section in the Constitution Act 1956 of Victoria also of similar wording to Section 69(a) of our Act Smith J. said at page 798 (line 48) to page 799 (line 7):

"It would be surprising to find in such section that something is made to amount to bribery which does not involve any intention to buy a vote, or to buy that approval and goodwill which may influence a vote.... Before the section should be held to apply here it should be shown that there was an intention to induce voting for the candidate, or to induce approval or gratitude towards the candidate and thereby to influence electors to vote for him or to refrain from voting against him, and an intention to produce those results by means of the gift as distinct from the advertisement on it."

See also the *Horsham Case* (1876) 3 O’M & H. 52.

In the case here the bribery primarily alleged is that of giving of the flight to Rarotonga and return to each of the electors so transported for $20.00 for the purpose of inducing the elector to vote for the Cook Islands Party candidates, the Respondent candidates. To sustain this allegation there must be proved to the requisite standard by the Petitioners:

(a) The giving of the consideration.

(b) That the consideration was valuable.

(c) That it was given to induce the voter to vote for the Respondent candidates and that it was given on the express or implied condition that the Voter would vote for such candidates.

(d) That the intent to do this was corrupt.

It is not necessary for the Petitioners to prove that the elector did in fact carry out his part of the bargain by voting. If the act of giving the consideration is done for the purpose of inducing the voter to vote or refrain from voting for a particular person, it is no answer to say that the bribe was unsuccessful. In *Henslow v. Fawcett*[[1835] EngR 629](http://www.worldlii.org/int/cases/EngR/1835/629.html); [(1835) 3 Ad. & E. 51](http://www.paclii.org/cgi-bin/LawCite?cit=%281835%29%203%20A%20%26%20E%2051?stem=&synonyms=&query=1978%20CKHC%201) at 58; [[1835] EngR 629](http://www.worldlii.org/int/cases/EngR/1835/629.html); [111 E.R. 331](http://www.paclii.org/cgi-bin/LawCite?cit=111%20ER%20331?stem=&synonyms=&query=1978%20CKHC%201) at 334 (lines 7 - 14) Patteson J. said:

"It appears that the defendant sought the voter, out, and gave him money for the purpose of inducing him to vote, and that the other took it. At all events, whether the voter did or did not mean to perform the contract, he professed to enter into it, and took the money given by the defendant for the purpose of corrupting him. In the second place, if he never had such an intention, I should still hold the defendant liable. Whether or not the voter intended to perform his part of the contract is immaterial; the defendant had done all that lay with him. If the agreement was made, that is enough."

See also *Harding v Stokes* [[1837] EngR 115](http://www.worldlii.org/int/cases/EngR/1837/115.html); [(1837) 2 M &W 233](http://www.paclii.org/cgi-bin/LawCite?cit=%281837%29%202%20M%20%26%20W%20233?stem=&synonyms=&query=1978%20CKHC%201) at 235; [[1837] EngR 115](http://www.worldlii.org/int/cases/EngR/1837/115.html); [150 E.R. 742](http://www.paclii.org/cgi-bin/LawCite?cit=150%20ER%20742?stem=&synonyms=&query=1978%20CKHC%201) at 743 and *Sulston v. Norton* [[1761] EngR 67](http://www.worldlii.org/int/cases/EngR/1761/67.html); [(1761) 3 Burr 1235](http://www.paclii.org/cgi-bin/LawCite?cit=%281761%29%203%20Burr%201235?stem=&synonyms=&query=1978%20CKHC%201); [97 E.R. 807](http://www.paclii.org/cgi-bin/LawCite?cit=97%20ER%20807?stem=&synonyms=&query=1978%20CKHC%201) at 808.

I now propose to analyse the evidence of the activities relating to the organising of the Ansett flights in the three areas in New Zealand with which we are concerned, Wellington, Tokoroa and Auckland.

As to the requirements (a) and (b) above, there is no dispute by the Respondent candidates that each voter was given the flight for $20.00. The evidence establishes that a normal return flight fare was at that time $328.00. The charter rate paid by those who travelled on Air Nauru was $245.00. A flight for $20.00 did indeed represent a giving of valuable consideration to the extent of at least $225.00 and I hold the elements of proof (a) and (b) have been established.

As to the first part of (c) i.e. the question of an inducement, the tenor of the evidence of those witnesses called to depose on this point is such that I have no doubt that they were induced to undertake the trip to vote because of the "free" flight. Some of these witnesses have stated this. But apart from this direct evidence, the transaction itself, emanating from the Cook Islands Party, by its very nature supports the contention that was intended to induce the elector who benefited from it to vote.

For the sum of $20.00 he was to receive transport in a large aircraft for the considerable distance of 1,874 miles to his homeland. It is true there was a guarantee of a stopover of no more than possibly 2 hours before returning but, there was the prospect of seeing friends and relatives, the eating of traditional food and the participation in the festivities that go with it. It added up to a day of excitement for $20.00. When measured against the proven charter fare paid by others from New Zealand who were determined to exercise their franchise to the extent of paying the full fare therefor, the consideration here was indeed large. In the case of those who paid the full charter fare the cost to them to vote was $245.00 and in the case of those who benefited from the Cook Islands Party’s scheme the cost to each was only $20.00, although if those who actually voted had shared the cost of the full charter fee of the Ansett planes, it would have cost each over $800.00.

Apart from the payment of the $20.00 the voter was involved in little effort or sacrifice other than the placing of a cross on a voting paper. That the transaction was an attractive one is borne out by the fact that while many applied only a comparatively selected few were chosen to benefit from it. These circumstances lead me to the firm conclusion that the scheme was indeed aimed to induce the persons benefiting from it to vote and as such it was a step in the transaction "of a very dangerous character; it brought the parties to the very verge of the law"- *Longford Case* [(1870) 2 O'M & H. 6](http://www.paclii.org/cgi-bin/LawCite?cit=%281870%29%202%20OM%20%26%20H%206?stem=&synonyms=&query=1978%20CKHC%201) per Fitzgerald J. at 15.

There being an inducement I pass to the second part of (c) which is the crux of the matter: i.e. whether there was an express or implied condition that the electors given the free flight would vote only for the Cook Islands Party candidates. I accept the uncontradicted evidence of Mr Cuthers on this point. He said in the New Zealand evidence at page 58 (line 33) to 59 (line 18) as follows:

"Q. Still talking about this meeting 3 days before flight was there any talk about who you would vote for when you got to Raro.

A. Yes there was something said I asked him how do we vote because I have never voted before so they got out card or piece of paper and drew on it 4 little squares with names of who we were to vote and showed us how to mark off the votes and showed everybody round the room.

Q. Did you see names on piece of paper.

A. Yes, I did.

Q. Do you remember names.

A. Yes Albert Henry, Teanua Kamana, Lionel Brown and Rei Jack.

Q. Did you know those names yourself.

A. Yes, I knew 3 of them but one I did not know who he was.

Q. Who was one you did not know.

A. Rei Jack

Q. Did they say anything else about 4 names.

A. Yes, they said we must vote for those 4 and nobody else.

A. Albert Henry

Q. What was political connection

A. CIP

Q. Was anything said about what would be position if you voted for someone other than those four.

A. Yes

Q. Who was speaking, where was he

A. Sam Samuel was standing right in front of me

Q. How far away

A. About 3 ft away from me when he said if anybody voted for demo they’d find out and fine person who voted for demo would have to pay $300 for the fare.

Q. That was meeting 3 days before you flew

A. Yes

Furthermore, on the trip to Rarotonga he told me of the reading over the aircraft loudspeaker system the names of the Cook Islands Party candidates. He fairly stated that the announcer, Mr Karati, had said that he had been requested by some to tell who these candidates were, but the matter went further than that. At page 60 (lines 4 - 17) Mr Cuthers is recorded as saying:

Q. While you were on the plane were there announcements made over loud speaker?

A. Yes there was announcement made by Papa Turi Karati over the intercom

Q. What was announcement made

A. He said we had to make sure that we voted for the Te-Au-O-Tonga CIP candidates which were Albert Henry, T. Kamana L. Brown and Rei Jack.

Q. That tells us who CIP candidates were but did he give their names in the announcement

A. Yes

Q. Did he say anything else about this subject

A. After he had spoken on the intercom, he and Sam Samuel some other delegates wrote out on small piece of paper the four names of the candidates who we were to vote for which had four names of CIP candidates.

Q. Did you see any of these pieces of paper yourself.

A. Yes one was handed out to me and my mate."

While the motive of announcing the candidates' names over the speaker system of the aircraft to all passengers because of the inquiry of only some is questionable, it may in a measure be so explained as negating an improper intent, but to distribute generally around the plane, the names of the Cook Islands Party candidates only is, in my view, the strongest evidence to support a conclusion that was intended to ensure that the voters voted only for those candidates.

The condition to vote for Cook Islands Party candidates was certainly taken seriously by Mr Cuthers who said at page 60 (line 26) to page 61 (lines 1 - 4):

"Q. Did you vote for CIP or not

A. Yes, I voted for Albert Henry, Teanua Kamana, Lionel Brown and Tom Davis

Q. Tom Davis is not CIP is he

A. No

Q. Was there any particular reason why you should vote for leader of Demo and 3 CIPs

A. Well on that occasion I was gambling

Q. Yes what was your gamble

A. I was gambling if I voted for 3 Cook Island Party and one Demo they would not notice

Q. Who would not notice

A. Cause Sam Samuel had said if we had voted for Demo we would have been fined or pay the amount of $300

Q. So what was gamble

A. The gamble was I took 3 CIP and one Demo hoping I would not have to pay $300

Q. Tell us why you were hoping you would not have to pay $300

A. Because I am not Cook Island Party supporter

Q. If you are not CIP supporter why did you vote for 3 of them

A. Because I was scared and to pay $300"

It should be noted that the Wellington organisers of the flight Mr Sam Samuel and Mr Turi Karati were each found guilty on the 13th day of June 1978 of the offence of bribery under the said Section 69(a) on a complaint involving Mr Cuthers and another witness Miss J. Pokoati.

After a careful weighing of Mr Cuthers' evidence and the evidence of Miss Pokoati, Mr Arai and Mr Pokoati, I am convinced that in the case of the Wellington electors it was a condition laid down by the Cook Islands Party organisers that in return for their being given this flight to Rarotonga they each should vote for the Cook Islands Party candidates in the constituency with which they were concerned. I am also satisfied that the Wellington organisers for the Cook Islands Party took every precaution to ensure that only those who would accept this condition were allowed to fly. If I required further fortification for this finding, I need but turn to the record of the speech by Mr Sam Samuel at the final election rally of the Cook Islands Party at Rarotonga on the 28th March 1978 at which he said:

"It was said that of the 270 voters for Te-Au-O-Tonga that arrived on Saturday 203 were for the Demos and 67 for us.

Who said so? Who looked for the voters coming?

Was it the Demos or me?

I spent seven nights in Auckland.

I was up day and night, day and night.

I, Mata Taruia and his wife, Tutini and Mama Pepe.

We were awake day and night, day and night and no sleep.

When sleeping we just sit upright in our chairs.

Here are the names obtained on that.

Ours Porirua and Lower Hutt their names.

190 votes Cook Islands Party for Te-Au-O-Tonga.

How did they get Ansett?

Those that came on that plane are people of mine from Mitiaro, Mauke, Te-Au-O-Tonga.

Others belong to this CIP behind here. For Rei Jack.

We did not want those who called themselves CIP.

We were annoyed.

We've had enough.

In Porirua we commenced with 250 people on our list.

We crossed out and deleted those that would split the vote.

Those that we were not too sure of totalled one hundred and fifty.

Wellington then will make up the balance."

In Auckland, there was also close scrutiny of those seeking flights. Mr Mata Taruia, who with Mr Charlie Carlson was sent to Auckland from Rarotonga, to help organise them said at a meeting of his Party at Constitution Park on 1st March 1978:

".... Here is your son to be sent on Tuesday to do that work, that is victory. I will take the screen, when I clean the screen not even a grain of sand will be able to come through. Our members are to be screened."

Mr Charlie Strickland the Auckland President of the Party, in a television an interview at the Auckland International Airport on 25th March 1978 said:

"Q. How can you be sure that all will vote for the Cook Islands Party?

A. Well - I am pretty sure they will they are going to vote for the Cook Islands Party - ah - because they are all - ah - Cook Islands Party voters.

Q. They are all members, are they?

A. Oh yes! They all members of the CIP."

Mr Charlie Carlson also gave an interview at the Airport to a reporter Mr T. Verdon whose report of the interview appeared in the New Zealand Herald of the 27th March 1978:

"Each flight yesterday carried out 130 voters, said one of the three Cook Islands Party organisers, Mr C. Carlson.

The voters had to show a special CIP card attached to their ticket, with details about their electorate, before boarding the plane.

They had been carefully screened by party organisers to ensure they were in fact supporters.

Mr Carlson said the lists had been studied for two weeks and the organisers knew practically every voter personally. Voter resident overseas must return to the islands to vote in the week allowed.

"We are fairly sure that 100 per cent of them are CIP supporters" he said.

Good Faith

However, he agreed the party was relying on their good faith to vote for the CIP.

"Even if 95 per cent of them vote for the party it will be all right," said Mr Carlson.

He said he was confident the party would win the election, even without the special votes, but it could not stand idly by while the opposition organised flights."

Mr Tu Ford explained in his I evidence the procedure followed in his case when he sought to be chosen for the flight to Rarotonga. At page 18 of the New Zealand evidence (lines 1-48) he said:

"Q. After you spoke with Tere Tuakura about this airplane flight what did you do? (sic)

A. I went over and paid my fare

Q. Whereabouts did you go to pay that fare

A. Hall Avenue Mangere

Q. Who did you pay when you went to Hall Ave Mangere

A. I paid it to Parau

Q. Do you know this person called Parau

A. Yes

Q. Do you know her surname

A. No

Q. How much did you pay Parau

A. $21

Q. And what was that payment for

A. $20 for fare and $1 for fee

Q. What was fee he paid $1 for do you know

A. Yes, I know for the badge

Q. When you paid this money to Parau did she have a discussion with you

A. Yes

Q. What did she say to you

A. She asked me if I was a Party

Q. What did you say to her in answer

A. I said to her yes

Q. Did she say anything else to you then

A. Do I know who I was going to vote for

A. No

Q. When you said No what did Parau do

A. She wrote all the names of the people that I have to vote on a piece of paper

Q. I want to show this piece of paper

A. Yes

Q. Is that the piece of paper which Parau wrote those names on

A. Yes

Q. The names on that piece of paper are those names Parau wrote for you.

A. Yes

Q. The crosses that appear next to those names were those crosses written by Parau also I’m sorry who wrote those crosses next to those names

A. Parau

Q. Would you please read out the names appear on that paper

A. Lionel Brown Albert Henry, Dan Teanua Kamana and Rei Jack

Q. .........Exhibit 22.........."

And in cross examination of his evidence that he had been excluded for the flight at the Airport he said at page 19 (lines 17 - 26):

"Q. Mr Ford are you Demo party supporter

A. Yes

Q. Is Tapa Ford your uncle

A. That's my old man

Q. And is Tapa Ford a Cook Islands supporter

A. Yes

Q. Did he object to your going on a Cook Islands Party plane

A. Yes

Q. Did you lead Parau to believe that you were a Cook Islands Party supporter

A. Yes."

As to the organisation in Tokoroa it is clear that the organiser Mr Eleazara had in fact carried out close scrutiny of those who were to travel on the planes when considering the applications. I refer to the following evidence:

Page 73 lines 20 - 4 to 25 - 4;

Page 74 lines 15 - 2 to 20;

Page 75 lines 1 - 3 to 10 - 3, lines 20 - 2 to 20 - 6;

Page 76 lines 20 - 5 to 35.

He was also interviewed by a reporter of the Tokoroa Newspaper. In that he states the manner in which the persons were chosen - see Exhibit 18. This evidence leaves me in no doubt that only those who would vote for the party were chosen and that it was undoubtedly a condition of the flight that the people chosen would vote for the respondent candidates.

The statements of the Auckland organisers as to scrutiny of those who sought the Ansett flights to ensure that only those supporting the Cook Islands Party candidates travelled on them and the evidence of Mr Ford illustrating how the aim was put into practice, satisfies me that the aims of the Auckland organisers in providing the inducement of these flights like that of their colleagues in Wellington and Tokoroa was to induce those obtaining them to vote for the Cook Islands Party candidates in the constituencies of Te-Au-O-Tonga, Takitumu and Puaikura and this was a condition of their participation.

Although I think it is very probable that each voter was told explicitly that they must vote for the Cook Islands Party candidates only, it is not necessary for me to make such a finding since I am quite satisfied, in view of all the surrounding circumstances, that there was in each case an implied condition to this effect. I am satisfied therefore that this part of element (c) has been established also.

As to the element (d) to be proved i.e. the corrupt intention, in the *Mitiaro* decision I referred to the interpretation of that expression. (See page 13 referring to Rogers on Elections 20th Edition, Volume II hereinafter in this Determination called "Rogers", and Adams Criminal Law and Practice in New Zealand 2nd Edition, para. 821 pp. 234; *Cooper v. Slade* [[1858] EngR 546](http://www.worldlii.org/int/cases/EngR/1858/546.html); [(1885) 6 H.L. Cas. 746](http://www.paclii.org/cgi-bin/LawCite?cit=%281885%29%206%20HL%20Cas%20746?stem=&synonyms=&query=1978%20CKHC%201); [10 E.R. 1488](http://www.paclii.org/cgi-bin/LawCite?cit=10%20ER%201488?stem=&synonyms=&query=1978%20CKHC%201); *Wairau Election Petition* [[1912] NZGazLawRp 37](http://www.nzlii.org/nz/cases/NZGazLawRp/1912/37.html); [(1912) 31 N.Z.L.R. 321](http://www.paclii.org/cgi-bin/LawCite?cit=%281912%29%2031%20NZLR%20321?stem=&synonyms=&query=1978%20CKHC%201), 326). The evidence above referred to, in my view, must result in the inescapable conclusion that the "fly-in" voting plan of the Cook Islands Party was purposely effected to induce electors to vote for Cook Islands Party candidates. The plan affected all those electors who availed themselves of the Ansett Flights.

If further evidence be needed to establish this intention reference need only be made to the purpose of the plan as outlined in Dr. Williams' "Suggestions" which were adopted by the Cook Islands Party organising committee. Furthermore, the wording of the Boarding Pass above referred to, which was handed to each of the travellers before they boarded the aircraft allows the strongest inference to be drawn that the flights were only for Cook Islands Party supporters as indeed does their refusal to provide flights for those who were suspected Democratic Party supporters and, in this regard, I refer to the evidence of Tu Ford, Aileen Moreland, and Tepapa Manuel. The effect therefore of my findings of fact mean that all the elements necessary to constitute bribery have been proved. However, Mr Brown for the respondent candidates submitted in closing that bribery by them was not established. He argued that all the passengers on the flights were staunch Cook Islands Party supporters and that they could not be bribed because as he said "One does not have to preach to the converted. There was no need to offer corrupt inducements nor to impose conditions." Mr Temm answered this submission by contending that the mischief begins before the conversion. One must ask why the flying electors were CIP supporters and he submits the answer can clearly be inferred from the evidence that they had to make it plain to the organisers of the scheme that they would vote for the parties’ candidates before they were given the flights.

I agree but apart from that it seems to me that if the evidence establishes, as it does here, that the intention of the perpetrators of the scheme was to offer the flights to the electors in order to induce them to vote for the Cook Islands Party candidates, the question of the political allegiance of the electors partaking in it is largely irrelevant.

Now, the law relied on by Mr Brown is not at variance with that submitted on behalf of the Petitioners, its applicability depending upon the finding of the facts in this case. He does, however, seek to distinguish on the facts this case with those in *Cooper v Slade* (supra) where there was found to be an implied inducement to voters. He contended that *Cooper's Case* related to collecting travel expenses after voting which is a different matter from the provision of travelling free of charge in advance of voting and he argued that once people board a plane no control (in terms of payment) can be exercised "by the provider of travelling expenses after that point and no control can be exercised in the Polling Booth itself".

He quoted *Bolton* (1874) 2 O’M & H. 145 which concerned a letter to a voter with these words - "We enclose a railway pass. I trust that you will be able to make it convenient to come over and record your vote in favour of Messrs Cross and Knowles." This was held not to be a conditional promise and therefore not bribery. Mellor J. at page 146 said:

"All control over that railway pass was gone when it left the Respondent's agent. That is how it stands. So far as it is in any sense a conditional bargain or can be called a bargain at all, it is a bargain entirely one-sided - I put myself in your power, I send you a piece of paper to take you to Bolton and back again."

In this case the position is quite different. Here there was complete control by the Cook Islands Party organisers over the air-ticket of each flight passenger. The boarding card referred to above which was handed to the passenger, was given at the Airport to those selected electors who had come to the Airport for the purpose of travelling on the aircraft which was waiting there to fly them to Rarotonga. That was the only ticket issued and upon it being issued, the passenger went to the plane. The question of control at the Polling Booth is irrelevant since there is no requirement of proof that in fact the elector passenger voted - *Henslow v. Fawcett* (supra). In my view, the promise to pay is the relevant factor and, if as in this case, it is given at the start of the transaction that is the end of the matter. This was the view of Willes J. in*Northallerton*[(1869) 1 O'M & H. 166](http://www.paclii.org/cgi-bin/LawCite?cit=%281869%29%201%20OM%20%26%20H%20166?stem=&synonyms=&query=1978%20CKHC%201) where he expressed himself as follows:

"No doubt if a promise were given beforehand that the fares would be paid it would be bribery. I do not know, however, that paying afterwards without any previous promise would amount to bribery. This is a point I believe that has yet to be decided."

I was also referred to the New Zealand case of the *Wellington City Election Petition* [(1897) 15 N.Z.L.R. 454](http://www.paclii.org/cgi-bin/LawCite?cit=%281897%29%2015%20NZLR%20454?stem=&synonyms=&query=1978%20CKHC%201) where on the facts it was held that the provision of free cabs by a political party to convey voters to the Poll was not bribery or an illegal practice. The ratio decidendi of the Election Court is expressed by Prendergast C.J. at 444 as follows:

"The Court does not think it necessary to call on Mr Skerrett to reply. It is not improbable that the persons placed in charge were persons appointed by the Liberal Association, but this has not been proved. If it had been proved that the Liberal Association provided the men who controlled the cabs that would have put a different aspect upon the matter ... So far as we can see these cabs were used by any person who chose to do so. It is said that it was so. I think it very possible that there was some attempt to accommodate some persons more than others, but there is no evidence which would justify us in saying that the cabs were used for the purpose of promoting the election of the Liberal candidates."

This case clearly is distinguishable on the facts from the present case where the Cook Islands Party organisers were in control of the flights and the purpose thereof was for the promoting of support for the Cook Islands Party candidates.

On the law, as I see it, the allegations of bribery have been undoubtedly established. The scheme amounted to a bribe to electors and the respondent candidates are in law answerable for it. They, by their words and conduct, showed that they knew of it and condoned it. They left its implementation to Sir Albert Henry and the Cook Islands Party organisers. They accepted what was done. They never disassociated themselves from it. They took the benefit of it. In such circumstances they are liable for the bribery. I have touched on this aspect in the *Mitiaro*case (see page 12 referring to the *Bay Islands Election Petition* [(1915) 34 N.Z.L.R. 578-586).](http://www.paclii.org/cgi-bin/LawCite?cit=%281915%29%2034%20NZLR%20578%2d586?stem=&synonyms=&query=1978%20CKHC%201) Agency in electoral law is different from the general law of agency. Blackburn J. in *The* *Bewdley case* (1869) 1 O'M & H.16 at page 17 said:

"No-one can lay down a precise rule as to what would constitutes evidence of being an agent. Every instance in which it is shown that, either with the knowledge of the member or candidate himself, or to the knowledge of his agents who had employment from him a person acts at all in furthering the election for him, in trying to get votes for him, is evidence tending to show that the person acting was authorised to act as his agent. It is by no means essential that it should be shown that a person so employed, in order to be an agent for that purpose, is paid in the slightest degree or is in the nature of being a paid person."

The aspect of agency is further discussed by Willes J. in his classic statement in the *Blackburn case* (1869) 1 O’M & H. 198 at 201 (line 26) to 203 (line 15) as follows:

"Nothing can be clearer than this law; it has existed for a considerable period, I believe certainly from as early as the time of James I. Some 265 years ago the general principle was laid down upon the first and only occasion upon which the jurisdiction of the House of Commons over parliamentary elections was seriously questioned, (*Goodwin's Case* 2 State Trials 91) and upon which occasion it was confirmed. And it is enacted and settled as the law by the Corrupt Practices Prevention Act of 1854, s.36 which, to my mind, does no more than lay down in very distinct terms that which has been always the understood law of Parliament, or rather the common law of the land, with respect to the election of Members of Parliament;

That is to say, that no matter how well the Member may have conducted himself in the election, no matter how clear his character may be from any imputation of corrupt practice in the matter, yet if an authorised agent of his, a person who has been set in motion by him to conduct the election, or canvass voters on his behalf, is in the course of his agency guilty of corrupt practices, an election obtained under such circumstances cannot be maintained. As it has been expressed from early time, no person can win and wear a prize upon whose behalf the contest has not been legitimately and fairly carried on, or, as it was expressed upon the occasion to which I refer, *non coronabitur qui non legitime certaverit*, which is only so much in Latin showing the antiquity of the principle which I have already expressed in English; and whether it be that the person who contends in respect of any unfair play of his own, whether it be the owner of a horse in respect of the unfair play of his jockey, whether it be the owner of a ship in respect of the fault of his steersman, or the hoisting of an additional sail against the rules of the race by one of the seamen; or whether it be a candidate in a parliamentary contest in respect of his agent, in every one of those cases, whether it has been the principal who has been guilty of illegality, or whether the illegality has been committed by his agent only even without his authority or against his will, provided it be done in his agency and for the supposed benefit of his principal, such principal must bear the brunt, and cannot hold the benefit in respect of that in which the agent has compromised him, and would in a matter of this description have also betrayed the public, who have a right that a just election shall be had.

The amount of the injury done by the agent, if the injury has been done of the character which I have described, is immaterial. If an agent bribe one voter with 2s.6d., and that voter votes for the candidate, election void. If an agent bribe one voter with 2s.6d, and the voter taking the 2s.6d. with purpose, express or implied, of voting accordingly, should break his promise, and vote for the other side, election still void. Although the result of the bribe was nothing as to the poll, the result was in point of law that an illegality of so gross a character and so difficult to trace would have been committed that no election would be safe, no community would be sure but that elections were gained by the exercise of corrupt practices, unless, for the sake of all, the election in which an agent has been guilty of such a malpractice were held void as against the principal of that agent.

It is not by way of punishment to the principal that the election is held void, it is not because the majority has been swayed or even affected by the malpractice that the election is held void, but it is because malpractices designated as corrupt by the common law and by the Legislature in the Corrupt Practices Act, are so odious and are so dangerous, that it is thought better to hold void an election where either such practices have generally prevailed, whether traceable to a Member or his agents or not, or where a single instance of such corrupt practice has been distinctly traced to the Member or to an agent of the Member."

Having examined the principles above expressed which I consider to be apposite and the facts in these cases, I am of the firm conclusion that the allegations of bribery by the Respondent candidates in respect of the Ansett flights are sustained and I so hold.

**Treating**

The Petitioners allege that the Respondent candidates were guilty in respect of the corrupt practice of treating since they provided the "fly-in" voters with meat, drink, entertainment or other provision for the purpose of procuring their own election or for the purpose of influencing the vote of those persons. There is no doubt such provision was made by the Cook Islands Party for the travellers. The evidence (including the television video-tapes) vividly tells of this. In the *Mitiaro*case I dealt with the law as to treating and I do not propose to elaborate on it here save as to point out that the burden is on the Petitioners to establish a corrupt intent.

I do not consider they have done this. I accept Mr Brown's submission that what was done here was consistent with traditional Polynesian hospitality. It would have been considered by the travelling voters as their due and I am satisfied would not be regarded as a "treat" in the sense of section 70 of the Electoral Act. Nor should those providing the feast have imputed to them a corrupt intent in doing so, since every Polynesian knows what according to custom is required to be done for visitors: the most important obligation is to provide customary hospitality. Baron Pollock in the case of *Lancaster* [(1896) 5 O'M & H. 39](http://www.paclii.org/cgi-bin/LawCite?cit=%281896%29%205%20OM%20%26%20H%2039?stem=&synonyms=&query=1978%20CKHC%201) at 43 when considering the provision during an election of a smoking concert in a working class environment said, as follows:

"However, that is done; that is the habit in that class of meeting; it is established from month to month and from year to year, and you cannot expect that it should be stopped because an election is coming at some time...."

I am therefore of the view that treating as alleged by the petitioners has not been established and I discard the allegations thereon.

**Use of Public Servants and the Cook Islands Broadcasting and Newspaper Corporation**

I now propose to deal briefly and generally with the allegations of bribery, undue influence and corrupt practice in relation to the use of public servants and the Cook Islands Broadcasting Newspaper Corporation (commonly known and hereafter referred to as "the CIBNC") to induce electors to vote for the Respondent candidates and the threat by the Cook Islands Party members in Government to inflict loss of office upon those employed as public servants who did not support the Cook Islands Party. Standing alone, these allegations, in my view, have not been proved to the standard which is required to sustain such allegations. However, taken with the other allegations I feel that the suspicion raised in the evidence concerning them, calls for some comment by me.

Dealing first with the public servants there is no doubt some were employed during normal Government working hours to put together the manifesto of the Cook Islands Party at the Government Printing Office. I have no doubt there was no deduction from their pay as public servants for this time spent on non- Government service. There was evidence of other public servants being engaged in Cook Islands Party campaign work both in the Cook Islands and New Zealand. The records of the Public Service Commission, if I accept the evidence of the Public Service Commissioner, are so appallingly inadequate that it is not possible to hold with certainty what the position was in relation to these people and I hold these allegations to be not proven. Nevertheless, it should be made clear that the involvement of public servants in political activities is fraught with danger. The right of public servants to ally themselves to a political party is unquestionable.

But political affiliation should neither lessen the obligation of the public servant to serve faithfully and well the Government which employs him, irrespective of the politics of that Government, nor should it place him at a disadvantage in respect of advancement in his career in any way. To threaten or even suggest that because of his political loyalty a public servant could or would lose his position in the service of government is a tactic worthy only of a totalitarian or despotic regime.

Should such an allegation be sustained, it could possibly give rise to legal proceedings, but, more importantly, I consider, if it arose from the action of a member of the executive Government, it could justify steps being taken under the Constitution to effect his removal from Ministerial office. Again, too a government, is empowered to use its public servants only in legitimate Government service. That statement is indeed trite, but, the temptation by the political forces of Government to direct the employment of public servants it controls to further its own political ends is great, if the atmosphere pervading is that of fear by the public servant, that a refusal to be so used, could result in either his dismissal from the service or his chances of promotion therein being inhibited.

The CIBNC is a statutory corporation created by the Broadcasting and Newspaper Corporation Act 1970-71. It is responsible for the publication of the Cook Islands news and the only broadcasting service in the Cook Islands. It is governed by a Board comprising the Financial Secretary and two Government appointed Directors. It is required to carry out any directions given to it by the Minister in Charge of Broadcasting. The main allegation of the Petitioners is that there is censorship of the Cook Islands News and Broadcasting service and control over the news to the extent that it is unfairly slanted in favour of the Premier and the Cook Islands Party. It is true that, as Mr Brown has said, the Cook Islands News is no English Sunday Times, but it is fair to conclude that its influence in its country of origin, the Cook Islands, is far greater than that of the Sunday Times in England. Apart from the distribution of the newspaper in the Cook Islands, its main news items are repeated in the National News broadcast over the Corporation's Radio Station several times daily.

The wonders of the transistor or battery radio have enabled even the remotest parts of our large Island territory to be reached by these National broadcasts. Listening to radio broadcasts is an integral, and sometimes the main, preoccupation of the people in the Outer Islands. It is their source of daily news and indeed provides, in many cases, their only information of national affairs. In these circumstances, the News Media of the CIBNC could indeed be a powerful propaganda machine in the hands of unscrupulous operators. The responsibility of the Board and the Management to ensure that there is always a truthful and objective dissemination of news is indeed a grave one and there can be little wonder that the columns of its news are so closely scanned by those who would criticise its objectivity.

I am not satisfied that the allegations of general censorship are made out. It would seem from the evidence and from an examination of the Cook Islands' News copies presented therein that there is reasonable coverage of news submitted to it by the Democratic Party albeit set in less prominent sections of the paper than the news of the Premier, his Ministers and his Government. The prominence given to rather banal news of the Premier from time to time is, I feel rather due to the imaginative pen and persistence of his Press Secretary than to a predetermined editorial policy.

There is, however, one complaint of the Petitioners which could support a finding of censorship by way of inference and that is the shockingly distorted and untruthful publication of news of the hearing of evidence in connection with these cases in Auckland. The publication of some evidence given and the failure to publish any reference to the damning letters of the Premier to the Director of the Philatelic Bureau of the 24th of February and the 13th of March, to which reference has already been made, could allow the strongest inferences to be drawn.

**The Misuse of Public Monies**

I have already made some mention of this topic and stated the basic facts thereon in the section of this determination called General Findings of Fact. For reasons I shall give shortly there is clear evidence of the use of public money and indeed in his evidence Sir Albert Henry acknowledged that his own solicitors had informed him that the transactions he proposed would be in breach of the Public Moneys Act 1969, Cook Islands. I shall elaborate on these matters later.

By way of a preliminary observation, I should say that if a proven misuse of a large sum of public money is established it would in my view amount to an illegality so gross as to justify action under the first part of Section 79(1) of the Act. In my Judgment on the *Mitiaro* petitions I have analysed at considerable length the relevant provisions of the Electoral Act and there is no need to repeat what I said here. The question of misuse of public money arose in a peripheral way on the *Mitiaro* petitions and at page 34 I said this:

"...if the allegation of misuse of public moneys stood alone and was substantiated I have no doubt that the Court could, if it considered that the circumstances were sufficiently serious to warrant it, declare the successful candidate not duly elected and his election void without either (a) necessarily having to have proof that the result was materially affected, this test being primarily confined to cases where irregularities are urged, and irregularities are limited to those described in Section 78, or (b) having to have before it proof of a corrupt practice as defined in the Electoral Act 1966...

In other words, it is my view of the statute that there may be misconduct or illegal practices which fall somewhere between the less important breaches, i.e. "irregularities" but do not reach the level of a corrupt practice or alternatively do not fall exactly within the statutory definitions of corrupt practices. Such misconduct, for the reasons I have given could, in appropriate circumstances, result in a candidate being found not to be duly elected and his election being held void or alternatively it could lead to another candidate being substituted as the successful candidate."

Accordingly, a finding of the misuse of large sums of public money could, standing on its own, be enough to warrant action by the Court under Section 79(1) either by a determination that all of the elections were void or alternatively by unseating the Respondent candidates and replacing them with the candidates obtaining the highest number of lawful votes.

On the other hand, the public moneys question is inextricably intertwined with the bribery allegations and clearly, I am entitled, if I wish, to look at the public moneys matter as supporting the allegations of bribery but in this section of my Determination I shall consider the public moneys question on its own.

I deal first with the explanations of the financial transactions given by Sir Albert Henry at considerable length in his examination-in-chief and in cross-examination. A fair summation of his testimony is that he had arranged with Mr Kenny a loan of all money necessary to implement the "fly-in voter" scheme. He was at pains to stress that it was a personal loan to him. He deposed that in view of the provisions of an American Federal law (and obviously the law in question must be the Foreign Corrupt Practices Act of 1977 (Public Law 95-213, 95th Congress) colloquially known as the "Lockheed Law"), which precludes advances to political parties, candidates or party officials, Mr Kenny asked for steps to be taken to protect him and as a result of this request the steps referred to earlier including the incorporation of a company called the Cook Islands Government New Projects Company Limited, were taken.

It was urged by Mr Temm that Sir Albert's actions in this respect amounted to a conspiracy to breach the laws of the Cook Islands. On consideration of this proposition, I am inclined to the view that, as a matter of law, the submission is untenable. However, what I think is the relevant consideration in this matter is whether the scheme of the Cook Islands Party for the chartering of planes to fly-in voters involved the use of public moneys within the meaning of the Public Moneys Act 1969.

After much close questioning in cross examination when he conceded that he was a party at least to a scheme to evade the Corrupt Practices Act, Sir Albert explained that he had complied with these requests from Mr Kenny in order to help and protect his friend. While that may well be the case, it would not, of course, have any bearing on the question of the applicability of the Public Moneys Act 1969 in the Cook Islands to the transactions in question.

Whether or not there has been a breach of United States Federal law is not for me to decide.

In considering the applicability of the Public Moneys Act, 1969 I think the starting point must necessarily be the letters of the 24th of February and the 13th of March 1978 which I have already set out in this Determination. I am satisfied that the critical letter of the 13th of March 1978 is not a sham and it truly records what indeed were the terms laid down by Mr Kenny for any advances from the Philatelic Bureau. I accept without hesitation Mr Little's evidence on the authenticity of this letter and I note in passing that Sir Albert Henry did not in his evidence challenge the validity of either of these two letters. Mr Little was cross-examined once in Auckland and once in Rarotonga by Mr Brown and while counsel explored the circumstances in which the letters had been prepared by Mr Little, signed by Sir Albert and approved as to form by Mr Trevor Clarke, the then Advocate General, who was also acting for Mr Kenny, there was no questioning to suggest that the letters were not valid.

Rather it appeared to be the approach of Sir Albert Henry and his counsel that the letters correctly stated the position but were written simply as part of the protective plan being arranged for the benefit of Mr Kenny. I have no doubt at all that Mr Little explained the purport of the letters to Sir Albert Henry who accepted the terms contained therein as Premier of the Cook Islands. Once the letter of the 13th of March was written, the die was cast. Acceptance of the cheque made out to the Cook Islands Government New Project Company Limited involved confirmation and acceptance of the letter of the 13th. No effort was made by Sir Albert Henry at that stage to query the statements made in the letter of March 13th.

Being convinced as I am of the genuiness of these letters the consequence I consider is that the money received from the Philatelic Bureau as a result of these letters was "public money" covered by the Act. I should explain my reasons for this holding by referring to the Act itself and in particular to the definition of public money in Section 2. "Public money" is defined in the following way:

"Public money" means money cheques or securities of any kind (including public securities) for the payment of money received by for or on account of, or payable to, or belonging to, or deposited with the Government or any Department or as agency of the Government, or received by any employee of the Government by virtue of his position as such.”

(The underlining is mine)

In view of the terms of the letter of the 13th of March and the fact that it was signed by the Premier and considering also that the cheque was made out to the Cook Islands Government New Project Company Limited which I have no doubt was, as stated by Mr Williams in his opinion, an agency of the Government, seems to me beyond question that the cheque for $337,000 was public money within the meaning of the statute.

As to the holding that the company was "an agency of Government", when it is recalled that all but one of the 1,000 shares in the Cook Islands Government New Project Company Limited were held by the Cook Islands Government Property Corporation, a statutory corporation operating under its own legislation, and that the other share was held by the Assistant Advocate-General, the conclusion to this effect is irresistible. The name Cook Islands Government New Project Company Limited itself reflects the true nature of the company.

What then follows from the factual and legal conclusion that the money so advanced was covered by the Act? Part IV of the Act applies to all "public money" and there are requirements that public monies be kept in certain public accounts in Rarotonga or elsewhere as the Financial Secretary may approve or direct. There are also requirements that the Financial Secretary shall control all bank accounts whether inside the Cook Islands or outside which contain public money; see Sections 12, 16, 33 and 34.

Public money held in overseas accounts established by consent of the Financial Secretary is also subject, by virtue of Section 34, to the requirement that "notice of the issue of every cheque drawn on such accounts shall be given by the person issuing it to the Financial Secretary in such form as he may from time to time direct". Only persons authorised by the Financial Secretary can operate such public accounts.

Part XI of the Act provides, by Section 49, that every person holding any public money who refuses or neglects to pay it into the account into which it is payable shall be liable to a fine not exceeding $1,000.00 and there are similar provisions creating offences in persons who refuse or neglect to make any proper returns or furnish any papers required under the Statute.

It should be noted as well that the explicit provision for public accounts to be opened outside the Cook Islands displays a clear legislative intention that the statute should have extra-territorial operation.

For all these reasons I am satisfied that all funds advanced by the Philatelic Bureau and referred to in the letters of the 24th of February and the 13th of March 1978 were public moneys within the meaning of the statute and subject therefore to all the consequential restrictions imposed thereunder.

There was extensive evidence relating to letters and other communications occurring after the time of the payment of the charter fee to Ansett Airlines and passing between Sir Albert Henry and Mr Kenny and also involving the Cabinet and the Philatelic Bureau. In addition, there was considerable testimony on the part of Sir Albert explaining in detail the arrangements which he claimed to have made recently for repayment of the money advanced by the Philatelic Bureau. Then there were long telexes from Mr Kenny which were admitted in evidence, either by consent or in the exercise of my discretionary powers under Section 3 of the Evidence Act to receive material which would otherwise be inadmissible at Common Law.

In these telexes Mr. Kenny vehemently stated his viewpoint on the disputed matters and it was clear that his version of events differed markedly from that of Sir Albert. I do not propose to consider any of the evidence on these various topics because it seems to me that it is irrelevant to the central question as to whether the money received by Sir Albert was public money. I am not obliged therefore to rule upon the validity of self -serving explanations given by Sir Albert Henry or Mr Kenny after the event nor am I concerned to explore in these proceedings the civil consequences of the various transactions, whether as between Mr Kenny and the Philatelic Bureau on the one hand and the Government of the Cook Islands or Sir Albert Henry on the other. These matters require no findings from me for present purposes.

In so far as Sir Albert Henry knowingly uplifted $337,000 in the form of a cheque from the Philatelic Bureau and failed to handle the cheque after receipt in the manner demanded by the Public Moneys Act, I consider the matter could rest at that point but I will shortly go on to consider the events in Auckland. I should record at this stage that Mr Brown contended that Sir Albert Henry's motives at all times were proper. I am afraid that the evidence does not support that conclusion. Even if there was an innocent explanation in the early stages or some misunderstanding thereafter, and I do not accept that there was, the matter is put beyond doubt by the events which subsequently took place in Auckland. Most of these events have already been mentioned but since they are particularly relevant to the point under consideration the following matters should be stressed:

1. According to the evidence of Mr Glasgow, which I accept as truthful, the time for payment of the charter fees to Ansett Airlines was not to expire, as claimed in evidence by Sir Albert, on Friday the 17th of March, but in fact was only payable, at the earliest, on the Monday of the following week i.e. 20th March. At page 3 of the New Zealand evidence Mr Glasgow is recorded as follows:

"Q. When was it arranged that the cost of the charter should be paid.

A. Thursday 22 March.

Q. It had to be paid on Thursday.

A. Yes.

Q. Had there any earlier date for fixture of payment.

A. Yes originally in verbal discussion we had agreed on 20th.

Q. Earlier when was date changed from 22 to 23.

A. When final contract was drawn up.

Mr Glasgow had produced to the Court the agreement between Ansett Airlines and Ipukarea Development Company Limited and that agreement is dated 21st March, 1978. Although I have no doubt that time was short this evidence appears to underline Sir Albert's explanation that the transactions had to be concluded and the money paid by Friday March 17th.

I consider that Sir Albert's decision to proceed against the advice of his own solicitors and without referring the matter back to Mr Kenny is explained not so much because of any time factor, although that may have been one consideration, but primarily because Sir Albert knew he would not be able to obtain the consent of Mr Kenny or his companies to change the character of the advance made to the Cook Islands Government New Project Company Limited from an advance to that company to a personal loan to Sir Albert himself and he was too deeply committed then to abandon the whole "fly-in" voter scheme.

2. The legal advice to which I have already referred, given to Sir Albert Henry by Mr Turner and Mr Collinge was no doubt unwelcome to Sir Albert but, to his credit, he made no attempt in evidence to deny that it had been given. Even if there were any doubts about his understanding of this advice, the written opinion of Mr. Williams which Sir Albert had apparently requested himself when the matter was raised by his own lawyers, was clear and unqualified in its terms and stated explicitly that any money handled by the Cook Islands Government New Project Company was public money irrespective of whether the funds were in the Cook Islands or New Zealand and the opinion drew attention as well to the criminal consequences of breaches of the Act. Against this background it is patent that Sir Albert knew that the funds were public moneys but he nevertheless chose to proceed regardless of this fact.

I should mention that Sir Albert Henry in that part of his evidence relating to his conduct subsequent to the receipt of this legal advice, attempted to distinguish between procedural matters and matters of substance. For example, at page 152 of the Rarotonga evidence the following passage appears:

"Q. When you signed the second cheque had your lawyers told you that money in the Government New Project account was public moneys under the Act.

They told me clearly and I understood it clearly that if I used the first cheque and transferred the money from the Cook Islands Government Account to Ipukarea that would be very wrong. In the absence of Paradise Tours, the best thing and correct thing to do was return the cheque back to the Philatelic account in the Bank of NSW. Then we arranged to meet the Manager of Bank of NSW late Thursday afternoon. The Manager kindly agreed that he would come an hour before official time and we met in his office at 9 o’clock on Friday.

When we met as I have previously explained the Manager, myself and my two legal advisers the decision to do the right thing or not be done in time. So, I asked the manager could you pay this to myself. Between the bank and a politician, it can be done, but the legal advisers although if they did not agree from the legal point of view, it was not as bad as paying it the other way. I then took the risk personal risk because I took as a procedure as matter of procedure not substance."

I believe this explanation is untenable. The matter of substance was whether what Sir Albert was doing was illegal; he was advised it was but he decided, as he put it, to take the risk. In so far as he went on to suggest that the risk he took was in expecting that the Philatelic Bureau or Mr Kenny would alter the arrangements and, he implied, agree to the advance being treated as a personal loan, it seems to me on the evidence that Sir Albert must have known Mr Kenny could not change the nature of the advance in view of United States Federal Law, the general effect of which statute Sir Albert openly conceded had been discussed between them. That Mr Kenny would not restructure the transaction is understandable when one considers the extremely heavy penalties provided in the Foreign Corrupt Practices Act for contraventions thereof; see Section 104(b)(1)(A) and (B) which provide in the case of corporations for a fine of not more than $1,000,000.00 and in the case of individuals for a fine of not more than $10,000.00 or imprisonment for not more than 5 years or both.

On the evidence of these events first in Rarotonga and then in Auckland I find that there was unlawful conduct of monumental dimensions and there is ample evidence of a corrupt or criminal intention. The use of public moneys was a means to an end - an illegal means, an illegal end. I refer in particular to the evidence of the Financial Secretary, Mr Wiremu Kingi, where at page 16 of the Rarotonga evidence he advised that he had no knowledge of the opening of the Cook Islands Government New Project bank account on March 7, 1978 although it is usual practice for a matter such as this to be referred to Treasury who, after consulting with the Minister of Finance and the Financial Secretary, determine who the signatories for such a bank account shall be. (He advised that Treasury retained copies of the signatories to public accounts and updated them as necessary).

Mr Kingi said that on the assumption that the Cook Islands Government New Project Company Limited account was a public account covered by the Public Moneys Act the usual procedures had definitely not been followed. Furthermore, he deposed that the transaction in question, involving funding from the Philatelic Bureau of public funds, should in normal circumstances have been the subject of a Cabinet submission, comment from the Financial Secretary, and a Cabinet minute. No such steps were taken in this case. He stated further that he would have expected consultation with him by the Advocate General's office which was forming the company, and that in the circumstances Mr Turner was obliged to inform him of the opening of the company's account especially when such a large sum of money was involved. There had been no such consultation and Mr Turner had not so informed him. Mr Kingi also stated that he never received custody of the cheque book of the Cook Islands Government New Project Company Limited account. By law he should have done so.

I should also mention at this stage that the first Secretary of the Cook Islands Government New Project Company Limited was Mr Gosselin, the Chief Electoral Officer, who also holds the position of Secretary of Planning and External Affairs of the Ministry of Planning and External Affairs. That Ministry handles all new projects and developments in the Cook Islands. Mr. Gosselin gave evidence that he was unaware of anything relating to Cook Islands Government New Projects Company Limited until he was informed by the Assistant Advocate-General Mr. Turner on the 6th or 7th of March that he had been appointed Secretary of the company and that this appointment was considered logical because of Mr Gosselin's role in the planning division.

Apart from signing a form necessary for the opening of the bank account, which Mr Gosselin did at the request of Mr Turner, Mr Gosselin told the Court that he was not involved in any way with, nor did he have any prior knowledge of, any of the transactions of the New Project Company occurring in New Zealand and he was no longer the Secretary of the company. I accept without hesitation Mr Gosselin's evidence and I am satisfied that he was completely unaware of the affairs of the Company and was an entirely innocent party in relation thereto.

It can be seen from the matters I have mentioned that in relation to this question of misuse of public moneys there was:

1. Undoubted unlawful conduct consisting of a clear breach or breaches of the Public Moneys Act.

2. The use of a vast sum of public money for a private political scheme.

3. This use of public moneys for the purpose of flying in Cook Islands Party voters, dramatically affected the result of the election, as will be seen from the figures that I refer to at the conclusion of this Determination.

4. When considered against the legislative purpose of free elections to which I have made frequent reference both in this Determination and in the *Mitiaro*Determination, the activities of Sir Albert Henry are incapable of any satisfactory explanation in terms of the Electoral Act and the Public Money Act.

I think I should now say something about another significant aspect of this misuse of public moneys and that is the involvement of Government. The purpose of the scheme was to charter aircraft. It could not be carried out without the intervention of a public agency of some kind because Mr Kenny had insisted, due to the Foreign Corrupt Practices Act, that in the circumstances the only party capable of safely receiving the funds from him or his agent was a Governmental agency of one kind or another. Therefore, the Bureau was used and so too was the Cook Islands Government New Projects Company Limited.

The Cook Islands Party was the Government in power which controlled Government agencies such as the Cook Islands Government Property Corporation which subscribed for the majority of shares in the New Project Company. Had it not been for the privileged position which the Cook Islands Party enjoyed as the Government Party, Government agencies and Government funds could not have been used at all. The scheme would not otherwise have been able to get off the ground in the manner desired by Mr Kenny. Sir Albert Henry and the other participants were therefore in an untenable position, legally and morally, from the beginning.

Whichever way one regards the transactions it is impossible to escape the vital importance, to those evolving the scheme, of participation of Government agencies and public money. What the participants did was to try to camouflage the element of public money and public agency involvement which, as I have said, in itself reveals a corrupt motive. If the dealings with the advances and the incorporation of the New Project Company had been above suspicion then proper procedures would no doubt have been followed.

There is one other explanation apparently given by Sir Albert Henry which should be mentioned. There was a passage in the evidence of the Financial Secretary Mr Kingi which suggested that the moneys had been advanced to Sir Albert Henry by Mr Kenny on the basis that it would come from Mr Kenny’s anticipated profits on a special coin issue. Mr Kenny would recoup from the special coin issue a sufficient profit to cover the personal loan made to Sir Albert Henry. Mr Kingi said he had been informed of this proposal during discussions he had with Sir Albert. This evidence went unchallenged.

The relevant statutory provisions dealing with coin issues are the Decimal Currency Act 1964 (N.Z.) and the New Zealand Laws Act 1966 of the Cook Islands and under these statutes it seems to have been necessary from time to time to promulgate Regulations authorising special coin issues and describing the design to be followed in the manufacture of the particular coins. By way of illustration reference can be made to the Coinage Regulations Amendment No. 10, Statutory Regulations 1975/5, which dealt with the Cook Bicentenary coins which were to be issued in $50 and $100 units. The evidence does not make it clear which precise special issue was being referred to by the Premier in his discussion with Mr Kingi but it appears that there can be no special coinage issue without either the introduction of appropriate Regulations or the making of a decision by the Executive Government. If in fact the advances made by Mr Kenny or his company were to be repaid in the manner suggested then I have little doubt that this would be unlawful. As Lord Denning M.R. pointed out in *Laker Airways Limited v Department of Trade* [[1976] EWCA Civ 10](http://www.bailii.org/ew/cases/EWCA/Civ/1976/10.html); [1977 2 All E.R. 182](http://www.paclii.org/cgi-bin/LawCite?cit=1977%202%20All%20ER%20182?stem=&synonyms=&query=1978%20CKHC%201) at 193 "at several times in our history the executive have claimed....that a discretion given by statute or by regulation is unfettered .... But the Judges have not (upheld these claims) of late". He went on to say:

"The two outstanding cases are *Padfield v Minister of Agriculture, Fisheries and Food*1968 A.C. at 1016; [[1968] UKHL 1](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1968%5d%20UKHL%201); [1968 1 All E.R. 694](http://www.paclii.org/cgi-bin/LawCite?cit=1968%201%20All%20ER%20694?stem=&synonyms=&query=1978%20CKHC%201) and *Secretary of State for Education and Science v. Metropolitan Borough of Thameside* [[1976] UKHL 6](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1976%5d%20UKHL%206); [1976 3 All E.R. 665](http://www.paclii.org/cgi-bin/LawCite?cit=1976%203%20All%20ER%20665?stem=&synonyms=&query=1978%20CKHC%201) where the House of Lords have shown that when discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers, so as to see that they are used properly and not improperly or mistakenly."

Thus, the exercise of a statutory power is invalid unless the repository of the power has acted honestly and in good faith. The deliberate promotion of a private purpose alien to that for which the power was conferred is to be regarded as unlawful. Accordingly, if the particular coin issue was for the dominant purpose of enabling Mr Kenny to recoup his outlay, then I must say, as emphatically as I can, that that would be quite improper and illegal. If further authorities to support this elementary proposition are necessary, they may be found conveniently summarised in Halsbury’s Laws of England 4th Edition, Volume 1, Para. 60, pages 67 - 70.

**General Corruption**

It will be recalled that there were allegations of "general corruption of a widespread and general nature." As to the implications of such allegations see *Lamb v McLeod* (No. 5) Infra. On the evidence before me I do not consider that corrupt or illegal practices have so extensively prevailed that they may be reasonably supposed to have affected the whole electoral process. While I have made findings of bribery and serious misconduct (a breach or breaches of the Public Moneys Act) there is no question here of the entire election proceedings being invalid. The Chief Electoral Officer and his Returning Officers carried out their duties admirably and apart from the partial but very serious imperfections relating to the Ansett "fly-in" votes, it is clear that the elections were conducted in accordance with the law as to elections. For these reasons I reject the allegations that there was general corruption in the legal sense of that phrase.

**Form of Relief**

I must now consider what form of relief is appropriate in relation to each of the three affected constituencies. There were four Petitions filed in relation to each constituency and each Petition claimed different relief. To illustrate the position, I shall now record the form of relief contained in the four Petitions relating to the Takitumu constituency.

- Petition 25/68 prays "that it may be determined that the said Matapo Matapo and Apenera Pera Short or either of them were/was not duly elected".

- Petition 26/78 prays "that it may be determined that the election was void".

- Petition 24/78 prays "that it may be determined that Iaveta Short and William Papa Cowan or either of them was duly elected, and ought to have been so declared."

- Petition 31/78 prays "that it may be determined that the following persons, namely Matapo Matapo and Apenera Pera Short (a) were not duly elected and/or (b) that the votes of those electors who were induced to vote or refrain from voting by virtue of the said corrupt practice be disallowed and not counted and that a recount of the votes for the Takitumu Constituency be made; and/or (c) that the election of the said Matapo Matapo and Apenera Pera Short was void and that the following persons be declared the elected, namely Teariki Matenga, Iaveta Short, William Cowan and/or (d) that the said election was void; and/or (e) that such other order or orders as this Honourable Court deems just".

The various patterns of relief which I have described in the petitions relating to the Takitumu constituency are repeated in the petitions, relating to the constituency of Te-Au–O-Tonga (Misc. 21, 22, 23 and 32/78) and the Puaikura constituency. (Misc. 27, 28, 29 and 30/78).

It is appropriate at this stage to say something about the differences between petitions which claim the election is void and petitions which "claim the seat". The judgment of the Court in *Lamb v McLeod* (No.5) [(1932) 3 W.W.R. 596](http://www.paclii.org/cgi-bin/LawCite?cit=%281932%29%203%20WWR%20596?stem=&synonyms=&query=1978%20CKHC%201), 597-598 contains the following helpful analysis of these differences:

"Election petitions are of two distinct kinds. The petitioner, in the one case, may seek to oust the candidate who has been returned, or has been declared elected, and to have another candidate seated as the duly elected member for the constituency. In that case the petitioner assumes that the election itself was a valid election, and he undertakes to prove that the candidate for whom he claims the seat received a majority of the legal votes cast. The respondent by maintaining his right to the seat, also supports the validity of the election.

Between these parties there is no question of the entire election proceedings being invalid, so as to necessitate the vacating of the seat and the holding of a new election. The only question in issue between them is: Who was elected. And the petitioner, by bringing his petition, assumes the burden of proving that his candidate, and not the respondent, was elected. The Judge trying the case must confine himself to the issue thus raised unless the statute, as sometimes happens, requires him to go further.

The petition in this case is of the other kind. No attempt is made to assert the rights of another candidate. In a petition of this nature, the petitioner has a wider scope of action and a wider field of investigation is opened to the Court. The petitioner is not concerned in securing the seat for another person. If his petition is allowed, the seat must be vacated and another election held.

Such a result may follow merely from some disqualification of the respondent or some unlawful practice chargeable against him, or some irregularity affecting his election, or on the other hand, it may be caused by an act or omission, with which the respondent has had nothing to do, either directly or indirectly, but which renders the whole election void, so that neither the respondent nor any other candidate was duly elected or might lawfully have been returned ...

In petitions of this kind the Court is not confined to a balancing of the relative rights and merits of two candidates. The inquiry may go beyond the candidates and strike at the election itself. As was remarked by Madden J. in the *North Louth Case* (1911) 6 O’M & H 103 at 114, ‘an election may be voided on two very different classes of cases, personal to the candidate or his agent, or affecting the constituency as a whole.’ The question then becomes (and in the present case it did become) having regard to the rights of the electors: Was a valid election held?"

At an early stage in the hearings in Rarotonga Mr Temm applied for a scrutiny under section 77 of the so-called "Ansett Fly-In" votes relating to those constituencies. Mr Giles for the Electoral Officer then pointed out that his client could not act without an Order from the Court and he referred to sections 61(2), 64, 73, and section 77. At that stage I asked the Chief Electoral Officer if he was able to ascertain from the voting records in his possession how many "fly-in" voters there had been, in which constituencies they had voted, and for which candidate they had voted. He said such information could be compiled. I then made an Order that the Chief Electoral Officer report to me on this statistical information. Since Mr Brown requested that the votes coming from the Air Nauru flights should also be analysed my Order covered both the Ansett and Air Nauru flights. However, it later became evident that the Air Nauru flights were no longer in issue and I subsequently discharged the order in so far as it related to those flights.

The Order I made was not made pursuant to section 77, and did not amount to a scrutiny as envisaged by sections 57 and 58 in the sense that I did not order that representatives of the petitioners and the respondent candidates attend as scrutineers when the information was being compiled. I felt it was sufficient if the Chief Electoral Officer and his counsel prepared the information and no party made any submissions to me requesting any other arrangements.

The order I made required that the information be collated in circumstances of absolute confidentiality so as to protect the secrecy of the ballot. I was also careful to point out to counsel when I made the order that the order was given without in any way prejudging the issue of whether the information to be supplied was relevant or whether the information should later be disclosed to any party. The primary purpose of making the order was to avoid delays later, should I be persuaded during the course of the hearing that the information was relevant to my Determinations on the petitions.

I subsequently received a report from the Chief Electoral Officer and, as I noted at the time, I was extremely impressed with the very careful steps that he had taken both to ensure that there was no breach of secrecy and also to obtain the maximum degree of reliability in the information thus supplied. The information included the number of "fly-in" voters who voted in the three disputed constituencies and the candidates for whom they voted. There was also a final analysis which showed the result in each constituency if the "fly-in" votes were eliminated.

At a later stage in the hearing senior counsel for the petitioners moved for an order that the information so provided in confidence by the Chief Electoral Officer to be should be revealed. He based his application on two grounds, first that in his submission the "fly-in" votes were illegal and he needed to prove that were in fact recorded in each of the constituencies which were the subject of the petitions and, secondly, that in view of an application he intended to make later as to the disallowance of such votes, the particulars of the way the individual "fly-in" voters voted should be disclosed. After careful consideration I concluded that it was permissible for evidence to be led from the Chief Electoral Officer to cover the first ground of the application but I refused the second part of his application basing myself on the judgment of the Full Court in *In Re Raglan Election Petition*[[1947] NZGazLawRp 11](http://www.nzlii.org/nz/cases/NZGazLawRp/1947/11.html); [1947 N.Z.L.R. 363](http://www.paclii.org/cgi-bin/LawCite?cit=1947%20NZLR%20363?stem=&synonyms=&query=1978%20CKHC%201) at 367 and *Stove v. Jolliffe* [[1874] UKLawRpCP 24](http://www.commonlii.org/uk/cases/UKLawRpCP/1874/24.html); [(1874) L.R. 9 C. P. 446](http://www.paclii.org/cgi-bin/LawCite?cit=%281874%29%20LR%209%20CP%20446?stem=&synonyms=&query=1978%20CKHC%201), [30 L.T. 299.](http://www.paclii.org/cgi-bin/LawCite?cit=30%20LT%20299?stem=&synonyms=&query=1978%20CKHC%201)

In accordance with my ruling the Chief Electoral Officer subsequently gave evidence from the witness box that the total number of "fly-in" voters who voted in the three disputed constituencies was 445 and he also provided a breakdown of voters from each of the six flights. The evidence was that from Ansett Flight 6752 there were 121 voters, from Flight 6754 108 voters, from Flight 6758 103 voters, from Flight 6760 51 Voters, from Flight 6764 33 voters and from Flight 6766 29 voters. As to the respective constituencies, he gave evidence that there were 308 "fly-in" voters who voted in the Te-Au-O-Tonga constituency, 77 who voted in Takitumu and 60 who voted in Puaikura. That was the extent of the information which was revealed in open court but, as I have mentioned, in the information supplied confidentially to me I was supplied with details of how the votes were actually cast in each constituency and from that point of view I am in a position, should I decide it is proper to do so, to ascertain what would be the result in each constituency, first if the votes for the Cook Islands Party candidates were eliminated and, secondly, if all votes cast including those for the Democratic candidates, were struck off.

There is one other matter of importance which should be mentioned before I pass to examine the detailed submissions on relief. It was quite properly pointed out by the Chief Electoral Officer in his evidence that there was a degree of uncertainty concerning the number of persons arriving on the Ansett planes who voted in the election. Discrepancies between the passenger lists supplied by Air New Zealand (who were acting as agents for Ansett Airlines) and the number of immigration cards completed by arriving passengers, led to the possibility, although it was no more than that, that there were persons who arrived on the planes and did not vote at the special polling booths at the airport but voted at other polling booths on election day. He elaborated by mentioning that on four of the flights there were 21 less immigration cards than there were names on the Air New Zealand passenger lists. Mr Gosselin conceded in cross-examination by Mr Temm that these "missing persons" might not have been qualified to vote. For example, they could have been children or could have comprised some of the many passengers who travelled on the flights but were not on the rolls and did not vote at the election. The evidence indicates that there were 758 persons who flew to Rarotonga on the Ansett flights and 209 of them were persons who "came for the ride" and apparently did not vote.

These non voters constituted quite a high percentage, perhaps about 25%, of those who came on the planes. Furthermore, even if these "missing persons" did vote some may have done so in constituencies other than those in which the result was disputed. (See in this regard, the passage from the evidence, cited supra where Mr Sam Samuel infers that some "fly-in voters" were coming to vote in the Mauke and Mitiaro elections and see also the transcript of the news broadcast by Mr Ngarima George on March 27th contained in the Translation Booklet Exhibit 38 where is recorded as saying "Fly voters and they were registered on the roll and voted accordingly as follows: Te-Au-O-Tonga 270; Puaikura 53; Takitumu 62; Aitutaki 69; Atiu 9; Manihiki 1; Penrhyn 4; Rakahanga 1; Mangaia 5; Mauke 3; a total of 477").

I should say at this stage that the evidence on these 21 "missing votes" is in my judgment too speculative to be allowed to influence the results which would otherwise flow from disallowance of tainted "fly-in" votes, assuming it should be held that it is otherwise proper to disallow such votes. In addition, I do not think there can be any onus on the petitioners to explain or answer the slight uncertainties mentioned by the Electoral Officer. The petitioners are bound only to show that a certain number of identified votes should be disallowed.

Moreover, if I were later to conclude that the "fly-in" votes should be struck off with the result that the Democratic candidates had the majority of lawful votes, but then allowed the slight evidentiary uncertainties raised by the Chief Electoral Officer to prevent the innocent candidates from gaining seats in constituencies like Takitumu or Puaikura where some of the margins are small, that would be to give the benefit of these remote doubts to the person’s least entitled to them. After all, it is trite law that no person should benefit from his own illegal acts.

In his written opening submissions Mr Temm dealt with the question of the relief sought in the following way:

**E.Relief Sought by the Petitioners**

33. For purely technical reasons the Petitioners have filed three petitions in respect of each electorate but they seek relief from the Court according to the three alternatives which the Electoral Act provides in Section 79. At Common Law Parliament and later the Courts, had only one power - when unlawful practices were proved, the candidate was unseated and the election declared to be void. By the middle of the last century, new statutes were enacted to remedy the difficulty created when candidates had gone to much expense over an election only to find their money wasted because some other candidate had contaminated the election by illegal practices. The Courts were then given the power to declare the election void as before but in addition, instead of doing that, the Courts were empowered to declare whether any candidate was lawfully elected, and if so, which one.

34. Our Electoral Act gives the Court those alternatives and the petitions which have been filed are directed to each form of relief. But in essence the Petitioners say, subject to submissions to be made later on the law at the conclusion of the evidence, that in this particular matter the same relief should be given in the first place in respect of each electorate - all the Cook Islands Party candidates should be unseated and the Court should declare that they were not and have not been lawfully elected. Further than that the Petitioners submit to the Court that the Court should exercise in its other power to declare the candidates named in the alternative petitions to be lawfully elected as being the persons who secured the highest number of lawful votes. The third alternative is for the Court simply to declare the election in the three electorates void and order by-elections to be held at a time to be stipulated.

35. The appropriate alternative will be the subject of detailed submissions arising out of the legal propositions involved in a case of this kind, but the Petitioners say that a principle which should underlie any decision in this case is that any hardship caused by illegal practices should fall upon those who perpetrated them; by the same token, those who have conducted themselves honourably should not suffer loss financial or otherwise, because of the wrong doing of others. As had been said elsewhere "He who breaks the rules must bear the brunt" and when all the evidence has been called, the Petitioners will submit to Your Honour that those who broke the rules governing this election are the Cook Islands Party and its candidates."

It will be observed that counsel was, perhaps understandably, keeping his options open to some degree and the implications of the differences between those petitions which sought to have the elections in each constituency declared void and those which 'claimed the seat' were not clearly articulated. However, following upon the interlocutory applications which I have mentioned, counsel in his closing submissions unequivocally "claimed the seat" in each case. In the written section of these submissions, it was contended that "where unlawful votes can be identified there should be a scrutiny to determine the result counting only lawful votes. If the candidate polling the highest number of votes is not disqualified for electoral malpractices, he should be awarded a seat".

Strong reliance was placed on the *Taunton Case* [(1869) 1 O'M & H. 181](http://www.paclii.org/cgi-bin/LawCite?cit=%281869%29%201%20OM%20%26%20H%20181?stem=&synonyms=&query=1978%20CKHC%201), 186 and it was emphasised that this decision had the express approval of Lord Denning M.R. in *Morgan v. Simpson* [1975 1 Q.B. 151](http://www.paclii.org/cgi-bin/LawCite?cit=1975%201%20QB%20151?stem=&synonyms=&query=1978%20CKHC%201), 162; [1974 3 All E.R. 722](http://www.paclii.org/cgi-bin/LawCite?cit=1974%203%20All%20ER%20722), 726. In oral submissions counsel expanded on this submission and forcefully argued that while it might seem a convenient and apparently just result to order a by-election in each constituency this would, for a number of reasons, be inconvenient and unjust. In his closing address senior counsel for the respondent candidates contended that if the Court reached the point where the form of relief was under consideration then a by election should be ordered in each case. It will be necessary for me to return to these competing submissions at a later point in this determination.

I must now consider the extent of the Court's powers to disallow tainted votes and, if the necessary power exists, decide whether in the circumstances of this case it is appropriate to employ it. If so, I must then ascertain whether the consequence would be the award of the seats to the unsuccessful Democratic candidates.

I begin with a consideration of the *Taunton Case* [(1869) 1 O'M & H. 181](http://www.paclii.org/cgi-bin/LawCite?cit=%281869%29%201%20OM%20%26%20H%20181?stem=&synonyms=&query=1978%20CKHC%201) which is so strongly relied upon by the petitioners. The case was decided in March 1869. On the 31st July of the previous year the Parliamentary Elections Act had come into force. This is a matter of importance in considering the significance of the judgment of Mr. Justice Blackburn. At page 186 he said:

"The further question as to whether or not Mr James should have the seat would depend on the result arrived at after going through the individual dual votes, and seeing, without regard to who it was that corrupted this man or that, what was the majority of uncorrupted voters, and whether there was a majority for anyone who had not rendered himself by personal misconduct incapable of standing."

As Lord Denning M.R. noted in *Morgan v. Simpson* (supra) at 162 (726) the report is not altogether clear and the learned Master of the Rolls says that the text book by Leigh and Le Marchant entitled The Law of Elections and Election Petitions (2nd Edition 1874) page 75 states the proposition better than does the report. I have not been able to obtain the Second Edition of that treatise but the following passage appears in the Third Edition at page 104:

"When the petition alleges that the unsuccessful candidate at the election had the majority of legal votes, and ought therefore to have been returned, the manner of ascertaining the truth of the allegation is by a scrutiny of the votes.

Electors on behalf of the candidate have the same right to claim the seat for him as the candidate himself.

"In the event of the candidate (C.D.) for whom the seat is claimed having been shown to have obtained the majority of legal votes, it will be the duty of the judge to state in his certificate to the Speaker that A.B. (the sitting member) is unseated, and that C.D. ought to have been seated, and ought to have been returned, and should be returned now". Taunton, Judgments, 357"

A close textual examination of the Parliamentary Elections Act 1868 which was the governing statute at the time of the *Taunton Case*, shows that the likely basis of the power to disallow the votes of corrupted voters is Section 11, para. 13 of that enactment. This provision, which is reproduced in *Rogers* at 409, provided as follows:

"At the conclusion of the trial the Judge who tried the petition shall determine whether the member whose return or election is complained of, or any or what other person was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the Speaker, and upon such certificate being given such determination shall be final to all intents and purposes."

I am inclined to think that the power to disallow tainted or illegal votes arose as a necessary corollary of the duty of determining whether a member whose return or election is complained of or any other person was duly returned or elected. I am fortified in this view by the following passage from Halsbury's Laws of England 4th Edition, Volume 15 para. 924, p. 501:

"On a petition complaining of an undue election the petitioner may complain that the, successful candidate was not elected by a majority of lawful votes and demand a scrutiny.1The object of the scrutiny is to ascertain by striking off, votes or adding votes which candidate had the majority of lawful votes."

The references given in footnote 1 of this passage are the *Taunton Case*and *York County, West Riding, Southern Division Case* (1869) 1 O’M & H. 2.13 at 215. In that case Mr. Baron Martin said:

"In this case the objection to Lord Milton's election was abandoned, and thereupon it became a question of whether the Respondent Beaumont or Mr Stanhope was legally elected. The direct mode of testing that would have been to have ascertained for which of them the greater number of legal votes was given, or, in other words, to have gone into a scrutiny...."

If, as I think, the Judges in these two cases were proposing to conduct what they called "a scrutiny" because the seat was claimed and they were bound under Section 11, para. 13, to determine whether the successful candidate was duly elected, then in view of the marked similarity between that provision and the second part of Section 79(1) of the Cook Islands Electoral Act 1966 I think it must be accepted that Section 79(1) itself gives, by necessary implication, the power to examine and disallow votes and I rule accordingly.

Where, as in the petitions I have mentioned, the seat is claimed the Court could not carry out its statutory responsibilities without the power to act in this fashion. This power is distinct and separate from the kind of scrutiny provided for in other sections of the Electoral Act including Sections 57 and 77. Although it is unnecessary to decide the point, I am inclined to the view that the power under Section 77 to order a recount or a scrutiny is primarily directed to cases where it is alleged that there were mistakes by the Electoral Officers in carry out their functions under Sections 57 and 58.

The Court could order a further scrutiny and recount in the manner provided in those sections to see if errors had occurred. This interpretation would explain the apparently narrow grounds for disallowance of votes applying to a scrutiny under Section 77(a) and (b). The grounds for disallowance on a scrutiny under Section 77 are that the voter was ineligible to vote or that the voter gave more votes that he was entitled to give (double voting). In such cases of scrutiny and recount under Section 77, which are different in character to the present case, it would be proper for both parties to have scrutineers present. That need does not really arise in cases like the instant one where no quest ion of ineligibility or double voting arises.

Rogers deals with the disallowance of votes at pages 220 to 226. At page 222 he indicates that:

"As a rule, a vote, which for any reason is declared to be void, is struck off the score of the candidate who is shown to have received it."

He goes on to point out that Section 25 of the Ballot Act 1872 makes an exception to this general rule. Section 25 of the Ballot Act 1872 is virtually identical to Section 165 of the Electoral Act 1956 (N.Z.) which latter provision provides as follows:

"Where, on the trial of an election petition claiming the seat for any person, a candidate is reported by the Supreme Court to have been proved guilty of bribery, treating, or undue influence in respect of any person who voted at the election, there shall, on a scrutiny, be struck off from the number of votes appearing to have been received by the candidate one vote for every person who voted at the election and is reported to have been proved to have been so bribed, treated, or unduly influenced."

It is not worthy that there is no provision corresponding to Section 25 or Section 165 in the Cook Islands Electoral Act 1966. Rogers continues on page 222 by observing that under Section 25 "a vote, not as in the other case the vote, is to be struck off. A possible explanation of this difference is that its object is specially to punish the guilty candidate, and that this could not always be affected by the ordinary procedure, e.g. the vote of a bribed voter, shown to have been given not to the guilty candidate, but to his opponent, would be struck off the score of the latter and thus the former would gain by his misconduct."

In the absence of a statutory equivalent to Section 25 or Section 165 it seems to me that all votes tainted by bribery or other misconduct must be struck off irrespective of whether they were cast for Cook Islands Party or Democratic candidates. In this respect the concession of counsel for the petitioners to this effect was properly made. Petitioners in cases like this must make a choice. They may establish corrupt practices and other illegalities which entitle them to a declaration that the elections were void. On the other hand, they may, as they did here, contend that all tainted votes including those cast for them must be disallowed and take the consequences of such disallowance, subject perhaps to the overriding discretion of the Court to order, in appropriate cases, new elections where disallowing the tainted votes would still not result in the installation of the innocent candidates.

Having concluded that the Court does possess the power to disallow tainted votes where a seat is claimed I must now return to the facts and consider the conflicting submissions as to the appropriate relief but before doing so I should say something about the information supplied to me by the Electoral Officer and the possibility of the secrecy of the ballot being undermined by acting upon that information. As will be seen from the recitation I have given of the Court's actions in relation to the application by the petitioners, I have been at pains at all stages to ensure that secrecy of the ballot was preserved.

The information which has been supplied confidentially to me was extracted by the Chief Electoral Officer and his counsel with very great care to ensure absolute secrecy and it was done in such a manner that they themselves at no stage could identify the way in which any person voted. So, in this case I am able, if I think fit, to disallow votes and to consider the consequential results on the poll without either the court or any other person knowing precisely how an individual voter cast his vote. In some cases, and this is not one of them, it may be necessary for the Court to ascertain the identity of a particular person and how he voted. As was said by Mr Justice Isaacs in the High Court of Australia in *Kean v. Kirby*[(1920)C.L.R. 449](http://www.paclii.org/cgi-bin/LawCite?cit=%281920%29%20CLR%20449?stem=&synonyms=&query=1978%20CKHC%201) at 459:

"The essential point to bear in mind in this connection is that the ballot itself is only a means to an end, and not the end itself. It is a method adopted in to guard the franchise against external influences, and the end aimed at is the free election of a representative by a majority of those entitled to vote. Secrecy is provided to guard that freedom of election. It is common ground, however, that in some cases, which need not be particularised, the court is at liberty to enquire how a person voted."

Now in considering the relief to be granted it is immediately apparent that two important principles are in conflict. I must decide between the need on the one side to support the franchise and to ensure that no citizen has his vote cancelled without compelling reason, and, on the other side, to ensure that no candidate guilty of corrupt practices should profit from his wrongdoing. The right of all electors to be given the opportunity to vote lawfully is a matter which must weigh heavily with this Court. It can be argued forcefully therefore that, as suggested by Mr Brown, the proper course is to return the matter to the electors for the purpose of allowing them to express their wishes again. It can be said in favour of this course, that, notwithstanding the evidence of bribery and other illegality, such actions should not be visited upon all those voters who travelled on the Ansett Flights since they may have acted quite innocently. Many of them no doubt took advantage in good faith of the free flights which were offered.

The Constitution, of course, recognises their right to vote as duly qualified electors and the Full Court of the Supreme Court of New Zealand in the *Maurangi Case* [1975 1 N.Z.L.R. 557](http://www.paclii.org/cgi-bin/LawCite?cit=1975%201%20NZLR%20557) has upheld the validity of the requirement that they vote in the Cook Islands and not in New Zealand. Some of the voters who came on the Ansett Flights may well have come to vote at their own expense if the free flights had not been available.

The arguments on the other side supporting the disallowance of the "fly-in" votes were persuasively presented by Mr Temm in his closing address and I think they are best expressed in his own words. In his written submission he contended that:

"The proper and just relief is to unseat the respondents, to recount the lawful votes and disallowing those cast under the influence of bribery or treating, and then to declare the appropriate result."

In support of this general submission, he made the following seven points:

"1. ANY candidate who has been a party to bribery or treating cannot hold his seat.

2. WHERE the highest total of lawful votes is attained by a candidate who was not a party to electoral breaches, he should be declared successful.

3. WHERE the highest total of lawful votes is attained by a candidate who is a party to electoral breaches there should be a by election.

4. THE principle that "he who breaks the rules should bear the brunt" should be applied to do justice to honest candidates.

5. THE honest candidate who has spent his own time and money on a campaign, or whose party has done so should not have his expense and troubles made fruitless because of the wrongful acts of the respondents.

6. THE Chief Electoral Officer can trace and scrutinise all unlawful votes cast by passengers on the Ansett planes. There is no evidence that the twenty-one names on the Air New Zealand list identify persons who voted.

7. THE Petitioners submit that all votes cast by the Ansett passengers should be disallowed including those cast for candidates who were innocent of breaches of the Electoral Act."

In oral submissions counsel amplified his argument in relation to these points. He drew attention to the evidence showing that the Democratic Party had spent over $30,000 during the General Election and invited the Court to infer that member’s of the Party or candidates each spent additional money of their own. He said that many honest citizens helped the candidates in their campaign with long hours of voluntary work. While it might seem a convenient and apparently just result that a by-election should be held for all eight seats held by the respondent candidates it was his submission that it was neither convenient nor just.

He submitted it was not convenient because there would be an unnecessary lapse of time before these troubled matters were resolved and he argued that the continuing atmosphere of uncertainty in the Cook Islands could not lightly be discounted. He further submitted that it was not convenient because there would be innocent voters who would find it impossible, for one reason or another, to exercise their rights again in new elections and whose votes in the General Election would thus be nullified by the actions of the respondent candidates and their agents. He stressed that the money which had been spent by honest candidates would just be wasted and so too would the money which was spent by citizens who had the interests of their country at heart and who saved from their own income to come up on the Air Nauru flights.

In approaching these rival contentions, I remind myself first that the main object of the Legislature in dealing with the conduct of elections is to secure the electors in the free exercise of the franchise and whatever interferes with that object violates the purpose of these provision and strikes at the highest interests of the whole body politic. Secondly, I have been involved in extensive research into the law apposite to these matters before me and I have been unable to find any reported instance in the history of electoral laws of New Zealand, Australia, or the United Kingdom where the corruption was of the magnitude as is evidenced here. The amount involved in the bribery is the equivalent of 2.8 per centum of the total budgetary expenditure of the Cook Islands. It involved the use of public money and involved 445 voters voting in the three constituencies with which we are concerned, the votes cast by them representing 9.3 per centum of the total votes cast therein. I can imagine no greater perversion of representative democracy than that huge sums of public money be secretly used by candidates to facilitate bribery of hundreds of voters and thereby secure their re-election. Thirdly, the malpractices which were committed were carried out primarily by persons who were at the time Ministers of the Crown or officers of the Executive Government. This is a disturbing and depressing circumstance for as Mr Justice Brandeis said in *Olmstead v. U.S*. [[1928] USSC 133](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1928%5d%20USSC%20133); [(1928) 277, U.S. 438](http://www.paclii.org/cgi-bin/LawCite?cit=%281928%29%20277%20US%20438?stem=&synonyms=&query=1978%20CKHC%201), 485:-

"... Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example ... If the Government becomes a law-breaker it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Fourthly, the Chief Electoral Officer was at plains to advise the political parties of any possible breaches of the Electoral Act 1966. He advised the Secretary of the Cook Islands Party of the complaints made to him alleging bribery in relation to the "fly-in" voters. He published extensively the relevant provision of the law namely section 69 of the Act. The Cook Islands Party and their candidates were well alerted of the possible dangers of pursuing the course they did.

I have given the competing submissions on relief long and anxious consideration but in the end, I have come to the view that in the special circumstances of this case, where the enormity of the wilful wrong doing is so striking, the dilemma is properly resolved by favouring the principle of free elections and the need to ensure that no guilty candidate profits from his wrongdoing over the general requirement that no voter be disenfranchised without compelling reasons.

Furthermore, I think considerations of fairness help tip the scales in favour of the petitioners. If I were to order new elections there can be little doubt that many of the voters who paid their own way on the Air Nauru flights arranged by the Democratic Party would be unable to afford a further trip. In a new by-election they would be disenfranchised. I think I am entitled to bring that into consideration and balance it against the possibility that by granting a seat to the highest unsuccessful candidate with lawful votes I may be disenfranchising certain others who voted in the last General Election.

A line has to be drawn somewhere, and in my judgment, it is better that there be an unequivocal denunciation of the misdeeds of the offending candidates and their agents than that by-elections be ordered which may allow the transgressors indirectly to profit from their misconduct which, especially in the case of the main perpetrators of the whole scheme, was of vast dimensions. I am fortified in my decision by the traditionally uncompromising attitude exhibited by the Courts over the centuries toward electoral malpractices. By way of illustration, I refer to the judgment of Mr Justice Grove in the *Wakefield Case* (1874) 2 O’M & H. 100 at 101 where the Learned Judge said that:

"Corruption will try to beat the law, but generally speaking - and I think in the long run I may say universally - the law will end in defeating corruption."

In the result, I am prepared to accept that the proper course is to disallow all of the Ansett "fly-in" votes and to thereupon ascertain which candidates had the majority of lawful votes in each constituency and then determine such candidates to have been duly elected.

The figures supplied to me by the Chief Electoral Officer, the accuracy of which I accept unreservedly, produced the following results in each of the constituencies if all of the fly-in votes are disallowed,

|  |  |  |  |
| --- | --- | --- | --- |
|  | Declared Result (P. 1699 1702 Cook Islands Gazette) | Less Ansett Fly-In Votes | Adjusted Final Result |
| (Successful candidates after disallowance of Ansett Fly-In votes marked with an asterisk) | | | |
| Te-Au-O-Tonga | | | |
| Bishop | 41 | 2 | 39 |
| Browne | 1363 | 281 | 1082 |
| Davis | 1248 | 6 | 1242\* |
| Goodwin | 1173 | 4 | 1169\* |
| Henry | 1420 | 286 | 1134 |
| Ingram | 1201 | 3 | 1198\* |
| Jack | 1323 | 274 | 1049 |
| Kamana | 1353 | 283 | 1070 |
| Piri | 1173 | 4 | 1169\* |
| Tavioni | 39 | 3 | 36 |
| Tixier | 40 | 1 | 39 |
|  | | | |
| Takitumu | | | |
| Cowan | 530 | - | 530\* |
| Keenan | 31 | - | 31 |
| Matapo | 603 | 76 | 527 |
| Matenga | 565 | 1 | 564\* |
| A.P. Short | 599 | 76 | 523 |
| I. Short | 564 | - | 564\* |
| Tetonga | 555 | 74 | 481 |
|  | | | |
| Puaikura | | | |
| Heather | 509 | 3 | 506\* |
| Mareti | 541 | 55 | 486 |
| Napa | 490 | 3 | 487\* |
| Pirangi | 517 | 48 | 469 |
| Williams | 37 | 2 | 35 |

My Determinations on the petitions affecting these three constituencies will therefore be as follows:

1. The petitioners, having established bribery and serious misconduct, namely, a breach or breaches of the Public Moneys Act 1969, I determine under the second part of Section 79(1) that the Respondent candidates namely Lionel George Browne, Albert Royle Henry, Teanua Dan Kamana, Rei Jack (Constituency of Te-Au-O-Tonga) Matapo Matapo, Apenera Pera Short (Constituency of Takitumu), Jimmy Mareiti and Raymond Tapai Pirangi (Constituency of Puaikura), were not duly elected and in the case of each of these candidates I declare his election void.

2. The votes shown in the middle column headed "Less Ansett Fly- In Votes" in the Schedule which appears at page 67 of this Determination are hereby disallowed and struck off as being unlawful votes tainted by bribery and/or serious misconduct, namely a breach or breaches of the Public Moneys Act 1969.

3. It having been shown that the following candidates have obtained the majority of lawful votes I determine that they should have been duly elected and I now declare them to be duly elected:

Te-Au-O-Tonga Constituency:

Thomas Robert Alexander Harries Davis

Fred Goodwin

Vincent Alfred Kura Teratu Ingram

Teariki Piri

Takitumu Constituency:

William Cowan

Iaveta Short

Puaikura Constituency:

William Heather

Harry Napa

4. I determine that Teariki Matenga whose election as one of the successful candidates for the Takitumu Constituency was never challenged in these Petitions was duly elected and I accordingly confirm his election.

5. Pursuant to Section 79(2) I direct the Registrar to forthwith transmit my determination to the Chief Electoral Officer so that he may attend to the public notification that is required by Section 79(2)(a) and the declaration that is required by Section 79(2)(c). There will, of course, be no declaration under Section 79(2)(b) or under course Section 7(5). (The consequence of the foregoing determinations is to immediately unseat the Respondent candidates named in paragraph (1) above and as soon as the Chief Electoral Officer makes his declaration under Section 79(2)(c) the persons referred to in paragraph (3) hereof will immediately become the duly elected members in their respective constituencies along with the said Teariki Matenga whose position as a duly elected candidate in the Takitumu Constituency remains unaltered.)

6. In case the Chief Electoral Officer should require any ancillary orders on any matters arising out of the foregoing Determinations, I reserve to him and his counsel liberty to apply for directions.

7. Since I did not have the benefit of any submissions on the question of costs, I reserve the rights of the parties to make submissions thereon. I should make it clear, however, that I am not prepared to receive any submission that an order for costs should, pursuant to Section 81, be made against the Chief Electoral Officer or the Returning Officers because I consider that they acted in an exemplary fashion and cannot be criticised in any way.

Although no allegations were made against them, they were properly joined as Respondents in these Proceedings since it is a commonplace of electoral law that such persons must be made parties. It follows from this, and to avoid any misunderstanding the point should be stressed, that no adverse inferences should be drawn against such officials merely because of their joinder in electoral proceedings such as these.

Submissions on costs shall be made in writing in the first instance. If I desire to hear counsel at any stage I will advise accordingly.

8. Pursuant to section 81(2), I direct that the deposits accompanying the Petitions shall be returned to the persons who paid the same.

9. I direct the Registrar to hand the whole of the evidence and exhibits to the Superintendent of Police for consideration. It will, as always, be a matter solely for the Police, in consultation with their legal advisors, to decide whether to launch prosecutions under Section 69 of the Electoral Act, under the Public Moneys Act, or under any other relevant Cook Islands statute.

In conclusion I would thank counsel for the various parties for their helpful submissions. Their duties have indeed been onerous in this case and they have all discharged them admirably. I would also record here my profound appreciation of the valuable assistance given to me by Mr D.A.R. Williams who not only ensured that the lengthy hearings in New Zealand and the Cook Islands were conducted with minimum inconvenience to myself, but, as "amicus curiae", gave me the utmost help.

**DONNE CJ**

Solicitors for the Petitioners: Short & Tylor, Rarotonga  
Solicitor for the First Respondent: J.G. Collinge, Auckland  
Solicitors for the Second and Third Respondents: Russell McVeagh McKenzie Bartleet & Co, Auckland

Sentence: 20 August 1979 Justice Beattie

1.Sir Albert Henry (former Premier) pleaded guilty to two charges of conspiracy and a further charge laid under the Public Moneys Act 1969.

The major charge of conspiracy relates to the fraudulent scheme whereby $337,000 of public monies was paid to Ansett Airlines for the charter flight to fly Cook Islands Party supporters from New Zealand to Rarotonga to vote in the last election. After careful consideration of what I know to be your state of health and your previous contribution to this country, I rule out a term of imprisonment as a first choice of punishment. So, the sentence of this Court is the maximum fine of $200.00 plus $2,000.00 contribution towards the costs of this prosecution and admit you to probation for three years.

The second conspiracy charge which concerns the sum of $14,973.00 used to pay for your travel in connection with the charter of aircraft and election expenses in New Zealand. You are fined the maximum of $200.00, payment within 14 days.

On the charge under the Public Moneys Act 1969, you committed an offence when you banked a cheque which came from the Philatelic Bureau for $337,000 into the bank account of the Cook Islands New Project Company. You are fined the maximum of $1,000.00

2.Geoffrey Arama Henry (former Minister of Finance) pleaded guilty to being a party to the commission of an offence under the Public Moneys Act 1969, by Sir Albert Henry. You were at the time Minister of Finance and one would expect that a person in that high office would pay meticulous attention to the requirements of observing statutory fiscal matters. You are fined $500.00

3.Charles Maxwell Turner (former Advisor, residing in Auckland, New Zealand) Like Geoffrey Henry, you are charged and have pleaded guilty to the offence of being party to the commission of an offence against S.49 of the Public Moneys Act, the offence being committed by Sir Albert Henry, that is, neglecting to pay public monies into the right account. I accept that Mr. Deobhakta (counsel) has said that your part is not as culpable as others, and I think you were to a certain extent “led up the garden path”. At 71 years of age, as a person taking no advantage from this transaction and certainly with no political aspirations, and being a first offender, you are ordered to pay $300.00 towards the cost of this prosecution. If you do that you will be discharged without conviction.

**Research Conclusion**

I have analyzed the intricate scheme of procuring and paying for the fly-in voters by Sir Albert Henry and his political partners. This is highlighted by a 11- step flow chart and the offences committed.

Flow chart of actual plans and payment timelines initiated by Sir Albert Henry, from the Philatelic Bureau to two newly created Government companies and finally to Ansett Airlines, Australia.

The initiation process began in December 1977 – the motive for preparing the charter flights (paragraph 7, page 5 of recorded proceedings) which reads;

“The future of the Cook Islands Party is dependent on the election. If we win the Party will live forever, if we lose the Party is dead”.

**Step 1**

12 Jan 1978 – Planning of Advance Payment from Philatelic Bureau to Cook Islands Government New Projects Company Ltd of NZD$337,000.00 plus NZD$8,230.00 for Company Registration.

**Step 2**

24 February 1978 a hand written letter by Sir Albert Henry was personally delivered to Finbar Kenny in Honolulu by Hon G A Henry, seeking financial assistance from C I Development Company Ltd for the campaign.

27 Feb 1978 – Election Campaign Begins.

**Step 3**

**Step 4**

6 Mar 1978 – Cook Islands Government New Projects Company Ltd is incorporated with Directors, Sir A Henry, GA Henry, G Ellis & A. Short for share capital of 1,000 shares, 999 shares to CI Govt Property Corp & 1 share to Charles M Turner.

**Step 5**

10 Mar 1978 – Bank account opened in Auckland with Commercial Bank of Australia.

**Step 6**

13 Mar 1978 - Sir A Henry letter to Philatelic Bureau to advance NZD$337,000.00 against 1978 Philatelic revenue payable to Government.

**Step 7**

14 Mar 1978 – Sir A Henry departs for Auckland

**Step 8**

16 Mar 1978 – Sir A Henry deposited into account of Cook Islands Government New Projects Company Ltd the sum of NZD$337,000.00

**Step 9**

16 Mar 1978 – Legal opinion sought from prominent Auckland Lawyer D Williams on funds transfer legality – concluded that it is public money.

**Step 10**

16 Mar 1978 – Ipukarea Development Company Ltd formed with Directors, C Strickland, H Mc Connal, T Pamatatau & M Samson for $100.00 share capital, 25 shares of $1.00

**Step 11**

17 Mar 1978 – Sir Albert Henry lodged cheque of $335,000.00 drawn on the CI Government New Projects Company Account into account in his own name at the Bank of New South Wales. Mr Charles M Turner on the same day made arrangements with the Australia New Zealand Bank, Auckland branch, to open an account in the name of Ipukarea Development Company Ltd and deposited a cheque of $335,000.00 drawn by Sir Albert Henry on his newly opened account with the Bank of New South Wales, Auckland branch.

The above flow chart depicts the detailed planning that went into the procurement and payment of public money from Philatelic Bureau through two newly established Government owned companies, then finally to Ansett Airlines, Australia, for the charter flight payment to fly-in voters for only $20.00

**Bribery**

Every person commits the offence of bribery who, in connection with any election;

1. Directly or indirectly gives or offers to any elector any money or valuable consideration or any Office or employment in order to induce the elector to vote or refrain from voting.

The law as to the provisions of travelling expenses for a voter is summarized in Halsbury’s Law of England 4th edition, volume 15, para. 770 at page 421:

“The unconditional payment, or promise of payment, to a voter of his travelling expenses is not bribery, but the payment or promise of a payment to a voter of his travelling expenses on the condition, express or implied, that he would vote for a particular candidate is bribery.”

In the case here the bribery primarily alleged is that of giving of the flight to Rarotonga and return to each of the electors so transported for $20.00 for the purpose of inducing the elector to vote for the Cook Islands Party candidates, the Respondent candidates. To sustain this allegation there must be proved to the requisite standard by the Petitioners:

(a) The giving of the consideration.

(b) That the consideration was valuable.

(c) That it was given to induce the voter to vote for the Respondent candidates and that it was given on the express or implied condition that the Voter would vote for such candidates.

(d) That the intent to do this was corrupt.

It is not necessary for the Petitioners to prove that the elector did in fact carry out his part of the bargain by voting. If the act of giving the consideration is done for the purpose of inducing the voter to vote or refrain from voting for a particular person, it is no answer to say that the bribe was unsuccessful. In *Henslow v. Fawcett*[[1835] Eng R 629](http://www.worldlii.org/int/cases/EngR/1835/629.html); [(1835) 3 Ad. & E. 51](http://www.paclii.org/cgi-bin/LawCite?cit=%281835%29%203%20A%20%26%20E%2051?stem=&synonyms=&query=1978%20CKHC%201) at 58; [[1835] Eng R 629](http://www.worldlii.org/int/cases/EngR/1835/629.html); [111 E.R. 331](http://www.paclii.org/cgi-bin/LawCite?cit=111%20ER%20331?stem=&synonyms=&query=1978%20CKHC%201) at 334 (lines 7 - 14) Patteson J. said:

"It appears that the defendant sought the voter, out, and gave him money for the purpose of inducing him to vote, and that the other took it. At all events, whether the voter did or did not mean to perform the contract, he professed to enter into it, and took the money given by the defendant for the purpose of corrupting him. In the second place, if he never had such an intention, I should still hold the defendant liable. Whether or not the voter intended to perform his part of the contract is immaterial; the defendant had done all that lay with him. If the agreement was made, that is enough."

**Misuse of Public Monies**

C J Gavin Donne commented, “Being convinced as I am of the genuineness of the letters the consequences, I consider is that the money received from the Philatelic Bureau as a result of these letters was ‘public money’ covered by the Act. “I should explain my reasons for this holding by referring to the Act itself and in particular to the definition of public money in section 2 ‘Public money is defined in the following way;

“**Public money** means any money cheques or securities of any kind (including public securities) for the payment of money received by or on account of, or payable to, or belonging to, or deposited with the Government or any Department or as agency of the Government or received by any employee of the Government by virtue of his position as such.”

Clarification was sought by Charles W Turner, during the procurement process, through Auckland Solicitor, David Williams, as to the Philatelic Bureau funds being public funds. In his evidence, Sir Albert Henry acknowledged that his own solicitors had informed him that the transactions he proposed would be in breach of the Public Moneys Act 1969.

The key letters that tie in the applicability of the Public Moneys Act 1969, is the 24th February and 13th March 1978 letters. The letters had been prepared by Mr Jim Little, signed by Sir Albert and approved as to form by Mr Trevor Clarke, the then Advocate General (later called Solicitor General). “Once the letter of the 13 March was written, the die was cast.”

The misuse of public moneys clearly confirms;

1. The unlawful conduct consisting of a breach or breaches of the Public Moneys Act 1969.
2. The use of a vast sum of public money for a private political scheme.
3. The use of public funds for the purpose of flying in Cook Islands Party voters, which dramatically affected the result of the elections.
4. The activities of Sir Albert Henry are incapable of any satisfactory explanation in terms of the Electoral Act and the Public Moneys Act.
5. The scheme would not otherwise have been able to get off the ground in the manner desired by Mr Finbar Kenny. Sir Albert Henry and the other participants were therefore in an untenable position, legally and morally, from the beginning. Whichever way one regards the transactions, it is impossible to escape the vital importance, to those evolving the scheme, of participation of Government agencies and public money. What the participants did was to try and camouflage the element of public money and public agency involvement, in itself reveals a corrupt motive.
6. It could not be carried out without the intervention of a public agency of some kind because Mr Finbar Kenny had insisted, due to US Foreign Corrupt Practices Act, agreeing to the advance being treated as a personal loan, could not change the nature of the advance in view of the United States Federal Law.
7. Mr Finbar Kenny therefore, would not restructure the transaction is understandable as there are extremely heavy penalties under the Foreign Corrupt Practices Act, in the case of corporations for a fine of not more than $1,000,000.00 and in the case of individuals, imprisonment.

As I analyze this landmark case, I have come to the conclusion that all three elements of the Cressey fraud and corruption triangle are prevalent in this intricate and sad part of our political history. The three elements are;

1. The opportunity – the Premier and Leader of the Cook Islands Party, Sir Albert Henry, did use his position of trust and authority and misused public funds for his Party’s political advantage, through a private political scheme.
2. The motivation – was to remain in power, through the chartering of aircraft in order to bring Cook Islanders from New Zealand as they “will influence the outcome of the election”.
3. The greed and rationalization – the need to maintain the political status quo through setting up the charter flight scheme, the payment of $337,000.00 from the Philatelic Bureau, leading to bribery, treating and general corruption. The motive for preparing this, is best expressed in the memorandum, which reads: “The future of the Cook Islands Party is dependent on the election. If we win the Party will live forever, if we lose the Party is dead.”
4. The research question I pose is, “using the **Te Toki e te Kaa Rakau** symbolism, was there a 4th contributing element of unethical cultural influences and the environment? In my view, such occurrences did exist.

The first is found in evidence, “After much close questioning in cross examination when he conceded that he was a party at least to a scheme to evade the (US) Foreign Corrupt Practices Act, Sir Albert explained that he had complied with a request from Mr Finbar Kenny in order to **help and protect his friend.** On 20 August 1979, Justice Beattie stated, in sentencing, “Nor can it be said that in pleading guilty you (Sir Albert) have **shouldered the blame to save others**.” “As one of the principal perpetrators of this scheme to use public money, together with the complicated steps that were taken to cover up, you have in my judgement forfeited the right to serve this country further in any political fashion”.

The second occurrence, in my view, was the complex pattern of transferring public funds through newly formed companies called the Cook Islands Government New Projects Company Limited and Ipukarea Development Company Limited as a means of paying Ansett Airlines for the charter flights. As counsel Grieve said, “it was not a bone fide Government company”. This was carried out without Cabinet authority and without the approval of the Financial Secretary.

A third, is the close community and cultural ties between the Cook Islands Party leadership and officials in the homeland of the Cook Islands and those in Aotearoa, New Zealand. It was through this relationship that Cook Islands Party specific voters were identified and were allocated on the Ansett flights to Rarotonga, to cast their respective votes.

A fourth is, in my view, the intended disguise by Sir Albert Henry leaving Rarotonga on 25 January 1978 for New Zealand for health and proposed international fishing agreements. It was found that he addressed Cook Islands people in Wellington, Tokoroa and Auckland, for the purposes of announcing that charter flights would be arranged for CIP voters in the coming election. In Porirua, on 30 January 1978, he told supporters his plans to charter plane so voters can fly free of charge.

**Lessons Learnt**

This historical and complex political conspiracy draws on so many conclusions and lessons learnt, however, for this research, it is important to show respect to the families affected from this unfortunate episode in our political history. Key lessons learnt from this specific case includes the following;

1. That, political leaders, members of parliament and senior officials must follow and abide to strict financial laws and regulations. There must also be in place a leadership code and code of conduct.
2. There should be sufficient checks and balances from the beginning to the end of all Crown transactions, notably those over material and significant amounts.
3. There should be clear lines of responsibility and accountability, in the segregation of duties and better monitoring of internal controls and procedures.
4. To avoid collusion at the highest or any significant level of public administration, there must be sufficient transparency and accountability along the lines of financial disclosure of procurements and payments.
5. The laws and regulations governing anti-money laundering (for both domestic and international payments and remittances) and suspicious transactions must be regularly updated, monitored and reported. It is noted that to date, that Government has vastly improved financial management policies and procedures, through legislative reform, in the MFEM Act, the Financial Intelligence Act and other financial laws and instruments.

Significant quotes used by CJ Donne, refers to the judgement of Justice Grove in the Wakefield case, where the learned Judge said that:

**“Corruption will try to beat the law, but generally speaking – and I think in the long run I may say universally – the law will end in defeating corruption.”**

The malpractices which were committed were carried out primarily by persons who were at the time Ministers of the Crown or officers of the Executive Government. This is a disturbing and depressing circumstance for as Justice Brandeis said in Olmstead vs US case.

|  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **“Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example, If the Government becomes a law-breaker it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”**  ……………………………………………………………………………………………………………………………………………………………   |  | | --- | | On the 1st of November 2023, the Office of the Prime Minister issued a **media release,** that the King’s Representative HE Sir Tom Marsters on the recommendation of the Executive Council has pardoned Albert Royle Henry. | | |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | |  | | --- | | **Albert Royle Henry Pardon 1 November 2023**  Luke 6:37 says: “Do not judge, and you will not be judged. Do not condemn, and you will not be condemned. Forgive, and you will be forgiven.”  I find this Bible verse so poignant and appropriate as we mark this occasion - the decision for the King’s Representative, Sir Tom Marsters, to exercise the Prerogative of Mercy and Pardon in Papa Arapati Royle Henry. It is also fitting that this announcement is made before the opening ceremony of the 52nd Pacific Islands Forum Leaders meeting.  Fitting because it highlights the significance of Papa Arapati’s contribution to the establishment of the first Pacific Islands Forum meeting more than 50 years ago. And our role as a founding member of this institution. This pardon for Papa Arapati has been a long time coming - far too long, in my very humble opinion.  A sentiment I believe is shared by my fellow elected members of Parliament past and present and the Cook Islands people.  Forgiveness is one of the most powerful expressions of love, and we owe Papa Arapati a great debt of gratitude and love for all that he did for our country and for our people.  Recently our, Executive Council approved the decision for the King’s Representative to pardon Papa Arapati, following the recommendation of the Chair of the Parole Board, Chief Justice Patrick Keane, in accordance with the Criminal Records Act 1991.  This is the first pardon to be exercised by our King’s Representative. The Board received the application from Papa Arapati’s grandson Howard Henry for the posthumous pardon.  In order that Papa Arapati, be pardoned by the King's Representative for his 1978 offences, the Board had to be satisfied, after inquiry, that 'those convictions should no longer reflect adversely on his character'. And let us never forget, his character and mana, built the foundations of what the Cook Islands is today.  Papa Arapati was the founder and first leader of the Cook Islands Party. When the Cook Islands was granted self-governance in August 1965, he became our nation’s first Premier. The creation of the House of Ariki had been proposed by the Cook Islands Party long before self-governance, and as Premier, Papa Arapati oversaw its implementation. I acknowledge the Kaumaiti and his confirmation today as President of the House of Ariki. He recognized the importance of one of our pillars of Cook Islands society in providing balance and protecting our traditions and customs.  He also introduced a welfare system in the 1960s that is the envy of many of our Pacific Island neighbors. The old age pension that he introduced was funded by the new philatelic bureau at the time. A legacy that is remembered by our pensioners as a gift introduced by Papa Arapati. This includes the child benefit that no other country in the region enjoys.  Papa Arapati strongly opposed French nuclear testing in the Pacific and was a strong proponent for a nuclear-free Pacific. That led to another legacy in the South Pacific Nuclear Free Zone Treat or now known as the Treaty of Rarotonga, signed in 1985.  He designed a new national flag consisting of 15 gold stars in a circle on a green ensign. A flag that represents our national colors and that reflects our identity as the Cook Islands and something for us to reconsider as a country.  In 1974, he hosted a royal visit from Queen Elizabeth II in Rarotonga, where he was appointed a Knight Commander of the Order of the British Empire. The occasion was the opening of the Rarotonga International Airport, which we will celebrate its 50-year anniversary next year. An airport that now underpins our tourism industry and our economic prosperity, a level of prosperity that has led to our graduation as a high-income country by OECD standards. A vision of Papa Arapati that resonates especially today.  In 1974 he spoke at the 3rd UN Convention on the Law of the Sea in Caracas, Venezuela, and strongly advocated for the establishment of the 200 NM Exclusive Economic Zone (EEZ), especially for small island states, as a means to enhance their prosperity and potential productivity. A legacy that endures today that ensures Pacific countries benefit from their fishery and potential mineral wealth. His achievements were many, I could go on and on. But I do not need to.  Papa Arapati’s offences, to which he pleaded guilty on the advice of legal counsel, were serious. But the fact was, he pleaded guilty. He accepted personal responsibility and assumed full accountability for his actions. Making sure no one else took the blame. An action taken by a man of honor and one he never spoke about again in public.  A motion was tabled in Parliament on 4 June 2004 by the Prime Minister of the time, Honorable Dr Robert Woonton, recommending that the Queen's Representative at the time, Sir Frederick Goodwin, exercise in Papa Arapati’s favor, the Prerogative of Mercy and Pardon. It was passed unanimously by all Members of Parliament.  As the speeches made at that time confirmed, the resolution was carried unanimously because all Members agreed that Albert Henry's life of public service had been so extraordinary, and his contribution to the Cook Islands and its peoples so unique, that those convictions should no longer reflect adversely on his character.  Those speeches also affirmed that all considered those convictions should be vacated. They had become, Prime Minister Woonton said at the time, a source of disunity, which only a pardon could cure; a theme echoed by others who spoke in the debate.  It was highly unfortunate however, that at the end of that Parliamentary term in 2004, the Queen's Representative Sir Frederick was not invited to exercise the Prerogative of Mercy and Pardon, and that the resolution itself lapsed.  This year, the Executive Council believed unanimously it was now proper to revive that resolution and to give it effect. Relying on that resolution – set against the whole trajectory of his remarkable life, his convictions should no longer reflect adversely on his character.  At the beginning of this address, I spoke about forgiveness. We cannot continue to deny Papa Arapati the acknowledgement and credit he so rightfully deserves as he led our country during a time of great political transformation. He was a man of tremendous oratory skill in both Maori and English. At a time when we as a people needed our voices heard, he spoke eloquently for all of us.  The tireless work he did in advocating for our independence and sovereignty, for the right of Cook Islanders to elect their own government, to govern ourselves as a nation of 15 islands for the benefit of our people, this is what Papa Arapati is remembered for.  His long list of notable and outstanding achievements and his extraordinary life impacted thousands of Cook Islanders at home and around the world.  Papa Arapati epitomized what it meant to be a proud Cook Islander. A rightful legacy to remember the first leader of our modern country.  Your Excellency, I humbly submit for your consideration to exercise in His Majesty’s favor the Prerogative of Mercy and Pardon for Albert Royle Henry.  Psalm 23:6 – Surely goodness and mercy shall follow me all the days of my life, and I will dwell in the house of the Lord forever.  End.    **Prerogative of Mercy – Pardon**  H.E. Sir Tom Marsters, the King’s Representative of the Cook Islands pardoned Albert Henry on 1 November 2023. The pardon was recommended by the Executive Council on the eve of the Pacific Islands Leaders Forum that was held in Rarotonga from 6th to 10th November 2023. Due to the recent pardon, I researched the historical background, forms and details of the prerogative of mercy in granting pardons.  **History**  In the English and British tradition, the royal prerogative of mercy is one of the historic royal prerogatives of the British monarch, by which they grant pardons (informally known as a royal pardon) to convicted persons. The royal prerogative of mercy was originally used to permit the monarch to withdraw, or provide alternatives to death sentences; the alternative of penal transportation to ‘partes abroade’ was used since at least 1617. (Acts of Privy Council of England, Colonial Series, Vol I, 1613-1680, p12 (1908) It is now used to change any sentence or penalty. A royal pardon does not overturn a conviction.  Historically the power of pardon has been near to an absolute, if not absolute power of the Executive and thus vested with certain flexibility. This fact serves to defy a clear-cut definition of pardon, particularly when taken out of its social-cultural context. Usually, pardon is thought of as constituting the complete remission of any legal consequences emanating from a particular crime. In such as instance, pardon is, if you would, an act of grace, a remission of guilt. (Jensen, Christen, Pardon, Encyclopedia of the Social Sciences, Vol. XI, 1933, p570).  **The Commonwealth**  In modern times, by constitutional convention, the prerogative is exercised by the Sovereign on ministerial advice. (The Governor-General, The Royal Prerogative of Mercy, Te Kanawa Tianara o Aotearoa, 17 June 2013).  In the Commonwealth realms other than the United Kingdom, the prerogative is exercised by the Governor- General (in the Cook Islands, this is exercised by his Majesty’s representative) of the realm on behalf of the Sovereign, but still on the advice of government, in this case, the Executive Council. The Executive Council consists of the Prime Minister, Cabinet Ministers together with the King’s Representative. In New Zealand, the prerogative of mercy is exercised by the Governor- General, as the King’s representative, with the power being delegated by the Letters Patent 1983. The Governor-General will act on the advice of the Minister of Justice and has the power to grant a pardon, refer a case back to the Courts for reconsideration and to reduce a person’s sentence.  **The Pardon: Politics or Mercy?** (Anne McMillian, Freelance Writer, [mcmillia.ae@gmail.com](mailto:mcmillia.ae@gmail.com)).  The pardon exists in many countries around the world, regardless of political systems or religious ideologies. However, its use has the power to ignite controversy, not least because some view it as an outdated, archaic power. Recently, the former President of the United States, Donald Trum, shone a spotlight on a long-running legal debate when he tweeted about his potential to pardon himself. As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong?  Whether these assertions turn out to be true or not, former President Trump identified the key elements of the pardon: it is usually issued by a head of state or government and traditionally implies an admission of guilt on the part of the beneficiary. Legally, and more specifically, it is the Executive power to forgive a crime. As Justice Robert Sharpe, a judge for the Court of Appeal of Ontario says, ‘the traditional view was that pardons were a safety valve that allowed for consideration in cases where the law failed to reflect understandable human frailties and where it would be dangerous or inappropriate for the law to do so formally.’  There is privilege in pardons, which threatens to undermine the principle of equality before the law and perhaps also calls into question common notions of justice. Richard Goldstone, previously a Constitutional Court judge and former Chief Prosecutor at the International Criminal Tribunals for both Rwanda and the former Yugoslavia, thinks it may be time to curtail the use of pardons. He says, ‘in my view, the pardon power is inconsistent with the rule of law and allows the head of state to exercise an arbitrary power. Where it is subject to judicial review the position is somewhat ameliorated but by no means completely. I have no doubt that the power can be replaced with a more democratic system. Some process is necessary to deal with injustices or changes in the relevant societal norms.’  But even in a democratic system, judicial involvement in overseeing the use of a pardon is no guarantee of transparency or fairness, as Goldstone observes, ‘judicial review of the pardon power is difficult in most cases, he says, ‘how does the objector establish bias or improper motive? It can be done, but in most cases, it is not likely to succeed.’ Thus, we are left with the notion that pardons are inherently vulnerable to political influence and vested interests. But always there is the question of whether such pardons are free of political motivation to increase the popularity of governments or a head of state with a particular constituency.  One of the most controversial (pardons) was President Gerald Ford’s 1974 pardon of his predecessor Richard Nixon, for his involvement in the Watergate scandal. Ford said the unconditional pardon was in the best interests of the country. It ended any possibility of Nixon being indicted. Adding more checks to the power of the pardon to meet modern ideals of transparency and the principles of liberal democracy is worth considering, especially in a country where the rule of law is strong. On the other hand, in less democratic systems it may hamstring the pardon when it serves to mitigate some of the otherwise harsh effects of a weak legal system. Thus, in an imperfect world, politics and personal bias will still play a role in the dispensation of this particular form of mercy. | | | | | | |  |  | | --- | --- | | |  | | --- | |  | | | | |  |  | | --- | --- | | |  | | --- | |  | | | |

Case No. 2

Date: 13 February 1989

**Commission of Inquiry - Italian Hotel Report**

**Part 1 - Preliminary Findings Report**

**Introduction**

Letters of appointment were received by members of the Commission comprising of Chairman, George Ellis and members John Scott and Tim Arnold. On Monday 13 February 1989 Tim Arnold met and discussed matters with Tony Manarangi as Solicitor-General, with a view to clarifying various legal issues and to gain further background as to the matter as a whole. On 14 February 1989 both John Scott and Tim Arnold met with Ken Mills to seek preliminary advice as to the physical aspects of the project. Ken Mills offered useful information with regard to the contract and the current state of negotiations between the parties.

The following day, the two Commissioners met with Murray Holt of Fletcher – Jon Short Construction to seek his comment on certain aspects of the building contract and related matters. Consideration of the building contract itself, and related matters was completed in discussions with David Kelly of the Ministry of Economic Development on 16 February 1989. Members of the Commission have made preliminary contact with a number of other key personnel, among them the Financial Secretary, the General Manager of the Tourist Authority, officers of the European Pacific Group and investment banking advisers of a prominent New Zealand merchant bank.

**Findings – Preliminary in Nature**

On 16 February 1989, members of the Commission were agreed on a number of salient points. These findings are preliminary in nature. The Commission does not expect the findings to be reversed or contradicted as investigation continues. In the view of the members of the Commission, the findings, although preliminary, are expressed in a manner which fairly reflects the position.

1. **Building Contract Overpriced**

The preliminary advice received from Ken Mills, confirmed in discussions with Murray Holt and confirmed further by David Kelly point conclusively to two factors of importance:

First, the contract in its present form is uncertain as to a large number of important construction details. The potential exists for cost over-runs in the event that facilities considered necessary in a hotel of this standard in the Cook Islands are not agreed to by the contractors.

Second, in light of the uncertainty, none of the three building consultants was able to make a definite comment on the fairness of the contract price. However, after making allowance for this uncertainty, and having taken into account the anticipated total outfitting of the hotel (beyond usual Australian and Pacific standards) the building consultants were each of the opinion that the contract was **overpriced**.

At this stage of its inquiry, the Commission believes, having regard to construction costs elsewhere in the Pacific and Australasia, that the building contract is overpriced by a margin of between 15% and 20%. On the basis of comments received from those involved in the negotiations, it seems that some flexibility on the part of the Tourist Authority and Government in the matter of the contract price, was seen as desirable having regard to the perception of the financial arrangements as amounting to a ‘soft loan’.

1. **Loan of a Commercial Nature**

The loan arrangements made by the Italian contractors should not be regarded as amounting to a ‘soft loan’. The Commission has had the opportunity of discussing the terms of the loan with specialist financial advisers of a leading New Zealand merchant bank, and also with visiting overseas officers of the European Pacific Group who are familiar with international commercial loan funding. Advice received is to the effect that the loan, denominated as it is in Deutsche Marks, represents a real and large financial risk to the borrower and to the guarantor of the loan.

In the view of the Commission, the currency risk in the transaction has not been fully considered by those advising Government and should, at this stage, be given attention having been overlooked, or inadequately considered in previous studies. Current market indications are that the New Zealand dollar is over-valued against the Deutsche and that the fall in the relative value of the New Zealand dollar can be expected. The loan seems to have been considered ‘soft’ because of the low rate of interest charged. The risk of currency fluctuations is however of more importance than the rate of interest charged.

Should the loan proceed, Government should take steps to relieve itself of the currency fluctuation risk. This can be achieved by carrying out a ‘currency swap’ transaction. Preliminary advice has been to convert the loan to New Zealand dollars would result in the New Zealand denominated loan carrying interest at a rate of approximately 13.8%. To put it another way, if one excludes the cost of the currency swap (approximately .3%) a Deutsche Mark loan at the rate offered to the Tourist Authority is equivalent to that same amount of money, borrowed in New Zealand dollars at a rate of interest well in excess of 13%.

1. **Building Contract and Loan in Combination Considered Unfavorable**

It is the Commission’s view that neither the building contract nor the loan terms amount to a “special deal” for the Tourist Authority or the Cook Islands Government. On the contrary, when the terms of the loan are considered together with the terms of the building contract, the conclusion would seem to be that the Tourist Authority and Government are being asked to pay millions of dollars more than would ordinarily be paid for the construction of a hotel of this sort.

1. **Feasibility Studies Suggest Project Not Viable**

A number of feasibility studies have been prepared by those advising Government. Of those studies, all which were prepared prior to the commitment of Government in December 1988, showed that significant losses would occur, requiring ongoing Government subsidy of large amounts for the foreseeable future. The cashflow forecasts prepared by the Italian contractors indicated that the project was feasible. However, only one feasibility study prepared in the Cook Islands has produced a bottom - line result which indicates a cash surplus. That feasibility was prepared by the General Manager of the Rarotongan Hotel in respect of the proposed siting of the project at the Hotel.

This “best case scenario” showed that to the end of 1999, the total cash surplus would be of the order of NZD$7m. This result is arrived at however by assuming that turnover tax will not be charged on the activities of the hotel. Turnover tax which would otherwise be payable by the hotel over this period is estimated, in the same study, at NZD$28m. The feasibility study does not take into account the possibility of loan repayments being increased because of currency fluctuations, nor does it take any account of the contractual right of certain owners of the hotel to obtain 1 – 1/2% of accommodation turnover on the property. The study also assumes the generation of significant casino revenue.

1. **Project Viable in No Form Unless Casino and Gaming Revenue Earned**

All persons to whom the Commission has spoken in connection with the feasibility studies have indicated that the project, in whatever form it takes, will only be viable on the assumption that casino revenues can be generated. In other words, under no scenario (including that prepared by the Manager of the Rarotongan Hotel) will the proposed hotel be financially self – supporting unless the Government of the Cook Islands allows the introduction of casino and gaming facilities in the Cook Islands.

1. **Private Sector Investment Opportunity Disregarded**

The Commission was interested to note the Cabinet submission of 8 August 1988 which indicated the willingness of Island Hotels Limited to undertake the development, subject to Government providing an incentive package. The Commission noted that the package requested was apparently discussed in Cabinet on 30 August 1988, and that considerable portions of the package requested were favorably received. In this regard, the Commission has not had the benefit of sighting a formal Cabinet Minute, but has reached this conclusion from a handwritten note of the proceedings of Cabinet as made by John McFadzien.

The Commission was surprised to note that in the memorandum to Cabinet of 26 December 1988 (prepared by the Solicitor General) it was asserted that ‘private investment is not available……to construct a “five - star flagship” independent of the Rarotongan Hotel”. The Commission also notes the statement on page 4 of the report by committee of officials made to you earlier this month where it is asserted “Island Hotels Ltd (Edgewater) represented by Mr Trevor Clarke, indicated an interest in contributing a 200 - room facility subject to concessions being granted by Government. A turnover tax concession was not granted, and consequently the company discontinued its interest”.

Members of the Commission could find nothing in the documentation received by them to indicate that the outcome of the Cabinet meeting of 30 August 1988 had ever been communicated to Island Hotels Ltd. Mr Clarke was asked as to the position of Island Hotels Ltd. He confirmed that he was advised of the indications of Cabinet. Mr Clarke told the Commission however that his company was advised that the Government intended to proceed with the Italian project and he therefore indicated that Island Hotels did not intend to proceed with its own development in a manner which would be competitive with Government’s own venture.

The failure of Government and its advisers to follow up and negotiate the proposal of Island Hotels is inexplicable on the information presently before the Commission. Mr Clarke has confirmed to the Commission the continuing interest of Island Hotels Ltd to promote, at its own cost and risk, on its own land, a project of the size and quality which Government seeks to have established in Rarotonga (that is, a four - star property). The Commission respectfully draws your attention to the cabinet submission of 8 August 1988, the commentary and paper of advice of 12 August 1988 from Tamarii Pierre to Dr Pupuke Robati, the file and the file notes of John McFadzien of 30 August 1988.

1. **Commercial Considerations Indicate Private Sector Investment Preferable to Continuation of Government Project**

It is the Commission’s view at this stage of its investigation, that Government and the Tourist Authority – were they to proceed with the project and loan in the manner anticipated by the contractual documentation – would be assuming financial risks of great magnitude, which could in turn have a long - term serious effect on the economy of the country as a whole. The arrangements as a whole are seen as onerous and the project does not appear to be financially self – supporting. Against this background the stated willingness of a private sector developer (with a proven track record in the Cook Islands) to undertake a project of this sort represents an opportunity for Government to advance its policy objectives in the tourist industry without exposure to financial risk of the sort presently contemplated. In the view of the Commission, urgent steps should be taken to explore further this offer, as to ascertain whether there are other private sector investors interested in such a development.

1. **Commission Expresses No Firm View on Rarotongan Hotel**

The Commission is well aware of current interest in the need to upgrade the Rarotongan Hotel – particularly in light of strong comments made at last year’s tourism forum. It is the view of the Commission however that the problems of the Rarotongan Hotel are not necessarily best served by the wholesale transplantation of a four – star hotel complex into the center of the Rarotongan site.

The Commission does not purport to express a view as to how best the Rarotongan Hotel should be upgraded, but at present has serious reservations as to the proposal to expend the Italian loan there. It is clear with discussions with the Solicitor General and the Cook Islands representative in New Zealand with the New Zealand Government, that the possibility exists of utilizing New Zealand services and materials in a Rarotongan Hotel upgrade in a manner which will allow the existing loan of some $6 million dollars over that hotel to be forgiven.

This substantial monetary advantage cannot, it seems, be utilized in the context of the Italian project. Having regard to the comments of the Commission above with regard to the Italian project as a whole, coupled with the apparent difficulties in marrying it to the existing facilities at the Rarotongan Hotel, the Commission believes that the upgrade of the Rarotongan Hotel should be considered against the possible ability to offset upgrading costs against the outstanding loan.

A definitive comment on the Rarotongan Hotels ability to service the new commitments in addition to the existing New Zealand Government loan will receive comment in the Commission’s final report.

1. **Commission Considering Legal Implications Further**

The Commission has confirmed that a drawdown of DM7,735,500 (million) was made in favor of the contractor in December 1988. This drawdown must be of the gravest concern to Government, particularly since it appears to have been made otherwise than in accordance with the contract. It must be a further cause of concern that the money has not been repaid despite requests made by the Cook Islands Tourist Authority. The legal implications of the documentation entered into are complex and the Committee is further investigating those implications with a view to producing a full report in due course.

1. **Government Possibly Party to a Fraud on Italian Lending Institution**

The Commission is concerned to note;

1. The building contract provides for payment for the Hotel of DM51 million (approximately) and USD5.5 million (approximately) each to be met by Government.
2. The Deutsche Mark commitment is funded.
3. The U.S. dollar commitment is not funded.
4. A “Side-Contract” indicates that the US dollar commitment need to be paid by the Tourist Authority.

The implication seems to be that the lender of the Deutsche Mark commitment believes that is funding 85% of the project. It is, in fact, to fund 100% of the project. The Commission alerts Government to the possibility that these arrangements may amount on a fraud (by) ICLE, the Italian Lending Institution.

1. **Functioning of Government Open to Criticism**

The Commission is concerned that Government should find itself in the position that it does. The actions of those advising Government, and others involved in the matter are open to criticism. To this point, several matters of concern have emerged.

1. **The building contract and side contract in this matter were originally signed by the General Manager, (Chris Wong) of the Tourist Authority in December 1987 on the instructions of the Acting Minister of Tourism (Hon. Norman George**). Neither the General Manager nor the Minister had legal advice as to the content of the contract and implications of the side contract before their execution. The contract purported to bind the Tourist Authority to expenditure approaching $50 million (subject to finance).
2. At no stage to the date of this report has a full “design brief” for the hotel been prepared. Building consultants with whom the Commission have spoken are unanimous in their view that in the construction of a hotel of this size the first step – without exception – is that a full and detailed design brief is provided to the architects and contractors as the basis upon which design is formulated. The preparation of a design brief is a specialized task and one which in the Commission’s view should have been undertaken and undertaken by specialists retained for that purpose.
3. Loan documentation evidencing the Deutsche Mark loan is governed and construed in accordance with the laws of Italy. The consequences of execution of that document are now of central concern to the Commission, but it is alarmed to learn that at no stage has anyone in Government sought Italian legal advice as to the legal consequences under the governing law, of entry into the document.
4. Neither Ministers nor officials investigated or negotiated the private sector proposal received. Although the documentation received by the Commission shows that officials, on a number of occasions, warned Government Ministers of the risks inherent in the proposed project, the Commission is critical of the failure of those officials to investigate this alternative – presenting as it did, a real opportunity to avoid those risks.
5. Given the size and nature of the financial commitments entered into the Commission is astounded to learn that no outside specialist advice was taken on the currency fluctuation implications of the proposal. The Commission is concerned also to note the relatively minor role played by the Cook Islands Treasury in advising Government in the financial implications of the transaction. **The present Financial Secretary advises that he was not invited to participate in any form in consideration of the project from the time of his appointment (September 1988) until January 1989**. The **Commission is advised that the previous Financial Secretary was strongly opposed to the project.**

Dated at Rarotonga this 17th day of February 1989.

Acting Chairman.

**Italian Hotel Project Commission of Inquiry**

**Part 2 – Report of Commission**

(Note – due to the length of this Report, of 65 pages, only key essential elements have been extracted for this research).

**Introduction**

This Commission of Inquiry is established under the Commission of Inquiry (Italian Hotel Project) Order 1989, an order in Executive Council made on 13 February 1989. The terms of reference of the Commission are….’to inquire into and to report upon the proposed construction of a Hotel on the island of Rarotonga and in particular to’;

1. Examine all documents, correspondence, contracts and plans relating to the proposed project;
2. Identify what commitments have been entered into by Government;’
3. Recommend alternative courses of action available to Government;
4. Advise on the likely financial, legal and other implications that any alternative courses of action might present.

**Procedure**

The Commission was advised at the outset that the nature of the matters under consideration was such that it should proceed to discharge its responsibilities with urgency. Over the course of the inquiry, that need for urgency has been emphasized by a number of people who have appeared before the Commission.

From the outset, the Commission has been mindful of the legal implications of its inquiry, should litigation ensue between the Cook Islands interests and the Italian interests concerned in the project. Given the urgency of the matter, and the undesirability of having a formal written record of all evidence given, the Commission has, throughout, proceeded on an informal basis. The Commission has spoken to a wide range of people and this report has been considered and endorsed by all members of the Commission.

The Commission has met or spoken with the following people, among others, on one or more occasions for the purposes of this Inquiry;

1. Tony Manarangi, former Solicitor General
2. John McFadzien, Crown Counsel
3. Chris Wong, General Manager of the Tourist Authority
4. Ken Mills, Architectural Consultant
5. Murray Holt, General Manager Fletcher – John Short Construction Ltd
6. David Kelly, Architect/Planner
7. Alistair Rutherford, Financial Secretary
8. Freddie Keil, Chairman Tourist Authority
9. Trevor Clarke, Director, Island Hotels Ltd
10. Pupuke Robati, Leader of the Opposition
11. Terepai Maoate, Deputy Leader of the Opposition
12. Mark Jones, Director E P Australia Ltd
13. Gavin Kennedy, Investment Banking Adviser, Fay Richwhite & Co
14. Nick Martinovich, General Manager of the Rarotongan Hotel
15. Terai McFadzien, Deputy General Manager of CIDB
16. Francesco Picchi, Representative Sicel SpA
17. Vincenzo Bertucci, Chairman, Exen SRL

The Commission has also examined the dossier of documents, correspondence, contracts and plans made available to it at the start of its inquiry, together with further documentation which has been made available by various of those people mentioned above.

**Comment on Preliminary Findings**

On 17 February 1989, preliminary findings were made available to the Prime Minister. It should be noted for the record that, in general terms, further inquiry and investigation have confirmed those interim findings. Two points of correction should be noted.

First, the Commission believes that it has understated the degree of uncertainty which surrounds the question as to what can be expected in the finished detail of the Hotel. At a late stage of the deliberations of the Commission, Mr Ken Mills produced comparative building figures for hotels of approximate “Four Star” standard which showed a wide variation in construction costs. Some of those hotels appear to be priced at considerably less than the contract price in the present case, while others are priced considerably higher.

It seems reasonably clear to the Commission that the rates prevailing in late 1987, a four - star hotel could have been built to a generous Sheraton standard for an amount of some 15% to 20% less than the asking price in the present case. It would be unfair to the Italian interests, to make a final determination in this regard until the precise detail of the design, construction and out-fitting of the Hotel has been made known.

The Commission would comment that its inquiries reveal the price quoted for the Hotel and accepted by the General Manager (Chris Wong) of the Tourist Authority in signing the building contract on 2 December 1987, has remained relatively unchanged throughout the negotiating process. The pricing of the Hotel was, of course, at no stage put out to competitive tender and when challenged by the Commission on the question of over – pricing the representatives of the Italian interests did not seriously contest this assertion.

Given these circumstances as a whole, it seems clear to the Commission that the building contract price is one with which the Italian building contractor is well satisfied, and the absence of access to competitive quotations and of negotiation or inquiry as to the fairness or otherwise of that price by the officials who signed and negotiated the documentation, suggest strongly that the contract is priced favorably for the contractor.

The Commission believes that the placing of undue emphasis on the cost of building the Hotel could be counter – productive to an understanding of the key issues which face Government. Even if Government were to assume that the Hotel was exceptionally good value for money, the question still remains whether the Hotel property is able to generate sufficient income to service the loan commitments entered into, to construct it. In other words, the key issue is not the cost of the Hotel but whether the Hotel, once built, can pay for itself.

The second point which should be noted, is that with regard to the private sector proposal of Island Hotels Ltd, Mr Clarke, on learning of the outcome of the Cabinet meeting of 30 August 1988, may well have advised the Solicitor General that his clients were not prepared to proceed on the basis of the response of Cabinet to the request by Island Hotels for various exemptions and concessions. The Commission remains critical of the failure of public officials to pursue that private sector interest, particularly when it became apparent that the viability of the Government proposal would require concessions in excess of those requested by Island Hotels Ltd.

**The Terms of Reference and their Discharge**

The Commission is charged with a three - step exercise. It is required to identify commitments of Government, following which it is to recommend alternative courses of action which are available to Government and it is to advise on the likely financial, legal and other implications which those alternative courses of action might present. The course of the inquiry has been such that the Commission feels unable to deal definitely with those tasks. These are explained in some detail below.

**Legal Issues Specialized and Complex**

In identifying commitments which may have been entered into by Government, the two commitments of greatest significance are undoubtedly;

1. The building contract of 2 December 1987 and
2. The loan agreement of 25 July 1988.

The building contract was signed in December 1987 by (Chris Wong) the General Manager of the Tourist Authority for the Tourist Authority. A year later, to the day, he (Chris Wong) wrote to the building contractors communicating the position of the Cabinet of the Cook Islands regarding turnover tax and in communicating that position wrote;

“Should this (position regarding tax) be agreeable to your company, would you kindly indicate your acceptance by signing this letter. Should you do this, you may consider thecontract to be in force”.

That letter was counter-signed on behalf of the building contractors leaving a clear indication that the building contract had come into force. That was certainly the impression given to the building contractors who, some days later, made the first (loan) draw-down under the contract.

With regard to the loan agreement, that document has been signed by the former Prime Minister, as Minister of Finance, and by the General Manager of the Tourist Authority in July 1988. In an undated letter, the Solicitor General opined, in favor of the Bank, that the loan agreement as executed and delivered, constituted legal, valid and binding obligations on the Tourist Authority and was enforceable against the Tourist Authority and Government in accordance with its terms.

At first sight, it seems that the Tourist Authority is bound by the building contract and both the Tourist Authority and the Government are bound by the terms of the loan agreement. However, both these documents appear to be susceptible to legal attack. Whether, and to what extent the commitments apparently entered into can be eliminated is unclear. Issues of public administrative law require careful consideration in the context of the actions of the General Manager of the Tourist Authority. Technical aspects of the building contract need to be considered by experts versed in the law of building contracts.

**In the case of the loan agreement, neither Government nor its advisers have, at any stage, considered that agreement in terms of its governing law.**

Staggering though it may seem, no one in the Cook Islands has any full and detailed appreciation of the loan agreement under Italian law and in particular, the implications under that law of the system of irrecoverable promissory notes by which the loan draw-downs are to be effected.

Italian law, the Commission understands, is based not on the English Common Law but on the Continental Civil Law. The Commission understands that no legally trained person in the Cook Islands has any experience or qualification to pass an opinion in respect of Italian law, specifically, or the ruling principles of Civil Law, in general.

There is a suggestion that the loan and building contract forming as they do, part of an export incentive scheme common in European countries, may be subject to certain regulatory constraints. In light of these constraints the way in which the building contract and loan arrangements are structured, may have an effect on the degree to which Government can be considered “committed” under the documentation.

In this regard, the Commission recommends that Government, asa matter of urgency, retain the services of legal advisers who are able to identify, and to consider professionally, those commitments and to advise Government with the protection of the Common Law privilege attaching to communications between solicitor and client. The issues of law involved tend to indicate that the services of a senior and experienced practitioner are called for. The wide range of questions which need to be addressed simultaneously suggests to the Commission that the research, resources and overseas contacts of a large overseas law firm will be required to do full justice to the task**.** The urgency of the situation is one which must also be borne in mind by Government. It is difficult for the Commission to advise how the Civil Law issues should be addressed, but it believes that if the matter is referred to an appropriate substantial law firm or agency, that firm or agency will be in a position to make direct contact with specialist advisers in that area.

**Alternative Courses of Action**

Government is faced with a wide range of options. At one extreme Government and the Tourist Authority could proceed with the building contract and loan agreement in their present form, to have the Hotel constructed as part of the Rarotongan Hotel complex. At the other extreme, Government as a sovereign entity, could resolve to proceed no further with the loan agreement and the building contract and could, as required, take the necessary steps at the level of executive government, and by way of legislation, to thwart any attempt on the part of the Italian interests to litigate the matter. The Commission does not believe either of these two options to be advisable at present.

**Government Policy Favors Growth in Tourist Industry**

The Commission understands that Government endorses the principle of growth within the tourist Industry and that it accepts, as did the previous Government, the advice of the General Manager of the Tourist Authority that growth could be encouraged in higher yield markets. Taking this starting point, the Commission believes that the proposed Hotel could be a valuable asset to the Cook Islands provided that the contract can be negotiated to a reasonable price and provided further that the financial requirements of the proposal can be met realistically.

**Affordability of Hotel a Paramount Concern**

It is important that Government appreciate fully the financial implications of proceeding with the proposal in its present form. Since the Commission’s preliminary findings were presented to the Prime Minister, the Commission has had the opportunity of considering in greater detail the feasibility studies prepared for the previous government. The Commission has viewed as significant the failure, in those feasibility studies, to take any account of the currency risks inherent in the Deutschemark denominated loan. The Commission has now made available a copy of the loan agreement to the Merchant Bank which provided the information for the preliminary findings.

Having perused the terms of that loan agreement, professional advice is that to swap the loan to a New Zealand currency at this time would result in a loan denominated in New Zealand dollars at an interest rate of between 14.75% and 15% (as opposed to the earlier estimate of 13.8%).

The rate of interest on a currency swap to New Zealand currency is high, but the Commission has absolutely no doubt that if the transaction is to proceed, then a currency swap or some other currency fluctuation protection must be effected. **The size of the loan is such that the failure to take this prudent, commercial step would constitute gross financial irresponsibility on the part of Government**. **The** **risks of continuing to hold the obligations in foreign currency have been likened to playing Russian roulette with the country’s economy, with three bullets rather than the usual one in the chamber of the gun!**

**Feasibility Studies – An Historical Review**

1. The SICEL feasibility study

The Commission notes that the Committee of Officials rejected the SICEL projections as being too optimistic. SICEL had a considerable vested interest in demonstrating that the Hotel could operate viably. Not only had SICEL promoted the venture but it had secured an exclusive role in advancing its position.

By linking its construction expertise to a financial loan package, it was able to exert its influence to a point where in late 1987 it had succeeded in effectively inhibiting its prospective client, the Cook Islands Tourist Authority from exercising any initiative and seeking comparative building quotations and/or financial packages or exploring private sector interest.

Given this situation the **Cook Islands Tourist Authority should have been alerted to the vulnerability of its position, however it was not.** **The General Manager signed the building contract on 2 December 1987.** In the four months which lapsed from then and the time that the proposal was placed before Cabinet there is nothing to indicate that the SICEL feasibility study was subjected to any critical examination or scrutiny whatsoever. If fact, the Tourist Authority submission to Cabinet on 28 March 1988 appeared to adopt simply everything that they said. Unfortunately, what they said provided Cabinet with neither an accurate nor reliable forecast of the financial implications.

Furthermore, although obviously the Acting Minister of Tourism, Norman George was aware of the existence of a building contract, as he had instructed that to be signed, it is not clear whether all members of Cabinet shared this knowledge. The Cabinet submission of 28 March 1988 was logically the correct and appropriate opportunity to mention it but strangely the submission is entirely silent. There is no reference to the building contract at all.

It was not until July that Cabinet papers made reference to the building contract and then in a context which suggested that the building contract was still subject to formal approval (see Minister of Tourism’s submission of 21 July 1988 and Cabinet Minute of 22 July 1988, CM (88) 839A) which, inter alia –

“Stipulated, that the contract of construction must be submitted for formal approval”.

In this context it is also interesting to note that not all members of the Committee of Officials were aware of the contract and the Chairman of the Tourist Authority has confirmed that his Authority had, at the time, also not been informed. Together these leave the suspicion that the earlier signing of the contract was being downplayed.

The Committee of Officials which was appointed by Cabinet on 30 March 1988 to assess the project, following consideration, of the Tourist Authority’s submission, was able to submit its first report on 14 April 1988.

In summary it identified the following flaws in the SICEL proposal –

1. That the Hotel of the standard envisaged should border a good sandy beach and lagoon swimming area. It is therefore critical of siting the Hotel in downtown Avarua.
2. That the SICEL projections were based on an overly ambitious high occupancy rate from the commencement of operations viz, 75% in the first year and 85% thereafter.
3. That the shop key money and rental estimates were quite unrealistic at USD$1.5 million for key money and USD$6-800 per annum for rental income and that such space should be converted to conference facilities.
4. That no provision was made for Turnover tax of 10% on gross income.
5. That no provision was made for the payment of royalties to the landowners.
6. That electricity costs were understated.

By a later report the Committee advised that it has reworked the SICEL loan repayment schedule to reflect capitalized interest. The effect of this after adjusting for a DM1,620,000 provision for the electric power station, was to increase the cost of the Hotel by a sum in excess of NZD2.7 million.

**The Committee of Officials Feasibility Studies**

Clearly, the results of the Committee of Officials comparative exercises highlight the magnitude of the financial strain that would evolve if Government proceeded. It concluded its conclusions as follows;

1. The proposed Hotel would be a valuable asset to the Cook Islands if the financial requirements can be realistically met.
2. If the Hotel is to be funded by borrowing on the terms offered by SICEL hotel revenue alone will be insufficient to meet loan repayments.
3. The amount of revenue the Hotel earns will have to be heavily subsidized by Government in order to meet loan repayments.
4. The amount of subsidy required would place an unacceptable burden on Government’s financial resources.
5. If the loan cannot be met, endeavors should be made to negotiate easier terms for the loan.

Accordingly, the Committee is now endeavoring to negotiate ‘softer’ loan terms so that either;

1. The loan repayments can be met out of the Hotel revenue, so that no Government subsidy is required, or (if that cannot be achieved)
2. If Government subsidy is required, it is kept to an acceptable level.

**Exchange Risk – Treatment by the Officials**

In its first report the Committee of Officials qualified both summaries of the Government subsidy requirement with the comments “also exchange losses must be taken into account and plus or minus exchange fluctuations”.

While attempting to alert Cabinet to a potential risk, the vagueness and almost inconsequential ranking of their observations was unlikely to have registered in the minds of **Cabinet Ministers who have little or no experience** in multi- million-dollar foreign currency transactions.

In its preliminary findings the Commission was critical of the officials in their treatment of this subject and it remains so particularly as they were sufficiently conscious that there were risks of currency fluctuation to have mentioned it, but made no effort to quantify those risks for those they were advising.

The Committee suggests that had the Committee taken just a few theoretical situations and computed those it would have become palpably aware that exchange risk was a very significant area deserving of much closer examination.

**Interest Rate Fluctuation Risk**

Throughout its treatment of the loan repayment program SICEL made no attempt to bring attention upon the fact that LIBOR (London Inter-Bank Offered Rate, that is, the rate at which banks borrow amongst themselves) is but a reflection of many economic indicators and was itself subject to fluctuation.

By way of illustration the LIBOR rate for 6 months Euro deposits in Deutsche Marks as at the date of signing of the Building Contract on 2 December 1987, was 3.625%. The applicable rate at the time of the first drawdown, a year later, on 20 December 1988, was 6.000%. A rise of this proportion, representing as it does an interest rate increase of 65.5%, if constant throughout the period of the loan, would add several millions of dollars to the interest bill.

As with SICEL, the Committee of Officials adopted a rate of 4.5% but, as opposed to SICEL, they had every reason to question seriously its susceptibility to change. However, they applied this rate to all their calculations without qualification.

The Commission acknowledges that it is impossible to forecast accurately movements in interest rates. However, the fact that interest rates constituted yet a further unknown, and potentially very costly factor in the structuring of the loan arrangements, and made it all the more imperative that specialist advice be obtained.

**Committee of Officials Concludes – Unacceptable Burden**

The Committee of Officials first report, while deficient, and failing to address issues in several areas, reached the inescapable conclusion that the operating losses of the Hotel, and Government’s commitment to fund these, “would place an unacceptable burden on Government’s financial resources”.

The Committee of Officials had set itself two options;

1. To endeavor to negotiate ‘softer’ loan terms so that the Hotel could pay for itself or,
2. If Government subsidy were required, how it might be kept to a minimum.

**The Commission of Inquiry’s Feasibility Studies**

The Commission has prepared and examined feasibility studies for twelve (12) different options. Six of these are the Rarotongan Hotel merged 300 rooms operation and six of the Italian 200 rooms project alone.

**Gaming**

No attempt has been made by the Commission to incorporate gaming revenue into any of its options. Quite aside from the grossly speculative nature of determining what level of income to estimate, Government has indicated that it did not consider being forced into major policy decision – making in this area by adverse feasibility studies as an appropriate or responsible treatment of the subject. Regardless, as will become evident after considering the Commission’s feasibility studies, gaming revenue would have to reach phenomenal proportions to be of assistance.

**Rarotongan Hotel Indebtedness to New Zealand Government**

No provision in earlier studies was made for the servicing or repayment of the debt of the Rarotongan Hotel company limited, of approximately $6 million to the New Zealand Government. The Commission notes that as Cook Islands officials had raised the question of this debt with New Zealand Government officials last year and received an indication that it might be forgiven of goods and services of an equivalent value were purchased from there in connection with the Hotel project. The Commission placed this possibility before the Contractor but the Contractor was adamant that such a possibility was out of the question.

**Summary of Options**

The salient points are;

1. Assuming that the interest rate did not vary from 6.75%pa and that the exchange rate for Deutsche Marks did not alter from NZ$1.00 = DM1.11 throughout the period of 8 years of repayment then the total cost of the Hotel in principal and interest would be $69,151,969.00.
2. In the event that the loan is swapped into NZ currency to avoid these risks then the total cost of the Hotel in principal and interest would be $99,417,450.00.
3. In either category, turnover tax rebates would be essential to cushion losses. These would range from $19,675,105.00 to $30,773,210.00.
4. Notwithstanding Government’s forgiveness of turnover tax, direct additional subsidy would be required from Government over the eight years repayment period in the range of $3,591,552.00 to $50,729,493.00 to balance the Hotel’s cash deficits.
5. In the event that Government was unable to find these deficits, alternate funding in the range $6,043,349.00 to $50,729,493.00 would need to be found (e.g., bank overdraft) however as that is unlikely to be forthcoming, then default on the loan, with all its consequences, would become unavoidable.

**Involving the Opposition**

The Commission has met with the Leader of the Opposition, Dr Pupuke Robati. At that meeting he was invited to consult with his Opposition colleagues as to whether they, or a representative from them, wished to meet with the Commission and make representations and/or discuss the Commission’s work, and Dr Terepai Maoate was nominated to talk with the Commission. Dr Maoate was acquainted with the feasibility studies that the Commission was preparing and an offer was extended to the Opposition, through Dr Maoate, to make these available to the Opposition for its own critical examination and scrutiny. Accordingly, on 22 March 1989, copies of the options, being those available, were forwarded to the Deputy Leader, Dr Maoate, under cover of a letter of explanation that these studies would be accompanying the Commission’s report to the Prime Minister in the very near future.

Three days was suggested as the timeframe during which the Commission could receive comment from the Opposition for incorporation into the report, however, as Dr Maoate reported later, they had been unable to progress in the matter, an extension of two days was agreed. The Commission has heard no further from the Deputy Leader, or his colleagues, despite the extension of time they were given, and must conclude that they either have no comments or do not wish to share them with the Commission.

**Acceptability of Feasibility Studies and Summary by Cook Islands Tourist Authority**

The Commission did not wish to engage in the time-consuming task of preparing numerous feasibility studies if they were not to find acceptance with the proposed owner of the Hotel namely the Cook Islands Tourist Authority or, more specifically, its General Manager, Mr Wong.

**Mr Wong declined participation** however in favor of personnel of the Cook Islands Development Bank performing its function and it is to Mrs Terai McFadzien that the Commission extends its appreciation as well as to the Manager of the Rarotongan Hotel, Mr Nick Martinovich, who provided much valuable input as well as the services of his computerware. Both have confirmed that the feasibility studies are a fair reflection of the financial performance which could be expected.

**Financing Package Not Viable**

It is for Government to decide whether the large deficits which the project will generate over the course of nine (9) years operation can be sustained by the economy. **The impression gained by the Commission from the Financial Secretary, Mr Alistair Rutherford, is that the country’s economy does not have the ability to absorb, subsidize, or in any other way accommodate deficits of this size which he described as a “sure road to financial embarrassment”.**

In considering the alternative courses of action open to Government, the Commission has assumed the accuracy of the feasibility studies and has assumed further that Government under no circumstances will allow the project to proceed on the basis of requiring subsidies of the size indicated.

A number of those who have spoken to the Commission have commented that it would be unusual for a project, financed as to 100% borrowing, to be financially viable. Most private developers would be expected to contribute a substantial proportion of equity before a lending institution would finance the balance. In the Commission’s view however, the feasibility studies clearly show the foolishness of attempting to finance a hotel of this sort on 100% borrowing that facility can hardly be considered desirable given the results of those studies.

**Courses of Action Must Be Determined by Financial Constraints**

In the Commission’s view, Government must choose its course of action in light of the financial realities which surround this project. At this point, the Government, broadly speaking, has three (3) courses of action open to it;

1. Government can proceed with the Hotel project in the knowledge of financial difficulties as noted in the feasibility studies and aim to dispose of the Hotel property prior to the point at which losses to Government become unacceptably large.
2. Government can move to renegotiate the building contract and the finance package so as to minimize the cost to Government and maximize returns from the project with a view to either operating the Hotel or implementing a sale as proposed above.
3. **Government can** **proceed no further with the building contract or the loan agreement** and take steps to compel repayment of funds already drawn down by the building contractor.

These courses of action are inter-related. Each is considered by the Commission. The Commission commends to Government further consideration of the viability of proceeding with the Hotel with a view to an early sale. Unfortunately, there is at present no design brief, no formal indication from any hotel operator of its willingness to consider operating the Hotel, nor has there been any exploration of the sale possibilities of such a hotel.

**These steps should have been attended to well before the finalization of contractual relations and the drawdown of monies by the contractor.** Their implementation is long overdue. If resale is considered, then it is not too soon to take steps to identify an interested purchaser. In this event the project should be placed on the market as soon as possible, through the Offices of reputable and expert brokers.

**Re-Negotiation**

The Italian representatives have stressed repeatedly to the Commission their willingness to re-negotiate the terms of the loan agreement and the terms of the building contract. Given the way in which the legal issues could well impinge on the re-negotiations, it is recommended that no steps with regard to re-negotiation be taken until such time as the Commission’s recommendations regarding legal advice have been implemented. **It would be** **foolhardy to attempt re-negotiation until the legal position of the Government and the Tourist Authority had been clearly established by appropriately qualified professional advisers.**

**Termination of Contractual Commitments (if any) As an Option**

As a sovereign entity, the Cook Islands Government has the power to take decisions either at an executive level or by way of legislation, to frustrate the objectives of the contract and to block any attempt on the part of the lender to recover the monies already advanced to the building contractor. The loan agreement contains waivers of sovereign immunity which could cause some difficulty, but the Commission has little doubt that with appropriate drafting, statutory measures could be taken to prevent termination of the project having financial implications for the Government or the Tourist Authority, at least within this country. There remains the question of the susceptibility of the country’s assets to attack. There also remains the question of the internationalcredibility of the country. Default by the Cook Islands on its international loan commitments could have a serious effect on the creditworthiness of the country and jeopardize future borrowings. The ethics, of terms of international law and politics, of loan default are a matter beyond the understanding of the Commission.

**Unified Course of Action Proposed**

The Commission, is unable, despite extensive enquiry, to provide Government with an answer to the issues which face Government arising out of this project. However, the Commission is certain as to the direction which Government must take in resolving those issues.

**Is the Country Bound to the Italian Project?**

The first step which Government should take is to find out whether, and to what extent, Government and the Tourist Authority are legally bound to proceed with the Italian Hotel project. As noted above, the **legal issues involved are specialized and complex.** An understanding of those issues and the opinion of appropriately qualified professionals as to the legal position, must be the first priority of Government.

**Desired Action if Legal Position Favorable**

If the legal position is favorable (i.e., if it is possible to terminate the relationship with the building contractor and the Bank without significant cost to the Cook Islands Government), then the Commission believes that the relationships of the Tourist Authority and the Government with the Italian interests should be **terminated.** The feasibility studies highlight the risks of Government venture of this sort. In view of serious private sector interest, Government should take steps to encourage private sector development of a four - star hotel complex.

**If the Legal Position is Unfavorable, then Diplomatic Avenues of Assistance should be Explored**

A number of those involved in negotiating the project have been skeptical of the Commission’s preoccupation with the legal issues arising out of the building contract and the loan. The Commission suggests that the role of the Italian Government in the transaction is purely commercial. The attitude of the representatives of the Italian interests left the Commission with a clear impression that the project was strictly commercial in nature. None of this offers encouragement for a diplomatic resolution of the matter.

Nevertheless, as the feasibility studies now stand, it seems that if this project proceeds, the effect on this country’s economy could be dramatic. It is fair to assume that the Italian Government would not wish to be embarrassed in having its own policies produce such unwelcome results in another country. Given the way in which the loan is structured, there may well be some diplomatic avenues which can be explored with the European Economic Community. Diplomacy at this level, given the stakes involved, is such that it would be appropriate for Government to seek guidance from New Zealand or Australia in formulating an appropriate diplomatic approach.

**If Diplomatic Initiatives are Successful**

If diplomatic initiatives enable the Cook Islands interests to terminate their relationships with the Italian interests, then this should be done and Government should proceed with private sector development as indicated above.

**If Diplomatic Initiatives are Unsuccessful, then a Private Sector Take-Over of the Building and possibly, the Loan should be Explored**

The Commission, in its preliminary findings, drew the attention of Government to the fact that Island Hotels has the land and finance available to build a hotel. If the building contract has advanced to the point that it must legally proceed, then Government should explore the possibility of having Island Hotels Ltd assume the position of the client under the contract. The representatives of the Italian interests met with Mr Clarke. While Mr Clarke has no authority to commit his company, it seems clear that further negotiations could be useful. The Italian proposal would not, in ordinary circumstances, be the proposal of choice for Island Hotels Ltd. Mr Clarke shared the Commission’s views as to the pricing of the Italian building contract and unless the contract could be priced more competitively, Government might have to pay the difference between the acceptable price to Island Hotels Ltd and the asking price of the Italian building contractors.

Although Island Hotels Ltd is the only identified private sector interest, the Commission believes that if committed to proceed, Government should take steps to see whether any other private sector interest is prepared to assume the obligations of Government under the building contract. Government may well have to guarantee loan funding, but in this regard, it seems that the loan facility made available to the Tourist Authority could be assigned to a private sector developer provided the Government guarantee remained in place.

**Action if Private Sector Takeover of Building Contract and/or Loan Achieved**

If a private sector take-over of the obligations of Government can be achieved, then Government should concentrate on the infrastructure and personnel requirements for a property of this sort, to ensure that the project does not fail for want of this Government support.

If it is not possible to negotiate a private sector take-over of the building contract and/or, then Government must take steps to facilitate re-negotiation and performance of the building contract.

Broadly speaking, three steps need to be taken;

1. The Hotel site must be identified,
2. A professional design consultant must be recruited to prepare a design brief,
3. A Hotel operator must be identified and committed, at least to the point of ensuring that the design brief and site are acceptable to it.

These steps are essential prerequisites to detailed re-negotiation of the terms of the contract. Until such time as a qualified design consultant has considered the optimum utilization of the Rarotongan Hotel site, and until a reputable operator has indicated that it would be prepared to commit itself to operating such a complex, the practicality of proceeding on the Rarotongan site cannot be determined. One thing is certain; unless a reputable operator can be persuaded to manage a property of that sort, it should not be built.

Recruitment of the design consultant and the identification of an operator are essential prerequisites to assembling negotiating team. Re-negotiate the terms of the building contract and the loan to the best position possible. The object of the re-negotiation should be to see whether it is possible to bring the cost of the project to the point that it is affordable to Government.

The Italian interests have expressed their interest in re-negotiating the terms of the building contract and although the loan itself cannot be re-negotiated, according to them, the issue of financing generally can possibly be improved. The negotiating team should be well supported by facilities to review feasibility. Indeed, the task of the negotiating team, in economic terms, will be to improve on the performance indicated by the feasibility studies.

If negotiations are able to produce a workable building and finance package, then steps should be taken to redraw the documentation to reflect the re-negotiated arrangements and the contract should be proceeded with, Government taking care to implement infrastructural and personnel requirements at an early stage. If sale of the Hotel is seen as required in terms of proceeding, then early steps should be taken to recruit a broker to facilitate that sale.

If it is not possible to re-negotiate the contract or the loan to a point where they are affordable, then Government should take steps to quantify the “bottom line” costs and risks of proceeding with the project. If after negotiations, Government decides that the project is not affordable, then the options of Government narrow dramatically. At that stage, three courses of action present themselves;

1. If the project is not affordable, but can be demonstrated to be of value to the country, then it may be possible to obtain some measure of overseas aid to mitigate the expected losses. If, as the Commission envisages, detailed negotiations have at that stage been concluded with the Italian interests, then it should be possible to negotiate, with some certainty, with possible donor agencies. The Commission believes that at that point, if the project offers the **prospect of financial embarrassment**, it would be appropriate to explore the possibilities of aid from Italy or the European Economic Community.
2. The Government may choose to litigate or arbitrate its position. It may be that legal advice is such that litigation or arbitration is commenced at the outset. If it is not however, this course of action remains open to Government throughout. It would be for the legal advisers of Government to comment on the appropriateness or otherwise of this course of action once the bottom - line costs and risks or proceeding have been quantified.
3. **Government may legislate to terminate** its relationship with the Italian interests. As this country has a constitution, there could be some difficulties in passing straight forward legislation to deny the Italian interests legal redress in this country. The Constitutional issues should be addressed at an early date. The Commission understands that Dr Alex Frame advises Government is such matters and it would be appropriate for his opinion to be sought at a relatively early stage. The Commission draws the attention of Government to the vulnerability of its overseas assets to the Italian interests should they proceed to obtain legal judgements in a foreign court. In the loan agreement, the Government of the Cook Islands has waived its **sovereign immunity** and it is difficult to see how any measure of immunity could be achieved in a way in which would be recognized by courts outside this country.

The Commission makes it quite clear that under no circumstances can it recommend proceeding with the Hotel in the almost certain knowledge of **financial disaster** and with the intention of defaulting on the loan if and when it is called upon.

Default is a most serious step, should only be taken as a last resort, and if it is to be taken at all, it should be taken in a manner which minimizes the cost to those to whom the Cook Islands interests owe financial obligations. For the Government to proceed with the intention of default, would be a most serious indictment on Cabinet, the Government and on the country as a whole.

The above sets out a course of procedure which, the Commission believes, is a structured and organized approach to the problems which face Government. Government must move with the utmost speed. By 30 June 1989, the interest bill alone on the first draw down will be almost a quarter of a million dollars. The problem which Government faces in this matter will not go away if it is ignored. Speed is essential.

**Comment as to the Administration of the Government and the Conduct of Officers in the Service of the Crown**

In its preliminary findings, the Commission made adverse comment as to various aspects of Government administration and indicated that in its final report it would present a more detailed finding in this regard. The Commission has spent most of its time addressing the four heads of action particularized in its terms of reference.

It has noted its general duty “…to inquire into and report upon the proposed construction of a hotel on the island of Rarotonga…” and has read this together with the enabling provisions of section 3 of the Commissions of Inquiry Act 1966, the relevant paragraphs of which permit the appointment of a Commission to inquire into and report upon any question arising out of or concerning –

1. The administration of the Government, or…
2. The conduct of any officer in the service of the Crown.

There has been **high degree of public interest** in the Italian Hotel Project, and the Commission is aware of general speculation as to whether there have been **elements of bribery or corruption** which **may have tainted the negotiating process.** As noted at the start of this report, the Commission has proceeded in a relatively informal manner.

Since the Commission has not exercised its power of summoning witnesses, administering oaths, and hearing evidence in a formal manner, its procedure has precluded a detailed investigation of a sort which would completely allay the **suspicions** of those in the community who **suspect impropriety** on the part of **public officials involved in the negotiations**. The Commission has investigated matters reported to it which, at first sight, may have given rise to suggestions of impropriety and the results of those investigations are set out below.

**Comment on Conduct of Former Solicitor General**

In the course of its enquiry, the Commission became aware of concern voiced by some as to the closeness of the relationship between the former Solicitor General, Tony Manarangi, and certain of the Italian interests. Mr Manarangi seems to have enjoyed a cordial social relationship with certain of the individuals involved in negotiating this matter for the Italian interests. Indeed, to the present, he maintains that social interest. His socializing appears to have caused some comment, as has the fact that he has received a gold bracelet from one of the Italians and further, had his wife join him on the occasion of his trip to Italy, with her airfares being paid for by the Italian interests.

Rarotongan society is small, and with the high degree of gossip and rumor at large, it is not surprising that these matters have assumed significance in the minds of some members of the public. The Commission has had the opportunity of meeting with Mr Manarangi and discussing these matters and believes that they should be set in their proper context.

First, with regard to the social activities of Mr Manarangi, these need to be considered in light of the fact that by any standards, “the Italians” as they are referred to here, are very social, cultivate a high profile, and have gone out of their way to be hospitable to their friends and those with whom they have business dealings in the Cook Islands.

Mr Manarangi has certainly been the recipient of their hospitality but so too have others such as Mr Wong, Mr McFadzien and Mr Mills. A number of those who have come to know the Italians socially have commented that they find them genuinely stimulating and interesting. Those members of the Commission who have met Mr Bertucci and Mr Picchi would have to acknowledge that they are both colorful personalities.

Given the position the country now finds itself in, it is not surprising that some would wish to put a more sinister interpretation on the high - profile social activities of Mr Manarangi and others here, with the Italians. The reaction is one which public officials should be aware of in future cases, when business and pleasure are combined in the course of negotiating public sector contracts and similar.

However, the Commission, upon reflection, does not believe that Mr Manarangi, or any other public official, can fairly be criticized in this regard given the absence of any established code of conduct, governing the conduct of public officials in such circumstances. The Commission feels somewhat differently with regard to Mr Manarangi’s acceptance of a gold bracelet and his acceptance of an offer on the part of the Italians to pay for his wife’s airfare to and from Italy.

At the outset, let it be said that the Commission is satisfied that there is not, in either case, any impropriety on Mr Manarangi’s part, in terms of his duty to the Government of the Cook Islands. The Commission is satisfied that the offer on the part of the Italians to pay for Mr Manarangi’s wife’s travel, was known to those Cabinet Ministers involved in the matter, and indeed that at one stage, it was contemplated that both the Hon. Norman George and the Hon. Raymond Pirangi would travel with their wives at the expense of the Italians.

Similarly, Mr Manarangi, on receiving the gold bracelet, stated that he had reported that gift to the Attorney General, who acknowledged the disclosures and allowed Mr Manarangi to retain the gift. Judged against these standards, Mr Manarangi’s professional conduct therefore cannot be said to have been improper. The criticisms which follow are, essentially, criticisms of the way in which Government has allowed its officials to conduct the business of Government.

Mr Manarangi was frank and open in his discussions with the Commission. He readily acknowledged receiving the bracelet, claiming he was unaware of its value. At the Commission’s request, the bracelet was examined by Mr Brain Baudinet, in the absence of a specialized valuer here, and he indicated that in his assessment the bracelet, being of 18 carat gold, was worth some $500.00. Mrs Manarangi’s airfares, paid by the Italians, were to the value of approximately $9,000.00

The Commission asked Mr Manarangi whether he felt in any way compromised by having taken these benefits from the Italians. Mr Manarangi’s considered reply was that he did not believe that he had been compromised. He pointed to the fact that although his wife’s airfares had been paid, for travel to Italy, the negotiations that took place there were intense, and resulted in unquestionable gains in the Cook Islands position.

The Commission, from other inquiries made, can confirm that between Mr Manarangi and Mr Mills, much valuable work was done in rationalizing the building contract. Indeed, along with early work of the Committee of Inquiry, the work undertaken by Mr Manarangi and Mr Mills in Italy stands out as one of the more professional chapters of the negotiating process. Mr Manarangi is on record, both before and after this time, as having advised against aspects of the project which he did not believe were to the overall benefit of the Cook Islands interests.

Unfortunately, the question remains as to whether Mr Manarangi was compromised in the more general sense. Those politicians to whom the Commission spoke referred to pressure to which they felt from the public officials, pressure which undoubtedly was being applied in turn to those public officials by the Italians. Mr Manarangi himself referred to the habit of the Italians in “camping” in the Crown Law Office until their needs were attended to. Had the relationship between Mr Manarangi and the Italians been less close, might he not have felt able to deal with them more effectively?

Given his opposition to the project and knowledge of its potential for financial disaster, might Mr Manarangi not have been more forthright with Cabinet Ministers bent on proceeding, had his relationship with the Italians been less close? In early December, when it became apparent that the Government proposal would require incentives and concessions in excess of those requested for the Island Hotels proposal, did Mr Manarangi’s relationship with the Italians blind him to the fact that there was the potential to negotiate a risk – free alternative to the Italian project.

These questions cannot be answered. They are in the realm of speculation and there they must remain. Mr Manarangi maintains that he acted to the best of his ability in the circumstances and that it is easy for others, with the benefit of hindsight, to draw conclusions on issues of this sort. The Commission agrees with Mr Manarangi, on the question of hindsight, but the fact remains that those are questions not just of speculation, but of public speculation.

The pity of it is that a man of Mr Manarangi’s status and ability should have to remain the subject of such speculation. While Mr Manarangi may be criticized for a failure to recognize the sensitivities of his position, the Commission is satisfied that his conduct, as it was in the full knowledge and with full consent of his client the Government, is unimpeachable if viewed in the strict terms of a solicitor- client relationship. It is the broader public interest in his work which does not seem to have been addressed on this occasion and again, it is difficult to criticize public officials in the absence of any accepted code of conduct which sets recognized standards of behavior and conduct in such circumstances.

In summary, the Commission having considered those aspects of Mr Manarangi’s conduct which are of public concern, is of the view that by the standards which govern solicitor/client relationships, Mr Manarangi had committed no impropriety of a personal or professional nature. With the benefit of hindsight, it may not have been prudent for Mr Manarangi either to accept the bracelet or accept the offer of payment of his wife’s airfares (leaving in the public’s mind the unresolved questions as to whether and to what extent his performance has been compromised) but the Commission’s chief criticism would be of the absence of any code of conduct to provide guidance for public officials who, in the performance of their duties, may find themselves in positions with the potential to prove compromising.

While it is clear that the public interest demands the highest standard of integrity from public officials, the Commission believes that public officials, similarly, are entitled to protection and guidance in difficult situations of this sort.

**Were Public Officials Equal to the Task of Negotiating the Italian Loan Project?**

The Commission was critical of the action of public officialsin its preliminary findings. The **Commission remains critical of the actions of the General Manager of the Tourist Authority, Mr Chris Wong.**

It confirms its criticism of the circumstances in which the Building Contract and Side Contract were executed and its criticism of the failure of the General Manager to commission a Design Brief for the Hotel. One further matter should be noted for the record. Following publication of aspects of the preliminary findings in the Cook Islands News, the Commission was approached by the Chairman of the Tourist Authority, Mr Freddie Keil, who took issue with the Commission’s references to the Tourist Authority in that first release.

The Chairman indicated that the General Manager of the Authority, Mr Chris Wong, had acted **WITHOUT THE AUTHORITY of the BOARD**, that the Authority had **NEVER AUTHORIZED** the **EXECUTION** of the **Building Contract**, the **Side** **Contract,** or the **Loan Agreement**, and when it became aware of it, that the **Tourist Authority Board had expressed its disapproval of the Hotel Project.**

These astounding allegations were put to Mr **Wong who acknowledged that such was the case.** This is an extraordinary state of affairs, and one which, in the general functioning of statutory bodies, **SHOULD NOT OCCUR**. Mr Wong acknowledged that he took his direction not from the Board, but from his Minister in the early stages and in the later stages, from the Crown Law Office.

Ministers and public officials all seem to have lost sight of the importance of the Board of the Authority and its role in policy making in the tourist industry. The Commission wishes the record to be set straight in this regard and apologizes to the Board of the Tourist Authority for any embarrassment which its earlier references to the Tourist Authority may have caused members of the Board.

In fairness to Mr Wong, the Commission wishes to record that the Chairman of the Tourist Authority indicated his Board’s strong support for the General Manager in other areas,and the concern of the Board that this report may have adverse consequences for the General Manager. In the opinion of the Chairman of the Board, Mr Wong was, and remains, the best man for the job in the Tourist Authority and he considered it would be unfortunate if this affair were to result in the loss of Mr Wong’s services as General Manager to the Tourist Authority.

The Commission had been of a mind to make critical comment of the functioning of the Crown Law Office in its negotiation of the Loan Contract. In the view of the Commission, specialist Italian legal advice should have been obtained in the matter and specialist financial advice should have been obtained.

The Commission has had the opportunity of speaking both to Mr Manarangi and Mr McFadzien in this regard. Both are strongly of the opinion that the Commission is not in a position to judge their actions in the absence of any specialist opinion as to the appropriate role to be played by officers of a Crown Law Office. In their view, financial constraints, the difficulties in dealing with Ministers of the Crown as “clients” and the specialized function and organization of the Crown Law Office are such that it is not appropriate for, say, a private practitioner to judge the workings of that Office and of Crown Law Officers by standards prevailing in private practice.

Upon reflection, the Commission is inclined to accept these contentions. The Commission is adamant that the Loan documentation should have been considered in light of its governing law and that specialist financial advice should have been obtained with regard to the transaction. If, however the course adopted by the Crown Law Office in this case was in line with accepted practice, then criticism is properly levelled not at the individual s concerned, but at the way in which Government has required the Crown Law Office to operate. The Commission does not propose to go into this matter any further, noting that Government now finds itself in the position of being able to seek its own, independent, advice.

Moving, more generally, to the question of whether public officials were equal to the task of negotiating this contract, the Commission believes, in a word, **THAT THEY WERE NOT**. Indeed, it would be difficult to assemble a local negotiating team equal to that task and the Commission acknowledges its own limitations. That is not to say that those officials did not have a valuable role to play; in the Commission’s view however the legal and financial complexities, and the specialized nature of the Hotel construction, is such that appropriately qualified specialists should have been consulted at the outset.

Whether those public officials should be criticized for failing to recognize their limitations, or whether their public masters should be criticized for making unrealistic demands on those officials is not a question which the Commission feels able to answer. Rather, without apportioning blame on either side, the Commission believes that the episode has clear morals for both partners in the business of Government. Public officials must recognize that like all of us, they have professional limitations. They do no favors to their masters in failing to draw their attention to those limitations.

To those who run this country, the Prime Minister and his Cabinet, it must be recognized that public officials are not superhumans. There is a tendency, here in the Cook Islands, to believe that we can take on any task and excel at it. One acknowledges that there is talent both in the public and private sectors. However, the limitations of those advising Government must be recognized and those in power must be prepared to give support to enable others more appropriately qualified to assist where it is necessary.

In a nutshell, this means that Government must be prepared to spend money for specialist advice where it is appropriate. Successive Governments have baulked at bringing in outside advice when it looks likely to result in a cost to Treasury. As the Italian Hotel Project shows however, failure to obtain the right advice at the right time can prove very expensive.

The Commission views this as its final report in the matter, but it remains on foot for the present, to deal with any queries or further inquiries which may arise out of this report.

Dated at Rarotonga this 6th day of April 1989.

Chairman – George Ellis.

**Research Conclusion**

The Cook Islands inherited this large public debt from the dishonorable performance by senior public officials and politicians due to the following critical reasons;

1.The Manager of the Tourist Authority, Mr Chris Wong, without the approval of the Tourism Board and Cabinet, approved and signed the Italian Project Building Contract and as a result, committed the Cook Islands to the loan arrangement.

In my view, this occurrence was totally unsatisfactory, and it is a breach of the Public Moneys Act 1969. Gross negligence has been described for such actions.

‘The Chairman indicated that the General Manager of the Tourist Authority, Mr Chris Wong, has acted without the authority of the Tourist Authority Board, that the Authority has never authorized the execution of the building contract, the side contract, or the loan agreement and when it became aware of it, that the Tourist Authority Board had expressed its disapproval of the Hotel Project. These astounding allegations were put to Mr Wong, who acknowledged that such was the case.’

2.The Manager of the Tourist Authority admitted, not seeking the approval of the Board of the Tourist Authority. Instead, he stated, that he obtained the approval of the Minister of Tourism at the time. This is an extraordinary state of affairs, and one which, in the general functioning of statutory bodies, should not occur. Mr Wong acknowledged that he took his direction not from the Board, but from his Minister in the early stages and in the later stages, from the Crown Law Office. The Minister of Tourism, alone, had no authority to grant his approval to Mr Chris Wong, Manager of the Tourist Authority, for the Italian Project to proceed. The only possible approval, would require Cabinets endorsement and approval. This was lacking.

In my view, the General Manager is employed by the Tourist Authority Board and not by the Minister or the Crown Law Office. This apparent breakdown in the segregation of employment duties failed as there was no oversight and review, by the Government administration.

3. The Commission remains critical of the actions of the General Manager of the Tourist Authority, Mr Chris Wong. It confirms its criticism of the circumstances in which the building contract and side contract were executed and its criticism of the failure of the General Manager to commission a design brief for the Hotel. In identifying commitments which may have been entered into by Government, the two commitments of greatest significance are undoubtedly;

(a) The building contract of 2 December 1987 and

(b) The loan agreement of 25 July 1988.

The building contract was signed in December 1987 by Mr Chris Wong, General Manager of the Tourist Authority for the Tourist Authority. A year later, to the day, Chris Wong wrote to the building contractors communicating the position of Cabinet of the Cook Islands regarding turnover tax and in communicating that position wrote;

‘Should this (position regarding tax) be agreeable to your company, would you kindly indicate your acceptance by signing this letter. Should you do this, you may consider the contract to be in force’.

In my view, and as presented by the evidence, the catastrophe triggering the Italian building contract and loan agreement, instantly proceeded once the critical documents were signed by Mr Chris Wong, General Manager of the Tourist Authority. As a result, the Commission states, ‘that letter was counter-signed on behalf of the building contractors leaving a clear indication that the building contract had come into force. That was certainly the impression given to the building contractors who, some days later, made the first loan draw-down under the contract.’

4.The Cook Islands Tourist Authority Board and even Cabinet, as a whole, was kept in the dark. Given this situation, the Cook Islands Tourist Authority should have been alerted to the vulnerability of its position, however, it was not. Again, this higher level of responsibility and accountability, was for one reason or another, ignored. Four months after the General Manager of the Tourist Authority signed the building contract on 2 December 1987, the proposal was placed before Cabinet, however there was nothing to indicate that the SICEL feasibility study was subjected to any critical examination or scrutiny whatsoever. In fact, the Tourist Authority submission to Cabinet on 28 March 1988 provided Cabinet with neither an accurate nor reliable forecast of the financial implications.

**Applying the Cressey Fraud Triangle Theory with the Te Toki e te Kaa Rakau Concept**

5.Applying Dr Cressey’s fraud and corruption triangle theory to this unfortunate Italian loan disaster, two elements are apparent. These are, the opportunity and motivation. As the General Manager of the Tourist Authority, he used the opportunity as the official in charge together with the motivation, to act and sign the critical documents. What is lacking from the fraud triangle, is the element of greed. There is no evidence to suggest of any fraud, misappropriation and theft of public funds had taken place. Public perception was indeed rife at the time, however there was no substance in the matter. The receipt of first - class airfares and valuable gifts from the Italian hosts, was merely part of the Italian style of gifting, entertainment and appreciation of its working relationship, with foreign guests.

Mr Manarangi, on receiving a gold bracelet, stated that he had reported that gift to the Attorney General, who acknowledged the disclosures and allowed Mr Manarangi to retain the gift. Mr Manarangi was open and frank about receiving such gifts.

6.Disclosure is the important feature relating to conflicts of interest. The Commission was satisfied that the offer on the part of the Italians to pay for Mr Manarangi’s wife’s travel, was known to those Cabinet Ministers involved in the matter, and at one stage, it was contemplated that both the Hon Norman George and the Hon. Raymond Pirangi would travel with their wives to Italy, at the expense of the Italians. The lack of any code of conduct did not assist in the management and governance over the responsibilities, functions and performance of senior public officials. The Commission stated, ‘it is difficult to criticize public officials in the absence of any accepted code of conduct which sets recognized standards of behavior and conduct in such circumstances.’

7. Applying the ‘Toki e te Kaa Rakau’ concept, it becomes increasingly apparent that the cultural influences and the environmental conditions, at the time, played a major role in determining the steps and actions that were undertaken by the officials involved. The close relationships, between the officials and the ‘colorful’ Italians, who applied undue ‘pressure’ may have escalated the internal business conditions amongst a close friendly environment, that made it conducive to move things along informally, with virtually no oversight.

The Commission stated, ‘those politicians to whom the Commission spoke referred to pressure to which they felt from the public officials, pressure which undoubtedly was being applied in turn to those public officials by the Italians.’ Mr Manarangi himself referred to the habit of the Italians in ‘camping’ in the Crown Law Office until their needs were attended to.’

Given Mr Manarangi’s opposition to the project and knowledge of its potential financial disaster, might Mr Manarangi not have been more forthright with Cabinet Ministers bent on proceeding, had his relationship with the Italians been less close? Did Mr Manarangi’s relationship with the Italians blind him to the fact there was the potential to negotiate a risk-free alternative to the Italian project.

These questions cannot be answered. They are in the realm of speculation and there they must remain.

To the question of whether public officials were equal to the task of negotiating this contract, the Commission believes, in a word, **‘THAT THEY WERE NOT.’**

8.The Financial Secretary, Alistair Rutherford commented that the ‘country’s economy does not have the ability to absorb, subsidize or in any other way accommodate deficits of this size which he described as a sure road to financial embarrassment’. The size of the loan is such that the failure to take this prudent, commercial step would constitute gross financial irresponsibility on the part of Government. The risks of continuing to hold the obligations in foreign currency have been **likened to playing Russian roulette with the country’s economy, with three bullets rather than the usual one in the chamber of the gun!**

**Lessons Learnt**

1.The lack of integrity and compliance regulations and procedures through the implementation of a regulated **Code of Conduct** for public officials, led to the failure of senior officials to do what they want, virtually with no confined restrictions.

2. Similarly, the lack of specified boundaries for Cabinet Minister’s relating to the level of authority in terms of transparent and accountable responsibilities. The lack of an approved **Cabinet Manual** to enforce collective responsibility limitations, undoubtedly led to ‘a Minister (s) doing their own thing’ without proper scrutiny.

3. The initial formation and the idea of a 4- or 5-star hotel concept for the Cook Islands in the late 1970’s was accepted as a good plan to cater for the growth of tourism in the Cook Islands. However, no prior detailed **feasibility and financial analysis** was carried out, for Cabinet and the Government to review, assess and consider, as to its viability and sustainability. This starting and crucial point, was totally overlooked, which as the Commission’s findings reveal, lead to its ultimate failure.

4. The **advice from qualified and professional staff** of Treasury, such as the Financial Secretary, at the time, was ignored. The Commission’s view was, ‘that specialist Italian legal advice should have been obtained in the matter and specialist financial advice should have been obtained’.

5. The **failure by the leaders of the Opposition party** and its members to contribute and comment on the Italian loan project, when requested to, by the Commission, shows, in my view, the lack of stewardship and accountability from the Opposition in Parliament.

6. In my view, a **perilous combination of poor decision – making phases** ultimately led to the demise and disastrous failure of the Italian hotel loan project. Not one single individual or entity is to blame but rather it must fall on the collective group of officials and politicians. I note, the Commission states ‘rather, without apportioning blame on either side, the Commission believes that the episode has clear morals for both partners in the business of Government. Public officials must recognize that like all of us, they have professional limitations. They do no favors to their (political) masters in failing to draw their attention to those limitations’.

Case No. 3

Date: 7 December 1995

**Michael Benns**

**The Michael Benns Saga Over 20 Months**

**Source – Cook Islands News Archives**

**Introduction**

It’s been nearly a year and a half since proceedings were instigated against former Cook Islands Liquor Supplies Ltd Manager Michael Benns, well known to many in the Cook Islands as ‘Mike Benz.” The following article backgrounds the various developments surrounding his case since June last year as reported in the Cook Islands News.

**June 3, 1994 – Public Service Commission and Audit investigation into Bond**

The Public Service Commission and Audit are carrying out an investigation into the Cook Islands Liquor Supplies and State -Owned Enterprises (SOE) has taken over management. Yesterday, Minister of State -Owned Enterprises Dr Joseph Williams said the investigation findings will be made public, and in the meantime, Rena Jonassen has taken over management of the shop, commonly known as the Bond.

Former Manager Michael Benns yesterday told Cook Islands News that he has been suspended for dismissing three girls last week for taking money. “When you start looking at public money the responsibility comes back to the boss,” Mr Benns said.

**August 11, 1994 – Arrest Soon in Bond Store**

Police expect to make an arrest today or tomorrow after a four - week investigation into what is alleged to be “substantial” theft from government’s liquor store. Inquiries are focused mainly on one person. New Police Commissioner Tevai Matapo said he could not name the person involved. Treasury officials complained in June to Police about two months of losses totaling $17,000.00, he said. However, inquiries by Avarua and Auckland fraud squad officers allegedly reveal much wider losses.

Inquiries since approval of the request have widened to three other countries involved Police in New Zealand and world - wide body, Interpol, Mr Matapo said. The investigation was first publicly confirmed on Tuesday night by State Owned Enterprises Minister Joe Williams during a speech to the Cook Islands Chamber of Commerce at the Rarotonga Hotel. A Prime Minister’s Department official, Rena Jonassen, has been appointed acting manager and a task force selected to take care of a huge backlog of liquor imports, some of which were never put on sale in the store. Dr Williams said debts of $1.4 million owed to New Zealand brewers Lion Nathan have been discovered.

**August 26, 1994 – Bond Theft Charges Top $400,000**

Three theft charges totaling $305,000 were laid against former liquor importer Mike Benns in the Avarua High Court yesterday. These join an original theft charge of $114,948.77, bringing the total to nearly $420,000.00

It is believed to be the highest amount ever alleged to have been stolen since self- government in 1965. Police are considering further charges. Mr Benns did not enter a plea to any of the charges. The four theft charges cover operations of the government owned Cook Islands Liquor Supplies (CILS Ltd) over the period from April 1 1990 to June 30 1994. Prosecution said restitution may be sought from Mr Benns if he is found guilty of the charges.

Police also allege Mr Benns left out details of commissions paid on imports under three other charges of willfully falsifying public documents. A final charge of conspiracy to defraud over the same period was laid involving Mr Benns and a New Zealand exporter, Trevor Cox of National Liquor Distributors Ltd. Police allege the two men arranged to import alcohol into the Bond and split the difference.

The seven new charges come out of continued investigations into Mr Benns’ 25- year management of the Bond. So far, investigations are understood to have been concentrated on the last four years. Standing in the dock yesterday, Mr Benns, tanned, bearded and trim, remained largely expressionless during submissions on continuing suppression of his name.

Defense counsel Tim Arnold said lifting of an interim suppression would only heighten rumor and speculation. Finding a jury of 12 people who have not been tainted by gossip would, he said, be a “near impossibility.”

Prosecutor, Crown lawyer Janet Maki said the original application by the defense for interim suppression had only been to allow Mr Benns’ time to contact family in New Zealand and put his affairs in order. Justice of the Peace Nikau Tangaroa, after resting head on thumb for a moment, said it was a “difficult one.” But he told Mr Arnold, as you have indicated – people are aware. He lifted the suppression of name and ordered Mr Benns next appearance on September 8. A trial date has yet to be set.

**August 29, 1994 – Another Hurdle for the Bond**

Cook Islands Liquor Supplies (CILS) has come across another hurdle with the removal of Acting Manager Rena Jonassen from his position a couple of weeks ago. Mr Jonassen is now back in his previous job with the Prime Minister’s Department. He has been replaced by Ine Wichman. Staff were not told of Mr Jonassen’s departure, which comes on the heels of the removal of CILS manager for 25 years Mike Benns and a fraud squad investigation of the supplies. Mr Benns faces theft charges totaling nearly $420,000.00

**September 23, 1994 – Former Bond Manager’s Case Further Adjourned**

Former government liquor importer Michael Benns, accused of theft topping $400,000.00, reappeared in the High Court, Avarua, yesterday. Mr Benns is charged on four counts of theft, one of conspiracy to defraud, three of willfully falsifying and one of procuring public funds. Counsel Mike Powell, for defense counsel Tim Arnold, asked that the case be adjourned as Police inquiries were continuing in Auckland and further charges may be laid.

The four theft charges cover operations of the government owned Cook Islands Liquor Supplies Ltd (CILS Ltd) over the period from April 1 1990 to June 30 1994.

**October 10, 1994 – Bond Connection Arrest**

An Auckland businessman has been arrested in New Zealand on 56 fraud charges, some relating to theft alleged to have taken place at government’s alcohol wholesaler. Trevor Cox of National Liquor Distributors was named in August by Police in the Cook Islands as conspiring with former Bond manager Mike Benns to defraud government. Charges against Mr Cox were laid in Auckland on Sunday, Cook Islands time. His case has been remanded until November 25, next month.

**October 19, 1994 – Five New Bond Case Charges**

Over $145,000.00 in five new theft charges will be laid against former government alcohol wholesale (Bond) manager Mike Benns this morning. This will bring the total to nine charges alleging theft of $565,700.00 and one charge of conspiracy to defraud. No plea has been entered on earlier charges and Mr Benns yesterday said no plea would be entered today on the new charges. ‘Just the one side so far,’ he commented on media coverage. He had no further comment. Between five and six New Zealand companies are involved in the charges including the largest one from that country’s largest brewery, Lion Nathan, who sell steinlager.

Mr Benns is accused of stealing over $108,178.00 of Lion Nathan sponsorship money between 1989 and 1994. The money was held in accounts for Mr Benns with Ollphant, Bell & Rose or the Auckland Savings Bank. Over $16,000.00 was allegedly stolen from National Liquor Distributors in Auckland. Manager Trevor Cox is facing over fraud charges there. Mr Benns allegedly also overpaid an account with BRL Hardy Wine Company by Australian $3,322.00 and stole the refund from the New Zealand company, sometime between 1993 and 1994. Police prosecutors allege Mr Benns stole A$8,079.71 in bank drafts supposed to be cashed for the promotion of products from the same company between 1992 and 1994. Over A$7,500.00 in bank drafts was stolen from Thomas Hardy & Sons, money also supposed to go towards promotions, between 1989 and 1994, Police allege.

**December 23 1994 – Benns Case Next Year**

The Court sitting for former government liquor importer Michael Benns charged for theft of about half a million dollars has been adjourned until next year. Benns is still in prison custody and was not present at Court on Wednesday. Crown prosecutor handling the case was also absent from Court. JP Nikau Tangaroa posed a question to Police on what the latest development was. Police were uncertain saying that the matter was entirely in the hands of Crown Law. Clarkes Counsel Michael Powell for defense counsel Tim Arnold asked that the case be adjourned until February 9 next year. Deferment of the case was granted by JP Tangaroa on the grounds that the Crown Prosecutor was not present in Court.

**February 11, 1995 – Extra Benns Bail Conditions**

Two extra bail conditions have been imposed by the Courts on former Cook Islands Liquor Supplies Ltd manager Michael Benns who faces 14 charges including theft. A High Court hearing on February 9 ordered that Mr Benns, represented by Clarkes firm lawyer Tim Arnold, not leave the country and that he must not remove any of his property from his house. The 14 charges against Mr Benns consist of nine theft charges, conspiracy defraud, three of willfully falsifying and one of procuring public funds.

Mr Benns, who lives on Rarotonga, will next appear before the Court on February 23.

**February 23 to October 1995 – Benns Case was repeatedly adjourned to new dates.**

**November 1, 1995 – Benns Bond Case by Christmas?**

Justice officials are just as curious over the 14 months since former Cis Liquor Supplies Ltd manager Mike Benns was charged in connection with almost half a million dollars from the Bond accounts. Court staff admit it’s the longest running case where the defendant has yet to enter a plea to the charges, but Crown Law solicitors handling the prosecution say the matter is complex enough to warrant the time lapse.

Solicitor General John McFadzien says as well as the criminal charges, Benns faces civil claims from more than one party. “The Crown, being one of those parties, is aiming to secure a position to seek the maximum possible return”. Mr McFadzien wrote yesterday by fax. The case would have been in Court back in July with Judge Gilbert – Gilbert’s delayed arrival until this month or December means the Benns case won’t be dealt with until then.

**December 5, 1995 – Former Bond Manager Pleads Guilty to Six Theft Charges**

Former Cook Islands Liquor Supplies manager Michael Benns has pleaded guilty to six Court charges of theft amounting to $149,850.48 and one of willfully falsifying. Mr Benns appeared before the High Court in Avarua yesterday represented by solicitor Timothy Arnold. Until yesterday’s appearance Mr Benns had been under house arrest but Judge Ronald Gilbert yesterday remanded him into custody until sentencing on December 6 at 9am when a probation report and a reparation report are required.

Crown prosecutor Viesturs Altments withdrew eight charges including three of theft, two of false accounting and one each of failing to account, conspiracy to defraud and procuring public funds. According to Mr Altments, some of the charges were duplicated while three chargers of theft could not be proved. He said however that the major charges of theft remained. – **Cook Islands News.**

**Cook Islands Liquor Supplies Manager Jailed**

Source – Cook Islands News Archives

The former Manager Cook Islands Liquor Supplies Ltd (a government - owned entity) has been **sentenced to three years imprisonment on six charges of theft and one of willfully falsifying**. Justice Ronald Gibert sentenced Mr. Benns in Avarua High Court, Avarua yesterday morning with a total sum of **$148,850.00** involved.

According to the Crown’s summary of facts, “this is to the Crown’s knowledge the **largest amount ever stolen from an employer in the Cook Islands**”. The charges were for **offences during the five - year period between January 1 1989 to June 17 1994**. Mr. Benns a Cook Islands permanent resident for 25 years, has lived in the country for about 28 years. Judge Gilbert said that the Court was greatly helped by Mr. Benns defense counsel Timothy Arnold’s final submission on the defendant’s behalf.

**Defense Submission**

Mr. Arnold told the Court, “The situation, then, is that Mr. Benns has, in his own mind, accepted that his activity in **receiving secret commissions was wrong**, not merely in the sense that he has the obligation to repay the money to the Crown, but also in the sense that he has **broken the criminal law of the Cook Islands**”. The defense lawyer said he would not ….” waste the Court’s time with a submission that my client should not serve a term of imprisonment, rather, I ask that the Court weigh the following matters in deciding what term of imprisonment, should be imposed;

* Mr. Benns is 59 years old, most men in his position would be on the eve of their retirement.
* A long - term asthma sufferer, his continued good health cannot be taken for granted, and although asthma is a condition unlikely to stand between him and jail, conditions at the jail are unlikely to improve his overall health”.

Mr. Arnold explained how the case had made “enormous strains on the relationship” with not only the defendant’s wife but also his children who are all in New Zealand with Benns’ first wife and children of that marriage. The defense lawyer says Benns is voluntarily surrendering his status as a permanent resident of the Cook Islands upon release from jail, and it has been agreed that he will make his home elsewhere. Mr. Arnold said, “like many people who have lived beyond their means, Mr. Benns has comparatively little to show for that.

The Court has received a full reparation report, from which it will be seen that Benns has undertaken to meet the Crown’s demands for restitution so far as he is able”. “There is no law of bankruptcy in the Cook Islands, but if there was, Michael Benns would today be a bankrupt”. Mr. Arnold said Mr. Benns has been confined to his property for a period of some 18 months. I do not suggest that a form of house arrest should substitute for a term of imprisonment, but it is nevertheless, in my submission, a matter which the Court should take into account in determining the length of sentence”.

During his closing submissions Mr. Arnold said “the Crown now has what it wants – **restitution**. The public, I submit, have what they want – a proud man brought low, **disgraced and financially ruined**; there is little to be gained by having him now to become a **burden on the taxpayer in this country’s prison system**. Rather, it is now time for the Court, in imposing sentence, to reflect the obvious needs of Mr. Benns’ wife and young family and the imperatives which face Mr. Benns upon his release”. While the Crown’s summary of facts was not read out in Court, copies of the statement were provided to the defense counsel, the Judge and the media.

**Prosecution**

Crown prosecutor Viesturs Altments’ written summary of facts stated, “it is to be noted that the offences took place over a period of five years, involving substantial amounts”. He said while the Crown has also noted that this year, the Cook Islands Parliament enacted a Secret Commissions Act along the lines of that which is in force in New Zealand. That Act, of course, post-dates the present offences. Mr. Altments said, “the time spent meantime, has been with a view to improving the Crown’s position as to restitution. The position is now, that a family trust, of which Mr. Benns children are the beneficiaries, has **given up to the Crown a property** in the Cook Islands. That property is accepted by the Crown as being all that is available in the Cook Islands to **meet Mr. Benns’ civil liability.**

The Crown accepted that there are mitigating factors in Mr. Benns case such as his loss of employment, being shamed in front of the business community, subjecting himself voluntarily to a form of ‘house arrest’ and demonstrating remorse by volunteering to surrender his status as a Cook Islands permanent resident. However, Mr. Altments added that “the **defendant nevertheless has abused a position of trust**. What’s more, he has **committed these offences as part of a plan of deception spread over a long period of time. The amounts involved are substantial”.**

He said, “the defendant must expect, and does expect a **custodial sentence**. The community is entitled to see that occur. The fact that Mr. Benns is a Papa’a (European) does not excuse him from suffering the **same form of punishment** that natural born Cook Islanders would have to endure. The privileged status as a permanent resident of the Cook Islands, carried with it corresponding obligations to **accept the standards of this community**”.

**Research Conclusion**

1.The six charges of theft and one of willfully falsifying transaction documents supports Dr Cressey’s fraud and corruption triangle theory. All three elements of motivation, opportunity and greed are sufficiently evident in the offences carried out by Mr Benns.

2.Mr Benns, as Manager of the Cook Islands Liquor Supplies Ltd for 25 years, had abused a position of trust. He committed these offences as part of a plan of deception spread over a long period of time – and the amounts stolen are substantial.

3.The deceitful and planned receiving of secret commission payments is the largest amount ever stolen by a public servant from an employer in the Cook Islands. Mr Benns was also colluding with a Mr Trevor Cox, his business partner in Auckland, New Zealand, who owned National Liquor Distributors Ltd (a front company) who purchased liquor products from New Zealand suppliers then on-sold it at a higher price to the Cook Islands Liquor Supplies Ltd. The New Zealand Serious Frad Office, charged Mr Cox with 56 fraud and theft offences.

4. Linking Dr Cressey’s fraud triangle theory with the ‘Te Toki e te Kaa Rakau concept’ symbolizing the cultural influences and environmental conditions prevailing at the time, illustrates actual situations, such as;

(a) A Papaa or European person in charge of a large Crown owned entity, with substantially high revenue turnovers and poor internal controls.

(b) This position of authority, trust and power, brings about a climate of entitlement and privilege that ultimately leads to unethical and corrupt practices.

(c) Knowing the inadequacies and limitations of inadequate review and oversight systems and processes, Mr Benns misused the Crown’s lucrative liquor revenue for his personal benefit to live beyond his means. Defense counsel, Tim Arnold stated, ‘he is disgraced and financially ruined; there will be restitution with property going to the Crown and to meet civil liabilities.’

**Lessons Learnt**

There are some fundamental issues arising from this case, that require some in-depth analysis;

1.Could the implementation of a Code of Conduct have prevented this fraud from happening? The simple answer is, no. A Code of Conduct for senior officials is only a guideline and a set of rules to follow.

2.The ethical values and beliefs of a manager or leader, determines their behavior, attitude and moral principles. In this case, Mr Benns accepted his wrongdoing, pleaded guilty and acknowledged the charges and took full responsibility.

3.The need for regular and random financial reviews and audits should be a rudimentary requirement, especially for high revenue earning Crown owned enterprises. At the same time, it is essential that qualified financial auditors and forensic examiners be recruited to undertake such specialist roles. The establishment of a dedicated and specialized Anti-Corruption Office is highly recommended.

4.Collusion and concealment, especially with foreign partners, holding high levels of authority and power, are extremely complex to disclose. Robust internal controls with purposeful segregation of duties, over time, are some of the remedies. Mr Benns carried out all the key management and financial functions himself. From ordering stocks, checking inwards container stocks, stock card entries, sales, banking, invoicing, sponsorships, wages and other key areas. Only mundane and everyday routine low-profile duties were delegated to staff. Mr Benns hardly took long periods of absence and leave from his role. There should have been closer scrutiny and review of his duties and responsibilities by his superiors at the Treasury Office.

Case No 4

Date: 30 November 2000

**BASILIO TUTAI KAOKAO**

**Introduction**

Basilio Kaokao was a senior Bank officer at the Mauke Savings Bank and a branch of the Cook Islands Savings Bank. As a result of an internal audit from the Cook Islands Audit Office, certain discrepancies and anomalies were found. Specific offences relate to forgery and the theft of public funds. A report of the offences was provided to the Police and the Office of Crown Law for prosecution. It was noted that Basilio Kaokao was a respected member of the community and a leader in the Catholic Church on the island of Mauke.

**DECISION OF GREIG CJ**

Basilio Kaokao, you are now facing sentence on a number of charges of dishonesty. This is a sad case because you are well respected and it seems, quite an important and trusted member of the community. It's sad too because you brought shame on your family and they're going to suffer harm from the sentence that I will be imposing upon you.

You pleaded guilty to two charges of forgery. Those charges were the false and forged withdrawal slips, one for $36,800 and one for $3,400. Although you forged those withdrawal slips, no money actually changed hands and no loss resulted. It was your intention however to hide the loss that had occurred so that you would not be found out.

There is another charge of falsifying accounts over a period of years with the effect of procuring a deficiency of $41,763. That again was to hide the missing money and what you had done about it. You are not charged with stealing that $41,000 that was a shortage which was discovered on a count of cash on April 1999. That count of the cash depended in part on figures that were carried forward and which you had recorded in previous accounting. The Court has not been provided with any reconstruction of the accounts so there is no evidence of what in fact was missing overall.

You are also charged with and found guilty of three counts of stealing, the total of that was $13,900. The jury heard all the evidence over a number of days and rightly convicted you of the dishonest conduct.

I have formed the view that the bank did not have a very good audit system. Over a period of some years there were a number of audit or checks on your account, a number of irregularities were found and suspicions were raised at the Head Office in Rarotonga. But there seems to have been no attempt to make a thorough check from the very beginning to see just what was happening. This may well have permitted you to continue your fraudulent activities. It is of course no excuse for the fraudulent activities that you undertook.

What you did was a serious breach of trust. All the more serious in a small community like this where people place reliance on you as representative of Cook Islands Savings Bank (CISB). They trusted you with their banking transaction and even their bank books. None of them as I understand it have suffered any actual loss. It is the bank that have to meet the losses if any and ensure that the accounts and balances are correct and accurate.

I said at the beginning that this affects your family and your community generally. It is right that I take into account the position that you had in the community and the work that you have done for it. This is your first appearance and I am sure you will not offend like this again. It is important however to impose a sentence which will deter others and which shows to you and to the community what the Court thinks of this sort of criminal activity.

On the charge of false accounting, you will be sentenced to 2 years imprisonment, on the charge #272/99, the charge of stealing $10,430 you will be sentenced to 2 years imprisonment. On each of the other stealing charges you will be sentenced to 1 year’s imprisonment on each. All these sentences are to be served concurrently.

**Research Conclusion**

As the Director of Audit at the time, this case reveals that if internal audit checks of Outer Islands Savings Bank Offices are not thoroughly carried out on a regular basis, then given the circumstances prevailing in the Outer Islands, certain unfavorable situations will arise. Outer Islands tellers are on low salaries, looking after large amounts of public savings, with little or no monitoring and supervision, will, as in this case exposes, falsify, forge, steal and misappropriate customers funds from their savings accounts.

The evidence shows that all three elements of the Cressey fraud triangle can be applied in this unfortunate situation.

1. Motivation – that the teller was motivated and pressured to carry out the offences due to financial pressures and incentives.
2. Opportunity – that the Bank officer, in a position of trust and authority, with limited oversight, used the opportunity to carry out the offences.
3. Greed/Rationalization – Although the teller was a respected member of the Catholic Church in a small close-knit island community, his unethical personal traits largely influenced his need to carry out such offences.

In this instance, the Bank officer could have been exceedingly influenced by various cultural and environmental conditions conducive to committing fraud. The 4th element of cultural influences and the environment, symbolized by ‘Te Toki e te Kaa Rakau’ concept may have played a major role in influencing the defendant towards an unethical practice by falsifying, forging and stealing funds from customers savings accounts. It was noted at the time, the defendant was living far beyond his means, owning high value assets, which was at variance with his annual salary. He was also providing for his ‘extended family’ and various community commitments. Given this scenario, one can now perceive how cultural pressures and environmental settings plays a significant role and stimulus in these unfortunate circumstances.

**Lessons Learnt**

Key lessons learnt from this Outer Islands Savings Bank fraud reveals that;

1. Isolated CISB Offices require regular audit reviews and monitoring, so that staff reporting and savings account balances are checked for accuracy, reliability and timely financial reporting.
2. Bank staff training – CISB should hold regular staff training for Outer Islands bank officers and supervisors in the areas of ethical practices and financial accountability.
3. A code of conduct with a manual of instructions should be implemented for all CISB outer islands offices.
4. Since then, the CISB has now become the Bank of the Cook Islands Ltd, a wholly owned Crown entity, operating on commercial terms. Policies, systems, technology, staffing and good governance structures have been implemented with governing Board oversight.

Case No 5

Date: 3 April 2002

**IN THE MATTER OF**  
the Declaratory Judgments Act 1994

AND

**IN THE MATTER OF**  
the Electoral Act 1998

BETWEEN

**NORMAN GEORGE**  
In his capacity as  
**ATTORNEY-GENERAL**  
Applicant

AND

**TEPURE TAPAITAU**  
Member of Parliament for the constituency of Penrhyn  
Respondent

**Introduction**

The Respondent, Tepure Tapaitau, was elected the Member of Parliament for Penrhyn on 24 June 1999. The Respondent decided to leave the Cook Islands Party and support the government of the day as an independent member of Parliament. From August 2000, the Respondent was employed by the Office of the Prime Minister in the service of the Crown. At the same time, he was a member of Parliament paid by Parliament. As a result, being a Crown servant, and in terms of the Electoral Act s. 8 (1) (1) the seat became vacant. Therefore, a by-election was held.

**Judgment of the Chief Justice**

1. This is an application brought in the name of Peri Vaevae Pare as Attorney-General and continued in the name of the present Attorney-General. It seeks two declaratory orders:
2. That the Member of Parliament for the constituency of Penrhyn, Hon Tepure Tapaitau, became a Crown servant (as that term is defined in section 2 of the Electoral Act 1998) on or after the 28th August 2000;

3. The Parliamentary seat of the said Hon Tepure Taipatau is vacant by operation of section 8(1)(l) of the Electoral Act. The definition of Crown servant set out in section 2 of the Act is as follows:

"Crown Servant" means any person who is employed in the service of the Crown and remunerated by way of salary or wages, but does not include any person whose salary is paid pursuant to the Civil List Act 1984 or any person remunerated only by way of allowances, commissions or fees.

Section 8(1)(l) of the Act provides that the seat of a member of Parliament shall become vacant if he or she becomes a Crown Servant. It is accepted that the Respondent was not remunerated pursuant to the Civil List Act or by way of allowances or commissions.

3. On 24 June 1999 the Respondent was declared elected as the Member of Parliament for the constituency of Penrhyn. On or about 28 August 2000 the Respondent was appointed engaged or employed as head of the Special Projects Division of the Office of the Prime Minister being a Ministry, department or agency of the Crown or a division of such at a remuneration of $15000.00 per annum. Those facts are accepted by the Respondent. Further the Respondent expressly concedes that he is employed in the service of the Crown. It is submitted by the Respondent that the sole question is the nature of the remuneration whether it is salary or wages or fees. There is however another or alternative response under the Constitution of the Cook Islands.

4. The evidence before the Court on this case is an affidavit, sworn 8 November 2001, in support of the application by Paul Allsworth, the Director of Audit and Head of PERCA, and affidavits, sworn in January 2002, by the Respondent, Robert Woonton (at the time the Deputy Prime Minister) and Edward Drollett, the Chief of Staff for the office of Prime Minister. There was no call for cross-examination of any deponent. No question of credibility arises though the effect or implication of the evidence is in issue. Submissions were made in writing.

5. The proceedings arise out of the investigations which Mr Allsworth instigated in October 2001. As a result of a report to him from his Senior Auditor the Director wrote to the Prime Minister on 17 October 2001 recommending among other things that the Director's findings be referred to the Crown Law Office for further action if necessary. The proceedings were begun on 9 November 2001.

6. The Respondent is a barrister and solicitor having graduated from the Auckland University in 1984. He was formerly a police officer for some 27 years including 8 years to 1994 as Commissioner of Police. He has a number of awards for management or executive skills from Police academies. The Respondent was after election a member of the Cook Islands party. On 27 June 2000 he advised the Prime Minister at a meeting at which (among others) Mr Drollett was present that he was to make a public announcement that he was withdrawing from the party and was to be an independent member of parliament. In a letter stating his intention he expressed his wish to work closely with the Prime Minister and his colleagues "in progressing with the initiatives necessary for the betterment of our people and the country as a whole."

7. In his affidavit the Respondent avers:

• During the discussion it was orally agreed that I was to be engaged as the Management Consultant on a contractual basis overseeing the management and coordination of various projects under the auspices of the Office of the Prime Minister.

• It was also agreed that I was to be paid a fee of $15000 per annum, which is the equivalent of the allowances paid to Under Secretaries to Ministers. It was suggested that I was to assume and accept the post of an Under Secretary. I objected to this, as I did not want to jeopardise my status as an Independent Member of Parliament.

• I stressed to the Parties at the meeting that it was important and essential that I was to be employed on contract as a Management Consultant and my fees for my services were to be paid on a fortnightly basis. This was agreed to by the meeting with an assurance given by the Chief of Staff that he would take care of the matter that all I was to do was to provide him with my bank account for the transaction to be processed. I said that if required I would prepare and file invoices for my fees on a fortnightly basis. The Chief of Staff however replied that this was not necessary, as he would take care of the transactions.

8.All that Mr Drollett states in his affidavit about this meeting is to confirm its existence and that the Respondent advised his intention to change his status to that of an independent Member of Parliament in support of the government at that time. As to the further matters relating to the engagement of the Respondent Mr Drollett avers:

As a result of the discussions held, I agreed to employ him as a Management Consultant on contract to oversee, manage and coordinate the work of the Special Projects Division of the Office of Prime Minister.

Mr Drollett confirms the other matters about payment, the rejection of the offer of the Under Secretary position, the contractual nature of the appointment and the advice about the lack of need for invoices.

9. By letter, which is undated but which has a handwritten note containing the mark "4/9", Mr Drollett wrote to the Financial Secretary advising that "the following staffs [sic] have been approved to work in the Prime Minister's Special Projects Division and their salary will be charged to the PMs Support Budget" The Respondent's name was included in the letter with a salary $15000 pa. The Financial Secretary was requested to "add them on the payroll effective from Thursday 28 August 2000. I will forward to your office salary arrears claims from 1 July 2000"

10. There are annexed to Mr Allsworth's affidavit pay details pertaining to the Respondent for the fortnightly periods ending 13 September 2000 to 10 October 2001 which show for each period his fortnightly payments for 70 hours work with a deduction for tax. To that affidavit there are also annexed copies of the time sheets relating to the hours worked by the Respondent for the same periods all of which show 70 hours as certified for each period including periods such as Christmas and New Year. It is stated that "The system of time-keeping, pay details and method of payment relating to the Respondent are identical to those of all salaried employees of Government Ministries and Offices"

11. During the period September 2000 to October 2001 there were no invoices or other accounts kept by the Respondent as to his work or remuneration. There was no contract or other document which evidenced the arrangement made except a paper prepared by the respondent and approved by Mr Drollett outlining the duties and responsibilities which is headed "Special Projects: Consultancy and Coordination Office." They are in 6 paragraphs, the last being "any other projects identified and delegated by the Prime Minister and/or the Deputy Prime Minister or by the Government."

12. On 10 August 2001 there was a meeting with the Prime Minister and the Respondent. Dr Woonton and Mr Drollett were also present. At the meeting the Respondent was told that his remuneration was to be increased from $15,000 per annum to $30,000 per annum because of his good performance in his role and in recognition of additional legal services. Again, there was mention of providing an invoice for each payment but the Chief of Staff replied that it as not necessary. By letter dated 7 September 2001 Mr Drollett wrote to the Acting Financial Secretary as follows: "Re: Staff Salary Adjustment

With the approval of the 2001/02 budget, I am writing to inform you of the salary adjustments for the staff listed below effective from 2 July 2001. The reason for the salary adjustments was based on excellent performance of the concerned staff during the last 12 months."

There followed a list of 7 names including the Respondent showing for him current salary $15000 pa and new salary $30,000 pa. The pay details as mentioned above were amended accordingly. No invoices were produced and no other contract documents followed.

13. On 8 November 2001 Mr Drollett wrote to the Financial Secretary asking him to remove the Respondent's name from the central payroll system effective from 8 November. It was noted that "our office will pay Mr Tapaitau's fees on a fortnightly basis as per his contract arrangements." The letter contained these paragraphs:

For the record, the agreement for Mr Tapaitau from the beginning was that he would be an independent contractor to the office of the Prime Minister and Government for which he would receive a fee. That fee was agreed not to exceed $15,000 per annum. However, this fee would be reviewed on an annual basis.

For administration purposes Mr Tapaitau's fees were grouped with the office staff to get him on the central payroll systems. His fees were paid on a fortnightly basis, and was not intended a [sic] salary, and henceforth [sic] no tax will be taken out. Mr Tapaitau will make his own arrangements."

14. Dated 15 November 2001 a written agreement was made between the Chief of Staff, referred to as the Appointer, and the Respondent as Appointee. Such an agreement has to be read as a whole and all of its contents taken into account. I have done that. But a number of particular clauses need to be noted and quoted here as follows:

1.1 This Appointer contracts the Appointee to provide services to the Special Projects Office. This agreement records an oral agreement reached on 27th June 2000.

1.2 The contract commenced on the 1st day of July 2000.

3.1 The Appointer shall throughout this contract pay the Appointee his fee not exceeding $15,000 per annum.

3.2 The fee received by the Appointee pursuant to this agreement shall be deemed to compensate fully the Appointee for all time worked and duties performed under this agreement.

5.2 Either party may terminate this Contract without cause by giving the other party three months notice in writing.

6.1 This Contract, constitutes the full and entire agreement between the Appointor and Appointee, and supersedes all previous negotiations, communications and commitments whether written or oral.

15. The duties and responsibilities were set out in an annexure which was similar to the duties and functions document prepared and agreed in 2000 except that the first paragraph was:

Providing legal advice to the Prime Minister, Deputy Prime Minister, Ministers and Cabinet as required: and attending meetings of Cabinet from time to time for that purpose.

The Respondent under date 26 November 2001 and numbered 0001 sent an invoice for the period 8 to 21 November 2001 in the amount of $1153.80. The gross amount recorded in the pay details, mentioned above, was $1150.69 per fortnight. The description was fees for consultation and legal services "as per contractual arrangements." The Respondent avers that he has rendered other invoices since on the same basis and they have been paid.

16. Both Mr Drollett and Dr Woonton in their affidavits depose to their opinion or belief that the arrangement was for services to be remunerated by fee. The former avers that he had made an administrative error in grouping the Respondent with other staff to avoid having to approve the invoices on a fortnightly basis. The opinions beliefs and intentions of the parties have little if any relevance or probatory value in construing a contract and finding its meaning. In any event in this case the matter has to be decided on the real relations between the parties and the conduct of that arrangement.

17. The issue at the relevant time or times is whether the Respondent falls within the definition of Crown Servant. That means was he in the service of the Crown and remunerated by salary or wage and not by fees only. That is in two parts. The first is the true relation between the parties. Did it amount to being in the service of the Crown? The second is the actual payment for the service. Was it by salary or wages or by fees only? The first part has been conceded against the Respondent but because the fundamental issue is one though in two parts it seems appropriate that I should consider independently of the concession the question of the relations between the parties. I think that on the second part there is no suggestion that the Respondent was paid wages. The whole of the argument has been on the assumption that the payment or remuneration was salary.

18. The phrase "employed in the service of the Crown" is not defined. Counsel did not cite any authority as to its meaning. I have been unable to find any assistance on the whole phrase in any of the texts which are useful in citing the meaning of words and phrases. However, Black's Law Dictionary (6th edition 1990) defines "employed" as performing work under an employer and employee relation. The Oxford English Dictionary (2nd Edition 1989) [the OED] defines "employed" as "that is in one's employ" and "employ" as "the state or fact of being employed; esp. that of serving an employer for wages."

19. The distinction between a contract of service and one for services has been a longstanding basis for distinguishing between the servant or employee and the independent contractor. There is no need here to discuss or choose between the various tests which may apply to define the distinction and, in any event, as I have said, the whole contract and, where appropriate, its matrix must be considered. What I think follows from what I have said and quoted is that the phrase in the definition requires a master and servant relation, a contract of service and not a contract for services.

20. The other words in issue in this case in the definition of Crown Servant are not separately defined either and in the end, one must rely on the ordinary meaning of them. Again, I refer to the OED. Salary is a "fixed payment made periodically to a person as compensation for regular work: now usually restricted to payments made for non-manual or non-mechanical work (as opposed to wages)." Fee has a number of definitions following its derivation from the estate in land and the tribute paid therefor. The relevant one is stated to be, "Extended to denote the remuneration paid or due to a lawyer, physician or (in recent use) any professional man, a director of a public company etc. for an occasional service." Counsel for the Applicant referred to a 19th Century case *Re Shine Ex parte Shine [1891 - 94] All E R Rep 789*. Which was quoted with approval in a 1972 case at first instance in *England GLC v Minister of Social Security*[*[1971] 2 All E R 285*](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1971%5d%202%20All%20E%20R%20285?stem=&synonyms=&query=2002%20CKHC) where the occasional nature of the payment was of importance to qualify it as a fee. I doubt if the views of even a very learned Lord Justice in the 19th Century are of much assistance today especially when the Judge was careful not to intend any exclusivity in his definition.

21. How does all this apply here? The Respondent is a Member of Parliament who changing his party allegiance and offering support to the Government of the day is offered as a reward a post as Under Secretary. He refuses and instead is appointed as a consultant on Special Projects especially in Tongareva. He has professional qualifications and wide experience in management and executive positions in his career as a policeman. He is paid a salary on a fortnightly basis on identical terms as to payment as any other staff member. He does not render invoices and there is no suggestion that he keeps a time record. He is paid as if he is working a full 70-hour fortnight every fortnight whether he is on holiday or is actually engaged in consultancy work. Tax is deducted as if he was an employee.

Mr Drollett states that he "agreed to employ" the Respondent as a Management Consultant "on contract." But I observe that an employee is also employed on contract. The word contract does not help the Respondent but is neutral. Although the word "fees" was referred to in the initial discussions the term of payment on the basis of an annual lump sum paid fortnightly is not consistent with the idea of payment of professional fees. And for whatever reason, error or not, the Respondent was paid a salary, in terms and in actuality, on a basis which is contrary to a fee basis.

22. When the contents and recommendations of the report from the Director of Audit became known steps were taken to rectify and clarify the situation. What was done directly confirms that the previous situation was other than the desired one but confirms that the pre-existing arrangements had treated the respondent as a staff member on a salary. That is the clear implication from Mr Drollett’s letter of 8 November 2001. Equally the written agreement a week later which supersedes all other agreements and sets out an arrangement different to the payment situation that had been in existence since August 2000 confirms the previous arrangement and its distinction from the one now recorded in writing.

In other words what was done in November 2001 changed the contract or arrangement as it had been carried out since August 2000. It put the contract and arrangement on the footing that the parties now say they had agreed in June 2000 and confirmed in August 2001. But that was not the actuality. The wishes and intentions cannot alter or recall the facts and the conduct of the arrangement between August 2000 and November 2001.

23. In my judgment having regard to all the factual circumstances and in particular the conduct of the parties and their words and intentions actually recorded at the time the arrangement that was made and continued and executed from August 2000 was an arrangement which employed the Respondent in the service of the Crown for which he was remunerated by salary and not by fee only. He thereupon became a Crown servant and in terms of the Act s. 8(1)(l) the seat became vacant.

24. The Respondent raised a Constitutional issue claiming that the provisions of section 8(1)(l) of the Act were invalid if they were to result, by his disqualification, in the constituency of Penrhyn having no representation in Parliament. The argument was that Article 27 of the Constitution establishes and provides for the Parliament which includes a representative of the island of Penrhyn. An Act of Parliament which has the effect of preventing or removing that representation is inconsistent with the Constitution unless passed in accordance with Article 41 of it. Section 8(1)(l) of the Act was not so passed.

25. It may be questioned whether a provision which disqualifies the Member means that the constituency is unrepresented. Death, resignation, refusal to take the oath of allegiance and perhaps other situations may under the Constitution leave the constituency and the seat vacant for the time being. There follows a bye-election by which the seat is filled and the constituency once again fully represented. The question remains however because if the Act and its provision is inconsistent with any provision of the Constitution then it cannot stand unless passed in accordance with Article 41.

26. There is no provision of the Constitution which deals directly or expressly with the issue in this case. No Article provides for the disqualification or removal of an elected Member. Article 30 which prescribes the taking of the oath of Allegiance indirectly deals with the issue by forbidding a member from sitting and voting in Parliament without taking and subscribing to the oath. That is not the point in this case.

27. The Constitution provides and prescribes the qualifications of candidates for election; Article 28B. It was that Article which was the basis of the decision of the Court of Appeal in Goodwin v Attorney General (CA OA2/94 18 February 1994). The Electoral Amendment Act 1993 prohibited Crown servants as defined from being nominated for election to Parliament. That was held to be inconsistent with the Constitution and its provisions for the qualification of candidates. There was no question in that decision of disqualification of an elected Member. The Constitution also provides in Article 27(3):

Subject to this Article and Articles 28, 28A, 28B, 28C and 28D hereof, the qualifications and disqualifications of electors and candidates, the mode of electing members of Parliament, and the terms and conditions of their membership shall be as prescribed by Act.

It may be observed that the provision in issue in Goodwin's case was re-enacted as paragraph (e) of Article 28B (1) of the Constitution.

28. The Act referred to in Article 27(3) is an ordinary Act not one which is to be passed in accord with Article 41. That follows from the definition of act in the Constitution.

29. The provision in question is not one about qualification of candidates but is about the terms and conditions of Members and their membership of Parliament. There is nothing about that in the Constitution. The disqualification of the Respondent does not mean that the constituency is unrepresented except to the extent that there is a vacancy until the bye-election is held. That temporary vacancy is not what the Constitution prohibits or is intended to prevent. Section 8(1)(l) of the Act is not inconsistent with the Constitution.

30. In the result there will be orders in the terms of the application. Costs are reserved. Counsel may make submissions in the absence of agreement.

**L M Greig CJ**

**Research Conclusion**

1.The Member of Parliament (MP) for Penrhyn, Hon. Tepure Tapaitau, was elected on 24 June 1999. On 27 June 2000, the MP resigned from the Cook Islands Party and became an Independent MP, shifting his allegiance to the Government.

2.On 28 August 2000, the MP was appointed by the Chief of Staff of the Office of the Prime Minister, as Management Consultant to the Cabinet. The duties and responsibilities were set out in an annexure, stating;

‘Providing legal advice to the Prime Minister, Deputy Prime Minister, Ministers, and Cabinet as required and attending meetings of Cabinet from time to time for that purpose’.

3.This appointment made the MP, a Crown Servant as per the Sec 2 of the Electoral Act 1998. Therefore, from August 2000 was an arrangement which employed the Respondent in the service of the Crown for which he was remunerated by salary and not by fee only. As a result, he became a Crown servant and in terms of the Act s. 8 (1)(1) the seat became vacant.

4. After changing Party allegiance and offering support to the Government of the day, the Respondent was offered as a reward a post as Under Secretary. The Respondent refused and instead was appointed as a Consultant on Special Projects especially for the island of Tongarewa (Penrhyn), his constituency.

5. After disclosure by the Director of Audit, when the contents and recommendations of the Director’s report became known, steps were taken to rectify and clarify the situation by the Chief of Staff of the Office of the Prime Minister. Changing the status from a paid salary position to one of Consultant’s fees, confirms the pre-existing arrangements and sets out a different arrangement a week later which supersedes all other arrangements that had been in existence since August 2000, confirms the previous arrangement from the new one recorded in writing.

6. In other words, what was done in November 2001 changed the contract or arrangement as it had been carried out since August 2000. Basically, the employer was trying to put the contract and arrangement on the footing that the parties now say they has agreed in June 2000 and confirmed in August 2001.

7. It is plain to see that was not the actual situation. The intentions and conditions cannot alter, change or recall the facts and the conduct of the arrangement between August 2000 and November 2001. In my view, this reveals implications of a ‘cover-up situation’ after disclosure.

8. Applying the three pre-conditions of Dr Cressey’s fraud triangle of motivation, opportunity and greed shows that they existed albeit in an administrative scheme, rather than in a criminal sense. The MP had forgone and shifted his allegiance from the Cook Islands Party to the Government of the day, for a price. The price was not the Under Secretary position offered but one as a contract Consultant with the Office of the Prime Minister. This means additional remuneration.

9. Therefore, the motivation and opportunity were taken to shift allegiances with the Government of the day, in order to receive a financial reward. Was the element of greed present? This particular characteristic and behavioral trait, in my view, is difficult to conclude. The MP was on a Parliament salary. In addition, and as a result of the new arrangements with the Office of the Prime Minister, he collected additional financial benefits, as a consultant, in lieu of the appointment as Under Secretary. The consultant services however were specifically for the island of Penrhyn’s benefit, the respondent’s constituency.

10. Using the ‘Te Toki e te Kaa Rakau’ symbolic model overarching these unfortunate circumstances, the question arises, were cultural and environmental conditions, at the time, influenced the MP’s shift in political allegiance, the reward of financial incentives and the effect on the political balance of power?

11. It would be fair to say that all the above occurrences actually took place. Although the MP remained an independent member of Parliament, the question begs, that as a trained lawyer and experienced civil servant, why did he and senior officials of the Office of the Prime Minister, not become aware of the Electoral Act provisions and the disastrous effect it would have on the outcome of his appointment?

12. The answer to the above question may lie in the domain of secretive and concealed agreement amongst the MP, the Chief of Staff of the Office of the Prime Minister and Cabinet Ministers in this unfortunate situation. It was only through a routine financial audit that disclosures were made transparent.

**Lessons Learnt**

1. Members of Parliament and senior Government officials should undertake regular training in specific legislation, laws and policies governing their responsibilities and duties to the Crown.

2. Code of conduct awareness and training for senior officials and a leadership code of conduct for members of Parliament, on the rules of behavior expected of them.

3. If unsure of any important legal matters, then senior officials, members of Parliament and Cabinet Minister’s should consult with the Crown Law Office for the appropriate advice.

4. Non disclosures and not being transparent and accountable in areas of employment and contractual agreements for members of Parliament in the Public Service, is a breach of the enabling legislation and will have serious consequences once revealed by Government auditors and Public Service inspectors.

Case No 6

Date: 2003

**Edward Drollett**

Former Chief of Staff of the Prime Minister’s Department, Edward Drollett, was charged with seven offences under the Secret Commissions Act 1997 and one charge of forgery under the Crimes Act 1997.

**Introduction**

As Director of Audit at the time, a special review audit was undertaken after certain discrepancies were revealed from the annual financial audit of the Prime Minister’s Office. Further audit testing showed that accounting fees charged to the Office of the Prime Minister by an external party, connected with the former Chief of Staff of the Prime Minister’s Office, were much higher than the standard market rates at the time. An audit report was completed disclosing possible misuse of public funds and possible secret commissions. The report was submitted to the Police and the Office of Crown Law for their legal opinion and prosecution.

**The Case and Sentencing**

Mr Drollett, you appear for sentence having been convicted of seven separate counts under Section 6 of the Secret Commissions Act and a single joint charge of forgery under Section 287 of the Crimes Act, the maximum penalty under the forgery charge is 10 years. As you know the penalty under the Secret Commissions Act is imprisonment not exceeding 10 years or a fine not exceeding $20,000 or both. The seriousness with which such offences are viewed by the Cook Islands legislature is apparent from a comparison of the comparative New Zealand provisions where the maximum penalty is only 2 years imprisonment.

It is necessary so there is no misunderstanding to explain the elements of the offence under the Secret Commissions Act and I can do no better than refer to the summary given by the Judge in his decision. He said the elements of S. 6 are first that the Accused must be an agent of the Crown, someone in the service of the Crown holding any office. That person must corruptly accept a payment, corruptly is a word of straightforward meaning, accepting a payment, and that is equally straight forward. The important part is as an inducement or reward for having shown favour in relation to the business of the Crown.

The offence as defined is one which falls under the broad heading of governmental corruption or dishonesty. The legislature of this country has set its face against governmental corruption by imposing extremely heavy penalties against it. In that respect the government has aligned itself with almost all civilized countries of the world who in various ways are seeking to combat the insidious effects of corruption and I note for example that the General Assembly of the United Nations has recently adopted a UN Convention against corruption which is now open for signature by the member states.

I am going to refer to what was said by the Secretary General when welcoming the adoption at that convention because as I’ll explain a little later, some people, especially those who provide references do not seem to understand the importance and seriousness of this kind of offence. The Secretary General in welcoming the adoption of the convention said that corruption was an insidious plague that had wide ranging and corrosive effects on societies, it undermined democracy and the rule of law, it distorted markets and could erode the quality of life for citizens.

He said that this evil phenomenon was found all countries big and small, rich and poor but that in the smaller developing countries its effects were most destructive. It is doubtless because of that kind of thinking that the Government of the Cook Islands has taken a very strong approach to Secret Commissions and this Court has an obligation to apply the law always fairly and appropriately but it must take note of the signals given by the government, strong signals under the Secret Commissions Act.

Reported cases of corruption such as this are fortunately fairly rare but when they do occur deterrence becomes an important consideration. When we have cases such as this, others who may be thinking of or tempted to engage in this kind of activity must know and understand that the law will deal firmly with such socially destructive behaviour.

This is a particularly sad case, it seems that you are as all have confirmed in your testimonials a highly regarded intelligent, motivated individual with a hitherto blameless record, you had made a significant contribution to Cook Islands society. If I could avoid a sentence of imprisonment on any proper basis I would willingly do so but when all the circumstances of your offending are taken into account, along with the public interest factors, and the strong message that is given to Judges by the Secret Commissions Act, it is impossible for me not to sentence you to imprisonment in spite of your many admirable qualities and in spite of the extraordinary support you received in the testimonials.

My duty therefore is to carefully assess the situation and try to find an appropriate term of imprisonment which fairly balances the interest of society as represented in the Secret Commissions Act along with those of yourself and your family and I understand very clearly that your family will undoubtedly suffer and has suffered your wrongdoing.

To assist me in determining an appropriate penalty in this case, I took the precaution of arranging to have produced to me the following, all of which I have studied very carefully. First of all, the Judgment of Justice Smith of 7 November 2003. Secondly the detailed Summary of Facts which has been read out and which subject to the alterations I made is accepted by the Defence. Written submissions by the Crown which was read and also detailed Defence submissions and a pre-sentence report. I have carefully considered all of this material. I want to deal with the pre-sentence report because it’s important both as providing me a detailed personal history and an indication of your achievements, also the period about your character.

You are described as a very hard worker whose management qualities often exceed expectations through good organization, professionalism, commitment, consistency, discipline and diplomacy and there is no doubt from this report and from your testimonials that you have performed exceedingly well in your official capacities. The other factors which I take into account are that your family will suffer because of your imprisonment and there will be financial difficulties because of your inability to run your business. I was troubled when I read the statement as follows:

*"when spoken to Mr Drollett acknowledged his part in the offence, further stating that it was an error of judgment and did not intend for this look as it is."*

Now, your counsel has expressed to me this morning that you have genuine remorse. I hope that is the case because I can tell that this was not something to be placed in the category of an error of judgment, it was a deliberate knowing breach of the Secret Commissions Act.

The assessment of the Probation Service is that notwithstanding your undoubted talents, you were placed in a position of authority, power, respect and trust and that you have undoubtedly broken the trust of your employer. I think that is undoubtedly the case, sad though it may be. I will be taking into account what the Probation Service describes as a very substantial contribution to the Cook Islands community. I do note the concluding observations of the Probation Service, that there is no excuse for what Mr Drollett has done, that being aware of his position in the public office and I note there is a recommendation for a custodial sentence.

Now, coming to the question of what the sentence should be, the Crown has referred to some New Zealand cases, we do not have a precedence here although the Benns case might possibly provide some guidance although the offending was over a much longer period and the amount much more significant and the maximum penalty available was 5 years for each charge and the Court would have looked at overall capability, the sentence was 3 years. The Crown have referred to other cases from New Zealand and there I refer to the Watson case and the Child case where in the case of Watson the sentence was 1 and ½ years imprisonment bearing in mind there’s a maximum of 2 years. I take into account Mr George’s observation that the offender there made it worse by trying to resist reparation but nevertheless there was 1 and ½ years imprisonment.

The Child and Courtney case, the sentence was 18 months and 2 years. Perhaps the most helpful analogies are those of Cook Islands cases relating to forgery and theft as a servant and in particular the case referred to by the Probation Officer. The name of the accused is not given but it was a case in which the charges were forgery and theft as a servant and the Defendant was the sole supervisor on the island of Mauke. The sentence there was 2 and ½ years imprisonment to be served concurrently. There was another forgery case on a guilty plea where on 15 December 1999, the JPs sentenced to 3 years imprisonment.

My study of the cases available to me in the submissions, it led me to conclude in a tentative way before I came to Court that the starting point for offences under the Secret Commissions Act should be around 3 years and the submission’s I’ve heard this morning from the Crown have confirmed me in that view, so that is the starting point. The question is, what effect on that starting point should be given to the aggravating and mitigating factors. The aggravating factors have been read out and I shall reproduce them in my sentencing notes, they have been read out and they are paragraph 14 of the Crown submissions.

I won’t go over them again but the crucial elements are the position of high responsibility you had in government and the abuse of a position of trust in that position. There is also the fact that you influenced a younger and more impressionable person to offend and there is the lying when approached by the Commissioner afterwards. The amount of money I accept is not great although in this economy it is by no means insignificant, it is a significant sum of money but cannot compare with such cases as the Michael Benns case.

I am prepared to accept that you realize the seriousness of your offending and I will disregard the statement in the Probation Report attributed to you that this was a merely an error of judgment. What are the factors for which you should be given credit. The Crown says there are not mitigating factors, that may be true in the strict legal sense but there are certainly factors which entitle you to credit and these are your prior unblemished record, your hitherto excellent character and the very great contribution you have made over the years in the Cook Islands Public Service. I also take note of your achievements as a parent and the excellent family which you have produced and also the fact that the penalty will impose considerable stress.

I have read each and every of the testimonials and apart from one thing that I will mention, they strongly support views that the Probation Service have expressed about your achievements. There is one troubling aspect of these, especially from high government officials. The troubling aspect was reflected in the submissions made by Mr George on your behalf that, to quote his paragraph 5, "local perception is that while there is revulsion to corrupt practices by officials, theft, breaking and entry in crimes involving violence are treated as far greater and more serious levels. The idea that these present charges are not as serious as theft and dishonesty is something which this Court rejects firmly. The Deputy Prime Minister for example, says "I do not treat what Edward did as of the most serious crime in our community, I treat theft and dishonesty as worse."

The simple fact is that the maximum penalty for theft is 5 years and most of the dishonesty offences also carry similar penalties and I must say firmly as I can that I am not impressed with assessments by people in high places which tend to downgrade what Parliament has done by saying that these offences are not as serious as theft, others have said that, not just the Deputy Prime Minister, I find that Mr Piri’s testimonial and that of Mr Dan Kamana and it is a thing which I reject.

I now have to deal with the question of the penalty and in my judgment the appropriate penalty is 2 years imprisonment.

I must deal with the forgery charge. I accept the Crown’s submission that it cannot be taken as simply an immaterial element in your offending as the Crown submitted in relation to forgery charges, it was a deliberate attempt to impede the investigation in a sense that it was produced in the hope that it would deflect the investigation and I agree that it was a serious matter.

I therefore not disposed to make the penalty on forgery a concurrent penalty deserves a separate penalty because it is a completely distinct matter, separated by years from the iron fending. In all the circumstances a term of imprisonment of 3 months will be adequate to express the Court’s abhorrence of the way you acted in creating the false letter.

I have taken into account in fixing these penalties as I stressed that the level of offending is at a fairly high level. It is true that the amount is not great and it is true as Mr George has said that the offending only occurred over a 5 - month period. I have to say that the suggestion of a discharge without conviction was totally unrealistic and bearing in mind the seriousness of the offending it is only your past Court record which has brought down the level of sentence from the starting point of 3 years. So, on all of the Secret Commissions charges the sentence will be 2 years imprisonment to be served concurrently, on the joint forgery charge, the sentence will be 3 months imprisonment which will be served separately and cumulatively.

**Justice Williams**

**Research Conclusion**

1.The Cook Islands Parliament enacted the Secret Commissions Act from New Zealand after the infamous Micheal Benns liquor fraud case, mentioned earlier. The summary given by the Judge in his decision, stated ‘that the elements of section 6 are first that the accused must be an agent of the Crown, someone in the service of the Crown holding any Office. That person must corruptly accept a payment…the important part is as an inducement or reward for having shown favor in relation to the business of the Crown.’ The offence as defined is one which falls under the broad heading of governmental corruption or dishonesty.

2.The Cook Islands Parliament imposed heavier penalties as to those implemented by the New Zealand Parliament. The legislature of the Cook Islands has confronted governmental corruption by imposing extremely heavy penalties against it. The General Assembly of the United Nations at the time, adopted the UN Convention against Corruption, whereby member states accordingly ratified. The Judge recalled the comments by the Secretary General of the United Nations, as he stated, ‘some people, especially those who provided references do not seem to understand the importance and seriousness of the kind of offence. The Secretary General of the UN, in welcoming the adoption of the convention said that corruption was an insidious plague that had wide ranging and corrosive effects on societies, it undermined democracy and the rule of law, it distorted markets and could erode the quality of life for citizens.’

3. The Judge stated, ‘reported cases of corruption such as this are fortunately fairly rare but when they do occur deterrence becomes important consideration. When we have cases such as this, others who may be thinking of or tempted to engage in this kind of activity must know and understand that the law will deal firmly with such socially destructive behavior.

4. To compound matters, the forgery charge was a deliberate attempt to impede the investigation in the hope it would deflect the investigation by creating a false letter. This is a single joint charge of forgery under sec 287 of the Crimes Act. This is a serious matter. This was separate from the 7 charges under sec 6 of the Secret Commission Act.

5. The Judge states, ‘I am troubled when I read the statement as follows;

‘When spoken to Mr. Drollett acknowledged his part in the offence, further stating that it was an error of judgement and did not intend for this look as it is.’

Now, your counsel has expressed to me this morning that you have genuine remorse. I hope that is the case because I can tell you that this is not something to be placed in the category of an error of judgement, it was a deliberate knowing breach of the Secret Commissions Act.

6. Clearly, the pre-conditional elements of motivation and opportunity in Dr Cressy’s fraud triangle were predominant throughout the pursuit of the offences undertaken by the defendant. The defendant used his senior position of trust and authority to grasp the opportunity and motivation to undertake such offences. Whether the insatiability and greed were a decisive factor combined with the other two elements is unknown. However, there was some financial benefit resulting from the offences, to the defendant.

7. Applying the ‘Te Toki e te Kaa Rakau’ concept of cultural influences and the environmental conditions impacting the unethical circumstances surrounding the offences. One can only decipher the facts emanating from this case. The Judge states, a ‘troubling aspect…. the idea that these present charges are not as serious as theft and dishonesty is something which this Court rejects firmly.’ The Deputy Prime Minister (DPM) for example, say, ‘I do not treat what Edward did as of the serious crime in our community, I treat theft and dishonesty as worse.’ This in my view, demonstrates a strong political and employment relationship between the defendant and the DPM.

The Judge states, ‘Not just the DPM, I find that Mr Piri’s testimonial and that of Mr Dan Kamana and it is a thing which I reject.’ Further you influenced a younger person to offend and there is the lying and cover-up when questioned afterwards.’ Both Mr Piri and Mr Dan Kamana are respected elders and community leaders from the same village as the defendant. It appears that regardless of the seriousness of a crime, colleagues, friends and community leaders will still provide references and support, to assist the offender. This socio - cultural relationship is prevalent in small close-knit Pacific societies such the Cook Islands. The cultural and occupational relationship between the offender and his co-offender made it more convenient to work together in order to defraud the Office of the Prime Minister of public funds.

**Lessons Learnt**

1.The Secret Commissions Act and the Crimes Act are effective legislations that provide inescapable boundaries that govern and protect taxpayers and citizens from corrupt officials.

2. Whether or not codes of conduct for public officials are in place, the characteristics and behavioral elements of opportunity, motivation and greed may be present, given the circumstances and conditions, conducive in carrying out the alleged offences, at the time.

3. Simply put, crime does not pay. Whether termed an honest mistake or an error of judgement, the judiciary will use the full force of the law to prosecute and penalize offenders in order to protect the public.

4. International conventions, such as the United Nations Convention Against Corruption (UNCAC) has been recognized and ratified by member states of the United Nations and Commonwealth countries. The Cook Islands is a party to the Convention. Its mission is to bolster integrity and reduce corruption by supporting and empowering civil society to collectively promote transparency, accountability and good governance and to advance the implementation and strengthening of legal frameworks.

5. Cultural influences and environmental conditions in the community should not be a stimulus to direct the outcome of undertaking unethical practices. Ever since Hofstede introduced his model on cultural dimension, culture has become more and more important in explaining economic country differences. Several studies have addressed the relationship between trust and corruption and find that countries which score high on the level of trust, have lower corruption. This is explained by the fact that trust facilitates and encourages cooperation between all members of society, improving the governments and the economy’s quality and in turn reducing corruption (La Porta et al, 1997: Uslaner, 2004).

Other scholars such as Harris (2007) take a different approach to the concept and use the level of social bonding in their regression. Bonding social capital is the level of trust and reciprocity between people that are close, such as family and friends as opposed to bridging social capital which describes the level of generalized trust and reciprocity between heterogenous groups and people (Putman, 2000).

When bonding social capital leads to the exclusion of people who are perceived as ‘out-group’, it discourages trust and cooperation with them. Simultaneously, it increases the favoritism inside a group and thus corruption, since it becomes a descriptive norm to help a fellow group member, even when it harms the outside world. Such normative rules of ‘helping one another’ become more and more stable over time, building strong corrupt networks (Harris, 2007).

Using data from the World Values Survey and the CPI Index and controlling for other factors that might impact the level of corruption and trust, she can support this hypothesis, finding that a high level of bonding social capital does indeed increase corruption when it discourages cooperation with outsiders. She concludes that policy makers can reduce corruption by fostering generalized trust in the society through civic education and thus opening up strong and possibly corrupt networks.

Case No. 7

Date: 10 December 2004

**IN THE HIGH COURT OF THE COOK ISLANDS**  
**HELD AT RAROTONGA**

MISC. 84/2004

IN THE MATTER  
of the Cook Islands Electoral Act 2004  
and the General Elections held on  
7 September 2004

AND

IN THE MATTER  
of a Petition by **TIKI MATAPO of Titikaveka, Candidate**

**Introduction**

**DECISION OF THE COURT**

The Petitioner, TIKI MATAPO, the unsuccessful candidate seeking the Titikaveka seat in the recent general election has filed a petition alleging three reasons why the Court should intervene and disqualify the successful candidate ROBERT WIGMORE.

Firstly, that there are sundry voters who for various reasons should have their votes disallowed.

Secondly, that there was corrupt treating on election day by Robert Wigmore in that he provided electors with refreshments in a marquee at his home; the polling was 3-4 hundred metres from the Wigmore home.

Thirdly, that Robert Wigmore directly or indirectly by himself or by others on his behalf committed the electoral offence of bribery. (These grounds were amended at the commencement of the hearing to "Bribery by improper use of government money".)

**Disallowed Votes**

The Court delivered an interim decision on the matter on 9th December 2004.

**Treating**

Two witnesses gave evidence on this matter; Mama Turi Atuatika gave evidence that she was uplifted from her home by a young woman who apparently was one Tapita Engu, driven around the island ending up at the home of Robert Wigmore she was offered a cup of milo and a sandwich this before she had voted, having drunk the milo and eaten half the sandwich she was shown the voting booth - she voted and was returned to her home by the same young woman; this witness was adamant she did not want to travel around the island or go to the Wigmore property. The second witness Mata Tavai was uplifted from his home and taken to the Wigmore home, he asked for and was given a drink of milo then proceeded on to the booth and voted. He saw Robert Wigmore but did not speak to him before voting.

Mr Wigmore giving evidence stated that he had put up a tarpaulin around to the rear of his home and refreshments were provided. This was usual practice around Rarotonga and he had seen the marquee of his opponent, the Petitioner, at Titikaveka being used for the same purpose. He stated that his electorate workers had been clearly instructed that only after a person had voted should refreshments be offered. Mr Wigmore did not know of his campaign workers who the young woman was that uplifted Mrs Atuatika. He said he saw Mrs Atuatika and spoke to her. Mr George argues that the Atuatika incident "oozes deception everywhere" - the voter was "tricked and treated" and Mr Wigmore should have known who had driven Mrs Atuatika.

Mr Little argued that the whole Atuatika incident was rather bizarre; the voter was upset with the driver taking her around the island - there was no talk of voting - she asked the same driver to take her home.

Dealing with Mr Tavai Mr Little pointed out that the voter asked for a drink of milo and there was no talk of his voting for Mr Wigmore. Mr Little's primary legal submission is that it has not been proven that Robert Wigmore provided food and drink for the purpose of corruptly procuring himself to be elected.

I am of the view that if the drivers of the vehicles taking these voters to the polling booth had been called to give evidence the Court would have been in a better position to evaluate what happened, neither were.

I am not prepared to find that Robert Wigmore provided the drinks and sandwich with the purpose of corruptly influencing those voters. He provided, like the Petitioner, refreshments to be partaken of by voters/supporters and like Mr Tiki Matapo instructed his campaign workers that refreshments were available to people after they had voted.

I reiterate that the culpability or otherwise of Mr Wigmore would have been clarified if the evidence of the drivers had been available, this evidence not being available I cannot speculate as to what motivated Tapita Engu or the other driver to call in at the Wigmore home before Mrs Atuatika and Mr Tavai had voted.

I find the evidence adduced on this issue insufficient to establish corrupt treating.

**Bribery by improper use of Government funds**

There are three prongs in this attack.

1. Bribery by having provided roads to two homes sealed at no cost to the home owners.  
   (ii) Bribery by having electric power lines erected to two homes at no cost to the home owners.
2. (iii) Bribery by approaching Cabinet for $100,000 for waste management project (the amount was amended to $40,000 during the hearing).

At the outset I mention two sketches of Robert Wigmore that have been pressed upon me. From Mr George I am asked to see a "godfather like" corrupt Minister, pulling the levers of Government powers influencing fellow Ministers and sundry public servants to manipulate and carry out the various projects with the view of enhancing Mr Wigmore's election chances.

The picture painted by Mr Little is that of an industrious Minister quietly going about his duties amongst which is a proper attention to the problems of his electorate.

**The Road Sealing**

There is no dispute that the sealing to the Wearing and Teura homes, the substance of the complaint, was carried out what is in issue is whether the work was in the usual course of projects carried out by the Works Department or was there an underlying political motive that caused this work to be done.

Mr George points out that this work was carried out in the three months preceding the election; that the way things operate in the Works Department is that once the Minister (Robert Wigmore) gave authority or seal dug up roads those below did not need to keep returning to the Minister's Office for further approvals. There was John Manuel the Minister's Field Officer who kept in touch with what was happening. He places significance on the letter that Mrs Wearing wrote thanking the Minister. He emphasizes the $24,000 and $3,000 sealing costs as an inducement to the home owners benefiting; effectively a bribe to secure their votes. The whole operation was deviously planned and subtly applied to protect the Minister from public exposure but the recipients "got the message" and wouldn't be mistaken as to who their benefactor was.

Mr Little submitted that the Minister had no idea when the road was sealed, there were other sections that benefited from the new road - the general public used the road - the Wearings enquired in 2002 about sealing the road. The sealing timetable depended upon completion of water works that excavated parts of the road - the water works were completed in June 2004. The decision as to which roads are sealed was the province of Mr Herman though the Wearing - road was not approved by him. The Minister had visited the Wearing property advising that post water works, sealing would be carried out.

In relation to Mr Teura's drive Mr Little referred to the evidence before the Court of how that came to be sealed.

The substance of his submission is that in relation to the particular sealing complained of, the Minister played an insignificant part, this work was carried out in the usual way without political consideration being taken into account.

The evidence before me on this sealing project involving Robert Wigmore is he has as Minister of Works pursued a policy of sealing roads throughout Rarotonga. He would like to see all roads sealed in time. He also detailed a policy whereby when water works entailed excavating roads his department would repair and seal the roads upon completion of the water works. The evidence showed that the Minister did not concern himself with the day- to- day implementation of these policies. Mr Manuel his Field Officer was the conduit between field operations and Minister's Office. There is no evidence before the Court contradicting the role of the Minister as outlined.

Moving to the actual sealing Mr Te Pakura Works Co-ordinator gave evidence that he had told Mr Wearing in February that sealing would wait for water works completion. This witness believed that the works was covered in the estimates and in May he indicated to Robert Wigmore that when this sealing was done people would talk; he said the Minister replied that talk wouldn't cause him to die. Mr Te Pakura was adamant that the decision to seal, and when to seal, the Wearing - road was his and there was no external or political pressure on him to do it. The water works were completed in June fine weather dictated an August start on re-construction and sealing because the road entailed steep grades and failure to seal would result, when heavy rains occasioned, in wash outs.

This witness is aware of the policy to seal all roads that are used by the public - approximately 80% of island roads now complete. There does not appear to be a distinction between private and public roads insofar as the sealing programme is concerned.

The evidence given by William Heather Junior regarding the sealing of the Teura drive is that after sealing the road to the Wearings there was some 300 litres of tar left. This was below the point in the tank whereby it could be re-heated and if not used at the time would solidify and cause problems with blocked equipment. On his own initiative without consulting either his superior in Works or Mr Teura he sealed the drive - some 35 metres - to the value of $3,000.

I am asked by Mr George to find on the facts outlined above the stealthy maneuvering of Robert Wigmore pressuring those involved to authorize and carry out this sealing always with a view to electoral advantage.

Having seen the witnesses I am convinced that both Mr Te Pakura and Mr Heather made their decisions based on good works practice considerations not political pressure. The Works Co-ordinator, because he knew heavy rain would wash out road formation, Works were obliged to do resealing following the water works and notwithstanding no approval by his superior, Mr Herman, caused the sealing of the Wearing Road to be completed. Mr Heather, because of the possible blocking up of plant with cold seal decided to use the 300 litres sensibly rather than dispose of it.

I find the involvement of Robert Wigmore in formulating the policies outlined above and leaving it to his subordinates in the Ministry to implement, is a proper exercise of ministerial functions; nowhere is there evidence of improper interference or even the subtle pressure Mr George intimates. The sealing was first mooted in 2002 - the policy of road upgrade after water works excavation was in place long before the 2004 elections and unless I find (without evidence) that the Works Department intentionally held off completion of the water works until June 004 to ensure the road be sealed immediately preceding the elections, I cannot accept the Petitioner's argument.

I find that there was no bribery or any other impropriety on the part of Robert Wigmore causing or influencing the sealing of the road to the Wearing home and the drive to Mr Teura's home.

**Erection of Power Lines**

The allegation in the Petition is that Robert Wigmore arranged for the installation of 300 metres of power lines to ensure that Tereapii Mareta had power to his home and that he promised Mata Tavai power; both were not expected to pay for their power.

Mr George argues that there was no reason for the home owners to receive free lines to their homes and notwithstanding Mr Wigmore not appearing as the instigator of the grants from the Social Responsibility Funds held by the Ministry of Works for this very purpose, he was the presence behind what developed and therefore he must be culpable. Mr George suggests that Mr Tapi Taio was given the hurry up to authorize the payment to the Power Authority. This he argues was evidence of corruption.

Mr Little in reply argues that the provision of electric power lines was not connected to the elections that Mr Wigmore did not make the decision to provide the power lines. Mr Little argues there is no evidence to support the various matters necessary to prove culpability on the part of Mr Wigmore; he points out that the power lines were erected some six months ago. The facts in this matter are not seriously contested — the lines were erected after Mr Tapi Taio the Minister of Finance had arranged the authorization for payment out of the Social Responsibility Fund. It appeared from the evidence that once the Power Company (Te Aponga Uira O Tumutevarovaro) decided and applied for assistance from the Social Responsibility Fund was desirable, they applied to the Minister of Finance; it was not an uncommon procedure, they had a pro forma letter that was used in these requests. The evidence is that the Minister of Finance after prodding by Robert Wigmore or his agent made the necessary request. Mr Taio mentioned that he was often being chased up by his colleagues to action these requests.

The explanation given that the 300 - metre line was essential to complete the circuit in that area and was necessary to ensure the voltage was kept as high as was necessary.

The grant to Mr Mata Tavai was explained as a usual one because the fund was available to assist people who could not afford the expense of power lines; Mr Tavai was of this category.

I accept the explanations and reject the suggestion that Mr Wigmore "bribed" the recipients of these power lines by assigning the social responsibility money with a view to inducing these persons to vote for him. I am of the view that any involvement of Mr Wigmore or his ministerial offices was reasonable and pursuant to his normally expected duties as the Titikaveka Member of Parliament.

I find that Robert Wigmore did not corruptly bribe any one in this power line matter.

**Waste Management Bribery**

From 2003 through to 2004 complaints of eye infections occurring after people used or bathed in the lagoons fronting the Titikaveka electorate area were becoming common. The general public in the area were becoming concerned and publicity mounted to the extent that the Prime Minister, other Ministers and Government officials attended a public meeting at the Kent Hall in Titikaveka on 21 June 2004 to discuss pollution by the various pig farms in the Titikaveka area. After the meeting, a ban was placed on swimming within 200 metres of the Akapuao Stream.

Previous Government action had resulted in overseas scientists being consulted as to water quality and health problems with a view to identifying the source of the problem.

A task force had been put in place and one aspect that was mentioned was the effect of waste from warm blooded animals. This turned the focus towards the many piggeries in the Titikaveka area particularly as some were discharging waste directly into adjacent streams, these streams flowing into the lagoon.

The outcome of the meeting was Dr Woonton Prime Minister publicly announced that Mr Tom Wichman a local consultant had been commissioned by the Government to look into the pig waste issue checking the location and size of piggeries in Titikaveka, Tikioki and Vaimaanga areas. Water quality in the lagoon and other sites around Rarotonga was being monitored samples being sent to New Zealand for testing.

Mr Wichman contended that some piggeries needed digesters and he proceeded without Government finance to erect a digester on the property of Walter Marearai. The Government was concerned by what was happening and authorized Mr Wichman to proceed with the erection of digesters where needed to process the pig waste; to this end the Minister of Finance in a memo to Cabinet requested a $40,000 transfer of appropriation from the M.O.W. Social Responsibility Fund to fund the erection of digester. The $40,000 was transferred from the $120,000 allocated to "Te Puka Septic Tanks", each was to cost in the vicinity of $6,000. These digesters were to be supplied at no cost to the piggery owner.

It is this transfer of funds for this project and the disposal of same that the Petitioner relies upon in his allegation of bribery of the piggery owners to gain their vote.

Mr George says there was no emergency declared and the whole effort of Government was to assist Mr Wigmore's electoral chances and thus he is guilty of bribery.

Mr George infers that the whole digester scheme was created by Mr Wigmore and his Cabinet Colleagues to "inject money for pig farmers". He goes on to submit that providing these free digesters only to Titikaveka electors/pig farmers who did not ask for this is political bribery.

Mr Little argues that what has been alleged does not establish bribery in terms of S.88 of the Electoral Act 2004 ("the Act"). He argues that the Petitioner has not adduced evidence to the required standard in law to justify a finding in his favour. He argues that the provision of these digesters was not "in connection with any election" as provided in S.88 of the Act. He further suggests that the provision of digesters was in connection to a public outcry relating to the pollution of the streams and lagoon by pig waste. Dealing with the request to Cabinet to transfer the $40,000 was at the behest of the Minister of Finance Teremoana Taio not Robert Wigmore.

I have carefully weighed up the submissions of counsel as well as the evidence before the court.

In reviewing the totality of the evidence, I have come to the conclusion that Robert Wigmore alone did not cause the building of the digesters by instigating the transfer of the $40,000 or the commissioning of Mr Wichman to build them.

The evidence before me dealing with this public health issue does not establish the pig waste has or had any connection to the health/eye problems; this is confirmed as late as 25th September (see report on piggeries Cook Islands News Exhibit "F" Mr Ata. Herman's evidence Exhibit "J" produced to this Court on 12/10/04). Having found no connection other than general acceptance that animal waste causes pollution I ask myself why the concerted effort to get these digesters built in the period leading up to the election. To answer this question, I make the following observations.

The health problem had been in evidence since 2003 but it was much closer to the elections when some Titikaveka people engendered publicity. This resulted in a committee getting underway in Government and the attendance of the Prime Minister, Deputy Prime Minister and three members of Cabinet at a meeting in Titikaveka where piggery owners were told that Government would take whatever steps were needed to deal with the waste problem. The end result of this was the digester scheme. The evidence before me demonstrates the Government and Mr Wigmore were under pressure on this issue.

I am of the view that the actions of the Government were a response to the pressure and publicity about the health/water problems. However, the absence of proper identification of the cause of the problems means there was nothing to justify the spending of $40,000 on the digesters. There was no credible explanation given for this spending. It follows that there may have been another reason for the spending. I believe that the spending of the $40,000 was to lessen the pressure and adverse publicity which could have impacted on a very marginal seat. I note that the $40,000 was not approved for transfer until late July. The elections were some six weeks later. I believe this cynical use of power to be one of the very corruptions that S.88 of the Act requires this Court to address.

S.88 of the Act provides:

"Every person commits the offence of bribery who in connection with any election:

* (a) directly or indirectly gives or offers to any elector any money or valuable consideration or any office of employment in order to induce the elector to vote or refrain from voting; or
* (b) directly or indirectly makes any gift or offer to any person in order to induce that person to procure or endeavour to procure the return of any candidate or the vote of any elector; or
* (c) upon or in consequence of any such gift or offer, procures or endeavours to procure the return of any candidate or the vote of any elector; ..."

Ss.(d) and (e) are not repeated here as these subsections are not germane to this enquiry.

Having found that the transfer and spending of the $40,000 was to effectively shore up support for Mr Wigmore in the forthcoming elections I obviously do not agree with Mr Little that there was no "connection" to the election.

The persons committing the offence were those Government Members involved in the transfer of the $40,000 as well the direction that it was to be spent to provide the digesters for the six piggery owners. This group includes Mr Wigmore.

In terms of ss(b) and ss(c) of s.88 of the Act I find there was an offer or gift of the money necessary to erect the digesters to each of the six recipients and that such gift or offer in terms of s.88(c) was an endeavour to procure the return of ROBERT WIGMORE to the Titikaveka seat.

I believe it was intended that the spending on the digesters project was to have effect on more than the six recipients; my findings above demonstrate my belief that it was aimed at the wider voting public in Titikaveka to ease the pressure and to show the electorate as a whole that the Government, and by inference their Member of Parliament, was doing something.

This being my view I find that the provision and disposition of the $40,000 paying for the erection of digesters for six piggery owners was part and parcel of corrupt bribery insofar as it affected each of the recipients of free digesters. This was a corrupt practice committed in relation to the election for the purpose of promoting and procuring the election of ROBERT WIGMORE and could have affected the whole electorate. It so extensively prevailed that it is reasonable to suppose the result of the election was affected in terms of s.98(2).

I also find in terms of s.98(1) as a Member of Cabinet ROBERT WIGMORE who was elected on 7 September 2004 in the Titikaveka constituency committed a corrupt practice in the election by being a party to the bribing of the six persons named in the petitions.

The Election of ROBERT WIGMORE is declared by the Court to be void.

**H.K. Hingston**

**Research Conclusion**

The petitioner and unsuccessful candidate, Tiki Matapo filed certain breaches under the Electoral Act 2004 against sitting MP and Minister, Robert Wigmore, following the 2004 elections.

There are three prongs in this case;

1.Bribery by having provided roads to two homes sealed at no cost to the home owners.

Judge Hingston found no bribery concerning the roads.

2. Bribery by having electric power lines erected to two homes at no cost to the home owners.

Judge Hingston found no bribery concerning the power lines.

3.Bribery by approaching Cabinet for $100,000 for waste management project (the amount was amended to $40,000 during the hearing).

On the offences of providing free piggery digesters, Judge Hingston stated;

This being my view I find that the provision and disposition of the $40,000 paying for the erection of digesters for six piggery owners was part and parcel of **corrupt bribery** insofar as it affected each of the recipients of free digesters.

The Judge stated; ‘I believe that the spending of the $40,000 was to lessen the pressure and adverse publicity which could have impacted on a **very marginal** **seat.** I note that the $40,000 was not approved for transfer until late July. The elections were some six weeks later. I believe this cynical use of power to be one of the **very corruptions** that S.88 of the Act requires this Court to address’.

This was a **corrupt practice** committed in relation to the election for the purpose of promoting and procuring the election of ROBERT WIGMORE and could have affected the whole electorate. It so extensively prevailed that it is reasonable to suppose the result of the election was affected in terms of s.98(2).

I also find in terms of s.98(1) as a Member of Cabinet ROBERT WIGMORE who was elected on 7 September 2004 in the Titikaveka constituency committed a **corrupt practice** in the election by being a party to the bribing of the six persons named in the petitions. The election of Robert Wigmore is therefore declared void.

Applying Cressey’s fraud triangle theory, together with the Te Toki e te Kaa Rakau concept, it became increasing apparent that all three preconditions of the fraud triangle, being motivation, opportunity and greed surrounding the waste management project to provide free piggery digestors to voters, prior to the election, was evidently present. The cultural and environmental conditions at the time, would have been the enormous community pressure from within the political party, the Minister’s Committee members and his village supporters, to regain and win the seat.

Judge Hingston noted three significant findings which heavily weighed against Robert Wigmore;

1.The **S40,000 spending** by Government was to lessen the pressure and adverse publicity which could have impacted on a **very marginal seat.**

2.The spending of the$40,000 was to effectively **shore up support** for Robert Wigmore in the forthcoming elections.

3. I (Judge Hingston) obviously do not agree with Mr Little (Wigmore’s Counsel) that there was **‘no connection’** to the election.

**Lessons Learnt**

1.**Enabling Legislation** - Although treating, bribery and corrupt offences are clearly documented and publicized in the Electoral Act 2004, adherence and strict compliance to such critical provisions in the Electoral Act was not followed and complied with due to various internal and external factors related to the Minister at the time. These being the opportunity, motivation and rationalization or greed that ultimately led to the use and misuse of public funds.

2. **Leadership Code and Code of Ethical Conduct** – Even though there are prescribed codes for Members of Parliament to follow and abide, the intrinsic and extrinsic pressures to remain in power, would have been both monumental and personally alluring, that such codes of behavior was ignored prior and leading up to the elections.

Case No 8

Date: 25 November 2005

**IN THE HIGH COURT OF THE COOK ISLANDS**  
**HELD AT RAROTONGA**  
**(CRIMINAL DIVISION)**

BETWEEN

**POLICE**

AND

**PERI VAEVAE PARE**

**Introduction**

This case involved a former Minister of the Crown, namely Hon Peri Vaevae Pare, who was Minister of Internal Affairs and Social Services. The basis of the complaint alleges that the Minister of Internal Affairs and Social Services, Hon Peri Vaevae Peri misused public funds by utilizing the Special Assistance Project Funds to purchase and pay for renovations on his private home in Matavera, Rarotonga. As the former Director of Audit, I issued the audit report on 20 October 2005 to the Deputy Prime Minister and Minister of the Audit Office, Hon Dr Terepai Maoate. The matter was also referred to the Police and the Crown Law Office for review and prosecution.

**The Case and Sentencing – Williams CJ**

[1] Mr Pare, you have been convicted on three charges under s. 251A of the Crimes Act of using with intent to defraud, documents capable of being used to obtain a pecuniary advantage and as you have heard the penalty provided under s. 251A is imprisonment for a term not exceeding 5 years, so it is obvious that it is a serious offence.

[2] The circumstances of your offending have been outlined in the judgment that I gave earlier this week and, in that respect, I refer to the three particular instances involving Emma Tearikiuri’s project which I have discussed at paragraphs 15 through 23 and the second aspect of that project, the first being the hardboard, the second is the louvre windows and then there was the Mama Purenga project and the ready- mix cement.

[3] It is not necessary to go through all of those details which are found in the judgment as I said at paragraphs 15 on hardboard through to 23, on louvre windows 24 to 30 and on the ready mix from 31 to 37. They all involved you giving instructions to Mr Tangapiri to order materials on project accounts and those instructions were carried out and goods were supplied to you and used by you which because of the fact that the invoices went through Government processing, were paid for by the Government.

[4] The question before the Court is what is the appropriate penalty. The first thing that needs to be said is that, as Mr McFaidzien explained in contrast to the Drollett case, the offending was in one sequence and I think it is proper to therefore deal with the charges together on the basis that whatever sentence is found appropriate, will apply to all of them so that there will be a cumulative sentence.

[5] I have been referred to the relevant cases in this area which give some guidance on such matters and I shall attach to my sentencing remarks a copy of the schedule produced to me.

[6] Sufficient to say that counsel agreed that based on particularly the Drollett case and the Areai case, an offence under 251A would probably involve a starting point in the consideration of a proper sentence of 1 and a ½ years.

[6] The position of the Prosecution is that giving credit for your truly outstanding community service. One would come down making those allowances to a situation where the appropriate sentence would be the one recommended by the Probation Service, namely, 6 months imprisonment.

[7] My duty today is to consider the particular facts of your case and decide whether that analysis by the Prosecution is correct or whether as Mr McFadzien so happily put it, accepting that starting point that your offending was at the bottom end of the scale, so far at the bottom end of the scale or so close to the bottom of the scale that you are best dealt with some punishment other than an imprisonment.

[8] Before I consider all the circumstances, I should say that I have considered what Mr McFadzien’s primary submission is, namely that there should be a discharge without conviction.

[9] I have had the advantage of receiving Mr McFadzien’s excellent submissions yesterday and I’ve carefully reflected on that. I have come to the view that it would be quite inappropriate, just as it was in the Drollett case or any similar cases involving misuse of public money for there to be a discharge without conviction and not even in a case like yours where there is so much to be said for you in terms of your prior blameless record and your excellent contributions to the community.

[10] It needs to be said that the sentence of the Court must balance the need to demonstrate the serious nature of the offending on the one hand with the particular circumstances which you present to the Court as the offender. And it is proper for me to deal with the first issue at somewhat greater length and to stress that it is of the very greatest importance in this or any other civilized society that people working in Government, especially the leaders, the Minister of the Crown do not betray their trust to the people by inappropriate behaviour involving misuse of public funds, whatever form that misbehaviour takes, whether it be kickbacks as in the Drollett case or taking Government property for own purposes or as here, acting in a way that results in public money being used for the private purpose of an individual.

[11] I would like to stress as well that not only the leaders must strictly obey their obligations to behave honestly but civil servants have an equally important duty and they also have a responsibility to be vigilant as to what they may observe or see around them.

[12] In this case I was left in some doubt as to whether the civil servants or some of them at least, had done that. The kind of misuse of public funds and related matters that I have been talking about can be placed under the broad heading of official corruption. And while there may be as Mr McFadzien has said, some slightly different approaches and the blurring of lines between the public function and private matters, this Court must enforce the law and the law is founded on the assumption that corruption is a deadly and insidious evil which strikes at the heart of any democratic society. The duty of the Court is to take a very strong stand against it when sentencing offenders and it usually justifies a strong element of deterrence in sentencing as was made clear by the Court of Appeal in the Drollett case.

[13] It is no answer or at least no complete answer to say that in a case like this where the amounts in question are not great, that there is no need for deterrence condoning small instances of misuse of public moneys is likely indirectly to encourage to it and allow it to spread to cases where there are significant amounts of money at stake.

[14] Having said all that, one must of course focus on your particular conduct and your background. I have, as I’ve said, been greatly assisted by what Mr McFadzien has said in his eloquent written submissions and apart from the proposition that a discharge without conviction is appropriate, and apart from his analogy with the ordinary man, I agree with a great deal of what has been said. If one puts to one side discharge without conviction, the essential becomes whether the recommendation of the Probation Service should be followed and here I should briefly summarize the matters which you are entitled to have brought into count in your favour and which Mr McFadzien has referred to.

[15] First of all, you are and have been an achiever in Cook Islands society and you have made a great contribution in your work initially as a laboratory technician and then as the officer in charge of the medical laboratory.

[16] Secondly, you have obviously done good things since being elected to Parliament and as I acknowledged in my judgment there is no doubt that you have tried very hard to assist the less fortunate from your ministerial position. I am not sure that I agree with Mr McFadzien’s shop lifting analogy but I think it’s fair to say that this conduction on your behalf might be regarded in some way as an abhorration and something which doesn’t fit with the general pattern that we are seeing with you because apart from your achievements and employment at the hospital and your achievements as a Member of Parliament and a Minister, it is correct to use Mr McFadzien’s phrase that you are a pillar of the Matavera community and as he has said the written submissions provide eloquent testimony to your contributions.

[17] The next thing that can be said in your favour is that the scale of the offending was not significant and that it did not take place over a lengthy period of time. I agree with Mr McFadzien that because a conviction will result in your losing your seat, that is a matter which must be taken into account and of course everybody knows that that is the law and that should be considered when Ministers are going about their businesses.

[18] I also agree with Mr McFadzien that you are most unlikely to re-offend. I have come to the view that a sentence of imprisonment would be in the special circumstances in this case, inappropriate. I consider that as some of your supporters have said in their letters that you have done a great deal for society and on this occasion, society, through the judiciary bring that into balance.

[19] The question is then what is the appropriate sentence.

[20] In my view, it is that you should be called upon to come up for Sentencing, if necessary, within one year. I want to say that if I had been disposed to impose a sentence of imprisonment, it would probably have been 3 months imprisonment. Why do I mention that, because in the unlikely event of you offending during the one - year period you can have an understanding that is the kind of thing that would be imposed, that sentence would be imposed if you are called on. I think it is permissible under s. 113 as is being pointed out. It says "the making of an order shall not limit or affect the power of the Court to make an order for the payment of costs, damages or compensation" and I’m going to take up the invitation from McFadzien to order that you pay $5,000 towards the cost of the Prosecution.

[21] So the sentence of the Court on all charges is that instead of passing sentence at this time, there will be an order that you will appear for sentence if called upon by the Court to do so within a period 12 months from today and that in the meantime you will pay within 14 days the sum of $5,000 towards the costs of the Prosecution.

**David Williams – Chief Justice**

**Research Conclusion**

The Minister of the Crown was directly involved with misusing public funds (materials) for private and personal gain. As the portfolio minister, he influenced and misdirected project funds from its intended project to his private home. As a result, he was charged with 3 offences under s.251A of the Crimes Act, for the intent to defraud public funds and procuring documents for a pecuniary advantage.

Utilizing the Cressey fraud triangle and the cultural and environmental influences using Te Toki e te Kaa Rakau concept, the following indicators prevailed;

1.Opportunity – The Minister in a position of superior authority, used his position as the Minister to misdirect project funds (materials) to his private home.

2.Motivation – The impulse and the need to undertake this corrupt activity was most likely influenced by the Ministers desire, drive and motivation to stray away from its intended project to his private home.

3.Greed – In my view, this unethical trait brings about an intrinsic behavioral attitude that runs deep within the perpetrator, in this case, the Minister. This part of the concluding prerequisites, completes the fraud triangle corruption.

4.The cultural and environmental conditions reflects an unethical atmosphere surrounding this unfortunate case. Surprisingly, although the Minister was earning a high local salary and could have easily afforded the value of the materials used on his house, for reasons explained above, the Minister decided amongst other things, to carry out a corrupt practice. CJ David Williams, stated, ‘This Court must enforce the law and the law is founded on the assumption that corruption is a deadly and insidious evil which strikes at the heart of any democratic society.’

5.After hearing testimonies from both Counsels, CJ Williams took into consideration the following;

a. The amount and value of the fraud was small and was not repetitive.

b. The Minister has a prior blameless record, with outstanding community service. He is a pillar in the Matavera community and written submissions provided an eloquent testimony to his contributions.

c. The Minister was discharged without conviction however, there will be an order that the Minister will appear for sentence if called upon by the Court to do so within a period 12 months from today and that in the meantime you will pay within 14 days the sum of $5,000 towards the costs of the Prosecution.

d. The Minister’s political career was basically over.

**Lessons Learnt**

There are some key lessons learnt from this unique case. These are as follows;

1.That Ministers and public officials must abide and follow the law at all times.

2.That no matter how small or immaterial public funds and resources are misused or diverted for private gain, the law will penalize the offenders.

3. Ministers and senior officials who carry out corrupt practices will be charged and prosecuted by the law.

4. As portrayed in this particular case, even though the Minister, who had an outstanding community service, the law, having taken into consideration this part, will still penalize the offender as a deterrent factor for society.

Case No. 9

Date: 30 July 2009

**Albert Numanga**

**Introduction**

Albert Numanga was the Officer in Charge and Manager of the Cook Islands Marketing Corporation Office (CIMCO) in Auckland. The Office was situated within the confines of the Cook Islands Consulate Office building in central Auckland.

The CIMCO budget and financial affairs were managed and controlled from Head Office, Rarotonga. CIMCO payments were under the supervision and control of the sole Manager, Albert Numanga. It was through the payments processing system that the Manager made false accounting of source documents which led to the theft of proceeds subject to direction and theft by person in a special relationship.

Albert Numanga, a long - time employee of the Cook Islands Tourism Marketing Corporation in the Auckland Tourism Office. Pleaded guilty to charges amounting to **NZD$1,001,475.50** using 326 separate cheques or transfers, related to an eight - year period.

**Decision**

The New Zealand Serious Fraud Office (SFO) after a complaint from the Cook Islands Audit Office and investigation into the matter by the SFO, filed four charges against Mr Numanga in relation to fraud against the Cook Islands Marketing Corporation (Auckland Office). Mr Numanga was charged with;

* False accounting under s 253 (b) of the Crimes Act 1961.
* False accounting under s 260 (a) of the Crimes Act 1961.
* Theft of proceeds subject to direction under s 222 of the Crimes Act 1961.
* Theft by person in special relationship under s 220 (2) of the Crimes Act 1961.

**Conviction**

Mr Numanga was convicted and sentenced on 30 July 2009 on all charges to 3 years and 9 months imprisonment.

**Research Conclusion**

This case is particularly significant, for the following reasons;

1.Besides the Michael Benns liquor store secret commissions and theft of public funds, the corrupt practices by Albert Numanga in Auckland, were by far, greater in dollar value, carried out over a longer period of time. Approximately, $1million and $1,475.50 were fraudulently stolen, using 326 transactions over an eight- year- period.

2.It was only through the services of the New Zealand Serious Fraud Office, through its bilateral cooperation with the Cook Islands Audit Office, that technical and forensic experts were engaged to undertake this complex fraud.

3.Using the Cressey fraud triangle and the cultural and environmental concept symbolized by the Te Toki e te Kaa Rakau, evidentiary indicators played a key role in this fraud. These being;

a. Greed was a key factor – due to the significantly large amount of public funds stolen from the Cook Islands Marketing Corporation bank account.

b. Motivation is another close association with greed that sensitized the incentive to undertake this fraudulent activity, as Albert Numanga was the sole officer in charge of the Office. Another words, he was internally driven to carry out this unprincipled and unethical task.

c. The opportunity of the position provided the attractive prospect and available chance to take advantage of the situation to commit the theft of public funds.

d. The environmental and cultural aspects at the time applied the pressure of an attractive and desired lifestyle over and above the perpetrators means. This was especially noted as Albert Numanga was always immaculately dressed and wore expensive clothing.

e. The former Manager was not on a relatively high salary in Auckland, therefore, in my view, the added allure to misappropriate public funds was all to great and easily accessible.

**Lessons Learnt**

This unfortunate and ill-fated situation could have been circumvented if the following procedures had been in place;

1.Isolated and stand-alone public offices should be reviewed and monitored at least once every six months, to ensure that all funds submitted are accounted for and that regular performance reports are prepared for senior management.

2.Senior staff performing as sole managers should be relieved of their duties, from time to time, so that an acting replacement could be found, so that the Officer in Charge is able to take leave. It is noted that it is a common trend in fraud and corruption cases, that the failure of senior Managers, Finance Officers and Sole Charge officers, holding key roles over large public funds, not taking regular leave and holidays, is a red flag in itself.

Case No 10

Date: 2 July 2010

**Subject: Special Review Report into Government’s Attempt to Nationalize the Fuel Industry.**

**AUDIT DIRECTORS OVERVIEW**

**Introduction**

Since the Cook Islands economic crisis in the mid 1990’s, much effort nationally and regionally has contributed to the reform of the Cook Islands public sector and equally important, to streamlining the productive sectors of the business community.

With the support of key aid-donor partners in New Zealand, Australia and the Asian Development Bank, the restructuring and building process was aimed at establishing a smaller, more sustainable, efficient and effective government service.

In this context. Initiatives were put in place, to release non-performing assets and concentrate on public service delivery in the areas of social, economic, cultural and environmental necessity. Government policy was geared towards a more “private sector” driven economy, as the key ingredient for providing national income. Government in essence, should facilitate and support the private sector and not nationalize and therefore monopolize, certain sectors.

**Regulation**

The fuel pricing arrangements of Cook Islands fuel importers have been under Government regulation since the Control of Prices Act 1966 was passed. Regulation has been designed to protect the consumer. Over recent times, however, regulatory steps have exposed serious liability issues for Government and those, in turn, led to the debacle now generally referred to as ‘Toagate’.

The architects of the purported partial nationalization fuel plan, through the acquisition of TOA Petroleum and to the obvious detriment of the long-time competitor of that business, Triad Pacific Petroleum Ltd, were the former Finance Minister, Sir Terepai Maoate, acting with the former Financial, Sholan Ivaiti. Both had no clear and specific government policy mandate to pursue any nationalization initiative. In the course of pursuing uncertain and individualistic objectives, fundamental public law procurement obligations were ignored, and in most aspects, totally overlooked, in the rather unorthodox process of achieving their desired outcome, irrespective of the cost and heavy burden to the taxpayer.

An important question to ask is, could Government have avoided all this and achieved the same desired result of reducing fuel costs to the consumer, through regulation? In my view, this costly exercise could have been avoided by way of a fairer and more transparent regulation process.

The total cost to Government for this failed fuel nationalization attempt as at 18 June 2010, stands at **NZD$2,541,412.87.** This excludes any future Crown liabilities under the mediation settlement, a potential **NZD$1.2 million**, for eight years, representing approximately **NZD$9.6 million**, a figure itself that is uncertain.

The High Court has summarized the expected operations, as follows;

* If TOA makes a profit in excess of NZD$1.2 million in a given year it will be repay to the Crown that excess;
* If TOA makes a profit of NZD$1.2 million in a given year that will be the end of the matter (it will keep the profits)
* If TOA makes a profit of less than NZD$1.2 million in a given year (or even a loss) the Crown will top-up the payment, up to the maximum of NZD$1.2 million. That is, the Crown’s potential liability could exceed NZD$1.2 million in a given year.

It is important to note that on 15 September 2009, Justice Nicholson’s ruling indicated that there was a “strong arguable case that the Government’s approach to the purchase was flawed”.

**Responsibility**

From our audit findings, interview and review of key documents and files, it is our view that the allocation of blame and responsibility for the failure of this high risk and costly Government project cannot be attributed to any single person or event but to the highly questionable conduct of public officials/elected members and the chain of events leading to comprehensive and disastrous results for the taxpayers of this country.

1. **Sir Terepai Maoate – former Deputy Prime Minister and Minister of Finance.**

Poor decision making and inadequate quality assurance in various Cabinet submissions and directives, ultimately led to systematic failures that confounded the proper role of Cabinet and Executive Government in the process.

1. **Sholan Ivaiti – former Financial Secretary.**

Throughout the review of this project, clear instances of inappropriate public administration and project management practices by the former Financial Secretary were prevalent. These included, providing misleading and false information, concealment and irresponsible fiscal and financial management. Clearly, as Government chief financial adviser, he must also be held principally responsible and accountable for this unsatisfactory situation.

1. **Former Cabinet Ministers, Prime Minister, J Marurai, Hon T Vavia, Hon K Ioane, Hon W Rasmussen and Hon N Munokoa.**

Cabinet Minutes and decisions reveal the collective responsibility that governs executive authority for decision making purposes. Given that the Minister responsible for preparing and presenting all TOA and fuel related Cabinet submissions was the former Deputy Prime Minister, Sir Terepai Maoate, the resulting outcome nevertheless binds all Cabinet members. It is against this background, that collective responsibility and accountability must also be shared by all members of the former Cabinet.

1. **Hon Wilkie Rasmussen – former Cabinet Minister.**

On 28 July 2009, the Prime Minister, with Cabinet’s endorsement, terminated and expelled Hon W Rasmussen. This was attributed to internal dissent within Cabinet and statement and actions by this Minister that were considered to be against Cabinet’s own decisions, and a personal undertaking by him to be part of the legal proceedings against the Crown. Dr Alex Frame’s legal opinion confirmed Hon W Rasmussen’s breach of Cabinet protocol. Although Hon W Rasmussen was part of Cabinet decisions up to the time of his dismissal from Cabinet, his dissent, expulsion and persistent opposition, clearly demarcates and differentiates his position in this process.

1. **Tingika Elikana – Solicitor General**

As Government’s principal legal adviser, the Solicitor General’s role in this process is both pivotal and controversial. The legal oversight of Cabinet submissions, opinions and views throughout this process were decisively poor and well below high standards of legal expectations. Two critical instances stand out;

* The wording of the Cabinet submission “to enter into arrangements” ultimately provided vague authority that in turn led to the signing of the Heads of Agreement; such submissions were no doubt poorly drafted. Former Cabinet Ministers admitted that this particular Cabinet submission was not sufficiently specific and clear in terms of what was required by Cabinet in terms of the Heads of Agreement.
* Without proper due diligence and external third-party legal review, this Cabinet submission was taken, by the former Financial Secretary as giving him the approval to sign the Heads of Agreement. This occurrence on 4 December 2008 effectively bound the Crown to a legal contract that sealed the purchase of TOA Petroleum. During the interview, the Solicitor General admitted that he has limited commercial law experience in this matter. These were critical issues that ultimately led to totally unfavorable and unsatisfactory outcomes.

1. **Kevin Carr – former Financial Secretary**

Kevin Carr has been the Financial Secretary from 1999 to 2007. During that period, he carried out and experienced many fuel price deliberations with suppliers TOA and TRIAD. Throughout this period, no formal and cohesive fuel price template was ever finalized.

On 14 June 2006, Kevin Carr, on behalf of Government, signed a Fuel Pricing Template Agreement, together with TOA and MOBIL. The unfortunate drafting of aspects of this Agreement allowed TOA to use this document to its advantage in negotiations to obtain a financial benefit from the Crown that went far beyond anything intended by Mr Carr or Government.

**Governance Principles**

The six basic principles that govern all public spending and procurement were not adhered to and in most cases, in my view, bordered on ‘negligence of duty, reckless and irresponsible fiscal management’ in regards to the performance of the former Finance Minister and former Financial Secretary. We summarize the basic principles as;

**Accountability**

Public entities and officials should be accountable for their performance and be able to give complete and accurate accounts of the use to which they have put public funds, including funds passed on to others for particular purposes. They should also have suitable governance and management arrangements in place to oversee funding and contractual arrangements.

**Transparency**

Public entities and officials should be transparent in their actions and in the administration of funds, bot to support accountability and to promote clarity and understanding of respective roles and obligations between entities and officials and any external parties entering into funding contractual arrangements.

The former Financial Secretary, task it upon himself, to conceal and keep ‘secret’ the signing of the Heads of Agreement.

**Value for Money**

Public entities and officials should use resources effectively, efficiently and economically without waste or mismanagement, with due regard for the total costs and benefits to the taxpayer, and its final contribution to the outcome the entity or officials is trying to achieve.

**Lawfulness**

Public entities and officials must act within the law and meet their legal and ethical obligations.

**Fairness**

Public entities and officials have a public law obligation to act fairly and reasonably. Public officials must be, and must be seen to be, impartial in their decision making. Strategic risk management is critical in identifying risks and managing those risks. The key here is to get the right balance between risk and the expected benefit. If the situation of high risk and irreversible exposure arises such was the case in this particular Government project, then significant steps should have been taken immediately to require a different approach in the process. It was noted that no such steps were taken by the officials when faced with multiple adversities during the process of acquiring TOA petroleum.

**Integrity**

Public officials who are managing and spending public resources must do so with the utmost integrity. This is to ensure that they are spending public money wisely and properly managing the process for spending it. For complex projects of this nature, external and independent legal advice should have been sought much earlier in the process, from a reputable legal firm specializing in commercial law and having the professional expertise on technical or probity matters particularly developing, reviewing and approving procurement and contractual documentations involving millions of taxpayer’s dollars.

**Audit Summary**

A fact-finding mission in December 2007 led by the then Deputy Prime Minister and Minister of Finance, Sir Terepai Maoate and the then Financial Secretary, Sholan Ivaiti, travelled to Tahiti then Samoa to hopefully learn of ways and means to minimize fuel costs in the Cook Islands. In May 2010, the High Court rules that the terms of the mediated settlement reached in December 2009 were valid and binding upon Government.

Before the mediation settlement reached in December 2009, the Government entered into negotiations to purchase both the TOA and JUHI petroleum facilities and completed a Heads of Agreement (HOA) with TOA Petroleum in December 2008 to purchase TOA’s fuel terminal and other assets for NZD$5.16million.

This was an integral part of the purported Government strategy to acquire fuel storage and distribution as a means of controlling and minimizing fuel prices. This in turn led to Triad Pacific Petroleum (Triad) another fuel facility owner, filing proceedings in the High Court contesting the legality of the process. The Audit Office, on 12 May 2009 and the Hon W Rasmussen MP, on 21 May 2009, later joined as interested parties.

The Triad application for an interim injunction was successful and the acquisition was halted (pending a substantive hearing of the judicial review proceedings) until a mediated settlement was reached in December 2009.The matter should have reached a conclusion of sorts with the mediated settlement agreements but the Government failed to meet the deadlines set in the mediation for certain payments to be made and actions undertaken and the matter was again returned to the High Court in early 2010.

In March 2010, the Court entered judgement (with the consent of Government) in favor of TOA and against the Government for payment of the sum of NZD$1.75 million to Apex Agencies Limited (TOA). The Government then contested the guarantee component of the settlement agreement in April 2010. Finally, in May 2010, the Court determined that the guarantee component of the settlement agreement was valid and binding upon Government and had to be honored.

Throughout the two years the matter has been in the public arena, a number of requests were made to the Audit Office and to the Public Expenditure Review Committee (PERC) for them to investigate the planned purchase and especially the conduct of the officials involved. The Audit Office already had concerns over the lack of disclosure and its failure to be provided with information requested under its legislation which resulted in the Director of Audit becoming a party to the High Court proceedings.

The Audit Office began its investigation in January 2010 and ended at the end of May 2010. Its findings fall into three major areas. Given the significant Government expenditure proposed there were questionable decision-making practices by the Executive (Cabinet) and senior officials; there were major systemic failures especially the lack of robust checks and balances within all management systems; there was inadequate identification and determination of management and accountability responsibility.

The investigation concluded that the fuel strategy initiative was led by the former Deputy Prime Minister and Minister of Finance, Sir Terepai Maoate and his senior official, the former Financial Secretary, Sholan Ivaiti, was more in hope than by reasoned analysis. The depth of detail that would be expected to accompany an investment of this magnitude on the part of Government was missing and this taken together with major systemic failings within Cabinet and public sector processes led to its failure.

**Significant Events and Anomalies**

* **Nationalization of the Fuel Industry** – The former Deputy Prime Minister and former Financial Secretary promoted their chosen strategy to nationalize the fuel industry as a ‘Government’ strategy without a clear policy or mandate from Government.
* **TOA Acquisition and Heads of Agreement** – The miscommunication and misinterpretation between the former Cabinet, the former Financial Secretary and the Solicitor – General of the words, **‘can enter into any arrangement’** from Cabinet minute on 7 October 2008 for the acquisition of the TOA fuel facility provided unfettered authority, with no checks and balances.
* The former Financial Secretary wrote to MFEM budget staff on 3 November 2008 and requested ‘**need to generalize this** ($5.16m appropriation for TOA) **so not so obvious in the budget**. **We are in the final negotiations with TOA’**. In Audit’s view, these actions were not transparent or conducive to good governance**.**
* The Solicitor-General failed to conduct a proper legal analysis of the Heads of Agreement yet advised the former Financial Secretary that the Heads of Agreement was in order to sign.
* The valuation process adopted by the former Financial Secretary and the EEA consultants for the TOA acquisition price was in itself flawed and challenged by independent international accounting firms, KPMG and Ernst and Young.
* The failure by the former Financial Secretary to properly address and consider the expiring land lease and diminishing ownership for the TOA site showed poor commercial risk management.
* It is important to note that the engineering due diligence report for the TOA site was completed on 18 December 2008, however the Heads of Agreement was signed on 4 December 2008. It is Audit’s view that due diligence for the TOA site and assets should have been carried out and completed **prior** to signing the Heads of Agreement.
* Upon signing the Heads of Agreement, the former Financial Secretary, failed to advise Cabinet that it had been signed and chose to conceal this important, multi-million- dollar contract from the former Cabinet and his Minister.
* The refusal by the former Financial Secretary to provide a copy of the Heads of Agreement to Cabinet, his Minister, PERC and Audit on the grounds of ‘confidentiality’ was misguided and without legal basis.
* The former Financial Secretary’s comments at a public meeting on 14 January 2009 when asked by a member of the public in regards to the Heads of Agreement, **‘can Government get out of (the) purchase now or are you committed?’** he replied**, ‘Government is not locked into agreement with TOA so to date can get out of it”.** In Audit’s view this comment was totally misleading**.**

**Mediation Settlement**

* On 6 December 2009, the former Financial Secretary, Solicitor-General and the former Deputy Prime Minister (via his executive secretary) received an email from Christopher ‘Kit’ Toogood QC, Government’s special legal consultant) regarding TOA’s suggested terms of settlement for mediation. Toogood advised that the terms included a claim for damages (around $2.7m) a new pricing template….**and a guaranteed minimum profit per annum of $1.2m.** In Audit’s view, this critical information should have been disclosed to the former Cabinet for their consideration **prior** to mediation.
* The Fuel Pricing Template Agreement, signed on 14 June 2006, in Audit’s view significantly influenced the mediation settlement agreement in TOA’s favor at the Crown’s expense. The intention of this document should have formed the basis of a formal Regulatory Contract **‘subject to the parties obtaining the appropriate approvals’** however, final approval was never obtained.
* In terms of the mediation settlement with TOA, it was agreed that the 20% ROI (return on investment) from the 2006 Fuel Pricing Template Agreement would be replaced with a new template with a guaranteed minimum EBITDA (earnings before interest, tax, depreciation and amortization) of $1.2million per annum, for a period of 8 years. In Audit’s view, the ROI clause from the 2006 Fuel Pricing Template Agreement was never intended to be used as a ‘guarantee’ and in our view was misconstrued, prior and during mediation negotiations.
* The Audit Office made 15 recommendations to Government that addressed specific areas that requires improvement and immediate changes in tender, procurement policy and procedures.

**Conclusion**

As a result of a number of serious concerns and complaints from members of Parliament and business leaders, together with the high public interest, a formal review was undertaken by the Audit Office into all areas and aspects of Government’s failed fuel nationalization initiative, in particular, the TOA Petroleum purchase.

Circumstances in the initial review stages found the Audit Office was obstructed due to the ‘secrecy methods’ adopted by the former Financial Secretary through the non-disclosure of key and relevant documentation. It was only on the judgement and advice of the High Court, that disclosure of relevant fuel project documents was eventually released.

By that time, procedures had well advanced to a point of disastrous results. This whole fuel acquisition process, spearheaded by the former Deputy Prime Minister and Minister of Finance, together with the former Financial Secretary, failed due to a combination of compounding errors and anomalies that were, in parts, avoidable, if certain strategic, risk analysis was undertaken to arrive at alternative options and decisions.

**Research Conclusion**

The architects of the purported partial nationalization fuel plan, through the acquisition of TOA Petroleum and to the obvious detriment of the long-time competitor of that business, Triad Pacific Petroleum Ltd, were the former **Finance Minister, Sir Terepai Maoate, acting with the former Financial, Sholan Ivaiti.** Both had no clear and specific government policy mandate to pursue any nationalization initiative.

The total cost to Government for this failed fuel nationalization attempt as at 18 June 2010, stands at **NZD$2,541,412.87.** This excludes any future Crown liabilities under the mediation settlement, a potential **NZD$1.2 million**, for eight years, representing approximately **NZD$9.6 million**, a figure itself that is uncertain.

The High Court has summarized the expected operations, as follows;

* If TOA makes a profit in excess of NZD$1.2 million in a given year it will be repay to the Crown that excess;
* If TOA makes a profit of NZD$1.2 million in a given year that will be the end of the matter (it will keep the profits)
* If TOA makes a profit of less than NZD$1.2 million in a given year (or even a loss) the Crown will top-up the payment, up to the maximum of NZD$1.2 million. That is, the Crown’s potential liability could exceed NZD$1.2 million in a given year.

**It is important to note that on 15 September 2009, Justice Nicholson’s ruling indicated that there was a “strong arguable case that the Government’s approach to the purchase was flawed”.**

It is important to record that the allocation of **blame and responsibility** for the **failure of this high risk and costly Government project** cannot be attributed to any single person or event but to the highly questionable conduct of public officials/elected members and the chain of events leading to comprehensive and disastrous results for the taxpayers of this country. Key players involved in this disastrous project were;

**Sir Terepai Maoate – former Deputy Prime Minister and Minister of Finance.** Poor decision making and inadequate quality assurance in various Cabinet submissions and directives, ultimately led to systematic failures that confounded the proper role of Cabinet and Executive Government in the process.

**Sholan Ivaiti – former Financial Secretary.**

Throughout the review of this project, clear instances of inappropriate public administration and project management practices by the former Financial Secretary were prevalent. These included, providing misleading and false information, concealment and irresponsible fiscal and financial management. Clearly, as Government chief financial adviser, he must also be held principally responsible and accountable for this unsatisfactory situation.

**Former Cabinet Ministers, Prime Minister, J Marurai, Hon T Vavia, Hon K Ioane, Hon W Rasmussen and Hon N Munokoa.**

Cabinet Minutes and decisions reveal the collective responsibility that governs executive authority for decision making purposes. Given that the Minister responsible for preparing and presenting all TOA and fuel related Cabinet submissions was the former Deputy Prime Minister, Sir Terepai Maoate, the resulting outcome nevertheless binds all Cabinet members. It is against this background, that collective responsibility and accountability must also be shared by all members of the former Cabinet.

**Hon Wilkie Rasmussen – former Cabinet Minister.**

On 28 July 2009, the Prime Minister, with Cabinet’s endorsement, terminated and expelled Hon W Rasmussen. This was attributed to internal dissent within Cabinet and statement and actions by this Minister that were considered to be against Cabinet’s own decisions, and a personal undertaking by him to be part of the legal proceedings against the Crown. Dr Alex Frame’s legal opinion confirmed Hon W Rasmussen’s breach of Cabinet protocol. Although Hon W Rasmussen was part of Cabinet decisions up to the time of his dismissal from Cabinet, his dissent, expulsion and persistent opposition, clearly demarcates and differentiates his position in this process.

**Tingika Elikana – Solicitor General**

As Government’s principal legal adviser, the Solicitor General’s role in this process is both pivotal and controversial. The legal oversight of Cabinet submissions, opinions and views throughout this process were decisively poor and well below high standards of legal expectations. Two critical instances stand out;

The wording of the Cabinet submission “to enter into arrangements” ultimately provided vague authority that in turn led to the signing of the Heads of Agreement; such submissions were no doubt poorly drafted. Former Cabinet Ministers admitted that this particular Cabinet submission was not sufficiently specific and clear in terms of what was required by Cabinet in terms of the Heads of Agreement.

Without proper due diligence and external third-party legal review, this Cabinet submission was taken, by the former Financial Secretary as giving him the approval to sign the Heads of Agreement. This occurrence on 4 December 2008 effectively bound the Crown to a legal contract that sealed the purchase of TOA Petroleum. During the interview, the Solicitor General admitted that he has limited commercial law experience in this matter. These were critical issues that ultimately led to totally unfavorable and unsatisfactory outcomes.

**Kevin Carr – former Financial Secretary**

Kevin Carr has been the Financial Secretary from 1999 to 2007. During that period, he carried out and experienced many fuel price deliberations with suppliers TOA and TRIAD. Throughout this period, no formal and cohesive fuel price template was ever finalized.

On 14 June 2006, Kevin Carr, on behalf of Government, signed a Fuel Pricing Template Agreement, together with TOA and MOBIL. The unfortunate drafting of aspects of this Agreement allowed TOA to use this document to its advantage in negotiations to obtain a financial benefit from the Crown that went far beyond anything intended by Mr. Carr or Government.

**Lessons Learnt**

There are some key fundamental issues and lessons to be learnt from this failed project.

1.That Government projects of this magnitude should be thoroughly reviewed and scrutinized by an expert and authority in the volatile and lucrative fuel business, before a proposal is submitted to Cabinet.

2.A legal opinion outside of the Government Crown Law Office should have been pursued. The external legal firm should have considerable experience and expertise in the fuel industry in the Pacific region.

3.That Cabinet papers and advice to Cabinet Ministers should be professionally researched and prepared before it is submitted. In this particular case, erroneous, ambiguous and limited information were submitted to Cabinet. Hence, their decision and ultimate resolution was totally unsatisfactory. Total loss to the Crown amounted to $9.6 million in Court settlement.

4. Any major variance to Government policy and key Government projects and plans, such as in this project, should have been disclosed to Cabinet and stopped at the time. However, when key players are also the Minister of Finance and the Financial Secretary, the situation becomes extremely problematic and politically sensitive.

5.Applying Cressey’s fraud and corruption triangle and the Te Toki e te Kaa Rakau concept to this doomed project, some elements are disclosed.

a. Certainly the motivation and the opportunity by key players was at play before and during the project implementation.

b. In my view, there is no evidence of greed or any personal financial gain by any of the key players, except the prospect of a positive outcome, in the unlikely event, the project was become successful.

c. Were unethical cultural and environmental conditions at the time influencing and advantageous in the projects planning stages? In my view, the cultural and political environment played a major role in this project.

In hindsight and looking at the political environment at the time, the Toagate saga began in late 2008, the Judge’s decision was issued on 15 September 2009 and the Audit Report to Parliament was issued on 2 July 2010.

The national elections were held on 17 November 2010. The backlash and public dissent in the November 2010 elections, in my view, most probably from the failed Toagate project, with the sitting Democratic Party losing the elections (winning only 8 seats) and the Cook Islands Party gaining 16 seats.

Case: No 11

Date: 29 July 2011

**Complaint into Imported Soft-Drinks by CITC & Loss in Crown Revenue**

The report was later called Colagate in Parliament.

**Introduction**

The Audit Office completed its review regarding a complaint that alleged local business CITC has avoided paying the full levy on their soft-drinks imports by separating contents from packaging on their invoices. The complaint alleged that the Cook Islands Trading Corporation (CITC) had not paid any levy on packaging when other importers had paid a full levy on the cost of the whole product. The complaint also claimed that because of the arrangement, CITC had gained an unfair advantage over other importers and there would have been a huge loss in Government revenue, over many years.

It was alleged the practice was an arrangement between CITC and the Ministry of Finance and Economic Management (MFEM) specifically through the Customs division (hereafter Customs).

A Special Review was initiated with the following objectives;

1. Determine if there was an arrangement in place between Customs and any importer which allowed the separate classification of packaging and contents.
2. Determine if there was any basis to the complaint and allegations made.
3. Determine if such an arrangement is legal under the relevant Cook Islands legislation and policy.
4. Determine if Government revenue from the arrangement was properly collected and ascertain if any losses to Government revenue was incurred.
5. Identify any anomalies or breaches of legislation or Government policy and address any areas of concern.

The Audit Office has a responsibility under section 27(g) and section 32 of the PERCA Act 1995-1996 to pursue any concern that arises in respect of the management of public resources which in its opinion justifies further investigation and to report its findings to Parliament.

**KEY FINDINGS**

We confirmed there was an arrangement in place, specifically between Customs and CITC that;

1. Allowed CITC to separate contents and packaging on imported products supplied by Coca Cola (NZ) since the mid 1980’s until the practice was revoked in September 2009.
2. By separating their invoices, CITC has paid a 10% levy on packaging and 40% levy on contents; whereas other importers had paid the full 40% levy on the cost of the product as a whole.
3. As a result of the arrangement, CITC has gained a significant financial advantage over other importers, including the steady increase in the value of packaging from 2001 onwards and especially when the 10% levy on packaging for all imports was removed by an Executive Order on 1 July 2006.
4. Total loss on Government revenue could not be quantified however from the analysis and calculations, we estimate for the period 2006 to 2009, a **loss in Government taxation revenue in excess of $1.244 million.**

Who approved the original arrangement with CITC, when it first commenced exactly and the specific terms of the arrangement could not be established due to the lack of documentation and recollection by former staff. When the former Treasurer and Manager of Customs, Mr Geoff Stoddart approved the continuation of the arrangement with CITC in 2006 we found that:

1. The legal head of Customs at the time was the former Financial Secretary, Mr Kevin Carr and it is debatable whether Mr Stoddart had the necessary authority to approve the arrangement on the basis that he did, including authorization of refunds to CITC.
2. Mr Stoddart should have brought the matter to the attention of Mr Carr for review before approval and implementation.
3. Mr Stoddart failed to review the practice in-line with relevant legislation, policy and public servant ethical standards, in particular the values of impartiality, transparency and accountability.
4. Mr Stoddart should have sought advice from NZ Customs and Crown Law and did not properly consider the impact of the arrangement on other importers or loss in Government revenue.

In Audit’s view, prior to 2009 Customs had weak processes in place for the collection of Government revenue, such as the;

1. Inability to confirm if legislative amendments/modifications has been implemented and adhered to by Customs staff.
2. Inconsistent classifications of products.
3. Poor storage of documentary records.
4. Weak communication procedures internally, with import agents and other agencies.
5. Weak operational guidance and direction.

We are pleased to advise that the proposed Customs Revenue and Border Protection Act, based on the NZ Customs Act and regarded regionally as model legislation, will be considered by Parliament later this year. New Customs policy and procedures are nearly completed and it is envisaged these will be implemented in-line with the new Act in January 2012.

Under the current and proposed legislation, the Comptroller is responsible for Customs and reports directly to the Minister. As Customs is a division and output of MFEM under the present structure, it is an unusual situation whereby the Comptroller can make decisions exclusive of his HOM, the Financial Secretary. It is our view that this situation must be addressed by the Minister, to ensure the Comptroller can meet his legal obligations.

A fully automated Border Management System (BMS) has been developed as part of a joint initiative between MFEM (Cook Islands Customs) and several NZ agencies, including the NZ Customs Service. The project builds on the work already undertaken over the last two years to modernize the Cook Islands Customs Service.

The BMS will replace Customs current manual system and provide the Cook Islands with a fully integrated border processing and revenue collection system, with the goods component of the project to be delivered by September 2012. It is envisaged that Government revenue collection will be greatly enhanced and will lead to;

1. A more accurate and increased collection of duties and taxes due to the uniform application of the law.
2. Automated calculation of duties and taxes and built-in controls.
3. The reduced opportunity for corruption due to improvements in transparency and by providing decision-making guidelines.

**CONCLUSION**

This review concluded that the separate classification of contents and packaging of Coca Cola products imported by CITC provided a significant advantage over other importers. It must be emphasized that this situation came about because of poor decisions by senior Government officials and not through any illegal activity or misrepresentation by CITC.

Whether plastic bottles are suitable for repetitive use is open to interpretation however we concluded that Mr Stoddart’s approval for the separation of aluminum cans and cardboard boxes on the same basis was illogical and unreasonable. Although the practice was not illegal, both NZ and Australian Customs advised that soft-drink products should be levied as one product.

Because many source documents were missing, the exact loss of Government revenue could not be quantified prior to 2006, however from 2006 to 2009, we assessed that Government made an estimated **loss in excess of $1.244 million in taxation revenue** as a result of this unfair practice.

Even if the decision to approve the arrangement from 2006 onwards was strong or lacking in jurisdiction, it remains fully effective unless it is set aside by the Cook Islands High Court. Until its validity is challenged in Court, its legality is preserved and any decision to seek or recover any loss in revenue would ultimately be a decision for Government to make.

It is apparent that Mr Stoddart had the opportunity in 2006 to revoke the practice, however in our view, his poor decision to allow the continuation of the arrangement was a failure to uphold basic ethical standards expected of a senior public servant. We commend the efficient manner in which the current Treasurer, Mr. Andrew Haigh, sought advice from the NZ Customs Service and revoked the practice as soon as it was brought to his attention. Steps have already been undertaken by Customs to address the areas of concern identified in this review.

**General Recommendations**

We recommend that before the computerized Border Management System has been implemented Customs should review the existing levels of staffing and resourcing to ensure they have sufficient capacity to provide assurance to the Executive (Cabinet) and Parliament regarding the integrity of Customs revenue systems and controls.

With the anticipated enactment of the new Customs Act, clear lines of communication with importers and other relevant stakeholders must be established and maintained to ensure compliance with legislative requirements and a uniform and consistent approach to revenue collection. Management decisions and changes to policy must be properly documented for any future review.

Consider reviewing whether the current Comptroller of Customs (Mr Andrew Haigh) can meet his legislative obligations under MFEM’s present structure. Or consider if it would be more practical to appoint the Financial Secretary, as HOM, as the Comptroller to ensure he can properly and accurately report on all matters under MFEM’s outputs, directly to the Minister.

Any significant operational decision that may affect Government revenue must be collectively reviewed with the Financial Secretary and Crown Law to ensure than an arrangement as disclosed in this report does not reoccur and to ensure decisions are in-line with Government financial policies.

**Parliamentary Select Committee Review**

A review of the Audit Report was undertaken by a Parliamentary Select Committee, who called various witnesses from Customs and the Treasury Department. Prior to calling the last two key witnesses, Geoffrey Stoddart, Treasurer and Manager of Customs and Mr. Trevor Clarke, Owner and Managing Director of CITC, Government called a snap election in April 2014. The Parliamentary Select Committee was therefore unable to be completed. It was noted New Zealand Customs provided advice to Parliamentary Committee, explaining that plastic Coca Cola bottles could not be repetitively used. They gave an example of the gas bottle – where it can be repetitively reused.

**Research Conclusion**

This review has some significant conclusions.

The separate classification of contents and packaging of Coca Cola products imported by CITC and approved by Customs provided a significant business and monetary advantage over other importers.

Customs permitted CITC to separate contents and packaging on imported products supplied by Coca Cola (NZ) since the mid 1980’s until the practice was revoked in September 2009. By separating their invoices, CITC has paid a 10% levy on packaging and 40% levy on contents; whereas other importers had paid the full 40% levy on the cost of the product as a whole. NZ and Australian Customs advised that soft-drink products should be levied as one product.

As a result of the arrangement, CITC has gained a significant financial advantage over other importers, including the steady increase in the value of packaging from 2001 onwards and especially when the 10% levy on packaging for all imports was removed by an Executive Order on 1 July 2006.

Total loss on Government revenue could not be quantified however from the analysis and calculations, we estimate for the period 2006 to 2009, a **loss in Government taxation revenue in excess of $1.244 million. This conservative figure would be considerably much higher, given the extensive period of operation, since Customs gave favorable treatment to CITC.**

Applying the Cressey fraud and corruption model to this unfair and biased business practice, in my view, there are clear elements of premeditation and planning between the key parties involved. Both parties had the motivation and opportunity to take advantage of the Customs ambiguity, which they did.

What is uncertain and remains clouded and undefined, is the element of greed.

Records and financial figures confirm that CITC received a substantial financial benefit, resulting from the Customs tariff (mis) interpretation over many years.

There is no documented evidence of any fraud or corrupt practices except the underlying nature, scope and outcome of the unethical processes by both Customs and CITC in this unusual arrangement.

Using the Te Toki e te Kaa Rakau concept, were there any unethical cultural and environmental influences at play before and during these arrangements?

In my view, the answer is affirmative, considering the known historical relationship between the two individuals. In a small business community where CITC is a major importer, with retail and wholesale operations, the head of Customs would have known this. It was also common knowledge that the head of Customs, Geoffrey Stoddart previously worked in the offshore banking industry for Standard Chartered before working at Customs and Treasury.

Trevor Clarke, owner and Managing Director of CITC, was also involved with the Standard Chartered Bank.

**Lessons Learnt**

1.First and foremost all senior public officials should sign a Conflict-of-Interest Declaration form which discloses and outlines the specific arrangements with businesses and third parties when there is a real, potential or perceived conflict of interest.

2.The need for effective and robust policies and procedures governing Customs customer and client relationships. Independent internal checks and inspections should be regularly carried out to ensure the safeguarding of the integrity, accountability and transparency of the Customs Service is maintained and not jeopardized.

3.That legal recovery procedures of wrongful customs duties claimed and paid, should have been implemented through the Crown Law Office.

4.The significant loss of Crown revenue due to the manipulation and misinterpretation of customs levies, leading to the financial advantage of one specific importer.

**Explanation with regard to Cases 12 and 13 – Tata Crocombe vs Geoffrey Stoddart, Collector of Revenue Management.**

Cases number 12 and 13 below relates to civil tax matters between Taturoanui (Tata) Crocombe, the Appellant and Geoffrey Stoddart, Collector of Revenue Management, the Respondant. The case stated was overseen by Justice Hugh Williams. The Appeal case was presided by Appeal Court Justices, David Williams President, Sir Ian Barker JA, Barry Paterson J.

The significance of this case was not so much the arguments for and against on the tax treatment of Tata Crocombe’s PAYE legal status and position but more so, the alleged misconduct by the Collector of Revenue Management, Geoffrey Stoddart, in providing Tata Crocombe’s company and personal tax information to Trevor Clarke, a local tax expert. At the same time, Trevor Clarke had business interests in the Edgewater Resort and is a business competitor directly involved in the tourism and hospitality industry. This situation raised a direct conflict of interest, which in part, was of major concern to the Appellant and to the Appeal Court.

When Mr Crocombe raised his concerns with the Collector, the response was that **Mr Clarke’s legal advice concerning this matter was privileged.** Mr Crocombe continued to express concerns and said in evidence at this hearing that; **"I am extremely concerned that the Collector has been providing my commercially sensitive financial and tax information to a direct competitor and supplier. I am even more concerned that the Collector has been seeking advice from a direct competitor and supplier on how to deal with my tax situation. This seems to me to be completely improper."**

Case number 13 deals with the appeal, its complexities and the outcome.

Justice Hugh Williams stated in line 136**, “The ground of improper conduct on the part of the Collector is accordingly dismissed.”** In line 138, Justice Hugh Williams continues, **“For the avoidance of doubt, the Court finds that none of the matters raised by the appellant in his Response to the Case Stated or in his additional ground of Improper Conduct have been made out.”**

**Evidence provided clearly shows that Justice Hugh Williams got it wrong in his interpretation in the Crocombe case, as the Appeal Court overturned his decision. This is highly significant as the same repeated judgement by Justice Hugh Williams in Cases 15 and 16 is again overturned in the landmark Tina Browne bribery and corruption electoral petition versus Hagai.**

Case No 12

Date: 3 August 2012

**Introduction**

**IN THE HIGH COURT OF THE COOK ISLANDS**  
**HELD AT RAROTONGA**  
**(CIVIL DIVISION)**

BETWEEN

**TATUROANUI GRAHAM CROCOMBE** of  
Rarotonga, Company Director  
Appellant

AND

**GEOFFREY COLIN STODDART** Collector of  
Revenue Management  
Respondant

**JUDGMENT OF HUGH WILLIAMS J**

**RESULT**

A. In the result the question for determination in the Case Stated is answered as follows:

1. The respondent was correct in assessing the appellant the amounts credited to the appellant by The Rarotongan in the sums of $250,000 in each of 2000 and 2001.

2. The respondent was correct in assessing the appellant an amount credited to the appellant by The Rarotongan in 2002, but the amount so credited to the appellant varies on the evidence between $187,500 and $200,000. The actual amount is to be resolved by counsel or, failing agreement, to be resolved by the Court on submissions from counsel to be filed within 28 days of delivery of this judgment.

B. None of the matters raised by the appellant in his Response to the Case Stated and his additional ground of Improper Conduct have been made out.

C. Costs are to be dealt with in accordance with para [137].

D. As a matter of caution, all other outstanding matters between the parties are reserved.

**CASE STATED**

[1] On 17 November 2005 the appellant, Mr Crocombe, filed his personal tax returns for each of the years ended 31 December 1999, 2000, 2001, 2002, 2003 and 2004. They were all signed on 10 November 2005. They all showed income received from Mr Crocombe’s employment by his company, The Rarotongan Beach Resort & Spa Limited (‘The Rarotongan’), and interest from the same source in the following amounts:

|  |  |  |
| --- | --- | --- |
| Year | Income | Interest |
| 1999 | $ 25,000.00 | $ 13,775.00 |
| 2000 | $ 47,350.00 | $ 12,255.00 |
| 2001 | $ 52,083.33 | $ 22,431.33 |
| 2002 | $ 54,166.67 | $ 22,264.42 |
| 2003 | $ 50,000.00 | $ 5,049.25 |
| 2004 | $ 50,000.00 | Nil |

[2] Each of the returns was on a standard RM.5 form and each included statements detailing the income and interest received and the tax payable. But the return for 1999 also included a sheet which became pivotal during the hearing of this case. It read:

**The Rarotongan Beach Resort Limited**

**Notes to the Financial Statements**

**For the Year Ended 31 March 2003**

**14. Fundamental Error**

Retained earnings at 1 April 2002 have been restated to correct a fundamental error in the calculation of the shareholders salary and interest on the shareholders current account.

The impact of this error relates to the following years:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Shareholder Salary | Interest | Total |
|  |  |  |  |
| 9 Months 31 March 2002 | (150,000) | (62,368) | (212,368) |
| (FILED) Year ended – 30 June 2001 | (200,000) | (12,929) | (212,969) |
| (FILED) Year ended – 30 June 2000 | (200,000) | 5,401 | (194,599) |
|  |  |  |  |
|  | (550,000) | (69,936) | (619,936) |

[3] The "Fundamental Error" page arose - in the circumstances later detailed -from the crediting of money to Mr Crocombe's current account in the books of The Rarotongan.

[4] The defendant, the then Collector (or Treasurer) of the Revenue Management Division ('RMD') of the Ministry of Finance and Economic Management ('MFEM') declined to accept the figures in Mr Crocombe's personal tax returns and, on 31 March 2006, reassessed his taxable income for each of the years for which the returns were received and substantially increased the amount of tax said to be payable by Mr Crocombe. On each of the Notices of Assessment for the 2000 and 2001years Mr Haigh, now the Treasurer of the RMD of the MFEM but then the officer charged with the management of Mr Crocombe's tax affairs, wrote in the "As assessed" column "includes Director's fees of $250K".

[5] Through the accountants then acting for The Rarotongan and Mr Crocombe, Ernst & Young, Mr Crocombe objected to the notices of assessment for each of the tax years 1999-2004.

[6] Ernst & Young's initial letter dated 17 May 2006 said the assessments were "based on the notional salary amounts included in the Financial Statements of The Rarotongan... which is not correct." The letter continued that Mr Crocombe received no salary from The Rarotongan until 2003 but that,

Prior to 2003, the auditors of RBRS at the time, PricewaterhouseCoopers, suggested that a notional salary of $250,000 per annum be put through the financial statements in order for the financial statements to show more realistic net profits. Accordingly, notional salaries were included in the financial statements of RBRS as follows even though Mr Crocombe was not in receipt of the same:

|  |  |
| --- | --- |
|  | **$** |
| Year ended 30 June 2000 | 250,000 |
| Year ended 30 June 2001 | 250,000 |
| Period ended 31 March 2002 (9 months only) | 200,000 |
|  | 700,000 |

However, PricewaterhouseCoopers later decided that the above was fundamentally wrong and adjusted the opening retained earnings in the financial statements of RBRS for the year ended 31 March 2003 in respect of the notional salary included in prior years financial statements (refer enclosed copy of Note 14 to the financial statements) as follows:

|  |  |
| --- | --- |
|  | **$** |
| Total notional salary included in the financial statements to 31 March 2002 | 700,000 |
| Less: Adjustment to retained earnings | (550,000) |
|  | 150,000 |

Even though RBRS had claimed deductions for $700,000 in their respective tax returns for the years ended 30 June 2000 and 2001 and period ended 31 March 2002, the adjustment of $550,000 together with adjustments in respect of interest were offered for tax in the tax returns of RBRS and were in fact taxed as ordinary income.

Accordingly, total deductions claimed by RBRS in respect of employment salary payable to Mr Crocombe for 2000 to 2002 taking into account the above adjustment amounted to a total of only $150,000.

**2000 to 2002 Assessments**

The total amount claimed by RBRS by way of salary for Mr Crocombe was returned by Mr Crocombe in his personal tax returns as follows:

|  |  |
| --- | --- |
| Tax Return for the Year: | **$** |
| 2000 | 43,750.00 |
| 2001 | 52,083.33 |
| 2002 | 54,166.67 |
|  | 150,000.00 |
|  |  |

From the above it will be apparent that the total amount returned for tax by Mr Crocombe balances with the total amount ($150,000) claimed by RBRS over the years 2000 to 2002.

On the contrary, where Mr Crocombe is to be assessed for $500,000 as per your 2000 to 2002 assessments, RBRS is in fact being deprived of $350,000 (being $500,000 less $150,000) in deductions. Additionally, Mr Crocombe is also being taxed on amounts that he did not and will not receive.

In view of the above, we would be grateful if you would reconsider the assessments raised for 2000 to 2002 and issue amended assessments in due course to properly take up the correct amount of salary paid/payable to the taxpayer as reflected in the tax returns lodged.

[7] After making comments on later assessments of tax paid, Ernst & Young sought waiver of any penalties.

[8] By letter dated 26 July 2006 the Collector disallowed Mr Crocombe's objection "insofar as the 2000 and 2001 assessments are concerned" and continued:

Briefly, some of the factors taken into consideration when reaching this decision were:

1. The original accounts in question were audited and signed off by the company director.

2. Signed tax returns were filed for the company reflecting the original allocations.

3. The "fundamental" error does not appear to be a genuine error but more an attempt by tax advisors and/or the director concerned to minimise Mr Crocombe's immediate tax liability.

4. Existing case law and established practice in this area does not suggest that retrospective reductions in director's fees in these circumstances should be entertained.

Please note that the company was assessed as per the original tax returns filed, ie. a deduction for director's fees as originally claimed has been allowed to the company.

Enclosed is your client's 2002 Notice of Assessment for income tax which includes $200,000 of director's fees also originally declared and paid to your client.

[9] Ernst & Young wrote to the Collector on 5 September 2006 objecting to a Notice of Assessment dated 20 July 2006 in respect of the year ended 31 December 2002 and largely repeating the submissions in their earlier letter.

[10] After further correspondence, Ernst & Young, on 23 October 2006, asked for Mr Crocombe's disallowed objection to be heard by this Court in accordance with the Income Tax Act 1997 (the 'Act').

[11] Section 35(3) of the Act requires the Collector to "state and sign a case setting forth the facts as alleged by the Collector, the nature of the assessment made, the ground of objection thereto and the question for the determination of the Court."

[12] On 25 September 2007 the Collector filed a Case Stated in this Court saying:

For each of the years ended 30 June 2000 and 20 June 2001 [The Rarotongan] paid to the Appellant a Director's fee of $250,000 and for the nine months ended 31 March 2002 the Company paid to the Appellant a Director's fee of $200,000 by crediting the amounts to the Appellant's current account with the Company.

[13] The Case Stated went on to record the objection of 17 May 2006 on the basis that...the original financial statements submitted to the Respondent for assessment by the Company contained "notional salary" figures for the Appellant that were "fundamentally wrong" and the amounts attributed as paid by the Company to the Appellant should be reduced to the following:

|  |  |  |
| --- | --- | --- |
| Year | Amended amount | |
| 2000 | 43,750.00 |
| 2001 | 52,083.33 |
| 2002 | 54,166.67 |
|  | $150,000.00 |

[14] The Case Stated posed the question for determination as:

Whether the Respondent was correct in assessing the Appellant the following amounts credited to the Appellant by the Company:

$250,000 in 2000

$250,000 in 2001

$200,000 in 2002

or whether the Respondent should have permitted the retrospective reduction of these amounts.

[15] Mr Crocombe's response to the Case Stated, dated 19 March 2009, said:

1. The crediting of the amounts set out in the Case Stated was the result of an error in the accounts of The Rarotongan.

2. The error was corrected by the auditors for the Resort and the erroneously credited amounts were reversed and the correct amounts (as set out in the Case Stated) were entered into the accounts.

3. The Collector erred in assessing the income of the Appellant as including the erroneously credited amounts.

4. The Collector's assessments are incorrect or should be amended to exclude the erroneously credited amounts.

[16] A further ground of alleged Improper Conduct on the part of the Collector was added to the Case Stated at the hearing. It is detailed later in this judgment.

**FACTS**

[17] Mr Crocombe is the sole director of The Rarotongan, a resort complex bought by him and his interests in late 1997. They bought it from the Cook Islands Government which had been running it unsuccessfully up to that date incurring large and continuing losses.

[18] When Mr Crocombe bought the complex it was in a parlous state, both in terms of infrastructure and financially. The buildings had become decrepit, the staff were poorly trained, the administrative and IT systems were antiquated and, almost inevitably in those circumstances, patronage had been declining and the Cook Islands tourism industry was suffering as a result.

[19] Mr Crocombe and his interests bought The Rarotongan for $3,250,000, settled by way of a promissory note payable in a decade. The hotel was then valued at $6million – but only on the basis that $3million was spent in refurbishment.

[20] Repairing the complex, upgrading the administrative systems, training the staff and generally getting the resort back onto a sound financial footing with corresponding increases in patronage absorbed many hours and much input from Mr Crocombe. He said he was working 80 hours a week at times to get the resort to the point where it could reopen and then cater to the public with a reasonable chance of financial success.

[21] It appears this process took a number of years with all profits in the meantime reinvested in the company and with Mr Crocombe taking no more than a nominal salary for the time and effort he was contributing.

[22] Mr Crocombe engaged PriceWaterhouseCoopers ('PWC') to assist on the financial side. They acted for Mr Crocombe and his other interests. The day – to - day liaison was with the financial controller and onsite manager of the PWC team when they were on Rarotonga and that person was responsible for all major decisions relating to the accounting systems for the resort complex.

[23] After a number of years input in this fashion and with the resort now reopen to the public after its considerable refurbishment, infrastructure upgrade, staff training and the like, Mr Crocombe said that when he and PWC were preparing the 30 June 2000 financial statements, it appeared a successful turnaround of the business in the future could be accomplished but the PWC partner made an: "observation that a common mistake made by owner-operated businesses is that they do not pay themselves either at all or a commercially realistic remuneration, thereby overstating the true underlying sustainable profitability of the company. .... He suggested it would cost at a minimum $250,000 to pay for [my] services, which were necessary for the company’s progression.

We both agreed that given the parlous financial state of the company and the need for heavy reinvestment to keep the company afloat that paying such a sum to either myself or any other person/persons simply was not an option and that his point, while valid, was simply theoretical and a useful tool to be used in the evaluation of the true performance of the company due to the fact that this notional $250,000 simply did not exist in the company’s finances and therefore could not be paid in reality.

This was my clear understanding of the situation at the time – that I was not, and would not be, getting a salary. This was simply impossible. Further, I knew I was owed around $1million by the company."

[24] As a result of that discussion sums were credited to Mr Crocombe's shareholder’s current account in The Rarotongan's books. It had shown a company liability to Mr Crocombe of $100,000.00 as at 30 June 1998 but this fell to $46,694 the following year. But, after that, the sums in the suggested “Fundamental Error” were credited to Mr Crocombe's current account and the balance owing to him rose to $295,507 in the accounts to 30 June 2000, to $561,736 for the year ended 30 June 2001 and to $806,744 in the 9 months to 31 March 2002. Thereafter, in the accounts to 31 March 2003, the amount shown in Mr Crocombe's current account fell to $38,377 because of the "fundamental error" adjustment earlier set out.

[25] In addition it should be noted that, in addition to the phrasing of the fundamental error in the accounts earlier recounted, a statement attached to the company's tax return to 31 March 2002 (not filed until 17 November 2005) said, under the heading "Fundamental Error":

"The auditors have agreed that there has been a fundamental error in the accounts for the years ended 30 June 2000, 30 June 2001 and for the nine months ended 31 March 2002 as reflected in Note 14 to the audited Financial Statements for the year ended 31 March 2003. This relates to director’s fees. The auditors corrected these amounts including the corresponding interest calculation in relation to the shareholder’s current account. The effect of these corrections is to reduce the expense of the company in the relevant years."

[26] The first increase in Mr Crocombe's current account occurred in conjunction with an exchange of emails which assumed significant importance in the hearing of this case. It took place between 27 February 2001 – three days after Mr Crocombe signed the company accounts for the year to 30 June 2001 – and concluded on 13 March 2001.

[27] In the earliest email The Rarotongan's financial controller asked Mr Crocombe about the "final adjustment for your remuneration" and asked "would you like me to show this as management fees or would you prefer it to be shown as salary?" Mr Crocombe replied the same day saying that "I guess that if it is salary, I need to pay PAYE and management fees it would be dealt with via the company" and asking whether there were other implications. That produced a response on 28 February 2001 saying that "any income whether classified as salary or 'fees' ultimately has to be declared for tax purposes", but with the financial controller caveating his comment by saying he was no expert on Cook Islands tax laws and suggesting he could "run it past whoever does your personal tax returns".

[28] On 1 March 2001, Mr Crocombe replied, but this time copying it to the PWC representatives with whom he worked, saying to them that "I have put through $250,000 as management fees or salary through the accounts but have not drawn this amount" and asking whether the most tax effective way to handle the payment was as salary or management fees. He said "if I do not draw the $250,000 will I have to pay tax on it? Would it be better to draw it and advance it to the company?"

[29] That produced a response from a PWC partner - though not until 13 March 2001 through some error - speaking generally of Mr Crocombe being taxable in the Cook Islands as a resident but also commenting on Crocombe & Company Limited’s tax in New Zealand. The email said "we have not researched the Cook Islands tax regime in any detail" but went on to make some general comment.

[30] That position and the practice of crediting sums to Mr Crocombe's current account annually continued until some time after 27 August 2003 when Mr Crocombe was advised by RMD that his tax returns for the years from 1997 had not been filed. He said he thought PWC was attending to this and immediately contacted them. A slight delay occurred until he was able to discuss the situation with PWC. That occurred around October 2003 at which point he said "PWC examined the situation and realised that they had made a fundamental error in relation to the notional salaries", something they endeavoured to correct with the annotation to the company’s 31 March 2003 accounts.

[31] He also complained to PWC at about the same time saying in an email:

"I have been further appalled that no-one at PWC, with full access to my NZ and Cook Islands accounts never thought to say that it was pretty dumb to be crediting salary and interest, both of which would not be drawn, as this would create a tax liability which would have to be paid in cash. It would appear to me that this is the downside of having only young graduates working on our audit. The first time that one of the accountants at Dorchester Finance reviewed the accounts they said "this is pretty dumb, who advised you to do that??" And that was free advice, which, as luck would have it, was followed shortly thereafter by a letter from the Cook Islands IRD. As it stands your advice is that now I am going to have to pay the Cook Islands Inland Revenue hundreds of thousands of dollars when in reality I have not been paying myself other than living costs and every cent has been reinvested back into the business."

[32] PWC then resigned as the accountants to Mr Crocombe and The Rarotongan and KPMG were instructed. A partner of that firm and Mr Crocombe met Mr Haigh on 19 January 2004 to discuss, amongst other things, the "reasons for reclassifying some of the director’s fees credited to the shareholder's account", a meeting which resulted in a letter to RMD from KPMG on 7 May 2004 saying that the "figure of $250,000 was inserted by his previous advisers for economic analysis and financing purposes only" and that it was "never intended that this figure would be in the final statutory accounts".

[33] That request was declined but was renewed by KPMG on 9 May 2005. The letter attached a copy of the "Fundamental Error" Note 14 to The Rarotongan's accounts to 31 March 2003.

[34] Mr Crocombe filed his tax returns for the years 1999-2002 together with another copy of the "Fundamental Error" Note, around 10 November 2005 but the Collector issued Notices of Assessment to him that declined to allow restatement of the company's accounts for the "fundamental error".

[35] Mr Crocombe and The Rarotongan then instructed Ernst & Young as their accountants and the chain of correspondence from 17 May 2006, earlier set out, occurred.

[36] In cross-examination Mr Crocombe was taken through the various sets of company accounts in evidence, his execution of them, the notes to the accounts and, of course, the increasing balance shown in the shareholder's current account but said that his "focus was on the fundamentals" and that he was not "really focussed on that sort of matter". He acknowledged it was "an oversight which obviously as the owner I have primary responsibility for".

[37] Of the February/March 2001 email chain Mr Crocombe, in cross-examination, said he was asking for advice of the PWC tax experts when he sent the email. He acknowledged the email discussions occurred after the company’s accounts were signed. Asked how, in light of the emails, he could assert that a mistake or error had been made when he was asking advice about the most tax effective way to handle the credit, he said: "Well it's an error because when you look at it on its face, it's commercially stupid to declare income which you don’t receive and then incur a tax liability for it, that's just insane, no-one in their right mind would do it if they were aware of it."

[38] He suggested he did not understand the full implication of his request and he was only asking for advice when he asked "Will I have to pay tax on it?" To the renewed suggestion it could not in the circumstances be an error or mistake, Mr Crocombe said:

"Well in business we have what's called a '12 year old test'. If you ask a 12 year old if this made any sense, they would say this doesn't make any sense, so obviously, somewhere along the line, I've missed, they had not provided the implications otherwise all of us would've said this is brainless, let’s not do it, because otherwise all I'm doing is paying tax on money I don't receive which has to be insane. You're looking at something without looking at the full context. This is not a matter that they have provided considered advice and I've taken under consideration and come to a considered decision. This is something where pieces of the puzzle were being put together, and the fundamental piece of the puzzle had not yet arrived. When it did arrive, everybody went 'oh my goodness'."

[39] When it was put to him that he had signed The Rarotongan's accounts containing the credit before seeking tax advice on the implications he said "it was a fundamental error which we made [and] corrected once we realised the implications". He did not take advice before signing the accounts "because the same accountant was doing the taxes, PWC, and I thought they had dealt with all those matters".

[40] It was put to him that he signed the audited Financial Statements as at 30 June 2000 on 23 February 2001 and the accounts attached to the company's tax return the following day but, when it was suggested, he must have been aware the additional $250,000 was showing up as a credit to his current account, he disagreed and said neither he nor PWC considered the position and that "we made a mistake collectively".

[41] He said that the mistake was repeated for the following years and again for the 9 months ended 31 March 2002. The focus, he said, was on the company's struggle for survival.

[42] On 19 October 2003, just before Mr Crocombe wrote the email to PWC earlier set out, one of PWC’s accountants emailed another fellow employee to say that she had sent Mr Crocombe an email on 15 October "asking if he wanted to change the accounts to reverse the 2003 management fee" but had had no answer, and that "it is not practicable to reverse the fees for prior years". Mr Crocombe said that his discussion with the PWC partner would have been shortly after that email and his own.

[43] Asked whether there were signed company minutes relating to the $250,000 credits, Mr Crocombe said The Rarotongan had no meetings other than on land matters because he was the sole director and effectively the sole shareholder. Accordingly, there were no signed director’s resolutions on the topic.

[44] When denying that either $250,000 credit represented the intention between The Rarotongan and himself, Mr Crocombe again applied his "12 year old test". He said that the situation which he, his staff and PWC found themselves in was "professionally embarrassing" and resulted from the fact their focus was on possible commercial total loss on the investment.

[45] Mr Haigh's evidence-in-chief largely dealt with the details of the relative documents and, as they have elsewhere been described, no recounting is necessary. The cross-examination of Mr Haig centred on the suggested ‘improper conduct’ ground later discussed.

[46] By consent a brief of evidence was adduced from a Mr Pickering, a partner in Ernst & Young. It attached Fundamental Reporting Standard No.7 ('FRS7') of the NZ Institute of Chartered Accountants dealing with "fundamental errors". Mr Pickering's brief did not link FRS7 or his evidence to The Rarotongan's accounts or Mr Crocombe's tax returns.

GROUND 1: SECTION 48 INCOME TAX ACT 1997 and FUNDAMENTAL ERROR

**Law and Submissions**

[47] Consideration of what may be termed the "Fundamental Error" aspect of this case begins by focussing on s 48 of the Act which reads:

48. Income credited in account or otherwise dealt with - For the purposes of this Act every person shall be deemed to have derived income although it has not been actually paid to or received by that person, or has already become due or receivable, but has been credited in account or reinvested, or accumulated or capitalised or carried to any reserve, sinking or insurance fund or otherwise dealt with in the interest or on the [sic] behalf of that person.

[48] Mr Ruffin, leading counsel for the Collector, submitted s 48 precisely fitted Mr Crocombe's position. Whether described as salary or as director's or management fees was immaterial: they were sums credited to his current account with The Rarotongan. Even though they were not "actually paid to or received" by him they were "credited in account" to him or, as an alternative, 'dealt with in the interest or on the behalf' of Mr Crocombe. Section 48 therefore deemed him to have derived the income represented by those credits, income which was taxable.

[49] Mr Ruffin submitted that the real essence of Mr Crocombe's appeal was that he sought to reopen The Rarotongan's accounts for the years ending 30 June 2000 and 2001 and the 9 months ending 31 March 2002 claiming they were incorrect because of "fundamental error".

[50] He submitted that, in default of case law in the Cook Islands, the Court should rely on New Zealand authority as to when accounts may be reopened. The Court did not understand Mr David, leading counsel for Mr Crocombe, to differ from this approach.

[51] The major case cited by Mr Ruffin was *Heywood v Parfitt* (M406/90 HC CHCH 12 July 1991 Tipping J). That case concerned partnership accounts and a central point was whether they could be reopened. The Judge, after citing partnership authority, held (at pp16-17): The primary grounds upon which a settled account may be impeached, either wholly or in part, are for fraud and mistake: see Lindley at page 640; Halsbury volume 35 paragraph 144 and Webb & Webb; Principles of the Law of Partnership 4th edition (1987) at page 201. In Webb & Webb the matter is put this way:

"A final account will start from the last settled account, ie in ordinary cases, on the footing that the last periodical balance sheet is correct, for the Court will never (unless for some proved fraud or error) disturb a settled account."

There is rightly no suggestion of fraud in the present case and it really comes down to whether the accounts should be re-opened for manifest error. I consider that the Court should approach a point such as this along similar lines to a rectification issue. The onus is on the party seeking to disturb the account to demonstrate that the written account does not accurately reflect the antecedent common intention of the parties. As in a rectification case the proof must be clear and cogent. In addition, of course the party seeking to re-open must not have acquiesced in the accounts.

[52] Then, after citing authority for reopening accounts prepared after an accountant had "made a manifest error which was likely to have led to another error', the Judge held (at 19):" It is in my judgment extremely important that Courts do not too easily upset settled accounts upon which parties have acted."

going on to state that, even if accounts before him were wrong, the party seeking reopening (at 19):"... had acquiesced in the accounts in circumstances where it would now be quite unfair and unreasonable for the accounts to be reopened."

Tipping J went on to note that (at 19): "Acquiescence is a species of estoppel and has a strong relationship with Laches."

*Heywood v Parfitt* was followed in the New Zealand High Court in *Moir v Moir* (CIV 2004-409-002501 HC CHCH 22 May 2006, at paras [41]-[51]) where Fogarty J, (at [45]) stated:

"It is not the signing of accounts that will make it a stated account but the person to whom it is sent keeping it without making any objection so that that person shall be bound by the same", noting Mrs Parfitt would have been prevented from disputing the accuracy of the accounts because Mr Heywood "had quite reasonably proceeded on the basis that the accounts represented the correct position and worked long hours in the Hotel in reliance upon that" (at [46]). After finding contributions by both parties of the same amount the Judge said (at [47]): "...the necessary elements of settled accounts described by Romer J in *Anglo-American Asphalt Co v Crowley Russell and Co*[[1945] 2 All ER 324](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1945%5d%202%20All%20ER%20324) at 331 apply. He said:

Where A owes, or may owe, B money, and B owes, or may owe, A money, and in their accounts, they strike a balance and agree that balance, that truly represents the financial result of their transactions. There is mutuality in it, and whereas A may be giving up something or B may be giving up something for the purpose of settling the matter between them, they expressly or by implication agree to a conventional position which is established by striking a balance, and that results in what is called a settled account."

Fogarty J then went on to hold that (at [51]): Is axiomatic that mere delay, of itself, is not enough to constitute either laches or acquiescence... but what I find here is delay, with prejudice to plaintiff, on the part of the second defendant, acting for himself and where appropriate for the first defendant trustees." [[1]](http://www.paclii.org/ck/cases/CKHC/2012/49.html" \l "fn1)

[54] *Heywood v Parfitt*was also followed by Asher J in *Malcolm v Mulcock & McCready* (CIV 2008-404-2295 HC AKL 4 November 2008 at paras [21]-[25]) and by Wylie J in *Commissioner of Inland Revenue v Allen & Palmer* (CIV 2007-404-1944 HC AKL 16 December 2009 at [74]-[77]).

[55] With specific reference to s 48 Mr Ruffin relied on a line of New Zealand precedent dealing with the former ss 92 of the Land and Income Tax Act 1954 and 75 of the Income Tax Act 1976 which were identical to s 48.

[56] The earliest Taxation Review Authority case on which Mr Ruffin relied was *Case Q49* (TRA No's 93/67 and 93/68, decision 36/93, 28 June 1993, Judge Willy). The objectors in that case were shareholders in a company which was sold to an associated company at a capital gain, on paper, which was credited to a capital reserve in the balance sheet and distributed to shareholders. The transaction was recorded in company minutes. It resulted in current account credits equivalent to the distribution.

[57] The Judge said had he accepted the minutes and the contents of the accounts at face value then the objections must fail as being caught by, amongst other sections, s 75. But then, by reference to a number of precedent cases, the Judge held (at p4):

"I am satisfied that the evidence discloses that the transaction involving the debiting of the capital account and crediting of the shareholders current account and loan accounts does give rise to a deemed dividend." citing from *Campbell v Commissioner of Inland Revenue* [[1968] NZLR 1](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1968%5d%20NZLR%201), 3, to the effect that (at p5):

"Although there has been no payment of a sum of money to the donees there is in effect a distribution of a sum of money by debit of the sum to the profit and loss account of the company and corresponding credit to the loan account of the debtors."

and then, from *Case F40* (1983) 6 NZTC 59, 762, 59, 764:

"...The money credited to the account would be of an earnings nature from the company to its shareholders and the debits to the account were private expenses of that shareholder... Any credit therein which comprise salary or director’s fees or payments of that type must be taxed to the third objector as an individual in the ordinary way."

[58] The Judge then continued (at 6-7):

"Mr Collins for the Commissioner relies on some observations made by me in *Case Q6* (1993) 15 NZTC 5047 as to the nature of a current account. I there said:

"[A shareholders current account] represents no more than monies advanced to the company or borrowed from it by that shareholder pursuant to whatever arrangements are in force between them at any given time. The account may comprise monies which are otherwise payable to the shareholder in the form of undistributed profits that the shareholder chooses not to take out, it may be in the form of wages or directors' fees or it may be in the form of advances to the company. How so ever, current accounts arise, they result in contractual relations between company and shareholder which relationship will be governed by expressed or implied terms as to payment and repayment."

I remain of that view.

It is clear, taking the minutes and accounts at face value that what occurred in this case was that the company resolved to remove monies from the capital reserve and credit to the current account and loan account respectively of the two shareholders of the company. The debit side of the transaction viewed from the point of the view of the company is evidenced in the balance sheet under the heading "Term Liabilities". It there shows that the advances made to the shareholders are treated as debts owing by the company to them, and are included along with the debt owed by the company to its mortgagee.

If the matter ended there the payments to the shareholders would clearly in my view amount to a distribution which is within the definition of a dividend in s 4 of the Act."

[59] The Judge then turned to other issues raised on behalf of the objectors, particularly the evidence from their accountant, that (at 8):

"He had no authority to make the book entries which he did and that if he had realised the taxation consequences of what he was doing he would never have done it."

quoting from the accountant’s evidence that what had happened was (at 9):

"A journal entry made in error which was subsequently reversed when this matter was first raised."

That evidence led the Judge to hold (at 16):

**THE TRANSFER OF FUNDS MADE IN ERROR**

Counsel next submits that on the evidence of the accountant it is clear that the transaction effected by him by entries in the accounts of the company was done in error, and that if he had realised the taxation consequences he would not have done what he did. I have no doubt that with the benefit of hindsight and perhaps a more accurate appreciation of the consequences of the transfer of the funds from the company to the shareholders all parties wish that the money had been left where it was in the capital account of the company. The fact is that as at the date for the filing of the 1989 return the money had been credited to the shareholders’ accounts and became their property. It may be that it is open to the shareholders to later disavow that transaction, as they have purported to do, evidence [sic] by the 1992 accounts, but that cannot operate retrospectively. The accounts clearly show for the years relevant to these objections that the money was held to the account of the shareholders with the consequence for the reasons I have previously given, that it became as at that time a dividend in their hands, and taxable as such. They may now reverse that process, but cannot thereby escape liability for the tax which was in my view rightly assessed as at the relevant dates.

[60] In *Case U27* (TRA 97/119 and 97/120, decision 25/99, 17 November 1999) resolutions in a company’s minute book prepared by its accountant recorded remuneration paid to shareholders by credit to their current account where the accountant was ignorant of an ongoing dispute between the company and the IRD. The resolutions were accepted by the accountant as having been prepared in error, in that the company was not profitable at the time, and its policy was that in those circumstances shareholder’s salaries would not be paid. The accountant later corrected the resolutions. Relying on *Dunn v Commissioner of Inland Revenue* (1974) 1 NZTC 61, 245, the Judge in *Case U27* held the rectification of the error was effectual and allowed the objection.

[61] In *Dunn*, a taxpayer was required to pay maintenance plus outgoings on a former matrimonial home. He set up a trust, the income of which was to be used toward his obligations but was insufficient to meet the liability in full. The Commissioner added the trust income to the taxpayer’s income as being deemed to be derived from the taxpayer by virtue of the then s 92 of the Land and Income Tax 1954. The Commissioner’s decision was upheld.

[62] After citing s 92 and other authority, Cooke J held:

"As for sec. 92(1), the subsection must be read as a whole. It is concerned with when a person is deemed to derive income. What the section is aimed at, I think, is the kind of situation where income which in the ordinary course would reach the taxpayer's hands is in some way diverted to other uses of benefit to him. The section postulates that income has not been actually paid to or received by him, not already become due or receivable. Hence, he could say that he has not derived it. So a rule is laid down that he shall be deemed to have derived it when it has been dealt with in his interest or on his behalf in any of various ways, some of which are specified. All the ways specified involve diversion of income which would otherwise have flowed to the taxpayer."

[63] Mr Ruffin submitted, with extensive reference to the facts, that the money credited in the various tax years to Mr Crocombe's current account was clearly deemed income within the meaning of s 48 and was accordingly taxable in the years to which it related. He submitted the facts disclosed no fundamental error or mistake in The Rarotongan's accounts and that, in any event, Mr Crocombe had acquiesced in those accounts with the accounts subsequently being signed, audited and filed with the company's tax returns. He submitted that, at best for the appellant, The Rarotongan's accounts for the 9 months ended 31 March 2003 were the only accounts open to the reversal of the current account balance.

[64] For Mr Crocombe, Mr David submitted the assessments the subject of the appeal was incorrect because they assessed the appellant's liability for tax by reference to company accounts which contained a fundamental error concerning the credits in the current account. Once discovered, the fundamental error was correctly reversed by applying appropriate standards. Thus, the Collector's assessments were wrong and based on the appellant’s receipt of money never actually received by him.

[65] He submitted that if audited company accounts show salary or fees as having been credited to a taxpayer's current account but auditors subsequently adjust the accounts by retrospectively reversing the amounts and the adjustment is made because no amount should have been credited because of a fundamental error, any assessment by the Collector should be reversed as the "individual taxpayer was never entitled to the amounts so credited and could never receive any benefit from it."

[66] Referring extensively to the facts of the case and also relying on the authorities cited by Mr Ruffin, Mr David submitted *Case C20* could be distinguished as none of the amounts credited were ever reversed and withdrawals were made. There was accordingly no error in crediting the accounts. *Case Q49* was also distinguishable in that there was no suggestion the correction of the error was made from the company's perspective. He said the mistake in this case was in crediting Mr Crocombe’s nominal salary to an account when there was no intention of making that credit, still less payment. This was a mistake from The Rarotongan's perspective, he submitted, and emails concerning the journal entries were inconclusive and ambiguous. Mr David submitted the real mistake was that when the accounts were prepared, they wrongly stated an obligation of the company to pay Mr Crocombe money. That was a fundamental error on the part of the accountant satisfying FRS7 and other relevant standards and, he submitted, that if the Collector was going to assess Mr Crocombe’s position by reference to the company accounts he must use accounts that properly reflected the company's position.

[67] With reference to FRS7 and New Zealand Standard Practice Statements, Mr David submitted the assessments for Mr Crocombe's tax were incorrect as they were made after the accounts had been corrected. He submitted PWC must have considered FRS7 in giving the company's accounts an untagged audit certificate that a fundamental error had occurred with the fundamental error being perpetuated by the Commissioner who assessed the appellant "as having received income he did not receive and was not entitled to receive". In any event, he submitted The Rarotongan's accounts were prepared for it, not for Mr Crocombe.

[68] Mr David further submitted that when accepted accounting practice was considered the notional salaries were not "credited in account" to Mr Crocombe within the meaning of s 48 because of the restatement following the suggested fundamental error. The appellant "did not have any entitlement to those monies because of the recognition of a fundament error... [and] he also had no entitlement to receive such money given the restatement of the company accounts".

**Discussion and decision on s 48 and "Fundamental Error"**

[69] According to Mr Crocombe's unchallenged evidence, when he and his interests bought The Rarotongan Resort, it was seriously rundown in every way. Years of mounting losses meant buildings and infrastructure were decrepit, systems were outdated, staff lacked training and, as a consequence, patronage was declining. The Cook Islands Government was only able to obtain a sale by deferring payment of the purchase price for a decade, and although the purchase price was only about half the complex’s valuation at $6million at the time, that valuation was predicated on $3million being spent to upgrade the premises and facilities.

[70] Mr Crocombe's evidence was that very considerable effort on his part was required to turn the business around, repair the buildings and infrastructure, train the staff, revamp the systems and enable the business to survive and its patronage to improve. The effort required many hours of Mr Crocombe's personal involvement for years after the purchase.

[71] The Collector did not challenge Mr Crocombe's description of any of that.

[72] One of the terms on which The Rarotongan was bought, improved and managed was that the company accounts should be audited. This was a sound requirement given the sale involved $3,250,000 of public money and survival of the complex and thus payment of the money could not, at least in the early years, have been assured.

[73] Mr Crocombe said his accountants at the time PWC, advised him to include a salary, however nominal, in the company accounts for his personal efforts even if the salary could not be paid. This, too, would seem to have been standard, prudent, advice. The Rarotongan's audited accounts would not, in terms of the auditor's reports forming part of them, be "free from material mis-statements" and give a "true and fair view of the financial position of the company" unless they contained a quantified allowance for the amount of time and effort required of management to produce the financial result the accounts showed.

[74] It was immaterial whether the sum credited to Mr Crocombe's current account was shown as management fees, director's fees or drawings. What the accounts were required to show, in order to provide a true and fair picture of the financial position of the company, was a realistic assessment and quantification of the management time and input required to achieve the financial position the accounts reflected. That was so even if actual payment could not have been made or payment might have adversely affected the company's bank or other financial positions.

[75] Quantifying the director's efforts was also important and appropriate for a number of other reasons. They included:

a) the Cook Islands government was entitled to audited accounts for The Rarotongan which were accurate in their depiction of the company's overall financial position.

b) had another buyer emerged for The Rarotongan or a takeover offer been made and due diligence insisted on, Mr Crocombe would have wanted to ensure both that the accounts were accurate and showed his entitlement to be recompensed for his effort. The accounts would otherwise have been misleading or be understated.

c) Mr Crocombe's evidence made clear that the very difficult financial circumstances surrounding the resort and the company, particularly in the first few years, must have made The Rarotongan's survival at times a matter of doubt. The company may therefore have chosen to go into liquidation or a creditor might have placed it in liquidation during that period. (There was a suggestion the appointment of a receiver by a creditor had been attempted.) Had any of that occurred, as Mr David was constrained to acknowledge in argument, Mr Crocombe would have wanted to be entitled to prove for the debt the company owed him, and would have been naturally concerned to ensure the debt owing to him, as reflected in his current account, adequately recompensed him for the very considerable time, effort and money he had contributed to the company.

[76] It may be the case that the question of shareholder's correct remuneration was not addressed in the first year or two after purchase with so many other matters calling for attention, but by the time of the first company accounts put in evidence, those as at 30 June 1998, the shareholder’s current account was then at $100,000 and generally increased annually thereafter until 2003. The amounts were a reduction of $533,306 to $46,694 as at 30 June 1999, an increase of $248,813 to $295,507 (30 June 2000), an increase of $266,229 to $561,736 (30 June 2001), an increase of $245,008 to $806,744 (9 months to 31 March 2002), and then the reductions for the suggested "fundamental error" in the year to 31 March 2003 by the adjustments of shareholder's salaries, $200,000 (30 June 2000) $200,000 (30 June 2001) and $150,000 (9 months to 31 March 2002) (and consequential reductions for interest) which is at the heart of this part of this case.

[77] Alongside that evidence of the shifting balance in Mr Crocombe's current account are the fact that he signed the 30 June 1998 accounts on 1 June 1999, the 30 June 1999 accounts on 11 October 1999, the 30 June 2000 accounts on 24 February 2001, the 30 June 2001 accounts on 24 September 2001, the 31 March 2002 accounts on 12 June 2003, and the 31 March 2003 accounts on 28 January 2004.

[78] Though it appeared the company accounts put in evidence were incomplete for some years, no doubt they all followed the standard format for such documents and were in accordance with relative statutory and regulatory requirements. The audit reports which were in evidence made clear it was the director's responsibility to ensure the preparation and presentation of the accounts gave a "true and fair view of the financial position of the company" as at balance date and Mr Crocombe's execution of the accounts and, ultimately, their submission to the Collector as part of the company's tax returns amounted to an assurance of the accounts' correctness in showing the financial position of the company. In addition, the accounts would have been sent, following audit, to the Cook Islands Government and, because of the company’s indebtedness, presumably also been copied to The Rarotongan's creditors and bankers. The recipients of the company's accounts year on year would have been entitled to rely on them and Mr Crocombe's execution of them to show the true position of the company's finances.

[79] Of pivotal importance to this aspect of the case is the email chain earlier recounted running between 27 February 2001, three days after the 30 June 2000 accounts were signed, and 13 March 2001.

[80] What that email exchange shows are:

a) that although the 30 June 2000 accounts had been signed a few days beforehand Mr Crocombe, his internal accountants and PWC were still discussing the appropriate amount to be included in the accounts for Mr Crocombe’s remuneration.

b) that possible taxation implications were uppermost in the minds of those involved in the exchange. That particularly applies to Mr Crocombe’s email of 27 February 2001 at 6.56 pm when he discussed whether the tax on those payments would be for him personally or to be "dealt with via the company".

c) that he was advised on 28 February 2001 at 7.16 am by his internal accountant that any income had to be declared for declared for tax purposes but the sender was not a tax expert.

d) that it was Mr Crocombe who said, probably on 1 March 2001 at 5.38 pm, that "I had put through $250,000 as management fees or salary". That email shows it was Mr Crocombe who made that decision as director and he who took the necessary action and that he did so without fully knowing the tax implications of his move because he asked to be advised of the "most tax effective way to handle this". The credit to his current account and the consequent journal debit in the company's accounts had already taken place by that time; it had been "put through".

e) Mr Crocombe received some taxation advice from PWC on 13 March 2001, but it was clearly tentative and not definitive as to the tax consequences of Mr Crocombe’s action.

f) for completeness, it needs to be noted that Mr Crocombe's action in relation to credits to his current account as at 30 June 2000 was repeated for the 2001 and 2002 accounts, again without evidence he sought advice as to the taxation consequences before taking the action.

g) there can be little doubt that when Mr Crocombe said on 1 March 2001 that he had "put through $250,000 as management fees or salary through the accounts" that must mean that his actions were already reflected in the company’s accounts to 30 June 2000. The almost exact correspondence between Mr Crocombe’s mention of $250,000 and the $248,513 increase in his current account in the account makes that plain as does the $250,000 "increase in the shareholders current account" in the reconciliation statement and the description in Note 5 to the Financial Statements.

[81] Although Mr Crocombe may not have held formal board meetings or executed formal board minutes or resolutions for The Rarotongan – understandable enough in circumstances where he was the sole director – his execution of the company's accounts coupled with the statement of his director's responsibilities and the reliance placed by the auditors on him as director in reporting to the Cook Islands Government makes clear that the company's accounts should be regarded as a settled account as that matter is discussed in the cases earlier traversed. That conclusion is also supported by The Rarotongan, though some years late, filing the salient parts of its annual accounts as part of its Tax Returns.

[82] It was submitted on Mr Crocombe's behalf that the company accounts reflected the position from its perspective, not the perspective of Mr Crocombe and that because he did not, and could not, draw the sums shown in his current account, s 48 was inapplicable to his circumstances.

[83] In the Court's view, that cannot be the case. The entries Mr Crocombe caused to be made in his shareholder's current account with The Rarotongan were an acknowledgement, which he arranged and the implementation of which he directed, that the company owed him the sum of money shown in the accounts. They were also an acknowledgement by him as shareholder that he was owed that sum. While the company accounts were, of course, prepared from the company's perspective, Mr Crocombe’s sole directorship and, being, effectively, the company's sole shareholder, means the accounts were evidence, irrefutable once signed unless meeting the criteria for re-opening, of the respective indebtedness and entitlement of the company and Mr Crocombe respectively.

[84] To this point, therefore, the only conclusion open is that, even though Mr Crocombe was not actually paid or did not actually receive the sums shown as owing to him by the company in his shareholder’s current account, the sums were receivable – even if only capable of being paid by the company with some difficulty – and, having been credited to the account, meant Mr Crocombe was deemed to have derived those sums as income in the terms of s 48.

[85] In terms of *Heywood* the three sets of the, The Rarotongan accounts in contention in this case were all settled or stated accounts as defined by the authorities. Until around October 2003 at the earliest, neither The Rarotongan or Mr Crocombe made any objection to the way in which the accounts were cast (*Moir*) because they showed an agreed balance (*Anglo American Asphalt Co*). The observation made by NZ judges concerning current accounts in company financial statements are directly relevant to positions of The Rarotongan and Mr Crocombe and the credits must therefore be taxable (*Case F40*). Alternatively, rather than being paid to Mr Crocombe, the sums were "diverted to other uses of benefit to him" by being shown as debts payable to him from the company's books (Dunn).

[86] Section 48 accordingly applies to the amounts credited to Mr Crocombe's current account, unless The Rarotongan accounts can, as a matter of law, be reopened for the "fundamental error".

[87] The account as between Mr Crocombe and the company having been settled by his execution of the company’s audited accounts (and by outside agencies no doubt relying on their accuracy) and there being no question of fraud, in accordance with *Heywood* and the other cases earlier discussed, the question is whether it was possible as a matter of law, for the settled accounts to be reopened for mistake.

[88] In that regard, both the cases and s 31 of the Act make clear the onus is on Mr Crocombe to demonstrate by cogent proof that the written accounts do not accurately reflect the antecedent intention of the parties.

[89] As noted in *Dunn*, the crediting of the funds in the company's accounts to Mr Crocombe’s current account involved diversion of the income of the company which would otherwise have flowed to it, and which he was entitled to have flow to him in due course.

[90] Although the sums credited to the current account were created by journal entry, there was an effect on the general company position which would have been important in any of the scenarios discussed in paragraph [75]. Given that (part at least) of the company's accounts were filed with The Rarotongan's Tax Returns, though not until 2005, the company's taxation position would also have been affected by the putting through of the sums credited the current account.

[91] The necessity for Mr Crocombe to prove that the company accounts did not reflect the mutual intention of the parties also brings FRS7 into consideration.

[92] The first point to be noted is that Mr Ruffin accepted the New Zealand standards applied in the Cook Islands as they are apparently the standards local accountants apply.

[93] Mr Ruffin took the point first that Mr Crocombe had failed to demonstrate that the amounts shown in the shareholder's current accounts of The Rarotongan were in error.

[94] In the Court's view, there is considerable force in Mr Ruffin's submission in that regard. The evidenced reviewed shows Mr Crocombe's decision to "put through" the sums was a deliberate one taken by him when he was alive to the possibility there may have been taxation consequences for him personally but which he decided to effect without awaiting tax advice from PWC or his internal accountants. The practice was continued in subsequent years until the 2003 accounts were prepared which purported to restate what had occurred in 2000-2002, but not until October 2003 at the earliest.

[95] A deliberate decision, effected without awaiting advice and repeated in subsequent years, cannot amount to a fundamental error. The crediting of the various sums to Mr Crocombe's current account was a standard, prudent action to ensure the financial position between them was correctly stated. The making of the credits was accordingly not an error; what was an error was that the credits were made without fully understanding that, as a matter of law, the making of the credits would trigger s 48's operation. That is not an error in the accounts but a failure to gain a full understanding of the consequences of deliberate action before taking it.

[96] The Court's finding is, therefore, that there was no error in the way in which Mr Crocombe's current account with The Rarotongan was dealt with in the years in question.

[97] True, had Mr Crocombe known of the impact of s 48 which flowed from his actions on his own and the company's behalf, he would not have done what he did. His test given in evidence was whether a 12, year old would have done what he did, the answer to which was obviously "no".

[98] But the answers to that are first, that Mr Crocombe's ignorance of the law provides him with no excuse and, secondly, that the evidence shows he took certain deliberate actions when alive to their possibly having taxation consequences but did not await advice on them.

[99] The Court accordingly finds that there was no error, fundamental or otherwise, in the way in which Mr Crocombe managed the company's and his own affairs in relation to the credits in his shareholder's current account for the years in question.

[100] In light of that, there is, strictly, no need to consider FRS7 but, in case this matter comes for reconsideration, the Court deals with the point as briefly as possible.

[101] FRS7 covers both "extraordinary items" and "fundamental errors" and says (paragraph 3.1) that the standard’s purpose is:

"To establish criteria for the identification and disclosure of extraordinary items and fundamental errors so that users of the financial report are provided with information which is necessary for an understanding of the results of the entity for a period."

[102] Paragraph 4.2 of FRS7 defines "fundamental error" by saying:

"An error is considered to be fundamental where it is so significant that it destroys the fair presentation of the financial report taken as a whole" and goes on to suggest that (paragraph 4.3) errors in financial reports result from:

"Mathematical mistakes, mistakes in the application of generally accepted accounting practice, or oversight or misuse of facts that existed at the time the financial statements were prepared."

[103] Paragraph 5.16 says:

"The after-tax effects of fundamental errors shall be accounted for by adjusting the opening balance of equity and, where practicable, restating the comparative figures for the previous period. In a historical summary, the amounts relating to prior periods shall be restated where practicable and the fact of their restatement disclosed."

[104] Corrections of fundamental errors are dealt with in paragraph 5.20 which reads:

"In exceptional circumstances a financial report may have been issued containing an error which is of such significance as to destroy its fair presentation. That financial report would have been withdrawn had the error been recognised at the time. The correction of such a fundamental error is to be accounted for, not by inclusion in the statement of financial performance of the current period, but by restating the prior period(s) with the result that the opening balance of retained earnings would be adjusted accordingly."

[105] In this case, there are at least two versions of the fundamental error in evidence. One said it related to director's fees, which was corrected by including it and interest in relation to the shareholder's current account as set out in the quoted table. The other said it resulted from a fundamental error in the calculation of the shareholder's salary and interest on the current account. There was also the suggestion it was "... inserted for economic analysis and financing purposes only".

[106] The first thing to be noted is that Mr Crocombe called no expert evidence which suggested that any error in relation to his current account with the company was "so significant that it destroys the fair presentation of the financial report taken as a whole". Although Mr Pickering attached FRS7 to his brief of evidence, he nowhere dealt with The Rarotongan’s accounts and nowhere said the suggested error was of such significance that it met the test for "fundamental error".

[107] The onus being on Mr Crocombe, the conclusion must therefore be that he has not proved that The Rarotongan’s accounts for the 2000-2002 periods were affected by a fundamental error such that their fair presentation of the company's position was destroyed in terms FRS7.

[108] Indeed, if anything, the contrary has been proved because the crediting of the sums to Mr Crocombe's current account provided users of the report with information which is necessary for an understanding of the results of the entity for a period".

[109] Secondly, even had Mr Pickering offered that opinion, counsel agreed that whether or not The Rarotongan's accounts for the years in question was affected by what amounted to a “fundamental error” could not be definitively stated by an accountant offering an opinion in relation to FRS7. It was agreed the question was a matter for the Court.

[110] Thirdly, applying that test, the conclusion must be that a journal entry within the general ledger resulting in a restatement of the one line in the company's accounts affecting the amount it acknowledges it owes its shareholder is not shown to be of such significance to the company's financial report taken as a whole that it destroys the fair presentation of the report.

[111] It certainly affected the company's financial position overall and, plainly, affected Mr Crocombe’s position, but in an enterprise of the scale of The Rarotongan and given that the additional sums shown in the current account were shown to be payable but were not meant to be paid, it could not be said that, even if there was an error in the preparation of the company accounts as it related to the current account, it destroyed the "fair presentation of the financial report taken as a whole".

[112] A further point in that regard is to repeat that there was no error in the "putting through" of the additional amounts credited to Mr Crocombe as far as the company was concerned. The error was that Mr Crocombe was unaware, when he “put through” the sums mentioned, that his actions would result in additional taxation being payable by him personally under s 48. That may affect him personally but, as far as The Rarotongan’s accounts are concerned, that is not an error under FRS7 which destroys the fair presentation of the company’s accounts seen as a whole.

[113] Then it is to be noted is that it appears that it was only about late October 2003 when PWC was auditing The Rarotongan's accounts for the 9 months ending 31 March 2003 that Mr Crocombe became aware of the impact of s 48 on the sums he had arranged to be credited to his current accounts in the 2000-20002 accounting periods. It was only then that the readjustment was endeavoured to be undertaken by a Note to the company's 31 March 2003 accounts, signed by Mr Crocombe on 28 January 2004, which contained details of the suggested "fundamental error" and reduced his current account.

[114] While it may have been open, as between The Rarotongan and Mr Crocombe, to reverse the previous practice of crediting amounts to the latter's current account for the period ending 31 March 2003, the PWC accountants were correct in saying that it was not "practicable" to apply that readjustment to the 2000-2002 financial periods as these were the subject of a settled account. As they said - and FRS7 says - it was simply not open to The Rarotongan and Mr Crocombe to attempt, in around October 2003–January 2004, to recast accounts signed on 24 February 2001, 24 September 2001, and 12 June 2003.

[115] For completeness, the Court notes that the New Zealand Commissioner of Inland Revenue issued a standard practice statement – Mr David submitted in response to *Case U27* – on 5 May 2005 dealing with "retrospective adjustments to salaries paid to shareholder/employees". That statement required requests for reconsideration of incorrect treatment of receipts or omissions of expenditure to be made in a timely fashion "when in the course of events and in the circumstances of the taxpayer company, one would have expected [the mistake] to have been discovered." The New Zealand IRD said that demonstration of the "genuine error" was crucial to accepting an application for readjustment and that "shareholder-employee salaries are generally irrevocable, unless a genuine error has been made".

[116] In this case, for the reasons already set out, the Court’s conclusion is that, irrespective of the categorisation of the credits of Mr Crocombe’s current account, no genuine error was made in the entries in The Rarotongan’s accounts, and, when the taxation impact of the credits became known, the attempted rectification was too late.

**Acquiescence**

[117] Because the Collector relied on it, it is necessary to deal with the suggestion that Mr Crocombe cannot succeed on this ground of the Case Stated because of his acquiescence. The point can be dealt with briefly.

[118] The authorities cited show the onus is on Mr Crocombe to show that it would be unfair and unreasonable for The Rarotongan's accounts not to be reopened. Prejudice to persons relying on the accounts must be shown.

[119] Here, as has already been observed, the credit to Mr Crocombe's current account in The Rarotongan accounts for the year to 30 June 2001 and its repetition in the two succeeding years went unchallenged – even unremarked – until October 2003 at the earliest, a period of up to 32 months. During that time, as the Court has observed, it is likely the Cook Islands Government and others relied on the audit accounts for the years in question. Further, had The Rarotongan filed its tax returns in accordance with the statutory timetable, the Collector would also have relied on the accounts being correct. All would be prejudiced by a reopening of the accounts at this juncture, around 10 years in the past. The Rarotongan itself may be prejudiced, given that any readjustment of the Annual Accounts in question may affect its own taxation and other affairs. Finally, when the crediting of the sums to Mr Crocombe's current accounts has been held to be, at its highest in his favour, an error in his not awaiting taxation advice, it would be, in the Courts view, both unfair and unreasonable for the company’s accounts to be reopened.

[120] Therefore, had it been necessary to reach a conclusion on this point, the Court would have held Mr Crocombe was debarred by acquiescence from having The Rarotongan’s accounts for the 2000-2003 years reopened.

**GROUND 2: IMPROPER CONDUCT BY COLLECTOR?**

[121] As a result of further discovery in the days leading up to the hearing, Mr Crocombe found that the Collector's file relating to this case disclosed it had been referred by the Collector at some stage to a Mr Clarke, a Cook Islands tax lawyer, for advice. Mr Crocombe became extremely concerned at this because, he said, Mr Clarke, whilst a lawyer, had not been in public practice for many years and was a business competitor of Mr Crocombe and The Rarotongan, not always on a fraternal basis.

[122] As a result, at the hearing, Mr Crocombe added a ground to his Case Stated to the effect that the Collector’s actions concerning Mr Crocombe's tax position had been improperly conducted.

[123] Although the new ground was raised only in the last few days before the hearing and was not articulated by Mr Crocombe in any clear way, Mr Ruffin did not object to the suggestion of improper conduct being added to the Case Stated, but refuted that any improper conduct by the Collector had occurred.

[124] The material on which Mr Crocombe relied was:

(a) a memorandum by Mr Stoddart dated 29 July 2006 discussing Mr Crocombe's current account balances and the "fundamental error" as asserted by the accountants which has a handwritten note in the corner - partly cut off - which appears as though it may read **"Files are with T Clarke".**

(b) a file note of Mr Stoddart dated 15 December 2006 recording a meeting with Messrs Crocombe, David and Hikaka concerning Mr Crocombe's tax position which bears the note "??? **Trevor Clarke** – answer please?" and the handwritten addition - author unknown – "Yes".

(c) a draft letter from Mr Stoddart to Mr David dated 19 December 2006 with a handwritten note "**Don't send this - per TC".**

(d) a chronology relating to this matter prepared by the Collector which contains an entry dated 29 February 2008 relating to a letter to **Mr Clarke** **"asking him to draft submissions; enquiring as to his availability to represent the Collector" and enclosing a number of financial documents relating to this dispute**. A copy of the letter was produced at the hearing which largely confirmed the accuracy of the file note.

(e) a letter to **Mr Clarke** from MFEM dated 4 April 2008 enclosing, amongst other things, Mr Crocombe’s file and asking Mr Clarke to discuss matters with Auckland counsel to secure representation for the Collector.

[125] Mr Crocombe had also obtained a copy of a Cook Islands Audit Office report dated 29 July 2011 concerning an arrangement apparently reached between Cook Islands Customs and Mr Clarke's company, Cook Islands Trading Corporation, concerning customs duty paid over a number of years on imported soft drinks. **The report was, on its face, critical of Mr Stoddart, as former treasurer and manager of Customs, and Cook Islands Trading Corporation.**

[126] When Mr Crocombe raised his concerns with the Collector, the response was that **Mr Clarke’s legal advice concerning this matter was privileged.** Mr Crocombe continued to express concerns and said in evidence at this hearing that:

**"I am extremely concerned that the Collector has been providing my commercially sensitive financial and tax information to a direct competitor and supplier. I am even more concerned that the Collector has been seeking advice from a direct competitor and supplier on how to deal with my tax situation. This seems to me to be completely improper."**

[127] Neither Mr Stoddart nor Mr Clarke gave evidence at this hearing. Indeed, there was no suggestion the issues raised by the appellant had been referred to either in the time available.

[128] In relation to the availability to Mr Crocombe of the ground of abuse of power, both counsel referred to the decision of the New Zealand Supreme Court in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [[2011] NZSC 158](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2011%5d%20NZSC%20158); [[2012] 2 NZLR 153](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2012%5d%202%20NZLR%20153). In that case one of the issues was whether judicial review was available to challenge the correctness of tax assessments when the taxpayer had not invoked the statutory objection procedure. Elias CJ and McGrath J (dissenting) held (at 162-3 paras [11]-[12], [14]):

**[11]** In a series of judgments, the meaning of the provisions limiting the availability of judicial review under the 1976 Act, in favour of the statutory objection and appeal process, came under close examination from the Court of Appeal. In *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [[1994] 2 NZLR 681](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1994%5d%202%20NZLR%20681) (CA), the Court of Appeal, in applying ss 26 and 27, drew a distinction between challenging the correctness of an assessment of tax and challenging the process of the Commissioner in making it, along with the character of the resulting assessment decision. The exclusionary provisions applied to the former and precluded judicial review, but on their true meaning they did not apply to the latter. The Court held that the legitimacy of the process, and whether or not the character of the decision was in the nature of an assessment as envisaged by the legislation, could be attacked in judicial review proceedings on administrative law grounds provided that there was a sufficient evidential foundation (at 688). The Court also held that whether the particular "assessment" decision under challenge was so tentative and provisional that it was not an assessment for the purposes of the Act could be addressed in judicial review. The Court accordingly refused to strike out the judicial review proceedings brought against the Commissioner by the taxpayer.

**[12]** Subsequently, in *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* [[1996] 2 NZLR 665](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1996%5d%202%20NZLR%20665) (CA), the Court of Appeal held that the Court’s powers, on hearing an objection, to "confirm or cancel or vary" (under s 33(11)(a) of the 1976 Act) the assessment covered every situation in which an assessment was challenged. It followed that challenges to the validity of an assessment of tax, as well as to its correctness, could be determined under the statutory procedure (at 671-672, applying *Harley Development Inc v Commissioner of Inland Revenue* [[1996] 1 WLR 727](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1996%5d%201%20WLR%20727) (PC)). Importantly, the Court added that it would only be in exceptional cases, typically involving an abuse of power, that the Court would entertain an application by a taxpayer who had chosen not to appeal under the statutory procedure for judicial review of a decision (at 672). The Court of Appeal has also recognised that in objection proceedings the Taxation Review Authority's examination of the correctness of an assessment in objection proceedings could correct defects in the Commissioner's process in making an assessment; *Dandelion Investments Ltd v Commissioner of Inland Revenue* [[2002] NZCA 311](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2002%5d%20NZCA%20311); [[2003] 1 NZLR 600](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2003%5d%201%20NZLR%20600) (CA) at [[50]](http://www.nzlii.org/nz/cases/NZCA/2002/311.html#para50)- [[64]](http://www.nzlii.org/nz/cases/NZCA/2002/311.html#para64)....

**[14]** To similar effect, in *Miller v Commissioner of Inland Revenue* [[2002] NZCA 202](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2002%5d%20NZCA%20202); [[2001] 3 NZLR 316](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2001%5d%203%20NZLR%20316) (PC), the Privy Council said that despite the broad language of the exclusionary section, judicial review was not precluded if proper grounds were made out relating to the legitimacy of the process adopted by the Commissioner and the validity of the outcome. As well, in some circumstances the making of an assessment, whether correct or not, might be an abuse of power (at [14]). The Privy Council also said that:

It will only be in exceptional cases that judicial review should be granted where the challenges can be addressed in the statutory objection procedure. Such exceptional circumstances may arise most typically where there is abuse of power; *Harley Developments Inc v Commissioner of Inland Revenue*at 736. But they have also been held to arise where the error of law claimed is fatal to the exercise of statutory power and where it would be wasteful to require recourse to the objection procedure: *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* at 671.

[129] The judgment of the majority of Blanchard Tipping and Gault JJ held (at 175-6 paras [58]-[59]):

**[58]** But despite the comprehensive scope of the challenge procedure and the powers of hearing authorities, it is necessary to recognise the possibility that there may be rare cases in which it is not practically possible for a taxpayer to challenge an assessment under Part 8A. Indeed, Tannandyce claims that the present is such a case. If that is so, proceedings for judicial review cannot be regarded as precluded by s 109 because the premise on which that section is framed, namely the ability of hearing authorities to consider any challenge, on whatever ground, is not present.

**[59]** We should add, for completeness, that judicial review will also be available when what is in issue is not the legality, correctness or validity of an assessment but some suggested flaw in the statutory process that needs to be addressed outside the statutory regime, because it is not provided for within it. An example might be the case of a well-founded concern that a particular Taxation Review Authority should, for whatever reason, be restrained from considering a challenge; for example, because of alleged bias on the part of the Authority. In such a case it would not be the disputable decision that was being disputed in a court but rather the legality of the process by which the challenge to that decision is to be determined under Part 8A. This is a different matter from a challenge to the legality of the process which led up to the making of the disputable decision. That process and any challenge to it directly puts in issue the disputable decision. Hence the challenge to that decision or its antecedents must follow the statutory procedure.

[130] Mr David submitted an inference was available that Mr Clarke had been given information and advice concerning the tax position of Mr Crocombe and The Rarotongan in circumstances where it was improper of the Collector to seek that advice and improper of Mr Clarke to accept the instructions and act on them.

[131] Mr Ruffin's response was that there was no evidence of Mr Clarke's involvement in the tax affairs of The Rarotongan or Mr Crocombe, before 31 March 2006 the date of the assessments at the heart of the case and the basis for the Case Stated nor before the objection was first notified on 17 May 2006.

[132] This point requires no extensive discussion. In early-mid 2006, were Mr Clarke’s business interests in such competition with Mr Crocombe and his business interests that Mr Clarke could not have been regarded as giving the Collector impartial taxation advice – as to which there is little proof – and were Mr Stoddart aware of the suggested rivalry and commercial competition between Messrs Crocombe and Clarke at the time – as to which there is also little proof – then an argument may have been open that Mr Stoddart should not have offered Mr Clarke the brief and Mr Clarke should arguably have declined it. But, as mentioned, there is scant evidence and little proof of any of that.

[133] On the other hand, there was said to be nothing unusual in the Collector seeking taxation advice from Mr Clarke – Mr Haigh said he was the only tax lawyer in the Cook Islands and was frequently consulted by the Collector – and both Messrs Stoddart and Clarke would have been aware of the secrecy and confidentiality provisions of s 7 of the Act. In addition, as a lawyer of lengthy experience, Mr Clarke would have been similarly aware of the confidentiality requirements of solicitor-client communications and the privilege that attaches to them.

[134] Seen in that light, there is no proved basis for Mr Crocombe's inference that he or his commercial interests were likely to be damaged by the referral of the assessments and file in this case to Mr Clarke. Indeed, Mr Crocombe's objection to the Collector's position relating to his tax had been known from settlement discussions between the parties for a number of years but it was only when the formal assessments on which this case is based were issued on 31 March 2006 and the formal objections were received on 17 May 2006 that it became obvious the dispute would not settle. It was only then that the likelihood of a Case Stated crystallised (even though a formal request for the same was not sent until 23 October 2006). It follows that the possibility of ultimate Court action only became probable once the objection of 17 May 2006 had been formally disallowed on 26 July 2006. It was only then the Collector needed to take legal advice - he had been content to handle the matter internally until then - and make arrangements for representation in Court. The evidence shows that, too, occurred after the objection was disallowed.

[135] **In those circumstances, Mr Ruffin is correct and there is no proof the Collector acted improperly in referring this matter to somebody who was said to be Mr Crocombe’s commercial competitor at any time prior to any necessity for the Collector to seek outside assistance, still less to the point where the battle lines between these parties were drawn.**

[136] **The ground of improper conduct of the part of the Collector is** **accordingly dismissed.**

**RESULT**

[137] In the result the questions posed for determination in the Case Stated are answered as follows:

(a) The respondent was correct in assessing the appellant the amounts credited to the appellant by The Rarotongan in the sums of $250,000 in each of 2000 and 2001.

(b) The respondent was correct in assessing the appellant an amount credited to the appellant by The Rarotongan in 2002, but the amount initially so credited to the appellant before the attempted reversal varies on the evidence between $187,500 and $200,000. The former appears the more intended as it amounts to three-quarters of $250,000 but the actual amount is to be resolved by counsel or, failing agreement, to be resolved by the Court on submissions from counsel to be filed within 28 days of delivery of this judgment.

[138] **For the avoidance of doubt, the Court finds that none of the matters raised by the appellant in his Response to the Case Stated or in his additional ground of Improper Conduct have been made out.**

[139] Counsel is to endeavour to agree issues of costs but if agreement eludes them, submissions on that topic (maximum 5 pages) are to be filed and served by the Respondent within 21 days of delivery of this judgment and by the Appellant within 35 days of delivery with each party certifying, if they consider it appropriate so to do, that the Court may determine all outstanding issues between them without a further hearing.

[140] Although this is an appeal brought by way of the Case Stated procedure, s 32 of the Act gives the Court power, as part of determining costs, to make orders concerning interest on the tax payable. In addition, as a result of this judgment, there may be issues of penalties which require further determination. Counsel did not address those points. It may prove to be over cautious but, in light of that, it is better to reserve any outstanding issues, including penalties and interest for a counsel's submissions.

[141] As a postscript – though it may only bear on the question of interest and penalties –Mr Crocombe's view that this claim "seeks to take opportunistic advantage of a technical mistake" is incorrect. Amongst the reasons for taking that view, the Court observes:

(a) Both he and his company were several years late in filing their tax returns despite reminders from the Collector. This contributed to the delay in having this matter finalised, as did the time taken up in discussions with a view to settling the matter.

(b) It cannot be opportunistic for the Collector, whose duty it is to administer the tax laws of the Cook Islands, to take steps to recover tax properly payable.

(c) As shown at the outset, nearly five and three years elapsed between the filing of the Case Stated, and the filing of Mr Crocombe's response respectively and the case coming to a hearing. There was similarly no explanation for that delay – though Mr Crocombe has a claim against PWC which might have played a part. Even so, the file does not suggest that Mr Crocombe, as appellant, was pushing to have the matter heard at an earlier date.

**Hugh Williams, J**

**Note**: The research conclusion and lessons learnt for both Case 12 - Case Stated and Case 13 – the Appeal, will be combined at the end of the Appeal case below.

Case No 13

Date: November 2013

**IN THE COURT OF APPEAL OF THE COOK ISLANDS**  
**HELD AT RAROTONGA**

BETWEEN

**TATUROANUI GRAHAM CROCOMBE**  
Appellant

AND

**COLLECTOR OF INLAND REVENUE**  
Respondent

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| --- |
| **JUDGMENT (NO. 3) OF THE COURT** |

**Introduction**

[1] In a judgment given on 3 August 2012 Hugh Williams J determined that the Respondent, the Collector, was correct in assessing the Appellant, Mr Crocombe, with amounts credited to Mr Crocombe's current account by The Rarotongan Beach Resort and Spa Limited ("The Rarotongan"). The Appellant appealed on various grounds, all but one of which were determined by this Court in a judgment given on the 11 March 2013.  
  
[2] The remaining point of appeal which is being determined in this judgment is that in issuing the assessment, there was improper conduct by the Collector amounting to an abuse of process that vitiates the validity of the assessments.  
  
[3] The basis of the allegation of improper conduct is that the Collector referred Mr Crocombe's tax situation to Mr Trevor Clarke for advice. Mr Clarke is a qualified lawyer who practised law in the Cook Islands for some years before retiring from his practice and undertaking a successful business career in the Cook Islands. He was known to be a business competitor of Mr Crocombe's and Mr Crocombe submits that it was an abuse of power for the Collector to engage a business competitor to provide him with legal advice about how Mr Crocombe's tax affairs should be treated.

Factual Background

[4] It is not necessary to set out the detailed history of dealings between Mr Crocombe and his advisors on the one hand and the Collector prior to the assessments being issued. Much of this appears in this Court's earlier judgment. It is sufficient to say neither Mr Crocombe nor The Rarotongan filed tax returns within the statutory time limits. A letter written by the Collector to Mr Crocombe on 19 December 2003 referred to previous correspondent and advised that unless the returns were filed by 23 January 2004 he would prosecute.  
  
[5] In June 2004 Mr Crocombe and his advisors had advised Mr Haigh, an officer of the Collector, that it was their wish to reopen the accounts of The Rarotongan and reclassify some of Mr Crocombe's director fees which had been credited to his current account. There were further negotiations between the parties and a formal request to reopen the accounts was made in a letter from The Rarotongan's accountants to the Collector on 7 May 2004. Despite further meetings and representations, the Collector declined to allow the accounts to be reopened.  
  
[6] The dates that the relevant tax returns were filed with the Collector were:

26/4/2002 - The Rarotongan's tax returns for the 1999 to 2001 years.

4/5/2004 - Mr Crocombe's individual tax return for the 1998 year.

10/11/2005 - Mr Crocombe's individual tax returns for the 1999 to 2003 years.

17/11/2005 - a further tax return by The Rarotongan for the 2001 year.

[7] Mr Crocombe became concerned when he discovered preparing for the hearing before Hugh Williams J that Mr Trevor Clarke had given advice to the Collector in respect of the tax returns.  
  
[8] Mr Stoddart as the Collector at the time, advised Mr Crocombe's accountant on the 21st July 2004 that he would not allow The Rarotongan's accounts to be restated. Mr Haigh, who later became the Collector himself, confirmed the position in a letter to The Rarotongan's accountant on 18 August 2004.  
  
[9] The tax assessments were issued on 31 March 2006 after all returns had been filed. These assessments confirmed the advice that the Collector had given on 21 July 2004. One of the returns filed before the assessments were issued was The Rarotongan return for the 2001 year which was filed on 17 November 2005. That return raised the issue of fundamental error. This Court's earlier judgment dealt with this issue.  
  
[10] Mr David for the Appellant relies mainly upon documentary evidence. It is only necessary to briefly refer to it at this stage although there will be a more detailed evaluation later. The documentary evidence relied upon is:

* (a) a file note prepared by the Collector dated 21 July 2004 which included words "my legal advice is that you cannot change history."
* (b) a further file note of the Collector dated 29 July 2006 which indicated that **Mr Crocombe's and The Rarotongan files were with Mr Clarke.**
* (c) a record of a meeting between the Collector, Mr Crocombe and Mr Crocombe's counsel on 15 December 2006 which concluded with the words **"Trevor Clarke – answer please?"**
* (d) the Collector's letter to Mr Crocombe's counsel of 19 December 2006 raising issues from the meeting held a few days earlier. A handwritten note on that letter said **"Don't sent this, per TC". It is accepted by the Collector that the reference to TC was to Mr Clarke.**
* (e) a letter from one of the Collector's officials to Mr Clarke dated 29 February 2008 forwarding the Collector's file for **Mr Clarke's perusal and comment.**
* (f) a letter of 4 April 2008 from one of Mr Stoddart's officers to Mr Clarke requesting that he arrange for representation in Auckland to advise the Collector.
* (g) a letter of 13 June 2012 from the Crown Law Office to Mr Crocombe's New Zealand solicitors advising that **Mr Clarke had given privileged legal advice.**

[11] Mr Haigh was cross-examined on the Collector's legal representation and did state that to his knowledge Mr Clarke had not been involved in giving advice on the assessments dated 31 March 2006. However, it was also Mr Haigh's evidence that Mr Clarke was the closest thing on the island to a tax lawyer and that during the relevant period he was the person from whom the Collector would get advice from on draft bills etcetera. **He confirmed that Mr Clarke was the Collector's legal advisor over the whole period and could see no reason why he would be replicated.**

Issues

[12] There are two issues for this Court to determine:

* (a) the factual issue of whether Mr Clarke did give advice to the Collector on Mr Crocombe's and The Rarotongan's tax matters and if so when he gave that advice; and
* (b) if advice was given relating to Mr Crocombe's and The Rarotongan's tax affairs was this an abuse by the Controller of his power as Collector.

Factual Issue

[13] Mr Ruffin for the Controller submitted that there was no evidence that Mr Clarke gave advice before the battle lines were drawn in this case. He was referring to 31 March 2006, the date on which the assessments were issued. Referring to the file note of 21 July 2004, it was Mr Ruffin's submission that the document has no context and may have merely been a question asked of another lawyer. Even if it was asked by the Collector of Mr Clarke it may have merely been a telephone query without formal provision of the accounts and simply asking whether it was possible to rewrite accounts particularly those that had been audited.  
  
[14] It was also submitted on behalf of the Collector that this Court should not draw any inferences from the Collector opposing the late application made by Mr Crocombe that the Collector and Mr Clarke be called to give evidence in this Court and from the Collector's failure to call Mr Stoddart. In this respect Mr Ruffin relied upon the New Zealand Court of Appeal case of *Russell v Taxation Review Authority* [[2003] 21 NZTC 18](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2003%5d%2021%20NZTC%2018),225.  
  
[15] The particular references relied upon from *Russell* were:

[31] ... We record, however, that we agree with the view taken by O'Regan J that there can be no obligation based on the rules of natural justice requiring a litigant in a civil proceeding, whether or not a public authority, to identify and make available witnesses considered by the opposing litigant to be the "correct ones". We agree also that there is no breach of natural justice by a litigant opposing successfully an application for an order for discovery of documents.

[32] We are not persuaded that the Commissioner stands in a unique position in objection proceedings so as to be under wider obligations than other civil litigants. The nature and purpose of this proceeding already referred to in this judgment makes that unnecessary. The argument for that unique position is just another attempted justification for the type of investigation we have held to be inappropriate."

[16] In this Court's view the facts of this case do not fall neatly within the comments made in *Russell*. Here, the witnesses required namely the Collector and Mr Clarke had been identified, albeit the realisation of their possible importance came on the eve of the High Court hearing. The Collector was within his legal rights in opposing the application to have Messrs Stoddart and Clarke called as witnesses and in deciding not to give evidence. However, in this case there was an allegation of improper behaviour against the Collector, who had an obligation to act in a high-principled way. There was some evidence to support that allegation. In the circumstances this Court does not accept that the Collector's failure to give evidence which would explain or clarify the documentary and other evidence, cannot be a factor from which an inference can be drawn. It is noted that the New Zealand Court of Appeal was not referred to the English authorities which are referred to later in this judgment.  
  
[17] However, this Court is satisfied, without having to make any inferences relating to the Collector's reluctance to give the information on when he sought legal advice and from whom, that it can form a view on the factual issue. **On the balance of probabilities, it concludes that Mr Clarke did advise the Collector on Mr Crocombe's and The Rarotongan's tax affairs before the assessments were issued and before Mr Crocombe's accountant was advised that the Collector would not permit the rewriting of The Rarotongan's accounts for tax purposes.**  
[18] The evidence given by Mr Haigh, the Collector's own tax auditor, was that Mr Clarke was the Collector's legal tax advisor throughout the relevant period. There was no other tax advisor on Rarotonga. The issue was an unusual matter of some complexity. It was being argued by a branch of a recognised international accounting firm that The Rarotongan was entitled to rewrite its accounts. The submission was that this could be done because the original accounts contained a fundamental error and that in accordance with international recognised accounting standards the accounts could then be rewritten. The issue is one in which the Collector would be expected to take legal advice before coming to a decision.  
  
[19] The Collector's memorandum of 21 July 2004 analysed in a reasonably detailed manner the issues involved in this case. On one vital point he noted that "his legal advice was that you cannot change history". It is difficult to give any other interpretation to this comment other than that Mr Stoddart took legal advice on the issues being raised by Mr Crocombe and his advisors.  
  
[20] There is clear evidence that Mr Clarke advised the Collector after the assessments were issued. The Collector's memo of 29 July 2006 raised issues and concluded that its intended focus was so that the Collector could see the important aspect. That file noted that the files at that time were with Mr Clarke. They were not with some other lawyer.  
  
[21] The record of the meeting on 15 December 2006 detailed the matters discussed with Mr Crocombe and his counsel and concluded with "**Trevor Clarke – answer please?" Clearly this was seeking legal advice.**  
[22] After the meeting of 15 December 2006 the Collector wrote to Mr Crocombe's counsel to record two aspects of the meeting. **The handwritten note on that letter indicated that it was not to be sent through Mr Clarke. No explanation has been given as to the meaning of this comment although a possibility is that the Collector did not want Mr Crocombe to know of Mr Clarke's involvement.**  
[23] A timetable prepared by the Collector shows that on 29 February 2008 a letter was written by one of the Collector's officers to **Mr Clarke asking for a draft submission and enquiring as to his availability to represent the Collector.**  
[24**] On 4 April 2008 the Collector wrote to Mr Clarke asking him to arrange for Auckland counsel to represent the Collector.**[25] On 13 June 2012 Crown Law replied to a letter from Mr Crocombe's solicitors in which Crown counsel advised "**Mr Clarke was instructed as counsel to provide legal advice to the Collector and as such his advice is privileged". The solicitors had sought information including details of Mr Clarke's involvement and the information disclosed to him. While advice given was privileged, the inquiries made were legitimate and the response inappropriate.**  
[26] **Clearly Mr Clarke gave advice to the Collector from at least 29 July 2006, shortly after the assessments had been issued and the objections filed. By his own admission on the file note of 21 July 2004 the Collector had taken legal advice before advising Mr Crocombe that the accounts could not be rewritten. The only evidence of an involvement of a lawyer was that of Mr Clarke. Mr Haigh's evidence confirms that Mr Clarke was the regular legal advisor as there was no one else on the island that the Collector could turn. On the basis of this evidence, this Court is of the view that the Collector did, prior to the issue of the assessment, seek legal advice from Mr Clarke on the tax position of both Mr Crocombe and The Rarotongan.** It is unnecessary in the circumstances to know the topics in which the advice were given. **The clear inference from the facts is that the Collector, prior to the issue of assessments, sought advice from Mr Clarke on the tax position of both Mr Crocombe and The Rarotongan. To give this advice it is more likely than not that Mr Clarke would have received the tax files and the accounts for The Rarotongan.**

The Legal Issue

[27] The legal issue, based on the factual finding that Mr Clarke did give legal advice to the Collector on The Rarotongan's tax matters before the assessments were issued, is whether the request for and the giving of that advice is **an abuse of power** which leads to the conclusion that this Court should set aside the assessments.  
  
[28] **Mr David relied on several cases, some from the House of Lords, to support the submission that there was an abuse of power in this case.** It is not necessary to cite extensively from these cases but reference will be made to some of the principles which the cases establish.  
  
[29] The House of Lords considered the abuse of power in *In re Preston* [[1984] UKHL 5](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1984%5d%20UKHL%205); [[1985] 1 AC 835](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1985%5d%201%20AC%20835). In that case Lord Templeman said at page 864:

(G) The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that "the unfairness" of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners.

[30] Lord Bingham in *The Queen v Commissioners of Inland Revenue ex parte Unilever plc* [1996] 68 Tax Cases 205, said at page 228:

I would in general terms accept almost all these points, which reflect high authority and rest on sound legal principle. But I am very uneasy at the conclusion which the argument is said to compel in this case. Unilever is, I think, entitled to make a number of points on the facts of the present case: (1) The courts have not previously had occasion to consider facts analogous to those here. The categories of unfairness are not closed, and precedent should act as a guide not a cage. Each case must be judged on its own facts, bearing in mind the Revenue's unqualified acceptance of a duty to act fairly and in accordance with the highest public standards.

[31] Simon-Brown LJ, also in the *Unilever* case observed at pages 233 and 234:

"Unfairness amounting to an abuse of power" as envisaged in *Preston* and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power.

And there is this too to be said. Public authorities in general and taxing authorities in particular are required to act in a high-principled way, on occasions being subject to a stricter duty of fairness that would apply as between private citizens. This approach is exemplified in cases such as *Regina v Tower Hamlets London Borough Counsel ex parte Chetnik Developments Ltd* [[1988] AC 858](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1988%5d%20AC%20858) and *Woolwich Equitable Building Society v Inland Revenue Commissioners* [[1993] AC 70](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1993%5d%20AC%2070), and reflected in Lord Mustill's reference in *Matrix-Securities* to "the spirit of fair dealing which should inspire the whole of public life".

[32] The Court is satisfied that the following principles apply:

* (a) a taxing authority has a duty to act fairly and in accordance with the **highest public standards**. It is required to **act in a high-principled way.**
* (b) if it acts with conspicuous unfairness, it may be **abusing a power.**
* (c) the categories of what may amount to an abuse of power are not closed. Each case turns on its own facts.
* (d) to establish an abuse of power it is not necessary to establish actual bias or improper motive or that either the Collector or Mr Clarke wished to disadvantage either Mr Crocombe or The Rarotongan. None of these elements are alleged by the Appellant to be present.
* (e) **if there has been an abuse of power a Court may set aside an assessment even if it believes it to be correct.**

[33] **The essence of the submission on behalf of Mr Crocombe is that by taking advice from a business competitor of Mr Crocombe, the Collector allowed the potential for bias and favour to become part of the taxation process. It was submitted that even if Mr Clarke did not actually act with any bias or favour, the reasonable person would see that having someone in Mr Clarke's position vis-a-vis Mr Crocombe advise on decisions determining Mr Crocombe's taxation liability, as demonstrating that there would be a real and apparent risk of bias. This is quite apart from the fact that because of the clear conflict, Mr Clarke should not have accepted the instruction in the first place or continued with the instruction.**

[34] **The Court accepts this submission. It does not suggest that Mr Clarke was biased but accepts he was in an obvious position of conflict. It is not suggested that Mr Clarke gave legal advice other than what he believed to be completely impartial legal advice.**  
[35] **However this Court has come to the conclusion that to ask a business competitor to advise on a rival's disputed tax position is unacceptable and improper and amounts to conspicuous unfairness**. **A taxpayer is entitled to expect that his financial position will not be disclosed by the tax authorities to a competitor and that legal advice will not be sought from a lawyer who is also a business competitor of the taxpayer. These points are sufficient to allow the appeal. The position is exacerbated in this case because of the relevant status of Mr Clarke and Mr Crocombe as prominent and leading businessmen who are competitors in the same small business environment. Thus, this Court is of the view that asking Mr Clarke to give the legal advice and Mr Clarke giving it was improper.**  
[36] **The Court is therefore of the view that Mr Crocombe is entitled to the relief sought. The appeal is allowed and the assessments are quashed and the matter referred back to the Collector for new assessments to be made.**

Costs

[37] Each party has succeeded under a judgment of this Court. Costs will therefore lie where they fall.

**David Williams, President - Sir Ian Barker JA, Barry Paterson J**

**Research Conclusion**

As stated, conclusions and lessons learnt are combined for both Case 12 – Case Stated and Case 13 – The Appeal, below.

1.Apart of the intricacies of the Appellants, (Tata Crocombe) personal income tax issues and arguments, the Court found that there was no error, fundamental or otherwise, the way in which Mr Crocombe managed the company’s and his own affairs in relation to the credits in his shareholder’s current account for the years in question. In light of that, there is, strictly, no need to consider Financial Reporting Standards 7 but, in case this matter comes for reconsideration.

**The Court found that Mr Crocombe is entitled to the relief sought. The appeal is allowed and the assessments are quashed and the matter referred back to the Collector for new assessments to be made.**

2.**The basis of the allegation of improper conduct is that the Collector referred Mr Crocombe's tax situation to Mr Trevor Clarke for advice. Mr Clarke is a qualified lawyer who practised law in the Cook Islands for some years before retiring from his practice and undertaking a successful business career in the Cook Islands. He was known to be a business competitor of Mr Crocombe's and Mr Crocombe submits that it was an abuse of power for the Collector to engage a business competitor to provide him with legal advice about how Mr Crocombe's tax affairs should be treated.**

3. Previously, Tata Crocombe had highlighted the close relationship between Geoffery Stoddart and owner of the Cook Islands Trading Corporation (CITC) Mr Trevor Clarke. Mr Crocombe had also obtained a copy of a Cook Islands Audit Office report dated 29 July 2011 concerning an arrangement apparently reached between Cook Islands Customs and Mr Clarke's company, Cook Islands Trading Corporation, concerning customs duty paid over a number of years on imported soft drinks. **The report was, on its face, critical of Mr Stoddart, as former treasurer and manager of Customs, and Cook Islands Trading Corporation.**

4. Mr. Crocombe strongly asserts that by taking advice from a business competitor of Mr. Crocombe, the Collector allowed for bias and favor to become part of the taxation process. This is a real and apparent risk of bias of having Mr. Clarke advising on Mr. Crocombe’s tax affairs and liability. This situation puts Mr. Clarke in an obvious position of conflict. In my view, as the researcher, this is **improper conduct** on the part of the Collector, Mr. Geoffrey Stoddart.

5. The Court of Appeal referred to Simon-Brown LJ, in the Unilever case, at pages 233 and 234;

“Unfairness amounting to an abuse of power” as envisaged in Preston and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law practice, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either its **illogical or immoral** or both for a public authority to act with **conspicuous unfairness** and in the sense **abuse its power**.

6.In my view, the Collector should have been **reprimanded** of some sort, as given the evidence presented by the three Appeal Court Judges, various words were used throughout this highly unusual tax case against the performance of the Collector, Geoffrey Stoddart. Unsavory words used such as improper conduct, real and apparent risk of bias, conflict of position, conspicuous unfairness and abuse of power.

7. From the perspective of the Cressey fraud triangle there are several revelations in this unusual taxation case. In my view, there are indications, as the evidence shows, of the Collector, using his position of trust, authority and control, to exercise his opportunity and motivation, to carry out the improper conduct part of the tax transaction. This is quite separate from the Collector’s responsibility of assess the appellants’ tax return. Although there were no evidence of greed or rationalization on the part of the Collector, there were elements of bias and favoritism against the appellant, as a result of engaging tax adviser, Mr Trevor Clarke. Mr Clarke is of course, a long - time business competitor of the appellant in the local hotel industry.

8.Applying Te Toki e te Kaa Rakau concept, unfolding unethical cultural and environmental influences, there are several apparent observations. As earlier stated, a clear set of values frequently listed as common to Oceania cultures and uniquely applies to this case is;

* Obligation, reciprocity and human responsibility
* Kinship and community
* Solidarity, loyalty and commitment
* Collectivity, cooperation and shared leadership

One immediate problem and concern is that even within one culture, different members of that cultural group might have different values and relationships with one another depending upon their age, gender, socio- economic background, occupations and other factors. It was common knowledge that both Geoffrey Stoddart and Mr Trevor Clarke had known each other in the offshore banking industry prior to Mr Stoddart working with Treasury and Revenue Management.

**Lessons Learnt**

This particular taxation case reflects poorly on the leadership of the Revenue Management institution, previously known as Inland Revenue. As an institution of critical importance in assessing, collecting and storing private company and individual tax information, it has a statutory duty to uphold the high values and principles of fairness, impartiality, confidentiality and above all, integrity. In my professional view, the fallout over this particular case involving the former Collector, Geoffrey Stoddart and Tata Crocombe, is the result of a weakness in ethical behavior and poor judgement on the part of Geoffrey Stoddart. The Court of Appeal highlighted this specific area in many parts in its judgement. The fact that no recorded consequence of any reprimand, penalty or admonishment was made against the former Collector, is totally unsatisfactory.

Written and signed codes of conduct and ethics with conflicts of interest declaration forms may still not be sufficient as a conditional and preventative employment proviso, as individuals will still go to great lengths to ‘bend and break the system’ in order to achieve their own personal requirements and goals.

Case: No 14

Date: 25 August 2016

**Introduction**

**Subject: Decision and sentencing of former Minister, Teina Bishop, by Justice Doherty**

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| The allegations made against the former Minister of Marine Resources, is one of bribery. The Crown’s case was that the former Minister accepted or obtained a bribe on 10 May 2013, the finance arm of Luen Thai, a company called Century Finance advanced **USD$256,745.00**, as a reward for having issued 18 finishing licenses and therefore had acted corruptly. |

[1] Teina Bishop, between December 2010 and January 2014, you were the Minister of Marine Resources and various government Ministries of this land. One of the functions of such a minister was the issuing of licences for commercial purposes of fishing within the Cook Islands waters and beyond. Companies associated with the Luen Thai Fishing Venture Limited, which is one of the largest fishing and seafood companies in the Asia-Pacific region, were granted licences by you. You issued 18 licences between 14 October 2011 and 24 April 2013.

[2] Luen Thai became closely connected with the government of the Cook Islands in 2011 when the two entered into a Memorandum of Understanding on fishing cooperation. You were involved in your capacity as Minister.

[3] You also became closely connected personally with the Chief Operating Officer of Luen Thai, a man by the name of Mr Chou. Over time, you regularly corresponded and spoke with Mr Chou using skype-messaging and skype-voice contact, and an analysis of the messages which formed part of the Crown case give an insight that your relationship was not just confined to government business under the Memorandum of Understanding. It appeared, to me at least, to be unusual that a minister of the Crown would be personally negotiating licensing matters with a senior official of the licence holder, let alone conducting personal business with him. To some extent I am told by referees, matters I will refer to later, who have given me advice on you that to some extent that is part of the way you are and part of your personality.

[4] In June 2012 you became interested in the purchase of the Samade Resort which was an accommodation establishment in Aitutaki where you live. It was experiencing financial difficulties and Westpac, its bankers, were effectively forcing a sale. A New Zealand couple had signed up but they required the approval of the Cook Islands Business Trade and Investment Board (“BTIB”) and under the appropriate government regimes, preferences are given to indigenous Cook Islanders over foreigners. You knew that. You already had extensive business interests in Aitutaki including a lagoon tour business and the Samade Resort would complement that and others of your businesses.

[5] You showed interest in the purchase and you attempted to raise finance and persuade the BTIB that you should be the preferential buyer. Put bluntly, you had difficulty raising the finance and as time was running out to clinch the deal you directly approached Mr Chou for a loan of USD$500,000 through Luen Thai’s Cook Islands company – that was in January 2013. You brought in another businessman, Mr Koteka. You negotiated with the banks and in particular Westpac who was forcing the sale. But also, the ANZ was approached for finance. The banks required a contribution of equity. Neither you nor Mr Koteka had that equity. You had already tried a number of avenues including business acquaintances, friends and family to put money into the venture. None of them was able or willing to do so.

[6] Over the next few months from January the negotiations continued culminating an offer of finance from Westpac Bank. That included the need for $300,000 Cook Islands dollars equity to be injected. This was early in April 2013.

[7] You continued negotiations with Luen Thai and those included lawyer-to-lawyer negotiations. They were generally couched in terms that regardless of the structure of the loan, the advance was to enable you to complete the purchase, and this was contested at your trial. Indicative, in my view, is an exchange of emails between you and Mr Chou on 25 April 2013. It was he who was personally involved in trying to make the deal work, and I want to read that. Mr Chou said to you:

“I still have a conference call meeting with my board and our lawyer. They are very worry [sic] about opposition can cause this incident to attack you and Huanan” – which is their company – “in the future. I’ll try my best to convince them and will advise the outcome later.”

You immediately replied:

“That is why the loan is for Thomas” – Thomas was Thomas Koteka – “even though it is the strength of our business that will secure and pay for it. It is also why we only want now $300,000 instead of half a million. We have already spread the word that the bank is giving us 60 percent of the funding and Ann and I through our savings is putting up $100,000 cash and Thomas is to put in $100,000. That is the deal that our bank Westpac came to us after they learned that ANZ was willing to give us $500,000 for the purchase. The two banks are fighting for our business but Westpac is who we will go with and also because Huanan is there and hopefully, we can deal with the finance in-house with them.”

[8] You may not have been straight with Mr Chou either in that exchange, as what you told him about the bank funding bore no relationship at all to what Westpac had offered and that was a matter confirmed in his evidence by your lawyer in the trial.

[9] In any event, the next day Mr Chou confirmed the advance would be made and on the same day you clinched the deal and got the approval of the BTIB.

[10] On 10 May 2013, the finance arm of Luen Thai, a company called Century Finance, advanced USD$256,745 to you. NZD$250,000 (or Cook Islands dollars) of that was ultimately used to complete the purchase of Samade.

[11] The Crown case that was put before the jury was that you accepted or obtained a bribe from the financing arm as a reward for having issued the 18 fishing licenses to Luen Thai interests. The Crown alleged that the bribe was in the form of the loan which enabled Aitutaki Villages Limited, a company set up with your family interests as a shareholder and Mr Koteka as a shareholder, to complete the Samade purchase.

[12] Further, the Crown alleged that you knew or believed that the loan advance was received in connection with your official acts of granting the 18 fishing licences and that therefore you had acted corruptly.

[13] The jury agreed and returned a guilty verdict on 20 August 2016 after a trial which had lasted some 13 sitting days in this Court.

[14] You are now for sentence.

[15] In my view, the jury’s verdict means it accepted that you obtained a benefit from the bribe in that obtaining it enabled you to buy Samade Resort. The bribe was by way of a loan to Mr Koteka in the technical sense but the predominance of the negotiations all referred to an advance to you or your interests; as late as five days before the advance was made.

[16] I find it inconceivable that Luen Thai would have advanced the monies to Mr Koteka, a person not known to them. They had no connection with him, bar through you. Mr Chou had difficulty getting his board to agree, particularly as there was the risk of political fallout and that is evidenced in the extract I have just read and it is a reasonable inference that the fact it was you behind the venture, as you yourself had said, was the important thing to the Chinese. You agreed to personally guarantee the advance.

[17] There has been some criticism that the Crown has not quantified the benefit of being able to complete the Samade Resort purchase. But at the very least it is a reasonable inference to draw that there was a positive benefit on your Aitutaki enterprises. I note that the Westpac Banking cash flow analysis and the working papers that were assessed to give you the loan, showed that your companies and the particular enterprise that Samade would represent, showed a healthy net profit before interest and tax. They can only have got that from you. Your own presentation to the BTIB forecasted net profits of $58,000 in Year 2 rising to $125,000 in Year 5. Now that does not mean that that is what the deal was worth at the time, but it seems to me that a calculation can be made and in any event the benefit was not insubstantial.

[18] I do not unreservedly accept your submission through counsel that the purchase was to help the inhabitants of Aitutaki. That may have been a consequence but, in my view, and on the evidence that I heard and accept, that was not a prime motivator. It was not mentioned in your presentation to the BTIB. And the only reference in the Westpac Bank’s analysis was that you would retain the then current small number of staff working at Samade. To me, all the indicators lean towards self-interest rather than altruism.

[19] The fact that the bribe needs to be repaid is in my mind irrelevant. If you did not get it, you would not have been able to buy Samade.  
[20] You come before the Court with no previous convictions. I have had the benefit of a Probation report. It tells me you are 57 years of age. And if I can generally summarise the positive tenor of that report, it tells me you are a man of humble origins, you have achieved education and success, you are a god-fearing Christian man, you are much loved and adored by your family, you are a good provider to your family, you are a businessman with altruistic aims for the people of the Cook Islands and Aitutaki in particular, you have been a politician and minister on and off for seventeen years. Specifically, you are a business achiever. You are a benefactor, both personally and through your companies who have donated much by way of time effort and real cash to local organisations. I note that in the last year alone there are receipts from such organisations which total about $35,000. You are a family person. You have provided well for your children with expensive overseas private education. Your own estimate is that that has cost you one million dollars. Your children adore and rely on you even in their adult state.

[21] The Probation report says you expressed remorse and counsel has said that you express remorse and regret through him today.

[22] It has not been explained to me how that remorse has been manifested. It is very easy to say one is remorseful; but where is the evidence of it? There has not been an apology from you to your community or to your government and within days of the verdict you gave an interview to the local press. Now, you reported as saying that you had done no wrong. To me, there is nothing you had done or has been put before me that shows me you are remorseful at all. I am sure that you are regretful for what has happened to you but I cannot see any remorse in the true sense that would weigh as a mitigating factor in sentencing. And significantly your counsel does not ask me to do that.

[23] The Probation report recommends a non-custodial sentence by way of supervision.

[24] Much has been made of the purposes of sentencing in cases like this and predominantly the discussion has been about deterrence. But accountability, the sheeting home of responsibility to you as a perpetrator of this crime, denunciation of your conduct as well as deterrence are the primary purposes of sentencing in these cases. And in any democratic society where the rule of law prevails and where those in positions of public responsibility have transgressed, the Courts have been unequivocal in their condemnation.

[25] Counsel have provided me with a number of decisions of various courts, not only in this country but elsewhere and many of them talk about this concept. In New Zealand there is the case of the *R v Field* [[2011] NZSC 129](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2011%5d%20NZSC%20129); [[2012] 3 NZLR 1](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2012%5d%203%20NZLR%201) where it was said corrupt actions have a tendency to promote corruption in others and bribery and corruption threaten institutions such as Parliament that are the foundation of democracy. In Australia, in a New South Wales case, the *R v Jackson & Hakim*[*(1988) 33 A Crim R 413*](http://www.paclii.org/cgi-bin/LawCite?cit=%281988%29%2033%20A%20Crim%20R%20413?stem=&synonyms=&query=2016%20CKHC%2015), it was said that a Cabinet Minister is under an onerous responsibility to hold his office and discharge his function without fear or favour to anyone, otherwise the very institution of democracy itself is assailed. Further the Court said:

“It is particularly important that those who have the privilege, the honour and the responsibility of cabinet rank should not for their personal advantage, abuse their position”.

[26] And really it is a matter of public trust. Can the public, should the public, are they entitled to have trust and confidence in these institutions and those that attain positions of power within them?

[27] The sentencing judge in the *Field* case said:

“The public should be able to have complete trust and confidence in the integrity and proper function of these institutions. Any actions which tend to undermine them - particularly when they are perpetrated by those whose duty is to uphold them - are deserving of particular condemnation”.

[28] In this country, in the Cook Islands, the public expectations are already enshrined in those documents that set out the rules for Members of Parliament and Cabinet Ministers. The Standing Orders say that it is the personal responsibility of every Member of Parliament to maintain the highest standards of ethical behaviour and to protect and maintain the integrity of Parliament. It says ministers should not, under any circumstances, undertake any decision or exert influence in any form whatsoever in respect of which a minister will derive personal gain or benefit. The Manual of Cabinet Procedures says that ministers must perform the duties of their office impartially and shall not be influenced by fear, favour or self-interest. They must disclose any conflict of interest. They must not solicit or accept any benefit for themselves, their families or any business in which they have an interest from persons and special relationships with the government.

[29] And it is for all of these reasons that the Courts have said, as was said by the New South Wales Court of Criminal Appeal in a case called *Retsos v R*[[2006] NSWCCA 85](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2006%5d%20NSWCCA%2085):

“Any offence of, or ancillary to, corrupt conduct on the part of any public official should be denounced plainly and punished condignly”.

“Condign” means “severe and well deserved”.

[30] And in all of the cases that I have referred to, and others, sentences of imprisonment have been imposed. In *Field* it was 5 years starting point for bribery and corruption on eleven counts where there was NZD$58,000 worth of work done for a member of parliament.

[31] In the *Jackson & Hakim* case, a minister accepted a bribe of $20,000 and got 10 years imprisonment.

[32] In other cases which have been referred to me by particularly the Crown like *R v Nua*[[2001] NZCA 190](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2001%5d%20NZCA%20190); [[2001] 3 NZLR 483](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2001%5d%203%20NZLR%20483), a New Zealand customs officer was convicted on one corruption and 30 counts of using a document where nearly NZD$200,000 was involved and a 5 year starting point was justified.

[33] In Canada, a case called *R v Bruneau*[(1963) Carswell Ont 22](http://www.paclii.org/cgi-bin/LawCite?cit=%281963%29%20Carswell%20Ont%2022), a Canadian MP who corruptly accepted a bribe of CAND$10,000 as a member of parliament was sentenced to 5 years imprisonment.

[34] In the Vanuatu case of *The Public Prosecutor v Kalosil & Ors*22 October 2015, Criminal Case no. 73 of 2015, the Supreme Court recently reviewed all of the corruption cases from Vanuatu, from Singapore, Papua New Guinea, Fiji, Hong Kong, and referred to cases from United Kingdom and Australia and said this:

“There is a settled sentencing practice for corruption and bribery offences of this nature and ordinarily the Courts will impose a custodial sentence as deterrence.”

[35] The consensus in all of the cases was noted as this;

“This is an area of sentencing where the Court should unremittingly adopt a firm no-nonsense approach.”

[36] In the Cook Islands the Courts have also confronted corruption cases and commented on them. And those comments by and large are in complete step with the rest.

[37] In particular there is the case of *Police v Pare* [[2005] CKHC 454](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2005%5d%20CKHC%20454?stem=&synonyms=&query=2016%20CKHC%2015)-459. That was a 2005 sentencing where a minister had been charged with three charges of using a document, which bore a 5 - year sentence of imprisonment as a maximum. He was found guilty after a defended hearing. It was not a corruption charge like this one is but was characterised by the Court as “official corruption”. Mr Pare had used CID$470 worth of goods which were public goods for his own benefit. And in that case the Chief Justice imposing sentence said this:

“This Court must enforce the law and the law is founded on the assumption that corruption is a deadly and insidious evil which strikes at the heart of any democratic society. The duty of the Court is to take a very strong stand against it when sentencing offenders and it usually justifies a strong element of deterrence in sentencing.”

[38] In that case the Court did find special circumstances to fall short of imprisoning Mr Pare. The Crown appealed the decision as being too lenient and the matter came before the Court of Appeal shortly thereafter. And the Court said this:

“In our view, the sentence under review was lenient and might not have been one which some individual members of the Court might have imposed had they been sentencing the appellant at first instance.”

It went on to say, after assessment:

“We do not consider that the sentence of the Chief Justice was merciful to the appellant was so inadequate as to justify intervention by this Court. Since a community - based sentence was fairly pointless for a man in the appellant’s situation, imprisonment was the only feasible option to that which was taken. The Chief Justice in the exercise of his sentencing discretion was entitled to pull back from the option of imprisonment in the particular circumstances of this offending and this offender, given the inexorable consequence of the appellant of a conviction.”

But what the Court then did was highlight the serious nature of public corruption and said as a final sentence,

“We emphasise that this is an exceptional case and that those who misuse public money should expect a serious penalty.”

[39] I have referred to these cases, and all of them, not necessarily as cases on all fours with yours, as to level of culpability which I will come to later, but as a guiding example of the principal that ordinarily courts will impose a custodial sentence for corruption.

[40] Your counsel referred me to other Cook Islands cases where leniency was given, and in particular *Police v Henry*[[1979] CKHC 3](http://www.paclii.org/ck/cases/CKHC/1979/3.html) and also *Drollett v Police*[[2004] CKCA 7](http://www.paclii.org/ck/cases/CKCA/2004/7.html). Those were also public corruption cases in the popular sense but they were not bribery and corruption cases under this specific section.

[41] I do not take what the Court said and did in those cases as meaning that the leniency should be, and is, a Cook Islands sentencing policy. All cases depend on their own facts and circumstances.

[42] I have had the benefit of detailed, careful, good submissions in relation to this exercise that I have to do today, from your counsel and from the Crown. And your counsels’ submissions highlight, firstly, that the bribe was at the low end of any scale. That is, it is a very low - level benefit.

[43] Second, that this is not a corrupt bargain case. This is not something that you did wrong in exchange for money. And the Crown did not suggest that.

[44] Third, this is a reward case or put another way, it puts it in a different and lower level of culpability.

[45] Fourth, there was no detriment to public administration. That is true in the sense that the integrity of the commercial fishing licence regime of this country was not in jeopardy and was not affected. The Crown did not suggest that it was.

[46] Fifth, that there was no self-interest and that you had full altruistic motives. Well, I have already dealt with that.

[47] Sixth, that you are good and decent man who has given much to your community in both the private and public sense.

[48] Seven, that your fall from grace will be a significant factor. There is the stigma of the conviction and the fact that you were a minister of this country. The fact that you lose your parliamentary seat as a result of the conviction is something that is significant. You also now have an inability to stand for election within the next five years.

[49] Next, counsel said that you were remorseful and I have already dealt with that.

[50] He also raised the issue of your health and in particular your mental health and the effects any incarceration may have on that. You were diagnosed with a bipolar disorder in 2010. You have used medication. I am not certain whether you still are but you have been stable and are described as being in full remission. Information I have had from your medical people tell me that you are aware of early warning symptoms and have been able to intervene early and prevent any relapse.

[51] An Auckland psychiatrist has told me that imprisonment may have a detrimental effect on your mental state and he said this:

“It will likely precipitate a relapse requiring medical intervention.”

[52] Now this is predictive, but speculative. That is an opinion given really without any evidence that I think that I can take any note of. It is his opinion. But I take into account that you have been a highly functioning public figure with no doubt your trials and tribulations and share of pressure and disappointment in that process. And there is no evidence of your being unable to cope in that environment. You are aware and you can identify your problems and should you be sentenced to imprisonment; any prison authority can be made aware of that situation.

[53] Counsel has also made forceful submissions on the effects that any sentence of imprisonment will have on your business interests and your family. And it is something that has been highlighted in many references that I have had from business people acquainted with you. But I do not think for a moment that there will be business failure if you are not there. There is ample evidence of the business acumen of your wife. You have promoted that. In the Westpac business analysis that I referred to earlier, there are notations such as “Teina and Annie Bishop are locals to Aitutaki and have vast experience in the marine tour market as well as strong Aitutaki connections”; “Annie has experience in finance and will look after the accounting side of the business”; and also “Teina and Annie Bishop have owned and operated their business for over ten years with knowledge of the Aitutaki tourism market. Annie also has experience in managing business account information”. Also, it was noted that Mr Koteka “has vast knowledge in the area and he is running the Aitutaki Villages Limited”.

[54] The Westpac cash flow analysis showed a healthy profit before interest and tax for your businesses. The ANZ did not get into the picture ultimately, but its business analysis also notes “Annie currently manages all the businesses that fall in the Bishop group”. So, it is also significant that you have a stable and well - run business.

[55] The profit and loss accounts for Bishop Cruises and your company T&M Limited show that the profit returns were healthy on your investment. You provided profit and loss accounts to the BTIB showing that your companies are in good heart.

[56] I have also taken into account in this aspect the glowing references that I have had from your business acquaintances. All of whom tell me that you are an exceptional businessman and that you have given much to them and to others. And I do not really expect that with the support network that you have got that they would stand by if your wife and family needed any help.

[57] There is also the play made of the fact that you took legal advice in this transaction and I have been addressed by counsel on both sides today. That too needs to be assessed in context. In my view, this was legal advice and, as the evidence showed, given in answer to a query raised by you when the ANZ Bank indicated it would be reluctant to lend if there was a loan from the Chinese fishing interests. They indicated that that might raise a conflict of interest.

[58] The evidence, and I refer to my notes, from Mr Manarangi was that you were walking in the street and you asked him whether he thought that you were breaking the law. He said he told you that given the loan would be to Mr Koteka on commercial terms, he could not see anything illegal in that, and that was pretty much the end of the discussion. It was characterised by Mr Manarangi as being “not that important”. But in taking this submission into account, I need to remember that the evidence of Mr Manarangi was that he had no knowledge firstly of your relationship with Mr Chou and the details of your dealings and therefore he would not have known of such things as the Bounty transaction where you helped out Mr Chou to get another fishing licence. He would not have known of the exchanges between you such as this one in June 2012, and this is Mr Chou to you, this is in the skype-messaging conversations that you regularly had:

“Bishop, there are two issues I really need your help. 1. There are two health certificate that will need your government to issue but until now we still can’t get it and shipment already arrived VN without HC. Then, two reefers won’t be able to clear customs. 2. We have applied for four licenses but until now we don’t receive any response from MMR - which would have been your ministry – I just afraid I will lose this license to other operators, can you assist on this as four vessels are ready to sail for long time already. Many thanks for your assistance on the two issues. I owe you on this.”

[59] But from the evidence, Mr Manarangi did not specifically know that at the time you had been speaking to Mr Chou about a loan to you and your interests.

[60] I do not think you can hide behind the ‘I took advice on this aspect and was told I wasn’t transgressing’. You had the wit to ask the question, but Mr Manarangi was not given the full story.

[61] Finally, there was a submission today from counsel and in his written submissions, that there is no need for an application of general deterrence in the Cook Islands because this is the first case ever to come before the Courts. Well, it is the first case under this section of the Act but public corruption in the wider sense has been an issue and I have referred, as he did, to the cases of *Henry*, *Drollett* and *Pare*.

[62] General deterrence is recognised by the Courts to be as much a prophylactic as a response to particular offending. It is a future indicator to those who may be minded to act in similar ways, that they will be generally dealt with in a particular way; and in these cases, with condign sentences as a starting point.

[63] The Court has received something approaching seventy references from various people all in support of you. They come from Ariki. They come from Aitutaki community members, religious leaders, political associates, political opposition, civil service colleagues, business colleagues and friends. And I have read them all, probably four times, and I kept thinking as I read there are some common denominators here, and words like this were used; decent, caring, helpful, a listener, a sharer, an orator, generous, tenacious, accomplished musician and singer, leader, compassionate, entrepreneur, humble, loyal, religious, charismatic, role model, honest, strong values, hard worker, respected, diligent, trustworthy, perfectionist, capable, reliable, unselfish. And without exception they laud your attributes as a politician, a businessman, a leader of people and a supporter of your family and constituents.

[64] To many you appear to be viewed as a saint in all things. That is how strongly they support you. One of them said that you are one of the finest leaders that this country has ever produced. Perhaps surprisingly, given the verdict of the jury, most described you as a man of integrity and honesty and most do not believe that you are guilty of any crime and that is their opinion and Mr Harrison your behalf made very proper and careful submissions that you are not promoting that and I do not take it that you are.

[65] In the face of that, I cannot ignore that until now you have done much for your community and for those who are in it.

[66] The Crown argues that your abuse of trust is a separate aggravating feature of your offending. I do not accept that. The elements of abuse of trust are inherent in the charge and is recognised in the maximum sentence that your parliament has thought fit to provide for this offending.

[67] If you are a public official or an MP the inherent abuse of trust is recognised by as possibly deserving up to 7 years imprisonment. In the case of a minister the extra loss of confidence in the office of the minister and in public institutions generally is recognised by the doubling of the maximum sentence to 14 years imprisonment. That is, there is an increased expectation of the public of the trust that they should be able to have in their Ministers of the Crown.

[68] The Crown also argues that there was a premeditation that aggravated your offending in that you acted in a deliberate and planned manner. Well, to an extent that you did, but in my view, not to any extent so as to mean that your culpability has increased. I do not think you cultivated your friendship with Mr Chou for the purpose of taking advantage of him or his companies at some time in the future. I do not think that for a moment. I tend to characterise your offending in a similar manner as one of your referees when he wrote that you were “trapped by enormous temptation to do what you did”.

[69] One of the principles of the tasks of any sentencing Court is that the highest sentence is reserved for the worst cases. And so, I must assess your offending within that principle and much of the argument that I have heard from counsel relates to this.

[70] I do not accept your counsel’s submission that yours is a unique case. It is just another case that has to be placed somewhere on the continuum of seriousness of offending of this nature. Nor do I accept, if I am asked to believe it, that your circumstances place you in some unique position. Unfortunately, many intelligent high achieving people have fallen from grace in the past. But this is not the worst case or anything like a worst case. As the Crown acknowledged, this is not a case of your granting commercial fishing licenses or like favours for millions of dollars over a long period. This is a case on my assessment where you as a talented intelligent individual, a leader of people, succumbed to the temptation to get something for yourself that meant you acted corruptly, and contrary to the rightful expectations of the Cook Islands people when you served as their Minister of Marine Resources.

[71] Succumbing to such a temptation is still regarded though as serious. Firstly, parliament has seen fit to set one of the highest finite terms of imprisonment in the criminal law as a maximum sentence - that is in this country. It still strikes at the heart of public confidence in parliament as an institution and I agree that breach of public confidence cases deserve the denunciation of the court on behalf of the community to such an extent that sentences should carry with it, not just accountability for those who are guilty but also to act as a deterrent to others who might be tempted to transgress.

[72] Your actions were deliberate. The value of the benefits that you received were neither, in my view, insignificant nor insubstantial.

[73] Your culpability when applied to the role of the court in these circumstances to denounce your conduct and show you are being held responsible and accountable and deter others is in my view such as to warrant a sentence of imprisonment.

[74] The Crown submits that a starting point should be towards the midpoint of the range available and it points relying on cases such as *Field*, *Nua* and *R v Palmer* [[2004] NZCA 41](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2004%5d%20NZCA%2041) at somewhere up to 6 years imprisonment. That is too high. For the reasons I have traversed I think your culpability places you within the lower range of the continuum and I assess that at 3 ½ years imprisonment.

[75] From that you are entitled to a credit for your contributions to your community, as a politician who has perhaps gone beyond the normal call of that job but also as a businessman, a philanthropist and a humanitarian in these lands. I think a reduction of one-third of the starting point, that is 14 months reduction as a generous reflection of that.

[76] Your sentence is 2 years, 4 months imprisonment.

[77] I also order that Dr Agnew’s medical reports provided to the Community Probation Service be forwarded to the Superintendent of Arorangi Prison.

[78] Thank you, stand down.

**Colin Doherty, Justice**

**Research Conclusion**

Sadly, we see another unfortunate case of a highly respected Member of Parliament and Minister of the Crown, being found guilty of bribery and corruption. As a friend of Teina Bishop and the family, with respect and dignity, this research does not give me satisfaction in disclosing the intricate ways and means on how this case was played out before the Courts and in the public arena. However, in my view, academic and theoretical research goes beyond friendships and personal acquaintances. There are historical lessons to be learnt, so that public officials, community leaders, students and scholars can learn and acquire some understanding so that public institutions and private sector interests, are safeguarded and protected for future generations.

**Bribery**

The former Minister of Marine Resources, obtained a bribe from Luen Thai Fishing Venture Limited via Century Finance, of USD$256,745.00 (NZD$250,000.00) for the reward for having issued 18 fishing licenses and therefore acted corruptly. The 18 licenses were issued between 14 October 2011 to 24 April 2013.The Crown alleged that the bribe was in the form of a loan which enabled Aitutaki Villages Limited, a company set up with the former Minister’s interests as a shareholder, to complete the Samade sale.

**Sentencing**

The Judged remarked the following;

Much has been made of the purposes of sentencing in cases like this and predominantly the discussion has been about deterrence. But accountability, the sheeting home of responsibility to you as a perpetrator of this crime, denunciation of your conduct as well as deterrence are the primary purposes of sentencing in these cases. And in any democratic society where the rule of law prevails and where those in positions of public responsibility have transgressed, the Courts have been unequivocal in their condemnation.

In New Zealand there is the case of the *R v Field case,* where it was said corrupt actions have a tendency to promote corruption in others and bribery and corruption threaten institutions such as Parliament that are the foundation of democracy. In Australia, in a New South Wales case, the *R v Jackson & Hakim*, it was said that a Cabinet Minister is under an onerous responsibility to hold his office and discharge his function without fear or favour to anyone, otherwise the very institution of democracy itself is assailed. Further the Court said:

“It is particularly important that those who have the privilege, the honour and the responsibility of cabinet rank should not for their personal advantage, abuse their position”. And really it is a matter of public trust. Can the public, should the public, are they entitled to have trust and confidence in these institutions and those that attain positions of power within them?   
The sentencing judge in the *Field* case said:

“The public should be able to have complete trust and confidence in the integrity and proper function of these institutions. Any actions which tend to undermine them - particularly when they are perpetrated by those whose duty is to uphold them - are deserving of particular condemnation”.

**Standing Orders and the Cabinet Manual**

In the Cook Islands, the public expectations are already enshrined in those documents that set out the rules for Members of Parliament and Cabinet Ministers. The Standing Orders say that it is the personal responsibility of every Member of Parliament to maintain the highest standards of ethical behaviour and to protect and maintain the integrity of Parliament. It says ministers should not, under any circumstances, undertake any decision or exert influence in any form whatsoever in respect of which a minister will derive personal gain or benefit. The Manual of Cabinet Procedures says that ministers must perform the duties of their office impartially and shall not be influenced by fear, favour or self-interest. They must disclose any conflict of interest. They must not solicit or accept any benefit for themselves, their families or any business in which they have an interest from persons and special relationships with the government.

**Strong Community Support**

The Court received over seventy references from various people all in support of you. They come from Ariki. They come from Aitutaki community members, religious leaders, political associates, political opposition, civil service colleagues, business colleagues and friends. And I have read them all, probably four times, and I kept thinking as I read there are some common denominators here, and words like this were used; decent, caring, helpful, a listener, a sharer, an orator, generous, tenacious, accomplished musician and singer, leader, compassionate, entrepreneur, humble, loyal, religious, charismatic, role model, honest, strong values, hard worker, respected, diligent, trustworthy, perfectionist, capable, reliable, unselfish. And without exception they laud your attributes as a politician, a businessman, a leader of people and a supporter of your family and constituents.

**Cressey Fraud Triangle and Te Toki e te Kaa Rakau Concept**

Applying the three preconditional elements of opportunity, motivation and greed from the Cressey fraud triangle to this case, confirms the intrinsic choices undertaken throughout this corruption event. The opportunity was provided from a position of authority and trust held by the former Minister of Marine Resources. The motivation and greed followed as it provided the mechanism to advance the objectives of obtaining the loan and funds from Luen Thai Fishing Ventures Limited. Thus, in my view, sealing the three components of the fraud triangle.

Utilizing the **Te Toki e te Kaa Rakau** symbolized concept, the question is, were there unethical cultural and environmental conditions prevalent at the time of the alleged offences? From the evidence provided, there were both internal and external pressures gravitating around and towards the sale of the Samade Hotel, in the following areas;

1.A Memorandum of Understanding was signed in 2011 between Luen Thai Fishing Venture Limited (LTFV) and the Cook Islands Ministry of Marine Resources. The former Minister was instrumental is accessing this agreement.

2.The former Minister had personal relationships with senior officials of the LTFV, one of the largest fishing and seafood companies in the Asia-Pacific region.

3.18 fishing licenses were issued to Luen Thai Fishing Venture Limited (LTFV) between 14 October 2011 and 24 April 2013.

4.The former Minister had a close business relationship with the Chief Operating Officer of LTFV, a Mr. Chou, who was personally negotiating fishing licenses.

5. In June 2012, the former Minister became interested in the Samade Hotel as he persuaded BTIB that he should be the preferential buyer.

6. Time was running out, both in raising finance and meeting the Banks (Westpac) deadline, who was forcing the sale.

7. On 10 May 2013, the finance arm of LTFV, a company called Century Finance advanced USD$256,745.00 to the former Minister, to purchase the Samade property.

**Lessons Learnt**

There are some significant lessons learnt from this case and that in hindsight, should never have materialized, had certain internal controls within the Ministry of Marine Resources been alerted to.

1.The issuance of fishing licenses should have been separated from Ministerial control. An independent body or Committee should have been responsible for issuing legally approved fishing licenses.

2.That any Minister of Marine Resources, who has an interest in fishing licenses or any matters relating to foreign fishing vessels and companies, shall openly declare his/her conflict of interest to his/her employer such as the Prime Minister or to the Clerk of Parliament, who will include such in the Register of Interests.

3.Code of Conduct and Ethics – Members of Parliament and Ministers of the Crown should have regular awareness and training on the leadership expectations and the performance and conduct expected of all public officials in carrying out their duties and responsibilities.

4. Oversight and Enforcement Agencies – The relevant agencies trusted by law to undertake regular review and monitoring procedures, of high risk and possible red flag prone areas, should have carried out their duties and responsibilities diligently and due process.

**Explanation with regard to Cases 15 and 16 – Tina Browne, the Petitioner versus Toka Hagai, the Respondent.**

Cases number 15 and 16 below relates to an Electoral Petition under the Electoral Act 2004. Tina Browne, the petitioner filed charges against Toka Hagai, the respondent, for **Bribery and Treating offences** allegedly carried out during the election of 14 June 2018. The petition case stated was overseen by Justice Hugh Williams. The Appeal case was presided by Appeal Court Justices, Williams P, Barker JA & White JA.

The petitioner, Tina Browne, alleged two offences against the respondent, Toka Hagai. These specifically relate to the Electoral Act 2004, of treating, under section 89 and of bribery under section 88. At point 78 of the case stated judgement, Justice Hugh Williams stated, **“For all those reasons, all the allegations in the amended petition of bribery relating to 25 May and 1 and 8 June failed”.** And at point 130 of the case stated, Justice Hugh Williams stated, **“As demonstrated by the conclusions recorded in the Results Judgement, all the allegations in the amended petition having being dismissed, the amended petition itself was dismissed”.**

Subsequently, the Appeal judgement by the Appeal Court found the following ruling as stated in points 133 and 134 below;

**Relief**

[133] Accordingly, the findings of the Court of Appeal on the questions of law properly identified as necessary for the determination of this appeal can be summarised as follows:

1. The **Chief Justice erred** in accepting the guidance of s 99 of the Act in addressing the substantive question to be decided in the election petition;
2. The **Chief Justice erred** in finding that a custom existed that could act as a defence to the treating allegation prior to the close of the poll;
3. The **Chief Justice erred** in finding that a *de minimis* defence existed in relation to treating; and
4. On the basis of the primary facts as found, the **Chief Justice failed** to draw the only reasonably possible inference as to the purpose of the treating, namely to procure the election of the Respondent.

[134] On the basis of the above conclusions, the **Appellant’s appeal therefore succeeds** and the Court, exercising its power (pursuant to s 102(3) of the Act) to reverse part of the Chief Justice’s judgment, hereby finds that the **Respondent has engaged in treating under s 89 of the Act.**

**Evidence provided clearly shows that Justice Hugh Williams again, got it wrong in his interpretation of the treating and bribery in the Tina Browne versus Toka Hagai case, as the Appeal Court overturned his decision. This is highly significant as the same repeated judgement by Justice Hugh Williams in Cases 12 and 13 was overuled in the Tata Crocombe and Collector, Geoffrey Stoddart taxation case.**

The research conclusion and lessons learnt will follow at the end of the Case Stated and Appeal case judgement.

Case No 15

Date: 19 September 2018

IN THE HIGH COURT OF THE COOK ISLANDS  
HELD AT RAROTONGA  
(ELECTORAL DIVISION)

IN THE MATTER of Parts 7 & 8 of the **Electoral Act 2004**

AND

IN THE MATTERof a **General Election for Members of the Parliament of the Cook Islands**

AND

IN THE MATTER of the **election for the constituency of Rakahanga**

BETWEEN **TINA PUPUKE BROWNE**, Candidate

**Petitioner**

AND **TOKA HAGAI,** Candidate

**Respondent**

Results Judgment: 7 September 2018

Reasons for Judgment: 19 September 2018

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| **REASONS FOR JUDGMENT OF HUGH WILLIAMS, CJ** |

**Introduction**

[1] On 12 April 2018[[1]](http://www.paclii.org/ck/cases/CKHC/2018/30.html#fn1) the Queen’s Representative, acting pursuant to Article 37 of the Cook Islands’ Constitution, dissolved the Parliament of the Cook Islands and fixed 14 June as the date for the next General Election of the Members to form the 24 seat Parliament for the ensuing four year term.

[2] Nominations of candidates for the General Election closed on 30 April.

[3] Since 5 August 1965 the Cook Islands has been a self-governing nation in voluntary free association with New Zealand. Her Majesty Queen Elizabeth II in Right of New Zealand is its current Head of State. She is represented by the Queen’s Representative living on Rarotonga[[2]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn2). It operates on a one vote per voter, First Past the Post voting system with the Prime Minister being the person appointed as leader of, usually, the party with the most seats in Parliament or the party which is predominant in any coalition. Of its 24 electorates[[3]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn3) 10 represent Rarotonga against 14 for the remainder of the Cook Islands – 3 seats for each of Aitutaki and Mangaia, 2 for Atiu and 6 for individual islands.

[4] One result, as far as the Cook Islands is concerned, is that constituencies have widely varying electoral roll numbers – from 1252 to 58 in 2018 – contrasting markedly with the electoral rolls in larger jurisdictions[[4]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn4). Consequently, turnouts are comparatively high but majorities often tiny[[5]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn5). That means Court challenges are a staple feature of General Elections with the challenges being, broadly, either to the qualification or disqualification of voters on the electoral roll or of the commission of electoral offences under part 7 of the Electoral Act 2004,[[6]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn6) usually of the corrupt practices of bribery or treating under ss 87-89. Some observations on that situation appear as Schedule 2 at the end of these Reasons.

**Electorate Contest in Rakahanga**

[5] These Reasons for Judgment concern the election for the one constituency on the island of Rakahanga.

[6] Rakahanga is in the Northern Group of the Cook Islands and is one of the less accessible. It lies 1248km north of Rarotonga. There being no airstrip, access is only possible by sea, either by a 44km voyage by small boat from Rakahanga’s nearest neighbour, Manihiki, or by occasional visits from larger ships which, the island having no sufficient break in its surrounding reef, anchor offshore and are serviced by lighter. Although, in relatively recent times, it has gained electronic access to the internet and the outside world, contact with and from Rakahanga remains – by comparison with others of the Cook Islands – relatively tenuous.

[7] Like islands in other nation states around the world, the attractions of Rarotonga and the wider world by way of employment and societal contact has led to Rakahanga having a declining population. While it was estimated that there were 500 inhabitants when the island was discovered in 1606 according to Wikipedia, its population had declined to about 300 around a century ago, to 127 at the 2008 census and, and now, according to the petitioner, about 95. All are concentrated in the one major village in the southwestern quarter of the 4km2 island.

[8] A consequence of all those factors, the evidence showed, is that everybody on the island knows, and is known, to everybody else, and the spasmodic supply chain from the outside world leads to a higher than usual degree of collaboration and mutual self-support.

[9] In the 14 June General Election there were two candidates for the Rakahanga constituency: the petitioner, Mrs Tina Browne, who, as president of the Democratic Party, stood in its interest, and the respondent, Mr Toka Hagai, since 2014 the MP for Rakahanga, who stood under the Cook Islands Party[[7]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn7) banner.

[10] The main electoral roll for Rakahanga (dated 19 April 2018) contained 56 names and the supplementary roll (which closed on 10 May) added seven names and deleted two.

[11] The declaration of the provisional count showed Mr Hagai polling 28 votes and Mrs Browne 20. When the final vote count was declared (dated 28 June) the numbers had increased to 39 and 24 respectively, thus resulting in a turnout approaching 100%.

**Petition and Amended Petition**

[12] Section 92 gives any candidate, (or five electors) who is dissatisfied with the result, the right to file a petition in the Court demanding an inquiry into the conduct of the election within 7 days after the final declaration of the result of the poll.

[13] Mrs Browne filed a petition on 5 July and followed that with an amended petition dated 7 August for such an inquiry[[8]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn8). Mr Hagai filed no cross-petition.

[14] The salient remaining allegations in the Amended Petition were:

Section 89: Treating

1. On 24 May, 31 May 2018 and 7 June 2018 – three separate allegations - the Respondent or his agents directly or indirectly gave, provided or paid for wholly or in part the expense of giving or providing food, free drinks of beer and other alcoholic drinks for the purpose of corruptly influencing their vote or procuring himself to be elected.
2. The Respondent at the gathering publicly asked the electors to vote for him.
3. The Respondent at that gathering publicly stated that after voting for him the electors could have a barbecue with him.
4. The purpose, or one significant purpose, for the provision of the free food and alcoholic drinks in the period leading up to the election was political, namely to procure the election of the Respondent.
5. Alternatively, the provision of free food and alcoholic drinks were corrupt or illegal practices committed for the purpose of promoting or procuring the election of the Respondent that so extensively prevailed that they may reasonably be supposed to have affected the result.

Section 88: Bribery

* + 1. May 2018

1. The Respondent at the gathering on 24 May 2018 publicly stated that after voting for him the electors could have a barbecue with him.
   * 1. May, 1 and 8 June
2. On 25 May 2018 Electors were marked down on the time sheet as being at work when in fact they were not at work.
3. The electors were absent from work because they were drinking on those days.
4. The Executive Officer, who was an electoral agent of the Respondent, paid all of the workers, knowing that they were not at work and without a legitimate excuse.

32.A purpose, or one significant purpose, for the payment of the electors despite their not working was political, namely to procure the election of the Respondent.

33.As to the Executive Officer’s electoral agency:

The Petitioner says the Executive Officer in his capacity as an electoral official ... was responsible for approving the payment of the Island Administration employees. He did so at times when employees did not work and did not have approved leave (whether annual or sick leave).

The Executive Officer was also responsible for approving the payment of all the Island Administration employees on 14 and 15 June 2018 (with the exception of Una Banaba on 14 June). He did so when none of those employees worked and did not have approved leave (whether annual or sick leave).

In addition, the Executive Officer was involved in the preparation, completion and forwarding to the Electoral Office in Rarotonga of the nomination form for the Respondent.

The Respondent and/or his agents accepted and/or adopted the actions of the Executive Officer such that the Executive Officer became his electoral agent.

12 June 2018

1. On 12 June 2018 the Respondent held a meeting at his home, at which speeches were made to the electors.
2. The caretaker Prime Minister (and leader of the Respondent’s political party, the Cook Islands Party), Hon. Henry Puna, addressed the electors at the meeting. He declared that 14 June and 15 June would be public holidays on Rakahanga.
3. Workers were paid by the Government for 14 and 15 June 2018, though they did not work on either of those days.
4. A purpose, or one significant purpose, for the declaration of a public holiday by the caretaker Prime Minister was political, namely to procure the election of the Respondent.
5. Alternatively, the payment of the electors despite their not working was a corrupt or illegal practice committed for the purpose of promoting or procuring the election of the Respondent that so extensively prevailed that it may reasonably be supposed to have affected the result.
6. Alternatively, the declaration of a public holiday by the caretaker Prime Minister was a corrupt or illegal practice committed for the purpose of promoting or procuring the election of the Respondent that so extensively prevailed that it may reasonably be supposed to have affected the result.”

[15] Each of the allegations concerning the pleaded dates was followed by lists of attendees or those paid. In the iterations of the pleading the lists varied but in the final version they named 31, 37 and 35 (24 and 31 May and 7 June respectively), 7, 9 and 7 (25 May, 1 and 8 June respectively) and 9 (paid when not having worked) persons.

**Treating**

[16] The electoral offence and corrupt practice of treating is defined in s 89 which reads:

89. Treating – Every person commits the offence of treating who, being a candidate at any election, by himself or herself or by any other person on his or her behalf, either before or during an election, directly or indirectly gives or provides or pays wholly or in part the expense of giving or providing any food, drink, entertainment, or other provision to or for any person -

(a) for the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or

(b) for the purpose of procuring himself or herself to be elected:

Provided that it shall not be an offence against this section for a candidate to provide at any time after the close of the poll, hospitality according to local custom or practice.

[17] Overseas cases on the law of treating neither depart from the wording of the section to any great degree nor are very contemporary. That may be because a text cited by Mr Hikaka, leading counsel for the petitioner, *Parkers Law and Conduct of Elections,* apparently comments that “so far as is known, the practices of bribery and treating no longer take place at elections”[[9]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn9). However, as has been observed, while that comment may apply in larger jurisdictions, allegations of bribery and treating are common after Cook Islands’ elections.  
[18] Most of the decisions cited by Mr Hikaka were from late 19th century Britain or early 20th century New Zealand. There is an obvious dissonance and mismatch in endeavouring to apply precedent, over 100 years old, based on very different social mores and values, and stemming from densely-populated, industrial states, to sparsely-populated 21st century Pacific Islands – especially such as Rakahanga – and, for that reason, it is considered appropriate to give greater weight to the terms of s 89 and to such Cook Islands authority as there is.  
[19] The authorities may, in the main, be old and foreign, but the seriousness of treating should not be overlooked. If found, it invalidates the candidate’s election under s 98(1), brings with it the other consequences set out in s 98(3) and must be referred to the Police[[10]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn10) pursuant to s 100. It may be for that reason that the standard of proof is the civil one, but enhanced by the seriousness of the allegation[[11]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn11).  
[20] All that said, it is useful to record the compendious advice of *Halsbury**[[12]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn12)*which notes “the essence of the offence of treating is that it should be corrupt. Treating, in fact, is often innocent; and prima facie it will be taken so to be” but that “no man is bound to abstain from customary and harmless hospitality because an election is pending”. Of relevance to this matter is *Halsbury’s* note that “custom is only relevant as having some bearing on the intent of a particular individual”[[13]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn13)  
[21] Paragraph (b) of s 89 does not expressly require proof of a corrupt motive but it is clear that such a motive must be proved – and the motive must have a significant political aspect[[14]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn14) – for the offence of treating under s 89(b) to be found, as its commission is a corrupt practice under ss 2 and 87(1) and, as the Court of Appeal said in *Wigmore v Matapo*[[15]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn15)*,* though speaking of bribery, that once the offence is complete, “that then becomes a corrupt practice for the purposes of s 87. There is no additional element of acting corruptly – the mere commission of the acts are declared to be corrupt”. What amounts to “corruption” in the electoral sense is now to be found in the decision of the Supreme Court of New Zealand in *Field v R**[[16]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn16)*where that Court held:

“...I am of opinion that there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election. I think the word ‘corruptly’ in this statute means not ‘dishonestly’, but in purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in any particular manner. Both the giver and the receiver in such a case may be said to act ‘corruptly’. The word ‘corruptly’ seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offence. I agree with what was said by the learned Judge at the trial, that if the moving cause of giving the money is the voter having voted for the particular candidate, such gift is contrary to the statute, as being given by way of reward for the vote, and therefore corrupt. [Emphasis in *Field*.]”

[22] Other components of treating are to be found in the decision, oft-cited in the Cook Islands, of the New Zealand Election Court in *In re the Wairau Election Petition**[[17]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn17)*where the following appears:

“In order, therefore, to amount to treating, a corrupt intention must be proved. A corrupt intention is an intention on the part of the persons treating to influence the votes of the persons treated. The question of intention is an inference of fact which the Court has to draw. If there are numerous occasions during the election on which drink has been supplied, the inference would be that it was the intention of the person supplying it to influence the election. If meat or drink were supplied on numerous occasions to a single voter the inference might be drawn that it was done to influence his vote, and the treating would be corrupt. So, also, if a good meal were supplied to an elector was in indigent circumstances the fact that he was given something which he could not procure for himself would lead to the influence that the meal was supplied to influence his vote. Where, however, on exceptional occasions a very small amount of drink is given to a man who is in independent circumstances, it would be absurd to suggest that the drink so given would be likely to influence his vote, or that the intention of the person giving it was to influence his vote. If in any case, looking at all the circumstances, the reasonable and probably effect of the alleged treating would be to influence the result of the election or to influence the votes of the individual voters, it might well be inferred that it was the intention of the person treating that this effect should follow.”

[23] The 1978 Cook Islands case, *Pokoati v Tetava*[[18]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn18) held that elements of treating were the giving or provision of food for the purpose of procuring a candidate’s election or any other purpose calculated to influence the votes of electors, with the giving or providing being with a corrupt intent. The judgment held that that terms “gives or provides” in the then treating section did not require proof of ownership of the food or drink on the part of the candidate because “the clear connotation of the words is to supply, furnish or make available and the concept of ownership may or may not be present”[[19]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn19). [[20]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn20)  
[24] The next legal issue relating to both the allegations of treating and bribery in this case is the question of the electoral agency of Mr Hagai by the Rakahanga CIP Planning Committee. In that respect, it is pertinent to record references from *Halsbury*. After noting that the “crucial test is whether there has been employment or authorisation of the agent by the candidate to do some election work or the adoption of his work when done” *Halsbury*notes:[[21]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn21)

In the absence of authorisation or ratification the candidate must be proved either by himself or by his acknowledged agents to have employed the agent to act on his behalf, or to have to some extent put himself in the agent’s hands, or to have made common measure with him for the purpose of promoting the candidate’s election. The candidate must have entrusted the alleged agent with some material part of the business of the election. Mere non-interference on the candidate’s part with persons who, feeling interested in the candidate’s success, may act in support of his canvass is not sufficient to saddle the candidate with any unlawful acts of theirs of which the candidate and his election agent are ignorant. Employment in the business of the election is a question of degree but it has never yet been distinctly and precisely defined what degree of evidence is required to establish such a relationship between the candidate and the person guilty of corruption as should constitute agency. No one yet has been able to go further than to say that, as to some cases enough has been established, but as to others, enough has not been established, to vacate the seat. All the circumstances of the case must be taken into consideration...

[25] The following passage from *Halsbury**[[22]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn22)*is also of assistance:

“What constitutes agency on the trial of a petition is a question to be decided on the circumstances of each case. However, the concept of agency is much wider in election law than in other areas of the law, such as contract, and a candidate is responsible generally for the deeds of those who, to his knowledge, do such acts as may tend to promote his election, provided the candidate or his authorised agents have a reasonable knowledge that those persons are so acting with that object. It follows accordingly that, in order to give in evidence the commission of such acts by an agent, it is not necessary to prove that they were authorised or sanctioned; it is merely necessary to prove at the trial that the person committing them was an agent

*[26] Pokoati*also dealt with electoral agency in the Cook Islands. Donne CJ held[[23]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn23):

The first respondent’s subsequent actions show he fully accepted what was done by the Minister. In such circumstances he must be bound by the Minister’s action. As was stated by Hosking J in *The Bay of Islands Electoral Petition* [[1915] NZGazLawRp 60](http://www.nzlii.org/nz/cases/NZGazLawRp/1915/60.html); [(1915) 34 N.Z.L.R. 578](http://www.paclii.org/cgi-bin/LawCite?cit=%281915%29%2034%20NZLR%20578) at 585, 586:

“The entrusting to an agent of the acts to be done may either be in express terms or arise from implication. As was said in *The Dungannon* case, “The circumstances of each case may differ, but that implication ordinarily must arise from the knowledge which it appears that the candidate has of the part which the person is taking in the election. If that part of the business of an election which ordinarily and properly belongs to the candidate himself be done to the knowledge of the candidate by some other person it appears to me that the other person is an agent of the candidate, and the candidate is responsible for any corrupt act done by the person”. In *The Harwich* case the law is stated thus:

“As regards the seat, the candidate is responsible for all the misdeeds of the agent committed within the scope of his authority, although they were done against his express directions and even in defiance of them... The authority may be actual or it may be implied from circumstances. It is not necessary in order to prove agency to show that the person was actually appointed by the candidate. If a person not appointed were to assume to act in any department of service as election agent, and the candidate accepted his services as such, he would thereby ratify the agency, so that a man may become the agent of another in either of two ways, by actual employment or by recognition and acceptance.”

[27] Also relevant, because what amounts to candidate hospitality during an election campaign is in issue in this case, it is helpful to note that in *Pokoati**[[24]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn24) ,* where meat, drink and entertainment was provided to “fly-in” voters, it was held that:

I accept Mr Brown’s submission that what was done here was consistent with traditional Polynesian hospitality. It would have been considered by the travelling voters as their due and I am satisfied would not be regarded as a “treat” in the sense of section 70 of the Electoral Act. Nor should those providing the feast have imputed to them a corrupt intent in doing so, since every Polynesian knows what according to custom is required to be done for visitors: the most important obligation is to provide customary hospitality. Baron Pollock in the case of *Lancaster* (1896) 5 O’M & H. 39 at 43 when considering the provision during an election of a smoking concert in a working -class environment said, as follows:

“However, that is done; that is the habit in that class of meeting; it is established from month to month and from year to year, and you cannot expect that it should be stopped because an election is coming at some time....”

[28] Also of assistance in this area is the observation in *Field**[[25]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn25)* that an assessment of whether a gift amounts to bribery, “must address the extent of the gift and the particular context in which it occurs”. The Court there held that “there must be a de minimis defence in relation to gifts of token value which are just part of the normal courtesies of life”

**24 May, 31 May and 7 June**

[29] As – with certain variations – all three gatherings on 24 May, 31 May and 7 June largely followed a similar pattern, it is convenient to consider the evidence relating to all three together against the background of s 89 and the authorities.

[30] All three functions were organised by the CIP Planning Committee on Rakahanga. The committee consisted of Puapii Ngametua Greig (known as “Bundy”), Trainee Maea, Papa Tuteru Taripo, Maggie Taripo, Enua Maea and Ngametua Tarau. All three meetings were held at Mr Hagai’s brother’s home, next door to Mr Hagai’s own home. Although Mr Greig said the functions’ purpose was to get Mr Hagai’s supporters together and suggested the committee meetings were only to plan the food, it is clear the meetings were not just to organise the refreshments. Mr Hagai regarded them as campaign meetings[[26]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn26) :that was a reasonable description.

[31] That is clear from a number of factors. The first is that Mr Hagai spoke to all those attending the gathering on 24 May, (and may – the evidence was unclear – have also spoken at the gathering on 31 May). Tiata Tupou[[27]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn27) recorded the speech, posted it on Facebook and an agreed translation – the speech was in Maori – was produced in evidence. While the speech was, by comparison with contemporary political discourse elsewhere, in reasonably temperate terms, it clearly extolled Mr Hagai’s achievements for Rakahanga in his four years as its MP, lauded the actions of the Government of which he was a member, spoke of future projects assisting Rakahanga and was mildly critical of Mrs Browne. It concluded by saying “we thought we would have a little barbecue, have a few drinks, but ... you have showed a good sign tonight by displaying your interest in bringing me back as your member of Parliament” and, “those of you who want to support me tonight, thank you very much” and, later, “this is my message to all of you tonight, June the 14th, you have only one name to vote for, look for Toka Hagai, cross, then we come home and start our barbecue”.

[32] In light of that, the conclusion must be that all three of the gatherings were convened by Mr Hagai’s campaign manager and the CIP Planning Committee and that at least one of their significant purposes was political, namely, to support Mr Hagai’s campaign for re-election. The gatherings had, as at least part of their aim, the shoring up of support for Mr Hagai’s re-election among his known supporters and, possibly, waverers. That was an object with which he agreed[[28]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn28). He said he regarded the speech as one of the best he had made[[29]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn29). It was a message intended to encourage people to think about the good things he had done for Rakahanga with the aim that they voted for him if they wished.[[30]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn30)

[33] That said, to attendees other than Mr Hagai and the CIP Planning Committee, the political purposes of the gatherings – claimed to be uncommonly large by Rakahanga standards – cannot have been unvarying. Mr Hagai delivered his speech at the first so its political purpose at that point must have been unmistakeable, but the gathering went on for some hours by which time its purpose may have become less obvious. There was some evidence he spoke at the 31 May function but he had no memory of so doing and, his recollection of his speech on 24 May being so vivid, it is reasonable to conclude he did not speak on the second occasion, That being so, the overt political purpose of the second function would only have been discernible from his attendance and the fact the function was organised by the CIP Planning Committee. There was no suggestion he spoke at the third gathering so, again, its political purpose would only have been discernible from the same factors.. There might have been said to have been some political purpose to be inferred from three similar gatherings being organised by the same people in a fortnight on Rakahanga when a General Election was in progress, but the possibility was not put that way by counsel so that possible motive seems pallid.

[34] To qualify as treating, the law requires at least one of the purposes of the impugned actions to be political and that that purpose also be significant. It is accepted that all three functions had a political purpose, but, for the reasons just discussed, the significance of their political motivation must also have varied. That is a factor to be taken into account in deciding if that element of treating is made out.  
[35] The second factor to be weighed is the nature of the invitation.

[36] While it is clear that a large proportion of those attending the functions (most, though there were varying attendances, were pleaded to have attended all three) may have been supporters, the lengthy lists of attendees at each of the functions appearing in the amended petition – and agreed to by the Mr Hagai and his witnesses – showed, when compared with the number of votes he received, first, that those attending must have gone well beyond Mr Hagai’s known supporters and, secondly, that invitations to attend were not restricted to those supporters. The invitations were extended by anybody, not just the CIP Planning Committee, and were informal. As an example, Tiata Tupou was invited to a “get together with Uncle Toka” at the completion of a tennis competition on 24 May. So, it was clear that anybody who wanted to attend could attend and, when they did, would have heard Mr Hagai’s speech directed towards his re-election. While many of those attending may not have been voters – a number of children were said to be present – those attending represented a considerable proportion of those on the electoral roll.

[37] In assessing that matter, it is to be noted that Nga Takai[[31]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn31), the Executive Officer of the Rakahanga Island Administration and the Returning Officer for the election, apart from a fleeting visit to one of the functions to collect his wife, did not attend any of the functions because he knew that s 5(6) debars any election official from holding “any official position in connection with any political organisation”. In terms of the invitations, however, there was no suggestion he could not have attended any of the functions had he wished.

[38] While much of the evidence did not differentiate between attendances at each of the three functions, there was specific evidence concerning the casualness of the invitation list for that held on 31 May because Mrs Browne, having arrived on the island two days earlier, and her family, attended an unveiling for her late father that afternoon. Almost all the islanders were present for the unveiling in accordance with custom. After the traditional kaikai following the ceremony, Mrs Browne saw a number of persons walking towards the respondent’s brother’s home. She said the gathering became noisy later that evening. She did not attend the function – though, however unlikely it might have been, there would appear to have been no bar to that and she could have politicked there, if she wished – and saw no one bringing food or drink to the gathering but Tiata Tupou did and confirmed in evidence – as did others -that alcohol and food was available to anybody, without charge, at that function.

[39] The third factor – and a major one in the circumstances – was the provision of that free food and alcohol at each of the functions.  
[40] There is a high correlation between the list of attendees in the amended petition and those being present listed in the evidence of Mr Greig and others and it is clear from all the evidence that almost without exception, all who attended brought food of various types – taro, “famous chicken curry”, soup, spaghetti, corned beef, pizza, fish, ika mata, noodles, rice, pancakes, donuts and salad and other foodstuffs were mentioned– and many also brought alcohol, either Coopers, a local homebrew, or beer or spirits purchased through the island’s only licensed alcohol seller, Taunga Tuteru.

[41] Messrs Greig and Trainee Maea were the only members of the CIP Planning Committee to give evidence and, of Mr Greig’s list of the members, he said he took nu to each function and, though his evidence did not greatly differentiate between the three, he said Tuteru Taripo brought alcohol and Trainee Maea brought kuru and ika mata. Mr Maea added kopa to Tuteru Taripo’s contribution and said he took ika mata to the second function and chicken to the third plus, possibly, alcohol.[[32]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn32) More generally, Mr Greig said the Planning Committee contributed fish, meat and poultry towards the functions[[33]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn33) but did not say how much.

[42] A few attendees made no contribution to the functions they attended including Tangaroa Rongo, the orometua – who contributed the prayers – Enuake Takai and Tiata Tupou.

[43] Mr Greig and Kavana Kavana, later assisted by Ratu Rodoko[[34]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn34), barbecued the food. At all functions, nearly all present took part. Nobody paid for the food or alcohol, even though alcohol is expensive on Rakahanga.

[44] Looking at all that evidence in terms of the components of treating it is clear that at each of the functions on 24 and 31 May and 1 June, that is during the interval between the dissolution of Parliament, Mr Hagai’s nomination on 26 April and the election itself, free food and drink was available to any person, elector or not, known CIP supporter or not, who attended the gatherings at the respondent’s brother’s home. Some witnesses spoke of music being available at the functions so it might be possible to conclude that entertainment was also available. Since it has already been held that all three gatherings had – though with varying significance – Mr Hagai’s re-election as one if their purposes, the remaining components of s 89 which require consideration are:

1. Whether Mr Hagai or “any other person on his ... behalf ... directly or indirectly” gave or provided or paid for the food drink and, possibly, entertainment;
2. Whether that those gifts or provisions were for the purpose of corruptly influencing voters to vote or refrain; and
3. Whether the defences outlined above are available to Mr Hagai

[45] Mr Hagai attended all three functions. He made a political speech at one. He no doubt sought to curry favour at all. He capitalised on and must be taken to have adopted the organising actions of the CIP Planning Committee. In terms of the authorities the committee was therefore either acting on his behalf or he had “to some extent put himself in the agent’s hands” or made “common measure” with them to promote his re-election. Attending and participating in meetings which the committee organised, which any elector on Rakahanga might attend and which were to boost his chances of re-election clearly amounts to Mr Hagai entrusting the committee with a “material part” of his election bid. In terms of the authorities that makes Mr Hagai responsible for the actions of the Planning Committee in promoting his re-election. That amounts to other persons directly or indirectly giving or providing food and drink on his behalf. Accordingly, that element of s 89 is satisfied.

[46] The remaining questions are therefore whether it is shown to the required standard that the actions of Mr Hagai through the CIP Planning Committee were or were not corrupt within the meaning of the authorities, namely in purposely doing an act which was not dishonest but which the law forbids as tending to corrupt voters, and whether any defence is available.

[47] That raises the question as to whether what occurred in the provision of food, drink and, possibly, entertainment at the three gatherings has been shown to be a “moving cause” towards Mr Hagai’s re-election or whether, as held in *Hosking v Browne*, what was done by the committee was merely providing hospitality so he, through the committee, should not have “imputed to them a corrupt intent... since every Polynesian knows what according to custom is required to be done for visitors; the most important obligation is to provide customary hospitality”.

[48] In considering that, what must be kept in mind is that the three gatherings were held on a remote island with a tiny population where all the inhabitants, not just the electors, know one another, where many are related to one another, where they socialise together and where many work together, particularly in central or local government service – the only significant employers on the island – and all, no doubt, collaborate in producing the food which sustains them on an island where outside deliveries are spasmodic so a degree of mutual support, sharing and self-sufficiency is to be expected, and may be vital.

[49] In the Cook Islands, and, the evidence shows, also in Rakahanga, contributions towards the kaikai which commonly – almost invariably – follow gatherings of any sort is mutual and universal. Only attendees such as the orometua who contributed the prayers at these gatherings, are exempt from the usual and customary obligation to contribute to attendees’ sustenance at all such gatherings. Mr Hagai said bringing food to help the small community is a habit on Rakahanga[[35]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn35)

[50] It is also crucial to keep two additional things in mind.

[51] The first is that contributions to the food and drink at the gatherings by any of those attending other than Mr Hagai and the CIP Planning Committee could not breach s 89: contributions by anyone else were not contributions by Mr Hagai “or by any other person on his .. behalf”. It is only contributions by Mr Hagai or the CIP Planning Committee which are relevant to whether s 89 was breached.

[52] The second is that the terms of s 89 make clear that it is only the provision of food and drink to electors which is relevant to whether that provision amounts to treating. The provision of food and drink to non-voters is beyond the scope of the section.

[53] Mr Hagai, mindful of guidance the Chief Electoral Officer gave him and other MPs as to permissible actions by them during an election campaign, said he contributed nothing to the food or drink at any of the three meetings. His evidence in that respect was not challenged.

[54] Any possibility that the actions of the CIP Planning Committee might therefore have breached s 89 comes down to their contribution of food and drink at the three functions. And the evidence on that is Mr Greig’s acknowledgment that the committee contributed an unspecified amount of fish, meat and poultry generally while the more specific evidence is that Mr Greig contributed nu to each, Mr Taripo and his wife contributed alcohol to all three functions and Mr Maea contributed ika mata to the second and chicken to the third.

[55] Set alongside the extensive list given by Mr Greig of the nature and extent of the contributions by virtually everybody else who was there, the contributions by the four members of the Committee who took part in contributing what would seem to have been small amounts of food and drink to the large proportion of the island’s population at the gatherings should be properly regarded as minimal – particularly when it is only the provision of food and drink to electors which is relevant – and to be no more than custom requires both in the Cook Islands and in Rakahanga.  
[56] In the mutually supportive community on Rakahanga, the Court’s conclusion is that, accepting the guidance of the “substantial merits and justice of the case”[[36]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn36), and giving appropriate weight to the cited observations from *Hosking v Browne*as to the obligations of Polynesian hospitality, the minimal proved contributions by members of the CIP Planning Committee on Mr Hagai’s behalf to the sustenance at the three meetings comes within the New Zealand Supreme Court’s finding in *Field*[[37]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn37) of a “de minimis defence in relation to gifts of token value which are just part of the usual courtesies of life”. Acting in accordance with, and to no greater extent than is required by, custom - one of those usual courtesies - meant that it was not proved that Mr Hagai, through the members of the CIP Planning Committee, acted corruptly in the sense explained in the authorities, of doing something not dishonestly but which the law forbids as tending to corrupt voters: he and they were fulfilling the dictates of custom, no more. Their contributions were not a reward for voting in a particular way.

[57] In light of that, the appropriate conclusion was that the allegations of treating by Mr Hagai in respect of the meetings organised by his electoral agents on 24 and 31 May and 7 June were not made out because a recognised defence was available to him and the allegations in the amended petition in that regard relating to those dates were accordingly dismissed.

**Bribery**

[58] Bribery is relevantly covered by s 88 which reads:

“88. Bribery – Every person commits the offence of bribery who, in connection with any election -

(a) directly or indirectly gives or offers to any elector any money or valuable consideration or any office of employment in order to induce the elector to vote or refrain from voting; or

(b) directly or indirectly makes any gift or offer to any person in order to induce that person to procure or endeavour to procure the return of any candidate or the vote of any elector; or

(c) upon or in consequence of any such gift or offer, procures or endeavours to procure the return of any candidate or the vote of any elector; or

(d) advances any money to any person with the intent that that money or any part thereof shall be expended in bribery within the meaning of this section; or...”

[59] The following passage – with relevant deletions from the source to avoid repetition – is of assistance[[38]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn38):

[13] The elements of electoral bribery are well settled. It is sufficient to cite from *Matapo v Wigmore**[[39]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn39)*where the following appears.

*The elements of bribery are:*

1. *The giving of consideration;*
2. *That the consideration was valuable;*
3. *That it was given to induce the voter to vote for the respondent candidate and that it was on the express or implied condition that the voter would vote for that candidate;*
4. *That the intent to do this was corrupt;*

[14] In *Tuariki v Beer**[[40]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn40)* the following appears:

*“[99] It is to be noted that in Wigmore v Matapo**[[41]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn41) the Court of Appeal adopted counsel’s submission that “conferring a benefit on someone (whether an elector or not) in order to enlist his or her efforts or services to procure the candidate’s return or the vote of some other elector, is what is covered by s.88(b).*

*[100] In terms of what amounts to a corrupt purpose, counsel relied on the decision of the Full Court of the High Court of New Zealand in Re Wairau Election Petition**[[42]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn42) where the following appears –*

*In order, therefore, to amount to treating, a corrupt intention must be proved. A corrupt intention is an intention on the part of the person treating to influence the votes of the persons treated. The question of intention is an inference of fact which the Court has to draw.*

*[101] The statement in Matapo v Wigmore that the standard of proof is on the burden of probability needs to be tempered with the observation that the seriousness of the allegation enhances that standard**[[43]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn43).*

*[102] It needs to be added that it is unnecessary for the petitioner to prove that electors carried out their part of the bargain by voting for the candidate. It is not an element of bribery that it be successful but the inducement must be coupled with an express or implied condition that the voter will vote for the respondent, even if they do not do so**[[44]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn44).”*

[18] It is well established that proximity of an alleged bribe to an election is an important factor in deciding whether bribery has been proved[[45]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn45).

[60] The comment as to the burden of proof may be amplified by reference to the Cook Islands case of *Piho v Puna*[[46]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn46) which, while holding that the standard of proof is the civil standard on the balance of probabilities went on to hold that the “the allegation of a finding of bribery requires cogent evidence” and that standard may be reached “by drawing inferences from proved facts, if those inferences allow the judge to determine the matter to the higher degree of probability required”.

**25 May, 1 and 8 June**

[61] The first set of bribery allegations centred around the assertion that on 25 May, 1 June and 8 June, 7, 9 and 7 named employees were marked on an Island Administration timesheet as working and were paid by the Executive Officer of the Island Administration when they were not at work and were without a legitimate excuse, they being said to have been drinking on the previous days. One significant purpose of all that was pleaded as being political, namely to procure Mr Hagai’s re-election.

[62] There is limited private enterprise on Rakahanga – outposts of Bluesky and Bank of the Cook Islands were the only examples mentioned – so almost all employment on the island is by the Rakahanga Island Administration or central Government. The allegations in the amended petition all relate to the former.

[63] The Rakahanga Island Administration timebook in which the 22 Island Administration employees and their hours of work were entered over the election period became a prime exhibit in the case. But, as all the allegations in the amended petition relating to this aspect of the case were dependent on proving that the Island Administration’s Executive Officer was, as a matter of law, Mr Hagai’s electoral agent, it is convenient to first focus on that component, bearing in mind the authorities previously considered as to when electoral agency arises.

[64] As mentioned, the Executive Officer of the Rakahanga Island Administration was Nga Takai. He is well versed in Island Administration having been acting Island Secretary in mid-2001, Island Secretary between 2004-06 and again in 2011 and Mayor of the Island Council from 2007 to 2010. The last time he was involved in politics was in 2000 and, importantly, he was the Returning Officer for the Rakahanga constituency at both the 2014 and 2018 General Elections. As earlier mentioned, in that capacity he was very aware of the s 5(6) bar on his holding any official position with any political organisation. He is related to both candidates. Though a witness for the respondent, he gave steadfastly neutral evidence and was a persuasive and convincing witness.

[65] A significant portion of the pleading as to why the Executive Officer was Mr Hagai’s electoral agent was deleted on 10 August. The remainder – without the names – was set out earlier.

[66] Mr Takai emphasised on a number of occasions in evidence that the most important thing for him is enhancing his working relationship with the Island Administration employees and his overriding wish is to ensure the completion of the various projects on which they are engaged. He is, he said, “output rather than time orientated”[[47]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn47) and to achieve that he is at the Island Administration building before 8am every morning and insists on the workers signing the timebook when they arrive and when they finish for the day (or, sometimes, by signing at the commencement of the next day’s work). If workers fail to appear he gets on his motorbike and rounds them up. He accompanies them to the worksites and often works alongside them but he said “I give my workers specific tasks and if they complete them early then I let them go home”[[48]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn48).

[67] The months leading up to the election were very busy ones for the Island Administration. There was a large tere party of Australians and New Zealanders coming to the island to mark the coming of Christianity to Rakahanga. That necessitated the renovation of the rundown community hall to accommodate them as well as the gathering of a considerable amount of food to feed them. The island was also preparing for a large number of its citizens to travel to Rarotonga for the Te Maeva Nui festival in early August. And there was the usual time needed for employees to grow or gather sufficient food to support themselves and their families in addition to gathering that required for the visitors’ hospitality. The Island Administration allocated one day a week for the renovation work to begin with but, as the visit approached and the work was still not completed, it extended that in May and June to four or five days a week.  
[68] Although, after he returned to the island on 1 May, Mr Hagai participated in the renovation work as part of a working bee, no other part of the Mr Takai’s duties involved the respondent. Other than the forwarding of the nomination form, there was no evidence of contact between Mr Takai and Mr Hagai in the run-up to the election. As mentioned, Mr Takai, apart from a brief domestic visit, did not attend the three meetings which are the subject of the treating allegation. He never heard Mr Hagai’s speech. There was no evidence to suggest that Mr Hagai was in any way involved in the payment of the Island Administration employees.  
[69] In those circumstances, in terms of the law of electoral agency, it is clear Mr Hagai did not employ or authorise Mr Takai to do anything concerning payment of the Island Administration employees. That payment was not election work. Mr Hagai was not shown to have authorised or adopted any part of Mr Takai’s work. Payment of the Island Administration employees was quite separate from the election and formed no material part of it. Mr Takai deliberately did not act in support of Mr Hagai’s candidature and did nothing to promote his re-election.  
[70] In those circumstances, the only available conclusion was that Mr Takai was not shown to have been Mr Hagai’s electoral agent in any of the ways pleaded and accordingly the whole of that allegation failed.  
[71] For completeness, there are difficulties reconciling the names in the pleading with the lists in the amended petition because in the electoral roll the surname appears first unlike in the balance of the amended petition but, even so, some names were never mentioned in evidence and some differ from the pleading. The lists included surnames that witnesses did not use and contractions which were unexplained. Additionally, with certain exceptions, the employees listed in the amended petition all have their times of working entered in the timebook for the days listed though there appear to be significant discrepancies. Reconciliation is accordingly problematic.  
[72] Further to that, on 25 May H Tianini is shown as being on sick leave, T Thorpe and T Takai have no hours listed for 1 June and on 8 June T Thorpe, H Tianini, C Setephano, P Hagai and S Aratangi shown as being on annual leave and T Maea with time off. Such entries are normally made by Takai.  
[br> [73] Against that, Mrs Browne saw few workers at the hall on 1 and 8 June, Tuanga Tuteru said that on 8 June Noah Tianini, Sema Aratangi, Lesley Thorpe and Riki Aramu were at Mr Tianini’s house drinking and in no condition to work, Ratu Rodoko said that he was drinking with Tuteru Taripo, Ngatakoa Elikanaand Lal Narayan on the early morning of 1 June and continued drinking all day from the five cartons of Heineken beer bought from Tuanga Tuteru early that morning. He said that about midday Noa Tianini and Frances Tupungangaro came to the house and were both intoxicated. He said Noa Tianini, Tamaro Thorpe, Temu Greig and the others mentioned did not go to work that day. Pupuke Robati also said that on 8 June aboum 10am he went to Noa Tianini’s house where he, Frances Tupungangaro, Semiangi, Temaru Thorpe and Rikd Riki Aramu were drinking. Riki Aramu and Frances Tupungangaro are not Government employees. Later that morning he went to Tuteru Taripo’s house and found him there with Lal Narayan. Both were drinking and did not go to work that day  
[74] As far as 1 June is concerned, of those able to be identified in the timebook T Thorpe has no hours entered, others may have entered hours in the timebook and the timebook entries for 8 June have already been recorded.  
[75] It may be that it was those inconsistencies which lead counsel only generally to endeavour to reconcile the work records and the workers in their final submissions.  
[76] Further to that, although Mr Takai’s entries in the timebook for annual leave, time off and the like may not have entirely married with the facts or the evidence, it seems inherently unlikely that someone who is so diligent in rounding up his employees for work would not have followed up on fairly widespread absenteeism of the Island Administration employees from work, particularly when he and they were under considerable pressure to complete the projects on hand, especially the renovation of the hall. It seems implausible that Mr Takai would have done such a thing, and the allegations were dismissed on that basis as well.  
[77] Electorally, the significance of that conflicting evidence could only have been if Mr Takai authorised payment to the named Island Administration employees on 24 May and 1 and 8 June when they were not at work, were absent without a legitimate excuse and that Mr Takai in so doing was acting as Mr Hagai’s electoral agent. Since the proposition of agency has already been dismissed it must follow that all the allegations of the commission of electoral offences in relation to workers being paid for their unjustified absence from work on those days were consequently also dismissed.  
[78] For all those reasons, all the allegations in the amended petition of bribery relating to 25 May and 1 and 8 June failed.

**12-18 June 2018**

[79] The bribery pleadings concerning the events of 12-18 June were recounted earlier.  
[80] On 12 June the caretaker Prime Minister and leader of Mr Hagai’s Cook Islands Party, the Hon Henry Puna, travelled to his home electorate of Manihiki. He was immediately ferried to Rakahanga and spoke that evening to a meeting of about 40 CIP supporters and their families held at Mr Hagai’s brother’s home.  
[81] Recollections varied as to the content of the Prime Minister’s speech.  
[82] Mr Greig[[49]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn49) recalled the Prime Minister saying there would only be two things after the election namely that they will be happy and celebrate or apare, to comfort someone after a death. Meti Tarau[[50]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn50), the Mayor of Rakahanga said the Prime Minister wished those present to stick together, to be strong for their party and not to apare after the election. Kavana Kavana[[51]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn51) recalled the Prime Minister talking about extending child support for parents and of his efforts to get a vaine Rakahanga, a better vessel to ferry passenger to and from Manihiki.  
[83] What is clear is that in questions and answers during the Prime Minister’s speech the Mayor’s wife Mata (or Moni) Tarau-Dean first asked him first whether the gathering was breaking any law by getting together so close to the election, and received a positive response. She then asked whether it “would be all right if we were to have a holiday on Thursday (Election Day)” to which he responded that electors had to be given time off to vote and in that sense there would be a holiday on 14 June, but that it was up to the Mayor and the Island Government if there were to be time off on Friday, 15 June, and it was more important for them to decide how they wished to spend their time on the Thursday, either by celebrating a win or mourning a loss. All the speeches were in Maori and the questions and answers were, the Prime Minister said, made in a jocular fashion and in a jovial atmosphere where he was speaking to known CIP supporters.  
[84] Mr Puna is a long-serving politician and knew a Prime Minister has no power to grant public holidays – something he thought his listeners also knew – but he said in evidence that it has been a practice for as long as he could remember under successive Governments for polling day in the Northern Group to be a day when people vote but do not turn up to work. He accepted that the Rakahanga Island Council also has no legal power to grant public holidays but he said from time to time they have done so, and that the practice applies in all the Cook Islands other than Rarotonga.  
[85] Cross-examined on the speech, Mr Puna said he laughed at the second question and responded in Maori that she should “ask your husband, he’s the boss, whether people would get time off on Friday” but acknowledged:

“Q. There has been evidence that people were told that you had declared a holiday on Friday. Will you accept the people could have taken that from what you said?

1. I guess if they wanted to take it, yes, they might have.”

[86] Though not an electoral matter, it was put to him that the informal practice of giving Government employees holidays without appropriate legal backing was an irresponsible use of public money. He replied that it was appropriate in the right circumstances that Island Councils grant time off to their employees when circumstances warrant. when the solar array was opened on Rakahanga and the Island Council gave its workers time off for the rest of the day.[[52]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn52) It was, he thought, appropriate that Island Governments should have the discretion to make such a call even though it involved expenditure of public funds.  
[87] What followed the Prime Minister’s 12 June speech was a matter of controversy.  
[88] What was acknowledged was that Una Banaba[[53]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn53), the finance officer for the Rakahanga Island Administration and, on 14 June, working in the polling booth, wrote, on the afternoon of Monday 18 June, the words “ELECTION DAY (HOLIDAY)” in the time book for 14 June and the words “HOLIDAY BY PM” at the top of the page for 15 June.. She did that, she said, because, on the afternoon of 14 June, she was told by Mr Takai, the Executive Officer, “that I didn’t need to come in on the 15th, the day after the election, because it was a holiday given by the PM and so I asked him about the 14 June and then he also told me that it was a holiday as well”[[54]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn54). On the afternoon of Monday 18 June when 21 and 20 of the Island Administration’s employees respectively had signed the timebook for 14 and 15 June[[55]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn55) she said she put the endorsements in it “as a reference for me when I do the payroll for the workers in case some of them hadn’t signed in by the time I have given our timesheet excel sheet then I would know why they didn’t sign it”.[[56]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn56)  
[89] The thrust, if not the precise wording of Una Banaba’s evidence as to Mr Takai’s direction was vehemently rebuffed by him in the following passage:

“Q. Did you authorise her to write that [the words at the top of the timebook for 14 and 15 June]?

1. A. No.
2. Q. She says that on Monday 18th you instructed her to write that.
3. A. She’s lying....
4. When did you first see the words Election Day, holiday, holiday by PM, when did you first see that?
5. The week after the election. I told her not to write anything inside the timebook because she has no right to write anything in the time[book] but she never listens.
6. Did you say anything to her that would cause that, was there anything you said to her about a holiday?
7. No.[[57]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn57)”

[90] Additional evidence bearing on the topic came from Tuanga Tuteru[[58]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn58) who was the supervisor of the hall renovations and is the overseer of all Island Administration workers on Rakahanga. He said that there was no work on 14 and 15 June because:

“I was instructed by the executive officer on 14 June that he was advised by the Prime Minister that public servants working for the administration would not be required to work on those two days”.

and that, of the 23 public servants, all but two – Una Banaba and Ngatokoa Takai who were working in the polling booth on 14 June – did not show up to work on both days and that “the administration workers did not work on 15 June because it was a holiday given by the Prime Minister”[[59]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn59).

[91] In cross-examination he said the words quoted were exactly what the Executive Officer told him on 14 June, and that the instruction was given him before 8am that day, even though some workers would have been at work for several hours at that point. On 14 June he voted, then went home but signed the timebook for 14 June on 18 June “as instructed by the Executive Officer”[[60]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn60)  
[92] Taunga Tuteru’s evidence on the point was not, unfortunately, directly put to Mr Takai. The relevant passages read[[61]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn61):

1. In respect to Tuteru, did you give him any instructions about holidays-
2. I can't remember doing that, usually I would write if there's like a public servant meetings, holidays like that I would write it out and put it on the wall in our administration office. But I told him that, I can't see the reason why I told him that, because I had, if I told him that then I would expect him to go out and tell the workers that its a holiday-
3. That would be his job, would it?
4. Yeah because he’s the overseer but I can’t remember saying that. Like I said I usually write it down and pin up in our administration office.

And[[62]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn62):

1. Taunga Tuteru has said that you told him on the morning of the 15th that he didn't have to go to work, did you tell him that?
2. I might have but I can't remember but usually I would write it on a piece of paper and put it in the office for when workers come to sign the timebook they can see this saying okay its public holiday or we're going to have a public servant meeting.
3. So did you tell workers there would be a public holiday on 14 June?
4. I didn't say that but like I said I never attended that function for the PM for me to note that the PM agreed to have a public holiday.

[93] As preliminary points to a more general consideration, it is held that one of the significant purposes of the 12 June visit was political and that, though not pleaded as such, the Prime Minister was Mr Hagai’s agent in the electoral sense discussed in the authorities. Mr Hagai invited the Prime Minister to the island. He probably spoke at the meeting. He obviously hoped the halo effect of the Prime Minister’s visit would redound in his favour in the election two days later and assist in his campaign for re-election. He thereby entrusted material aspects of his electoral campaign to the Prime Minister. However, three interrelated questions arise from that:

1. Did the Prime Minister declare 14 and 15 June to be public holidays on Rakahanga and was a significant purpose of that announcement to assist in Mr Hagai’s re-election?
2. Did Mr Takai know of the Prime Minister’s declaration and instruct all the Island Administration employees, including Una Banaba and Tuanga Tuteru, that 14 and 15 June would be public holidays?
3. If the answer to (a) and (b) is in the affirmative, what were the legal consequences?

[94] As to the first question, the Prime Minister, a lawyer, an experienced politician and one who knows the limitations of his office, was suitably cautious in response to the second question from the Mayor’s wife. He did not declare 14 and 15 June to be public holidays, or appear so to do. In a jocular fashion, he merely told the gathering of supporters what their options were after commenting on the gist of s 50 as to 14 June, Election Day. As to 15 June, he made it explicit that were there to be time off on that day was a matter for the Mayor and the Island Government, not for him or central Government.  
[95] Although he accepted that those who were so minded might have interpreted his remarks as saying he had declared a holiday on 14 or 15 June, or both, in light of the words the Prime Minister actually used, it could only be by a purposive, perhaps even wilful, misinterpretation of his actual reply by anybody with that frame of mind that could have led to such an conclusion, a conclusion which could have had no foundation.. And the remarks about a possible celebration or a wake are no more than the possibilities available to any politician or party after an election.  
[96] Then it must be remembered that the Prime Minister’s claimed declaration was only made to a gathering of CIP supporters, not to Rakahanga electors at large. Had there been any declaration that everybody on the island – CIP and Democratic supporters alike, voters as well as non-voters, Island Administration employees and those not so employed – were to have two days’ holiday, it might have been expected that there would have been evidence of the dissemination of that news. Bar Tuanga Tuteru, there was none.  
[97] Additional to that, had 14 or 15 June or both been declared to be public holidays, it is likely there would have been evidence of the wider population of the island taking advantage of the declaration. Again, there was none.  
[98] And, had the declaration been found as pleaded, its possible impact in persuading voters to support Mr Hagai would have been diluted by the declaration benefitting all the island’s population, not just those voting for him or being likely so to do. That would have undermined the s 88 requirement that the Prime Minister’s declaration must have been directed towards Mr H#8217;s re;s re-election or was made to influence electors&#8217es  
[99] Summing all that up, analysis osis of the Prime Minister’s remarks shows that, alert to his powers, he answered the second question by differentiating between 14 and 15 June, was careful to do no more than summarise s 50 in relation to the former, and make no promise in relation to the latter. In relation to 15 June, he did no more than refer his questioner, the Mayor’s wife, to her husband’s Council, which, if anybody was to take up her suggestion concerning the practice, was the body to do it. The Mayor said the council did nothing about the proposition. It would have made little sense when work was already behind schedule and, after all, Island Administration workers (and electors) were, on 14 June, doing no more than their civic duty.  
[100] The conclusion was accordingly that it had not been shown that the Prime Minister, at a political meeting on 12 June, declared that 14 and 15 June would be public holidays on Rakahanga.  
[101] As to the second question, the high points for the petitioner are, of course, Una Banaba’s evidence of being told by the Executive Officer on the afternoon of 14 June and again on 18 June that 14 and 15 June were public holidays, coupled with her annotations in the timebook. There is also Tuanga Tuteru’s evidence of having been instructed by Mr Ngatai on 14 June of the advice he had received from the Prime Minister that Island Administration employees did not need to work on those two days.  
[102] In that regard, it is significant that Mr Takai’s only contact with the Prime Minister during his visit was to exchange greetings as he was embarking on the morning of 13 June. Mr Takai did not attend the 12 June meeting, maintaining his neutral stance, and there is no evidence of any attendee telling him what was said to have occurred on the previous evening about holidays. It follows that Tuanga Tuteru’s evidence that Nga Takai told him what the Prime Minister was said to have told him must be erroneous.  
[103] Mr Takai was forthright in rebutting Una Banaba’s evidence about his instructions and, as already mentioned, was a convincing witness. His evidence was accepted and accordingly the appropriate conclusion was that Mr Takai’s evidence was the more credible and consistent and that he gave no instructions about holidays to Una Banaba or Tuanga Tuteru and in fact did not know of the suggested public holidays until 18 June.  
[104] Thirdly, it is significant that the claimed instructions were not said to be given until, illogically, workers were already at work on 14 June and there was no evidence of Mr Takai following his usual practice of notifying those affected by a notice in the administration building near the timebook.  
[105] True, Una Banaba annotated the timebook as she did, but there was strong evidence of her previous disobedience of Mr Takai’s instructions in that regard, and it is noteworthy that she did not make the endorsements until the following Monday, 18 June, and then made them mainly as a prompt for her when making up the Islands Government’s employees’ wage records.  
[106] Before dealing with the evidence as to attendance and non-attendance at work of Island Administration employees on 14 and 15 June, there are two issues to note.  
[107] The first is that, although Island Administration employees are paid by the hour, the evidence was they were still paid for public holidays[[63]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn63).  
[108] On that basis, it must be the case that all Island Administration ( and other) employees would be paid for 14 and 15 June regardless of whether they worked. So the fact that they were paid for those days would have had no impact on the Island Council’s financial position and the most the petitioner could allege in this regard is that, on those two days, the Island Government had to meet the cost of the employees’ wages but received nothing of value in return, despite the Island Administration being under pressure to complete the various projects. The other side of that is that because all Island Administration employees were to be paid for 14 and 15 June irrespective of whether they worked, even if had it been found that the pleaded declaration of 14 and 15 June being public holidays had been made, having no financial impact it is unlikely that the declaration would have had any significant influence on the way the workers voted so could not have amounted to the corrupt or illegal practice of promoting or procuring Mr Hagai’s re-election.  
[109] The secondary preliminary comment is that s 50 requires every employer on Election Day to allow every worker-elector to have time off before 4pm for voting and debars any employer deducting from the worker-elector’s wages any sum in respect of a reasonable time taken to cast their vote, breach being a criminal offence.  
[110] In relation to the Rakahanga election that means the 23[[64]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn64) Island Administration employees were statutorily entitled to a reasonable time off to vote without deduction from their wages. In fact, the evidence shows that so many voted early on 14 June that by mid-afternoon Una Banaba and Nga Takai were aware only a handful of electors had not cast their vote, but the relevant point for present purposes is that at least for a reasonable period of 14 June the Island Administration employees would not be at their usual workplace but would not be penalised in their wages.  
[111] That had the result of explaining the movements of some of the workers during that day and in part explains why Mrs Browne and others saw so few working on the hall on Election Day.  
[112] To the extent the amended petition pleads as a corrupt or illegal practice the payment of electors despite their not working, the effect of s 50 diminishes the impact that might otherwise have had.in relation to 14 June.  
[113] What was the evidence as to attendance or non-attendance at work on 14 and 15 June?  
[114] Mrs Browne saw none of the administration staff at work on 14 and 15 June except for Nga Takai and Una Banaba. Una Banaba worked as an electoral official on 14 June but did not work the following day (and did not sign the timebook for that day). Taunga Tuteru who, as supervisor of the employees, was probably in the best position, other than Nga Takai, to observe the situation said Una Banaba and Nga Takai (on 14 June) were the only workers who showed up on both days and listed the 21 he said were absent. He also listed seven others who are central Government, not Island Administration, employees and are therefore not in the timebook who he claimed were absent from work on both 14 and 15 June.  
[115] Una Banaba said that “I know on the 14th no one worked and even on the 15th I didn’t see anyone working but added “as we get closer to lunchtime through the afternoon they would’ve completed most of their jobs by that time except when they’re working on the church hall”[[65]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn65). Her capacity to observe workers’ actions on 14 June was hampered by her electoral duties that day but she explained her evidence as to the absences of 15 June by saying that most of the work is done outside and she passed the church hall between 9-10am and there were no activities there for some hours afterwards[[66]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn66).  
[116] Against that, Mr Hagai said that on 14 June people signed and voted and went home but on 15 June he saw public servants going to work on the hall next door to his house and indeed helped with the work on the hall on the morning of 15 June. Mr Greig said that on 15 June he worked half a day at the machinery shed near the administration block with eight named others dismantling a scaffold and they spent the afternoon ferrying the ballot boxes to the *Lady Moana*moored offshore. The mayor, Neti Tarau, said all those listed in the timebook worked on both 14 and 15 June but he was clearly relying on no more than the entries in the timebook so his evidence in that regard carried the matter no further.  
[117] However, he said that it has long been a practice on Rakahanga for Island Administration workers on Election Day to go to work, sign the timebook, exercise their vote and go home[[67]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn67) and that although he believed – erroneously, it was accepted – Island Councils have the legal ability to declare public holidays for overworked staff he did nothing in that respect in May or June 2018[[68]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn68).  
[118] Trainee Maea went to work on 14 June, voted at about 2pm and spent the rest of the day at the workshop before he went home. He also worked on 15 June[[69]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn69). He was doing work for the road on 14 June and maintenance on the tractor on 15 June[[70]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn70). Nga Takai said that on 14 June people were working collecting rubbish after signing in and then went to vote[[71]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn71) but he was occupied at the polling booth for the rest of the day. On 15 June he organised the employees to shift the island boat from its anchorage to the wharf to ferry the ballot boxes to the *Lady Moana*[[72]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn72). He worked all day on 15 June[[73]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn73) mainly organising the workers’ collection of the rubbish with the tractor[[74]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn74). The employees on 15 June were working in the machinery shelter though he accepted that on 14 June most worked on their own projects after voting[[75]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn75). Kavana Kavana signed the timebook on 14 June, went to work, voted about 10am, went home, being unwell, but returned to work at the machinery shed and worked all day on 15 June, though he accepted his timebook record was inaccurate for those days[[76]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn76). He listed at least nine workers other than he who worked with him on the scaffolding on 15 June.  
[119] The conclusion to be drawn from that conflicting evidence is that, although the entries in the timebook for 14 June are erroneous to some degree, that is partly because they make no allowance for the s 50 absences and seem to be no more erroneous than the eight hours claimed on other days. The evidence, especially that of Nga Takai, is that he distributes the workplan for the day when the workers sign in at the administration building about 8am but that if they complete their allotted tasks before the claimed 8 hours has expired, the practice is that they may go about their own business or, on occasions, do paid work outside those hours, including at night, fishing or accumulating food for the tere party or the Te Maeva Nui expedition. On many days, not just on 14 and 15 June, the timebook contains multiple “8.00-12.00, 1.00-4.00” entries, but those, while accepted as being accurate enough for wage payment records, often, the evidence showed, do not reflect the hours actually worked by the Island Administration employees.  
[120] As far as the timebook records for 15 June are concerned, while not all the employees gave evidence, that of witnesses such as Mr Greig, Trainee Maea and Kavana Kavana, when seen in association with Nga Takai’s evidence, indicates that most of the employees were occupied at their allotted tasks in the usual way during that day and the evidence to the contrary from the petitioner’s witnesses was mainly because of the numbers of employees at the machinery shed rather than working on the hall.  
[121] In terms of the amended petition, it was therefore not established to the required standard that Island Government employees who were electors were wrongfully paid on 14 and 15 June – especially the latter – despite not being at work. Accordingly, the allegations of corrupt or illegal practice in that regard were not made out.

**Barbecue Comment**

[122] The next aspect relating to the events of 24 May is the claim Mr Hagai committed bribery and treating by stating at that day’s gathering that on 14 June, “you have only one name to vote for, look for Toka Hagai, cross, then we come home and start our barbecue”.  
[123] That statement, whilst taken directly from the transcript of his speech, was within the proviso to s 89 in that it was clearly “hospitality according to local custom or practice” after the poll had closed in the sense that the offer was only open after people had voted. It therefore did not amount to treating.  
[124] Similarly and for the same reasons, it did not amount to bribery because, to offend against s 88, the comment must have been “in connection with any election” and, once electors had voted, the election was, for them, over.  
[125] In relation to both claims, it must also be doubtful that, since he made no offer to pay for or provide sustenance for the barbecue, Mr Hagai’s invitation was of sufficient value to amount to “valuable consideration” or to be a “gift or offer” made with the required intent to induce or influence voters’ intentions  
[126] In the context of a General Election and in the Rakahanga environment, this, too, should be seen as an offer of “token value which are just part of the usual courtesies of life”[[77]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn77) and, as noted, his actions were protected by the proviso to s 89.

**Nomination Form**

[127] Dealing finally with the nomination pleading, although Mr Takai was involved in the nomination of Mr Hagai in the sense that he may well have forwarded the latter’s nomination form to the Chief Electoral Officer, nothing hangs on that as far as the petition is concerned. That was no more than Mr Takai complying with his duties as Returning Officer under Part 4, especially s 36.  
[128] Further, s 31 requires nomination forms to be signed by “at least two registered electors of the constituency for which the nomination is made”[[78]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn78). Mr Takai did not sign the form as a nominator and, even had he done so, there is no disqualification for someone like him, a Rakahanga elector, doing that. Nomination merely enables a person to become a candidate[[79]](http://www.paclii.org/ck/cases/CKHC/2018/30.html" \l "fn79), so is a neutral, not a partisan action, and – particularly as it affected Mr Takai’s position – could not be said to infringe s 5(6).  
[129] That allegation accordingly failed.

**Conclusion**

[130] As demonstrated by the conclusions recorded in the Results Judgment and in these Reasons for Judgment, all the allegations in the amended petition having been dismissed, the amended petition itself was dismissed.  
[131] Any issues of costs will be dealt with in overall judgment once the current round of election petitions is concluded.  
[132] The certificate required by s 104 appears as a schedule to these Reasons for Judgment.  
  
 **Hugh Williams, CJ**

Case No. 16

Date: 14 December 2018

**IN THE COURT OF APPEAL OF THE COOK ISLANDS  
HELD AT RAROTONGA**

IN THE MATTERof **Section 102 of the Electoral Act 2004**

AND of the Constituency of Rakahanga

ANDof a General Election for Members of Parliament of the Cook Islands held on 14 June 2018

BETWEEN **TINA PUPUKE BROWNE**of Rakahanga, Candidate

**Appellant**

AND **TOKA HAGAI** of Rakahanga, Candidate

**Respondent**

Coram: Williams P, Barker JA, White JA

**JUDGMENT OF THE COURT OF APPEAL**

**Introduction**

[1] This is an appeal by way of case stated made under s 102(2) of the Electoral Act 2004 (**the Act**). It is against a decision of Williams CJ delivered in the High Court of Rarotonga (Electoral Court) on 7 September 2018 which dismissed all claims of treating and bribery advanced by the Appellant in an electoral petition. Reasons were given on 19 September 2018. The Appellant was dissatisfied with the part of the Judgement which decided that the allegations of treating by Mr Hagai in respect of the meetings on 24 and 31 May and 7 June were not made out.[[1]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn1)

General Election June 2018

[2] The background facts are that on 12 April 2018, the Queen’s Representative, acting pursuant to Article 37 of the Cook Islands’ Constitution, dissolved the Parliament of the Cook Islands and fixed 14 June 2018 as the date for the next General Election of the Members to form the 24-seat Parliament for the ensuing four-year term.

[3] In the 14 June 2018 General Election there were two candidates for the constituency of Rakahanga, the Appellant, Mrs Tina Browne (President of the Democratic Party), and the Respondent, Mr Toka Hagai (the sitting member of Parliament for Rakahanga and a member of the Cook Islands Party (**CIP**)). The main electoral roll for Rakahanga (dated 19 April 2018) contained 56 names and the supplementary roll (which closed on 10 May 2018) added 7 names and deleted 2. The declaration of the final vote count on 28 June 2018 showed the Respondent polling 39 votes and the Appellant polling 24 votes. Hence, there was on election day, a majority for the Respondent of 15 votes.

[4] In the course of the election, the CIP Planning Committee organised campaign meetings for the Respondent on Rakahanga at which free food and drink, including alcohol, was provided by the CIP as well as others attending the meetings. The claim of treating and bribery related to the provision by the CIP of the food and drink at these meetings.

[5] For the purpose of the appeal, it is noted at the outset that treating is proscribed by s 89 of the Act which provides:

89. Treating – Every person commits the offence of treating who, being a candidate at any election, by himself or herself or by any other person on his or her behalf, either before or during an election, directly or indirectly gives or provides or pays wholly or in part the expense of giving or providing any food, drink, entertainment; or other provision to or for any person –  
(a) for the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or  
(b) for the purpose of procuring himself or herself to be elected:  
Provided that it shall not be an offence against this section for a candidate to provide any time after the close of the poll, hospitality according to local custom or practice.

The Appellant’s election petition and the resultant High Court proceedings

[6] Pursuant to s 92 of the Act, the Appellant filed a petition on 5 July 2018 (amended on 7 August 2018) requesting an inquiry into allegations of corrupt practices by the Respondent during the election (being allegations of treating and bribery under ss 89 and 88 of the Act respectively). The election petition was heard by Williams CJ in Rarotonga on 10, 11 and 13 August 2018.

[7] On 19 September 2018, Williams CJ delivered his reasons for the judgment and annexed a Certificate as to Result of Election for the constituency of Rakahanga pursuant to s 104 of the Electoral Act in the following terms (**the Certificate**):

At the conclusion of the hearing of an amended election petition brought in relation to the Rakahanga constituency in the General Election of 14 June 2018 the Court certifies that it determined that Toka Hagai, a candidate for the said constituency, was duly elected and returned as a Member of the Parliament of the Cook Islands.

[8] The Respondent was sworn in as a member of Parliament and took his seat in the Parliament despite the filing of the electoral petition.[[2]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn2) This was justified by Article 29(2) of the Constitution under which Parliament may meet once all election petitions filed in the High Court in respect of the election have been finally determined “by the High Court at first instance”. On the first day of meeting of the new Parliament after a general election, Standing Order 5 of the Standing Orders of the Parliament of the Cook Islands required that members take the Oath of Allegiance before the Speaker pursuant to Article 30 of the Constitution.[[3]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn3)

[9] On 4 October 2018, the Appellant applied for leave to appeal by way of case stated to the Court of Appeal in terms of s 102(2) of the Act in respect of that part of the petition which alleged that the Respondent had engaged in treating in breach of s 89 of the Act. This Court made procedural orders to ensure that the appeal was able to be heard during the week when the Court sat in Rarotonga (29 October to 2 November 2018) and leave to appeal was presumptively granted. Williams CJ stated the case on 25 October 2018 (**the Case Stated**).

[10] On 31 October and 1 November 2018, the Court heard the appeal and reserved its decision.

The Respondent’s resignation and aftermath.

[11] The Respondent on 1 November 2018, unexpectedly (and without prior notice to the Court), resigned his seat. The Speaker of the House accepted the resignation and published the Respondent’s letter of resignation in the *Cook Islands Gazette* that afternoon. The Respondent’s resignation letter read as follows:

It is with regret that I tender my resignation as the Member of Parliament for the constituency of Rakahanga. This resignation is to take effect immediately as of this day 1 November 2018.

[12] The Gazette Notice did not meet the requirements of s 9(4) of the Act since the publication did not include the Speaker’s declaration that the seat had become vacant. Section 9(4) provides:

When it appears to the Speaker that the seat of any member has become vacant [pursuant] to subsection (1), the Speaker shall declare in writing that the seat has become vacant and the cause thereof, and shall forthwith notify the Chief Electoral Officer and cause that declaration to be published in the Cook Islands Gazette.

[13] On 2 November 2018, the Appellant sought an urgent order staying the effect of the Certificate issued by the High Court and suspending any obligation on the Chief Electoral Officer to call a by-election under s 105 of the Electoral Act. On the same day, after hearing counsel for the parties and the Chief Electoral Officer, two judges of this Court (Barker JA and White JA) issued interim orders to stay the by-election process. The orders were made under s 59(d) and (j) of the Judicature Act 1980-1981 (as inserted by the Judicature Amendment Act 2011) (**the Judicature Act**) and under s 102(4) of the Act and were as follows:

1. That the by-election process resultant from the resignation of the Respondent from his seat in Parliament and the time-frames under the Electoral Act thereunder are stayed until further order of this Court; and
2. That the effect of the Certificate issued by Williams CJ is also stayed under s 102(4) of the Electoral Act until further order of this Court.

[14] The Court convened a telephone conference to determine whether to continue the interim orders made on 2 November 2018. After hearing from counsel, on 9 November 2018, the Court ruled that the interim orders made on 2 November 2018 should continue, pending further order of the Court.

**Judgment in the High Court**

[15] The passages of the judgment under appeal which the appellant submitted contain the errors of law are paragraphs [56] and [57]. Those paragraphs read as follows:

[56] In the mutually supportive community on Rakahanga, the Court’s conclusion is that, accepting the guidance of the “substantial merits and justice of the case”, and giving appropriate weight to the cited observations from *Hosking v Browne* as to the obligations of Polynesian hospitality,[[4]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn4) the minimal proved contributions by members of the CIP Planning Committee on Mr Hagai’s behalf to the sustenance at the three meetings comes within the New Zealand Supreme Court’s finding in *Field* of a “de minimis defence in relation to gifts of token value which are just part of the usual courtesies of life”. Acting in accordance with, and to no greater extent than is required by, custom – one of those usual courtesies – meant that it was not proved that Mr Hagai, through the members of the CIP Planning Committee, acted corruptly in the sense explained in the authorities, of doing something not dishonestly but which the law forbids as tending to corrupt voters: he and they were fulfilling the dictates of custom, no more. Their contributions were not a reward for voting in a particular way.  
[57] In light of that, the appropriate conclusion was that the allegations of treating by Mr Hagai in respect of the meetings organised by his electoral agents on 24 and 31 May and 7 June were not made out because a recognised defence was available to him and the allegations in the amended petition in that regard relating to those dates were accordingly dismissed.  
(emphasis added)

[16] It is noted that although the *de minimis*defence appears to be identified as the successful “defence” in the High Court’s judgment, the Appellant’s counsel also submitted that the High Court applied another defence, namely a customary hospitality defence.

[17] When reflecting on the ratio of the High Court’s judgment as set out in the two paragraphs above, it is important to note (a) what issues were not raised by the parties or otherwise addressed during the hearing; and (b) what are the positions of the parties in relation to the current appeal.

***Issues not addressed before the High Court***

[18] It is not disputed by the parties in their submissions on appeal, that the following issues were not raised by them or otherwise addressed during the High Court hearing notwithstanding that the matters listed below as (1) and (2) are now agreed to form part of the essence of the ratio of the judgment in paragraph [56] (as set out above in paragraph [[15]](http://www.paclii.org/ck/cases/CKCA/2018/2018_4.html#_Ref531098324) above):

1. The application (or non-application) of s 99 (Real Justice to be Observed) of the Act concerning “the substantial merits and justice of the case”;[[5]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn5)
2. The existence and application of a *de minimis* defence in the context of s 89 (Treating);[[6]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn6) and
3. The legislative history of s 89 (Treating) of the Act and, in particular, the effect of the 1998 amendment to the proviso which restricted the previously unqualified statutory exception permitting hospitality according to local custom or practice so that it is only permissible “at any time *after the close of the poll*”.[[7]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn7)

[19] Additionally, the Appellant asserted during the course of the appeal hearing that the existence of a customary defence (customary hospitality) was not raised or relied upon by the Respondent in the High Court. The Respondent, however, disagreed, and said that he had raised the relevance of custom in its submissions by means of a passing reference to *Re Te-Au-O-Tonga Election Petition*[[1979] 1 NZLR S26](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1979%5d%201%20NZLR%20S26)at S47–S48 (addressed in further detail below at paragraphs [[47]](http://www.paclii.org/ck/cases/CKCA/2018/2018_4.html#_Ref532551324) to [[74]](http://www.paclii.org/ck/cases/CKCA/2018/2018_4.html#_Ref532551337)).

***Position of the parties on appeal***

[20] The parties’ different understandings of the *ratio decidendi* of the High Court’s judgment (at paragraphs [56] and [57] of that judgment) may be noted as follows.

[21] The Appellant understood that Williams CJ had found:

1. The elements of s 89 (Treating) were established on the grounds that (i) the Respondent was a candidate at an election; (ii) the Respondent (either by himself or through any other person on his behalf) directly or indirectly provided food and drink to persons during the election; and (iii) the Respondent’s actions were accompanied by the requisite intent (either for the purpose of corruptly influencing those persons to vote or for the purpose of procuring himself to be elected);
2. However, the Respondent’s actions were excused because of (i) an established customary defence (Customary Hospitality) referred to in the *Re Te-Au-O-Tonga Election Petition* case; and (ii) an established *de minimis* defence recognised in *Field v R*[[2011] NZSC 129](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2011%5d%20NZSC%20129), [[2012] 3 NZLR 1](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2012%5d%203%20NZLR%201).

[22] The Appellant also submitted that Williams CJ’s decision on the substance of the case was guided (in the Appellant’s view, incorrectly) by the “substantial merit[s] and justice of the case”, notwithstanding the fact that s 99 of the Act was not raised by the parties and was legally irrelevant to a decision on the merits.

[23] The Respondent contended that Williams CJ found that the elements of s 89 (Treating) were not established because Williams CJ (in the Respondent’s view, rightly) drew an inference that the Respondent did not have the requisite intent under that provision. The Respondent said that Williams CJ drew that inference based on factors including (i) the minimal food/drink provided (applying the *de minimis* principle); and (ii) the fact that the amount provided was no more than that justified by custom in the Cook Islands. It followed that the Respondent did not consider that Williams CJ relied on any “defence” to s 89 of the Act. Rather, Williams CJ found on the evidence that s 89 was not satisfied.

**The Case Stated**

[24] There is no dispute that the procedure governing an appeal by way of case stated is set out by this Court in *George v Tatuava*[[2004] CKCA 7](http://www.paclii.org/ck/cases/CKCA/2004/7.html) at [[9]](http://www.paclii.org/ck/cases/CKCA/2004/7.html#para9)–[10], following the New Zealand High Court decision in *Auckland City Council v Wotherspoon* [[1989] NZHC 705](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1989%5d%20NZHC%20705); [[1990] 1 NZLR 76](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1990%5d%201%20NZLR%2076) (HC) per Fisher J. Those passages are set out below:

[9] Although we were informed by counsel that there is no provision regarding cases stated in the relevant rules of the Court, this particular mode of appeal is well known in English and New Zealand law. The whole area of law in this regard is well summarised by Fisher J in *Auckland City Council v Wotherspoon*[[1989] NZHC 705](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1989%5d%20NZHC%20705); [[1990] 1 NZLR 76](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1990%5d%201%20NZLR%2076).  
[10] That case makes the following matters clear.  
(a) It is the responsibility of the Judge to record the facts as found by him and to articulate the questions of law for the opinion of the appellate Court.  
(b) Normally it is for counsel to confer on the form of the case stated. If counsel cannot agree, it is the duty of the Judge to settle the case stated.  
(c) It is not sufficient for the Judge merely to annex the notes of evidence to the case stated and leave it to the appellate Court to try and resolve the matter.  
(d) If there is a conflict of evidence or if some of the evidence has not been accepted by the tribunal determining the facts, such evidence is irrelevant to the appeal and should not be included: see *Conroy v Patterson*[[1965] NZLR 790](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1965%5d%20NZLR%20790), 791.

[25] The learned Chief Justice recorded the following facts in the Case Stated:

[1] Gatherings were held in Rakahanga on 24 May, 31 May and 7 June 2018.  
[2] All three of those gatherings were organised by the Cook Islands Party Planning Committee on Rakahanga. The committee consisted of Puapii Ngametua Greig, Trainee Maea, Papa Tuteru Taripo, Maggie Taripo, Enua Maea and Ngametua Tarau.  
[3] The gatherings were campaign meetings.  
[4] All three of the gatherings were convened by Mr Hagai’s campaign manager and the CIP Planning committee and at least one of their significant purposes was political, namely, to support Mr Hagai’s campaign for re-election. Each gathering had, as at least part of its aim, the shoring up of support for Mr Hagai’s re-election among his known supporters and, possibly, waverers.  
[5] Mr Hagai gave a speech in Maori at the gathering on 24 May 2018. The contents of that speech were as set out in the agreed translation. He did not speak at the second or third gatherings.  
[6] Mr Hagai delivered a speech at the first meeting so its political purpose at that point was unmistakable, but the gathering went on for some hours by which time its purpose may have become less obvious. The overt political purpose of the other two functions would only have been discernible by Mr Hagai’s presence and the fact they were organised by the CIP Planning Committee. The significance of the political motivation varied.  
[7] Anybody who wanted to attend the gatherings could attend and invitations were informal. While many attending may not have been voters (children were present) those attending represented a considerable proportion of those on the electoral roll of 61 names for the Rakahanga constituency.  
[8] Prior to the second function almost all the islanders were present for the unveiling for Mrs Browne’s late father in accordance with custom. A traditional kaikai followed the ceremony.  
[9] Free food and alcohol were provided at each of the functions. It was only contributions by the CIP Planning Committee of food and drink to electors at the gathering which were relevant to the allegation of treating.  
[10] Almost without exception those who attended the gatherings brought food of various types as set out in the evidence of Mr Greig and many also brought alcohol, either Coopers (a local homebrew) or beer or spirits. Mr Taripo and his wife (Maggie Taripo) contributed alcohol to all three functions.  
[11] Nobody paid for the food or alcohol at the functions, (even though alcohol is expensive on Rakahanga).  
[12] The free food and drink was available to any person, elector or not, known CIP supporter or not, who attended the gatherings.  
[13] The CIP Planning Committee also contributed fish, meat and poultry. The contribution by attendees other than the CIP Planning Committee should be contrasted with the contributions from that Committee. Mr Hagai, mindful of guidance given by the Chief Electoral Officer as to permissible actions during an election campaign, contributed nothing to the food or drink.  
[14] Mr Hagai sought to curry favour at all the functions, and capitalised on and must be taken to have adopted the organising actions of the CIP Planning Committee. In attending and participating in meetings which the committee organised, which any elector on Rakahanga might attend and which were to boost his chances of re-election clearly amounted to Mr Hagai entrusting the committee with a material part of his election bid. This amounts to other persons directly or indirectly giving or providing food and drink on his behalf.  
[15] The gatherings were held on a remote island with a tiny population where all the inhabitants, not just the electors, know one another, where many are related to one another and where they socialise together and where many work together.  
[16] All collaborate in producing food on the island which sustains them. Outside deliveries are spasmodic so a degree of mutual support, sharing and self-sufficiency is to be expected and may be vital.  
[17] In the Cook Islands, and, the evidence shows, also in Rakahanga, contributions towards the kaikai which commonly – almost invariably – follow gatherings of any sort is mutual and universal. Only attendees such as the orometua who contributed the prayers at these gatherings, are exempt from the usual and customary obligation to attendees’ sustenance at all such gatherings. Mr Hagai said bringing food to help the small community is a habit on Rakahanga when you go to functions.  
[18] The contribution of food and drink by the Committee set alongside the contributions by virtually everyone else who was there should properly be regarded as minimal and no more than custom requires.  
[19] The contributions by the CIP Planning Committee acting in accordance with, and to no greater extent than required by, custom (a usual courtesy of life) were fulfilling the dictates of custom and their contributions were not a reward for voting in a particular way.

**Case Stated Procedure**

[26] In *Wigmore v Matapo & Ors*[[2005] CKCA 1](http://www.paclii.org/ck/cases/CKCA/2005/1.html) at [[18]](http://www.paclii.org/ck/cases/CKCA/2005/1.html#para18), this Court cited with approval a passage from Fisher J in *Auckland City Council v Wotherspoon*who referred with approval to the dictum of Henry J in *Conroy v Patterson*[[1965] NZLR 790](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1965%5d%20NZLR%20790) at 791. That passage read as follows:

On an appeal by way of case stated on a point of law only the Court is concerned with the relevant facts as found and the grounds for determining the particular question of law, which question itself must be properly stated. The ... Court is not further or otherwise concerned with the evidence or the other findings which were made. ... The evidence as a whole is not material except in rare cases where the question is whether or not the finding was supported by the evidence.

[27] As to the possible types of questions of law which may be heard and determined in an appeal by way of case stated, Fisher J in *Wotherspoon*noted at 85:

Whether there is the right to an appeal on a question of law is simple enough where the facts are not challenged on appeal and the argument is limited to the legal consequences of those facts in the conventional sense. The intelligent layman might reasonably expect that the matter would end there. In fact, under the label “question of law” the Courts have allowed a limited incursion into the factual area – but only in two special situations. One concerns the question whether a positive factual finding made by the Court below was unsupported by any evidence. The other concerns the question whether any inference other than that contended for by the appellant could reasonably have been drawn from those primary facts actually found by the Court below.

The terms of the Case Stated in this case

[28] The Case Stated set out of the following questions on which the opinion of this Court was sought:

1. Did the High Court err in accepting the guidance of s 99 of the Electoral Act 2004 in addressing the substantive questions to be decided?
2. Did the Court err in “giving appropriate weight” to the observations from *Hosking v Browne* as to the obligations of Polynesian hospitality?
3. Is there a *de minimis*defence in relation to gifts of token value which are just part of the usual courtesies of life in relation to treating, and if so, was it satisfied?
4. Was there evidence upon which the Court could properly find that a custom existed that could act as a defence to the treating allegation and that if it is such a defence existed the complained of conduct was in satisfaction of that custom?
5. Was there evidence upon which the Court could properly find that the treating allegation could be dismissed?

[29] Whilst mindful of the significant time pressure involved at the time when the case was stated, the Court has reservations about the framing of the questions of law (above). The Court does not consider it desirable to attempt to answer the questions as framed and, accordingly, has re-framed what it sees are the issues determining the appeal as follows:[[8]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn8)

1. Did the Chief Justice err in accepting the guidance of s 99 of the Act in addressing a substantive question to be decided in the election petition?
2. Did the Chief Justice err in finding that a custom existed that could act as a defence to the treating allegation?
3. Did the Chief Justice err in finding that a *de minimis* defence existed in relation to treating?
4. On the basis of the primary facts as found, did the Chief Justice fail to draw the only reasonably possible inference as to the purpose of the alleged treating?

[30] The first three questions above constitute what Fisher J labelled “conventional legal question[s]” (at 86). The final question comprises the most critical question in this appeal and falls within one of the rare circumstances in which a factual inference drawn by the court at first instance can be challenged.

**First Issue – Section 99 of the Electoral Act 2004**

[31] In determining a substantive question to be decided in the election petition, namely, whether the Respondent through members of the CIP Planning Committee acted “corruptly” for the purposes of s 89, the Chief Justice accepted the guidance of the “substantial merits and justice of the case” under s 99 of the Act. That step has been challenged by the Appellant as an error of law.

[32] The Court must consider whether his Honour erred in accepting such guidance in addressing a substantive question to be decided.

[33] The starting point is to set out s 99 of the Act, which provides:

99. **Real justice to be observed** – At the hearing of any election petition the Court shall be guided by the substantial merits and justice of the case and the Court may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible in the Court.

The Appellant’s position

[34] According to the Appellant, s 99 of the Act was applicable *only* to procedural aspects of electoral petitions. Counsel for the appellant emphasised that the wording of the provision specially stated “[a]t the hearing of any election petition”. Counsel for the Appellant noted that the provision does not refer to the making of the substantive decision (the legal analysis required to establish whether or not treating has occurred) but rather relates to the manner in which an election petition is to be heard.

[35] During the hearing, counsel for the Appellant argued that the provision was intended to have the effect of a warning against letting rules of evidence get in the way of providing the Court with the information required to determine the substantive question in the petition. In the Appellant’s view, this interpretation was confirmed by this Court in *Wigmore v Matapo* [[2005] CKCA 1](http://www.paclii.org/ck/cases/CKCA/2005/1.html) which considered the operation of s 99 at paragraph [96]. That passage is set out below:

We doubt whether the section was designed to equate the equity and good conscience provisions often found governing the jurisdiction of inferior courts. The section appears to be directed, as Mr Harrison submitted, rather to the hearing process and the reception of evidence. That apart, the Court is bound to give effect to the dictates of the Act itself. If s 22 applied, then Mrs Ringia was deemed to be properly on the roll and entitled to vote. ... There is simply no room for s 99 to operate. The decision to invalidate her vote was therefore wrong in law.

[36] According to the Appellant, the election rules around treating are strict and based on sound principle so as to ensure that elections are free and fair. Counsel for the Appellant submitted that the substantial merits and justice assessment mandated by s 99 of the Act was, by way of contrast, highly discretionary and dependent on the subjective outlook of the judge in each case. In the context of election petitions where certainty is fundamental, the Appellant contended that it would undermine the general public faith in the system for electoral petitions to be decided on a particular judge’s view of the substantial merits and justice of the case.

The Respondent’s position

[37] Counsel for the Respondent submitted that the issue of whether s 99 of the Act permits the court to be guided by the substantial justice and merits of the case in making a substantive decision as well as conducting the hearing is not yet settled (and remains open for interpretation). In the Respondent’s view, the words “guided by the substantial merits and justice of the case” suggested that s 99 of the Act goes beyond merely the hearing of evidence.

[38] In any case, the Respondent submitted that the guidance taken from s 99 of the Act by the Chief Justice did not materially add anything to the reasoning behind the decision and the result would have been the same without it. In the Respondent’s view, the Chief Justice did not rely on s 99 to overrule, modify or interpret any other provision in the Act. Instead, the Chief Justice deployed drew upon s 99 for “reinforcement for the other conclusions he reached”.

**The Court’s Analysis**

[39] The Court accepts the submissions of the Appellant. Section 99 of the Act empowers the Court with a discretion to avoid the applicability of the strict rules of evidence during a hearing. It is limited to evidentiary or procedural matters only. Indeed, the provision expressly starts with the phrase “[a]t the hearing of any election petition”.

[40] As stated by this Court in *Wigmore v Matapo* at paragraph [96] when considering the application of s 99 of the Act (already set out in paragraphs [[35]](http://www.paclii.org/ck/cases/CKCA/2018/2018_4.html#_Ref531706704) and [[33]](http://www.paclii.org/ck/cases/CKCA/2018/2018_4.html#_Ref532221584) above respectively):

We doubt whether the section was designed to equate the equity and good conscience provisions often found governing the jurisdiction of the inferior courts. The section appears to be directed, as Mr Harrison submitted, rather to the hearing process and the reception of evidence.

[41] We agree with the Court’s interpretation of the scope of s 99 in *Wigmore v Matapo* at [96]. Section 99 of the Act is directed to the hearing process and the reception of evidence only.

[42] A similar provision can be found in s 240 of the New Zealand equivalent of s 99 of the Act – the Electoral Act 1993 (NZ). Section 240 of that Act provides:

**240 Real Justice to be observed**

On the trial of any election petition, –The court shall be guided by the substantial merits and justice of the case without regard to legal formalities or technicalities:  
(a) The court may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible in the High Court.

[43] The intended operation of s 240 of the Electoral Act 1993 (NZ) is described in Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at paragraph 12.2.1 as follows:

When investigating any issues raised by the election petition, the court has an extremely wide jurisdiction. It may “inquire into and adjudicate on any matter relating to the petition in such manner as the Court thinks fit”. In conducting its hearing of the petition, the court is to be guided by “the substantial merits and justice of the case” rather than legal technicalities, and may admit any evidence it believes may assist it in dealing effectively with the case.  
(emphasis added)

[44] The description above of the intended effect of the equivalent New Zealand provision reinforces the Court’s interpretation of s 99 of the Act. There is no room for the operation of s 99 of the Act when deciding substantive questions in an electoral petition.

[45] As to the Respondent’s submission that s 99 of the Act did not materially influence the Chief Justice’s decision, the language used in paragraph [56] of His Honour’s judgment is inconsistent with that assertion. On the contrary, the learned Chief Justice deployed the guidance of the “substantial merits and justice of the case” as a central factor in his determination. Accordingly, the Chief Justice has misapplied a legal principle which formed part of the *ratio* of the judgment.

[46] In summary, the Court finds that the Chief Justice erred in accepting the guidance of s 99 of the Act in addressing a substantive question to be decided in the election petition.

**Second Issue – Custom as a defence to treating**

[47] This Court has been asked to determine whether a custom existed that could act as a defence to the treating allegation.

[48] The background to this part of the appeal is set out in the High Court’s judgment at paragraph [56] (which has already been set out in full at paragraph [[15]](http://www.paclii.org/ck/cases/CKCA/2018/2018_4.html#_Ref531098324)):

[56] In the mutually supportive community on Rakahanga, the Court’s conclusion is that, ... giving appropriate weight to the cited observations from *Hosking v Browne* as to the obligations of Polynesian hospitality, the minimal proved contributions by members of the CIP Planning Committee on Mr Hagai’s behalf ... meant that it was not proved that Mr Hagai, through the members of the CIP Planning Committee, acted corruptly in the sense explained in the authorities, of doing something not dishonestly but which the law forbids as tending to corrupt voters: he and they were fulfilling the dictates of custom, no more.  
(Emphasis added)

[49] The “observations” referred to in that passage of the Chief Justice’s judgment above were derived from *Re Te-Au-O-Tonga Election Petition*[[1979] 1 NZLR S26](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1979%5d%201%20NZLR%20S26)at S47–S48. In addressing the allegation that the electoral candidates were guilty of treating, Donne CJ stated:

... [S]ince they provided the “fly in voters” with meat, drink, entertainment or other provision ... I accept Mr Brown’s submission that what was done here was consistent with traditional Polynesian hospitality. It would have been considered by the travelling voters as their due and I am satisfied that it would not be regarded as a “Treat” in the sense of s 70 of the Electoral Act. No should those providing the feast have imputed to them a corrupt intent in doing so, since every Polynesian knows what according to custom is required to be done for visitors: the most important obligation is to provide customary hospitality.

[50] As to the relevance of that passage to the present circumstances, the Court notes in passing that the citizens of Rakahanga, unlike the fly-in-voters in the *Re Te-Au-O-Tonga* case, were not “travellers” or guests visiting from another country (see S47 of that judgment), but rather local residents of the electorate of Rakahanga.

[51] Quite aside from the question of the existence (or otherwise) of a customary practice regarding Polynesian hospitality, there is a preliminary and important separate question as to whether it was even permissible for the High Court to rely upon the passage regarding Polynesian hospitality from the 1978 judgment in view of the legislative history of the treating provision of the Act (and, in particular, the 1998 amendment, addressed further below). It is this question which the Court now turns to address.

**Appellant’s position**

[52] Counsel for the Appellant submitted that, as a matter of law, there was no scope for a customary defence to a treating claim except in the “very limited” circumstance expressly provided for in the proviso to s 89 of the Act (**the proviso**), which reads:

Provided that it shall not be an offence against this section for a candidate to provide any time after the close of the poll, hospitality according to local custom or practice.

[53] According to the Appellant, the legislative history of the treating provision in s 89 of the Act demonstrates that the current state of treating in the Cook Islands is in a unique position where Parliament has “rolled back” the previously unrestricted exception available in relation to local custom and practice so that it may only be engaged “after the close of the poll”. Counsel for the Appellant submitted that the effect of that legislative amendment was such that the provision of hospitality according to local custom or practice was no longer a recognised statutory exception to treating as it had been under the 1993 amendment (to the then s 70), unless the act took place after the close of the poll.

[54] In the Appellant’s view, the approach taken by the High Court to allow customary hospitality before the close of the poll to act as a defence to treating would effectively leave the scope of the proviso to s 89 of the Act unchanged from the 1993 amendment despite Parliament’s deliberate steps to limit the proviso in 1998.

**Respondent’s position**

[55] The Respondent accepted that custom was not “*per se*” a defence to treating. The Respondent asserted, however, that the removal in 1998 of the absolute defence in the 1993 amendment to the treating provision did not prevent the Court from considering whether the custom “negates the intent”.  
[56] According to the Respondent, the Chief Justice merely recognised the existence of a custom whereby the host was expected not to be “empty handed” in the midst of guests. The Respondent submitted that, in light of that custom and the circumstances of the case, the Court then drew an inference that the Respondent did not provide food and drink for one of the purposes listed in s 89, but rather to satisfy the dictates of custom.

[57] In that regard, the Respondent submitted that there was ample evidence for the Court to determine that the CIP Planning Committee was only ever furnishing food to the extent expected of them pursuant to custom.

**The Court’s analysis**

[58] As noted above, it was acknowledged in this Court by both counsel that neither party had referred the Chief Justice to the legislative history of the treating provision in s 89 of the Act. In the Court’s view, the legislative history surrounding the treating provision (and in particular the proviso in relation to hospitality according to custom) is decisive in relation to this appeal. It is a matter of regret that the Chief Justice was not taken by either counsel to the legislative history of the treating section which, as can be seen from this Court’s judgment, is of central importance especially in view of the change to the proviso in the treating provision in the 1998 amendment. As is made clear below, that particular change represented a deliberate decision by Parliament to avoid any risk of treating, especially in small electorates (of which Rakahanga is one). The Chief Justice did not appear to be aware of those amendments.

[59] In the Court’s view, the lack of guidance to assist the Chief Justice is apparent in paragraph [136] (Schedule 2) of the judgment, where the Chief Justice recommended legislative amendment as follows:

Further, experience shows that petitions based on the alleged commission of electoral offences very often involve the provision of hospitality by way of food or drink to electors. But, given that meetings of almost any type in the Cook Islands are followed by a kaikai, if the offences of bribery and treating are to remain corrupt practices and electoral offences, to align them with the way of life in the Cook Islands, consideration might perhaps be given to amending the Act to extend the exemption of “hospitality according to local custom or practice” in s 89 to the giving of ordinary Cook Islands hospitality by candidates during the period between the close of nominations and the closing of the poll on Election Day.

[60] The passage above is, of course, consistent with the now outdated law in relation to treating following the 1993 amendment which continued until the 1998 amendment (addressed in the section immediately below). Had the Chief Justice’s attention been drawn to the legislative history, His Honour would have understood that Parliament made a conscious decision to shift the balance in electoral law away from seeking to accommodate traditional practices and, instead, in favour of accepting the strict principles of electoral law in a modern democracy.

**Legislative history of the treating provision in the Cook Islands**

[61] The Court now turns to analyse the legislative history of s 89 of the Act. During the teleconference of 7 November 2018, counsel were requested to provide a detailed analysis of the legislative history surrounding treating in the Cook Islands. With the assistance of a helpful joint memorandum of counsel dated 14 November 2018, the Court is able to record that history as follows:

1. The Electoral Act 1966 was passed approximately one year after the Cook Islands achieved legislative independence. Section 70 of that Act provided as follows:

70. Treating – Every person commits the offence of treating who, being a candidate at any election, by himself or any other person on his behalf, corruptly gives or provides any meat, drink, entertainment, or other provision to or for any person for the purpose of procuring his own election or on account of his having been elected or for any other purpose calculated to influence the vote of that person.

1. Relevantly, the provision concerning treating in 1966 did not include the proviso allowing a candidate to provide “hospitality according to local custom or practice” (**customary hospitality**).
2. In the Electoral Amendment Act 1993, s 9 repealed s 70 of the Electoral Act 1996 (set out above) and substituted a new s 70 which provided (**the 1993 amendment**):

70. Treating – Every person commits the offence of treating who, being a candidate at any election, by himself or any other person on his behalf, corruptly gives or provides any meat, drink, entertainment, or other provision to or for any person for the purpose of procuring his own election or on account of his having been elected or for any other purpose calculated to influence the vote of that person:  
Provided that it shall not be an offence against this section for a candidate to provide at any time, hospitality according to local custom or practice.  
(emphasis added)

1. Even though this amendment was enacted, strong concerns were expressed by some members of Parliament at the time that the proposed proviso would be open to abuse by candidates. For example, Mr N David said during the Committee stage ((23 September 1993) 5 CIPD 578):

...[D]o we have customs and traditions relating to the electing of a Member of Parliament? What is our practice as it relates to our local traditions and customs, Mr Chairman. It is not written anywhere in our law, Mr Chairman, that this practice is our local customs and traditions. That means Mr Chairman, that we can hold any function and say, as an excuse, that it was held as part of our local traditions and customs. I am afraid Mr Chairman, that through this amendment before the House, it will aid the potential for corruption during the time of an election.

1. Thus, it was that, by the 1993 amendment, a proviso was deliberately added to allow candidates to provide customary hospitality at any time (whether *before or after* the closing of the poll).
2. The treating provision as amended by the 1993 amendment was then replaced by s 84 of the Electoral Act 1998 following Parliamentary debates (**the 1998 amendment**). Section 84 provided:

84. Treating – Every person commits the offence of treating who, being a candidate at any election, by himself or herself or by any other person on his or her behalf, either before or during an election, directly or indirectly gives or provides or pays wholly or in part the expense of giving or providing any food, drink, entertainment, or other provision to or for any person –  
(a) for the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or  
(b) for the purpose of procuring himself or herself to be elected:  
Provided that it shall not be an offence against this section for a candidate to provide at any time after the close of the poll, hospitality according to local custom or practice.  
(emphasis added)

1. The important change in the 1998 amendment to the treating provision was the deliberate addition of a temporal limit on permissible customary hospitality. Parliament incorporated a time limit to the otherwise unrestricted proviso set out in the 1993 amendment so that customary hospitality was permissible only “after the close of the poll”.
2. The 1998 amendment was then carried over into s 89 of the current Act in 2004 in identical terms, which is set out in full at paragraph [[5]](http://www.paclii.org/ck/cases/CKCA/2018/2018_4.html#_Ref532195905) above.

[62] The inference to be drawn from the legislative history is obvious. It is to forbid any provision of customary hospitality until after the closing of the poll. The Court agrees with the Appellant that this was a deliberate decision by Parliament to restrict the formerly wide ambit of the proviso introduced via the 1993 amendment.

[63] Further guidance may be found in the Parliamentary debates relating to the 1998 amendment. The Hansard transcript of the debates was helpfully supplied by the parties on 14 November 2018 along with helpful submissions on the relevance of the transcript on 23 and 25 November 2018 from the Appellant and the Respondent respectively. Unfortunately, most of the discussion of the proposed amendment to the treating provision occurred *in camera*.

[64] Section 5(j) of the Acts Interpretation Act 1924 (NZ), which applies in the Cook Islands, states:

Every Act, and every provision or enactment thereof, shall ... receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

[65] It is now a commonplace in New Zealand for courts to refer to Parliamentary debates when construing legislation. Reference may be made to R I Carter*Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) which states at page 282:

Particularly since 1984 our Courts, most notably the Court of Appeal ... accept they have a discretion to admit and use parliamentary history, even parliamentary debates. They do so often.

[66] Additionally, the author notes at page 282 that “*[c]hanges to a Bill in the course of its passage are one of the most helpful aids, and there are several examples of Courts gaining assistance from them*”.

[67] The approach of the New Zealand Courts of referring to the Parliamentary debates has been followed in the Cook Islands. In *Minister of Cook Islands National Superannuation Fund v Arorangi Timberland Ltd*[[2014] CKCA 4](http://www.paclii.org/ck/cases/CKCA/2014/4.html) at [[125]](http://www.paclii.org/ck/cases/CKCA/2014/4.html#para125), this Court examined the legislative history which led to the enacting of the Cook Islands National Superannuation Fund Act 2000. On appeal to the Privy Council, Lord Neuberger and Lord Mance referred to statements by the then Deputy Prime Minister during Parliamentary debates (see *Arorangi Timberland Ltd & Ors v Minister of the Cook Islands National Superannuation Fund* [[2016] UKPC 32](http://www.paclii.org/ck/cases/CK-UKPC/.html) at [[6]](http://www.paclii.org/ck/cases/CK-UKPC/2016/1.html#para6)).

[68] In the present case, in the course of discussing the proposed 1998 amendment, the (then) Prime Minister, Sir Geoffrey Henry stated:[[9]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn9)

We will always, Mr Speaker, find ourselves in the situation where on the one hand we have the modern principles of Democracy to accept and indeed to nurture, while at the same time we have our own traditional culture which does not always sit well with the new methods, ideas and practices. One was made reference to by the Leader of the Opposition when we traditionally regard a practice as *aro’a* but the electoral law will regard it as bribery. In most cases our people do not understand the legal technicalities or the legal differences between what is a natural, traditional, practice to them and what the Electoral Act describes fairly forcefully as bribery.  
(Emphasis added)

[69] He went on to say:[[10]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn10)

There is no law against it until he or she is a voter and you are a Candidate. These are the areas, Mr Speaker, where the law is often different from the traditional practices ... But today we have accepted the practice – the principles of Democracy brought to us – and, Mr Speaker, I have been impressed by the comments of many who have been to this country who have said that this small Nation is a model of Democracy among the Island Territories.

[70] These excerpts reinforce the conclusion that the formerly permissive approach following the 1993 amendment of the treating provision was deliberately departed from in favour of prohibiting customary hospitality at all times up to the closing of the poll.

[71] In defining electoral offences, the words that Parliament chooses are critical. In New Zealand, for example, there is an express exception permitting the provision of a “light supper” to ameliorate the harshness of the otherwise strict prohibition against refreshments at pre-election events. The position is noted in Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at paragraph 8.3.3 as follows:

[Treating] involves a candidate corruptly purchasing or providing food, drink or entertainment, before, during or after an election, for the purpose of:

* Corruptly influencing a person to vote (or not to vote); or
* Procuring himself or herself to be elected; or
* Rewarding a person for having voted (or not voted).

However, because of the breadth of the prohibition on providing food and drink to electors technically precludes providing any refreshments at all pre-election events, an exception permits the offer of “a light supper after any election meeting”. What constitutes “a light supper” is a little uncertain, but candidates and their agents should stick to sandwiches, cakes and hot beverages at any public, election-related proceedings and especially avoid providing alcoholic beverages.

[72] The New Zealand provision is found at s 217 of the Electoral Act 1993 which provides in part:

**217 Treating**

(1) Every person is guilty of a corrupt practice who commits the offence of treating.  
(2) Every person commits the offence of treating who corruptly, by himself or herself or by any other person on his or her behalf, either before, during, or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing, any food, drink, entertainment, or provision to or for any person–  
(a) for the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or  
(b) for the purpose of procuring himself or herself to be elected; or  
(c) on account of that person or any other person having voted or refrained from voting, or being about to vote or refrain from voting.  
...  
(5) Notwithstanding anything in this section, the provision of a light supper after any election meeting shall be deemed not to constitute the offence of treating.  
(Emphasis added)

[73] There is no equivalent exception for a “light supper” in the Cook Islands provision. Additionally, the Court also observes that it is not an offence in the Cook Islands if the act constituting the alleged treating occurs “after an election” (in other words, after the polls have closed). Parliament must be taken to have consciously and carefully selected the wording of the provision to apply in the Cook Islands. It follows that the Court must therefore give effect to the specific wording chosen by Parliament in s 89 of the Act.

[74] For the foregoing reasons, and especially in light of the legislative history, the Court finds that hospitality according to local custom or practice may serve as a defence to an allegation of treating under s 89 of the Act only where the provision of food and drink (which is claimed to be in accordance with such custom) takes place after the close of the poll. Thus, it is not possible to rely on the defence of custom at any time before the close of the poll. As Parliament decided to adopt the strict principles of electoral law in a modern democracy, it would be contrary to the purpose of s 89 of the Act to permit the defence.

[75] That makes it unnecessary for the Court to explore the question of whether the existence of a local custom in relation to customary hospitality was supported by evidence.

**Third Issue – A de minimis defence to treating**

[76] The Court has been asked to determine whether the *de minimis* defence recognised by the Supreme Court of New Zealand in *Field v R*[[2011] NZSC 129](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2011%5d%20NZSC%20129), [[2012] 3 NZLR 1](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2012%5d%203%20NZLR%201) at [[65]](http://www.nzlii.org/nz/cases/NZSC/2011/129.html#para65) could operate as a defence in the context of a treating allegation under s 89 of the Act. In the context of the crime of corruption and bribery by a member of Parliament under s 103(1) of the Crimes Act 1961 (NZ), the Supreme Court noted at [65]:

This particular problem cannot be solved by simply treating an antecedent promise as a touchstone for criminality. In the example given of the Member of Parliament who accepts a rugby jersey when opening a rugby club, the Member would still not be corrupt even if he or she knew in advance of the opening that there would be a gift (perhaps because of a question as to what size rugby jersey would be suitable). So, if there is an exception, it must address the extent of the gift and the particular context in which it occurs. We consider, therefore, that there must be a de minimis defence in relation to gifts of token value which are just part of the usual courtesies of life.  
(Emphasis added)

[77] The Court begins its analysis of this issue by setting out the parties’ respective positions.

**Appellant’s position**

[78] The Appellant submitted that the High Court erred in finding that a candidate could rely on a *de minimis* defence in relation to treating under s 89 of the Act.

[79] The Appellant submitted that the authority referred to by the High Court in support of the *de minimis*defence, *Field v R*, could provide no proper assistance in relation to s 89 of the Act for the following reasons set out below:

1. It concerned a criminal offence under s 103(1) of the Crimes Act 1961 (NZ), not a question of electoral law;
2. It related to conduct carried out by a member of Parliament in that capacity, not by a candidate seeking election;
3. It concerned bribery, not treating; and
4. It was from New Zealand and had little relation to s 89 of the Cook Islands Electoral Act.

[80] Section 103(1) of the Crimes Act 1961 (NZ) is set out below and provides:

**103 Corruption and bribery of member of Parliament**

(1) Every member of Parliament is liable to imprisonment for a term not exceeding 7 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her capacity as a member of Parliament.  
(Emphasis added)

[81] According to the Appellant, a *de minimis*defence is inappropriate in the context of treating because it removes the examination of intention completely. The Appellant submitted that the consideration of the extent of the alleged treating is but one relevant factor to assess in the examination of a candidate’s intention when providing food, drink or entertainment.

**Respondent’s position**

[82] The Respondent accepted that the *de minimis* defence appeared in *obiter* comments made by the New Zealand Supreme Court in *Field v R*. According to the Respondent, the courts have historically applied the principle for years (albeit without express reference to the words “*de minimis*”).

[83] The Respondent submitted that the defence applied to petitions under s 88 (Bribery) of the Act and there was no reason in principle why it should not be equally available in treating cases.

[84] By way of an example where the *de minimis* defence had been applied, the Respondent cited the recent decision of Williams CJ in *Teina Rongo v Albert Nicholas*and *Tukaka Ama v Tamaiva Tuavera*CKHC Misc 33/2018. At paragraph [12] of that decision, Williams CJ observed:

...[A]n established defence to an electoral petition can be that the gifts were merely of token value and part of what the law calls the “usual courtesies of life”. That is a description taken from a New Zealand Supreme Court decision in a case of *Field*involving bribery of a Minister.

[85] Counsel for the Respondent referred to three other cases which, in his view, demonstrated that courts often took into account the size and scale of the giving in the context of bribery allegations.

[86] In *Wilkie Olaf Rasmussen v Willie John*CKHC Misc 40/2014, the High Court dismissed allegations of bribery in relation to a loan of $600 given to a voter as well as two birthday gifts of $50. The Respondent highlighted the passage of the judgment where the High Court noted that it was “important to look at whether the loan could be regard as out of the ordinary”.[[11]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn11) Additionally, the High Court dismissed allegations of bribery in relation to the giving of two $50 gifts by the candidate at birthdays. The Respondent took the Court to the passage of the judgment where the High Court emphasised that the money was given on behalf of the candidate’s family as a matter of tradition.[[12]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn12)

[87] In *Norman George v Vainetutai Rose Toki-Brown* [2014] CKHC Misc 33/2014, the Court dismissed an allegation of bribery in relation to the provision of labour to assist in fixing a roof immediately before an election. The Respondent highlighted the passage of the judgment where the High Court noted that “the policy by which labour was provided was of long-standing and not in any way related to the 9 July election ...”.[[13]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn13)

[88] The Respondent also sought to rely on the High Court’s decision of *In the Matter of a Petition by Norman George* CKHC Misc 73/2004. In that case, the candidate’s wife took cakes to one home and a tray of food to another on the Sunday preceding the elections (which also happened to be Father’s Day). The Respondent drew the Court’s attention to page 7 of the judgment where the High Court stated:

I believe Mrs Tatuava’s explanation as to both incidents and in considering these visits and the quantity of food involved I take on board what Speight J. had to say in the re Cowan Petition Case in 1983;  
“...this trifling incident has been over-blown by the hot house atmosphere of political intrigue and recrimination...”.  
It is noted that in the Cowan case the Petitioners also established that Mr Cowan had sometime after giving the electors twisties said he would be pleased if they voted for him.  
I find that nowhere does the evidence given point to an intention by Mrs Tatuava to corruptly treat any one of the voters in the homes she visited.  
(Emphasis added)

[89] The Respondent submitted that the cases cited above showed that the Courts have consistently applied a *de minimis*defence without articulating those words.  
[90] The Respondent submitted that a balance must be struck between the need to preserve the democratic process and the need to ensure that persons are not tainted with criminality for actions that do not warrant it. In that regard, counsel for the Respondent emphasised the possible consequences for the candidate could be that he or she could lose his or her seat, forfeit to an opposing candidate or possibly face prosecution.

**The Court’s analysis**

[91] The Court again recalls that the existence or otherwise of a *de minimis* defence in the context of treating was not raised by either party in the High Court. In the context of the present case, it was first raised by Williams CJ in his judgment at paragraph [28] where he stated:

Also of assistance in this area is the observation in *Field* that an assessment of whether a gift amounts to bribery, “must address the extent of the gift and the particular context in which it occurs”. The Court there held that “there must be a de minimis defence in relation to gifts of token value which are just part of the normal courtesies of life”.

[92] His Honour then went on to find at paragraph [56]:

... [T]he minimal proved contributions by members of the CIP Planning Committee on Mr Hagai’s behalf to the sustenance at the three meetings comes within the New Zealand Supreme Court’s finding in *Field* of a “de minimis defence in relation to gifts of token value which are just part of the usual courtesies of life”. Acting in accordance with, and to no greater extent than is required by, custom – one of those usual courtesies – meant that it was not proved that Mr Hagai ... acted corruptly”.  
(Emphasis added)

[93] As a preliminary observation, that statement from the New Zealand Supreme Court was made in relation to corrupt practices under s 103(1) of the Crimes Act 1961 (NZ) (Corruption and bribery of member of Parliament). That provision is replicated in s 114(1) of the Cook Islands Crimes Act 1969, which provides:

**114. Corruption and bribery of member of Legislative Assembly** – (1) Every member of the Legislative Assembly is liable to imprisonment for a term not exceeding seven years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his capacity as a member of the Legislative Assembly.

[94] In the Court’s view, it is clear that the Supreme Court of New Zealand intended to recognise a *de minimis* defence in relation to the crime of bribery by a member of Parliament, as was made clear in [66] of the same judgment:

While we are satisfied that the acceptance of gifts which are de minimis (as just explained) should not be considered corrupt under s 103(1), the acceptance of other benefits in connection with official actions is rightly regarded as corrupt irrespective of whether there was an antecedent promise or bargain. ... [I]t is the presence in s 103(1) (and like provisions) of the word “corruptly” which permits the de minimis exception to liability which we accept exists.

[95] The Court finds the Appellant’s submissions on the distinguishing features of *Field v R* (above at paragraph [[79]](http://www.paclii.org/ck/cases/CKCA/2018/2018_4.html#_Ref532209451)) compelling. The application of the *de minimis*defence cannot be extended to treating under s 89 of the Act in the Cook Islands.

[96] During the hearing, the Appellant emphasized the “clear distinction” between bribery and treating cases noted in *Cornwall, Bodmin Division Case, Tom and Duff v Agar-Robartes*(1906) 225 where at 231, Lawrence J stated:

There is a clear distinction between bribery and treating. In cases of bribery there is always something in the nature of a contract. ‘If you give me a sovereign, I will give you a vote’, or some such understanding, but treating is an entirely different matter. In treating it is not necessary that the person treated should belong to the opposite party, whereas it is of no use to give money to a man who is going to vote for you already, the money must be given to the other side in order to draw another vote. But if you give drink to a man with the intention of confirming his vote and of keeping up the party zeal of those believed to be already supporting your candidate, then that is corrupt treating ...

[97] As to the decision of *Tukaka Ama v Tamaiva Tuavera* (cited by the Respondent), the *de minimis* principle from *Field v R* was applied in determining the question of whether the consideration provided was “valuable” for the purpose of s 88(a) of the Act (the bribery provision). The relevant passage is found in paragraph [42] of that decision, where Williams CJ stated:

If there were “valuable consideration”, it could only have been either because Mr Tuavera did not charge them for the hire of the generator or did not charge them for the fuel it consumed overnight but, if this was what the petitioner intended might have amounted to “valuable consideration” in the circumstances it must, at the very most, have amounted to no more than a few dollars and not deserving of being regarded as “valuable consideration” having regard to the citation from *Field*which appears earlier in this judgment.

[98] There is, of course, no equivalent element required to make out the offence of treating under s 89 of the Act.

[99] With respect to the decision of *Wilkie Olaf Rasmussen v Willie John*, the Court does not consider the judgment to be particularly relevant to the present appeal. The bribery allegation surrounding the $600 loan was dismissed because it was not proved that the candidate intended to induce the vote of Mr Tonitara. The allegation was not dismissed on the basis of a *de minimis*defence. Indeed, the High Court remarked that “[t]he making of the loan and the size of the loan at first blush do appear very suspicious”.[[14]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn14) The allegations regarding the birthday gifts were not dismissed on the basis of a *de minimis*defence either. The High Court considered that, in the circumstances of a birthday where the gifts were given on behalf of the candidate’s family (as opposed to by the candidate in their personal capacity), the bribery allegations could not stand.[[15]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn15)

[100] Similarly, it is difficult to draw a link between the High Court’s reasoning and the *de minimis* defence in relation to *Norman George v Vainetutai Rose Toki-Brown*. In that case, the High Court accepted that it was “obvious” that “provision of free labour ... the day before the election was valuable consideration”.[[16]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn16) The point of contention was the purpose behind the reroofing and the supply of free labour.[[17]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn17) In the circumstances, the recipient of the free labour was an 85 year old pensioner whose roof leaked and was in desperate need of replacement.[[18]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn18) His son had returned to the Cook Islands for a limited period of time only and had himself supplied the roofing materials. He had also applied to the Atiu Island Government for access to its policy of assisting pensioner’s by providing free labour. The High Court accepted that the provision of labour pursuant to a long-standing policy was approved out of humanitarian concerns for the pensioner.[[19]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn19) At paragraph [72], the High Court stated (without any reference to the *de minimis*principle):

The appropriate conclusion in all those circumstances is that, although the approval and provision of free labour by the Island Government employees was a matter bound to raise eyebrows once Mrs Brown won the Teenui-Mapumai election, there was no proof that the giving of that free assistance involved her or her agent with her authority. There is similarly no proof the free labour was provided by the First Respondent on the condition that Papa Akai would vote for her, still less that his household would. There is also no proof that the decision to approve the provision of the free labour was corrupt in the sense discussed in the authorities or that its purpose was political: any possible political motive was considered but rejected. The actions undertaken were not done with the object and intention of doing something s88 is intended to forbid.

[101] In the Court’s view, the cases cited above by the Respondent do not support its submission that the Courts have “consistently applied a *de minimis* defence” without articulating the words (especially when the Court is faced with an allegation of treating under s 89 of the Act).

[102] As to the High Court’s ruling *In the Matter of a Petition by Norman George* (also relied on by the Respondent), the Court accepts that the “quantity of food involved” was considered a relevant factor in determining whether Mrs Tatuava intended to corruptly treat voters. However, it cannot be suggested that the quantity factor alone was decisive. The High Court also stated that it believed Mrs Tatuava’s innocent explanation as to both incidents, which was confirmed in evidence given by the recipients.[[20]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn20) In any case, the Court does not consider a passing reference by the High Court to the “quantity of food” in one case as demonstrative of a consistent practice of applying a *de minimis* defence in the context of an allegation of treating under s 89 of the Act.

[103] The Appellant cited what it described as the “classic statement” as to the meaning of “corruptly” and the means of determining that intention in the words of Blackburn J in *Staleybridge Case, Ogden, Woolley and Buckley v Sidebottom, Gilbert’s Case*(1869) 1 O’M & H 66 at 73:

I think there can be little doubt that the whole is governed by the word ‘corruptly’, which means with the object and intention of doing that which the Act of Parliament intended not be done for the object and purpose of influencing the election by the giving of meat and drink. The question whether or not there is ‘corrupt’ giving of meat and drink must, like every other question of intention, depend upon what was done, and, to a great extent, the extent to which it was done, the manner and way. And therefore is a question which must always be more or less a question of fact.  
(Emphasis added)

[104] Justice Blackburn also observed in *Wallingford Case*(1869) 1 O’M & H 57 at 58–59:

I think that what the legislature means by the word ‘corruptly’ for the purpose of influencing a vote is this: that whenever a candidate is, either by himself or by his agents, in any way accessory to providing meat, drink, or entertainment for the purpose of being elected, with an intention to produce an effect upon the election, that amounts to corrupt treating. ... But everything is involved in the question of intention, and it becomes important to see what is the amount of the treating. The statute does not say or mean that it shall depend upon the amount of drink. The smallest quantity given with the intention will avoid the election. But when we are considering, as a matter of fact, the evidence, to see whether a sign of that intention does exist, we must, as a matter of common sense, see on what scale and to what extent it was done. No one would think it reasonable to draw the conclusion from the mere giving of a thimbleful of drink (to use a strong expression), that it was done with any intent to influence the election as to bring it within the statute.

[105] In the Court’s view, there is no stand-alone *de minimis*defence to treating under s 89 of the Act. Rather, the extent and likely effect of the alleged treating in the circumstances is only relevant insofar as it assists the decision-maker in assessing whether it is reasonable to draw an inference that the act was done with intent to influence the election. If, for example, what was done was so insignificant that the reasonable and probable effect would have no bearing on the election result or on the votes of individual voters, it would be open for a decision-maker to draw an inference that the action lacked the requisite intent for the purposes of s 89 of the Act.

[106] This approach is consistent with that in the leading case of *In Re Wairau Election Petition*[[1912] NZGazLawRp 37](http://www.nzlii.org/nz/cases/NZGazLawRp/1912/37.html); [(1912) 31 NZLR 321](http://www.paclii.org/cgi-bin/LawCite?cit=%281912%29%2031%20NZLR%20321) where the Court said:

A corrupt intention is an intention on the part of the person treating to influence the votes of the person treated. The question of intention is an inference of fact which the Court has to draw ... If in any case, looking at all the circumstances, the reasonable and probable effect of the alleged treating would be to influence the result of the election or to influence the votes of the individual voters, it might well be inferred that it was the intention of the person treating that this effect should follow.  
(Emphasis added)

[107] This Court’s approach is also consistent with the wording of s 89 of the Act which uses the phrase “providing any food, drink, entertainment, or other provision to or for any person (emphasis added)”. The wording of s 89 is such that it might even encapsulate a situation where food, drink, entertainment or some other provision is given to a single person only.

[108] It follows from the reasoning above that the Court finds that the *de minimis* defence is not a recognised defence available where the elements of s 89 have been established.

**Fourth Issue – Inference as to the purpose**

[109] The critical issue in this appeal concerns whether the Chief Justice failed to draw the only reasonably possible inference in relation to the purpose of the provision of food and drink.

[110] Under s 89 of the Act, the giving of food and drink alone is itself not enough to be treating. It must be accompanied by the necessary intent, namely, the giving must have been for the purpose of influencing voters to vote (or refrain from voting) or for procuring a candidate to be elected. As has already been mentioned, neither custom nor a *de minimis* defence may serve as a defence where the elements of s 89 of the Act are otherwise satisfied.

[111] In the High Court, the Chief Justice acknowledged that one of the significant purposes of the campaign meetings was political. However, the Chief Justice viewed the provision of food and drink in isolation and drew an inference that the sole purpose was to provide the minimum hospitality necessary to satisfy the dictates of custom in Rakahanga.

[112] Before turning to examine the validity or otherwise of the

inference drawn, the Court first sets out the respective views of the parties.

**Appellant’s position**

[113] The Appellant submitted that, if a significant purpose of the act was political, then that was sufficient to establish the necessary intention. According to the Appellant, there was no evidence upon which the High Court could have properly dismissed the petition.

**Respondent’s position**

[114] The Respondent submitted that, although a “significant purpose for the function was political”, that would not “*ipso facto*” translate to the provision of food having a political purpose. According to the Respondent, the meetings were organised to influence voters, the food and drink was not.

[115] The Respondent submitted that the Chief Justice was entitled to draw an inference that the contributions of the CIP Planning Committee were minimal and no more than what custom demanded such that there was no significant political purpose in supplying food and drink at the functions.

**The Court’s analysis**

[116] As the authorities on Case Stated appeals point out, the fact that the appellate court might have drawn a different inference does not matter if it was reasonably possible based on the primary facts for the lower court to draw a particular inference. In *Wotherpoon*, Fisher Jnoted (at 90):

[T]his ground of appeal must not be confused with the question whether, among a number of possible inferences, the Court at first instance has drawn the inference which would have been favoured by the appellate Court.

[117] Indeed, the threshold successfully to challenge an inference drawn from primary facts is high. This Court in *Wigmore v Matapo*referred to guidance from the Supreme Court of New Zealand in *Bryson v Three Foot Six & Ors*[[2005] NZSC 34](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2005%5d%20NZSC%2034), [[2005] 3 NZLR 721](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2005%5d%203%20NZLR%20721) where it was stated at [27]–[28]:

[27] It must be emphasised that an intending appellant seeking to assert that ...“the true and only reasonable conclusion contradicts the determination”, faces a very high hurdle. It is important that appellate Judges keep this firmly in mind. Lord Donaldson MR has pointed out in *Piggott Brothers & Co Ltd v Jackson*the danger that an appellate Court can very easily persuade itself that, as it would certainly not have reached the same conclusion, the tribunal which did so was certainly wrong:  
“It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option. To answer that question in the negative in the context of employment law, the appeal tribunal will almost always have to be able to identify a finding of fact which was unsupported by *any* evidence or a clear self-misdirection in law by the Industrial Tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option ...”  
[28] It should also be noted that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be said to give rise to a finding on “no evidence”. It could nonetheless lead or contribute to an outcome which is insupportable.

[118] More recent decisions of the New Zealand Court of Appeal have echoed the New Zealand Supreme Court’s remarks regarding the “very high hurdle” that must be met when asserting that the true and only reasonable conclusion contradicts the determination.[[21]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn21) In dismissing an application for leave to appeal in *Mayne v Nuplex Specialties NZ Ltd*[[2013] NZCA 400](http://www.paclii.org/cgi-bin/LawCite?cit=%5b2013%5d%20NZCA%20400), the Court of Appeal noted:

[5] As the Supreme Court held in *Bryson v Three Foot Six Ltd*, determining the terms of a contract of employment will normally be a question of fact. At the same time, as the Supreme Court recognised, appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion if the Court has overlooked a relevant matter or taken account of some matter which is irrelevant to the proper application of the law or reached an ultimate conclusion that is unsupportable – so clearly untenable – as to amount to an error of law. An appellant seeking to assert that there was no evidence to support a finding ... or that the true and only reasonable conclusion contradicts the determination faces “a very high hurdle”.  
(Emphasis added)

[119] Although the threshold is very high in such circumstances, the analysis which follows compels the Court to find that the Chief Justice had self-misdirected himself in law, such that the only reasonable conclusion contradicted the determination made by him.

[120] In order to justify the inference drawn that the provision of food and drink (including alcohol) was motivated by customary hospitality considerations, the Chief Justice considered those acts in isolation from the campaign meetings which he accepted were politically motivated. In doing so, this Court considers that the Chief Justice misdirected himself in law.

[121] In *obiter* statements of Donne CJ in *Mitiaro Election Petition*[[1979] 1 NZLR S1](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1979%5d%201%20NZLR%20S1) at S12:

...[I]t may be that the “governing motive” approach outlined in *Rogers* puts the matter too favourably to the first respondent since there are recent decisions of high authority holding, in comparable fields of electoral law, that it is sufficient in case of mixed motives if one of the purposes of the scheme was the designated illegal purpose: see, for example, *Director of Public Prosecutions v Luft* [[1976] UKHL 4](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1976%5d%20UKHL%204); [[1976] 3 WLR 32](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1976%5d%203%20WLR%2032); [[1976] 2 All ER 569](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1976%5d%202%20All%20ER%20569) and the note thereon in [(1976) 39 MLR 730](http://www.paclii.org/cgi-bin/LawCite?cit=%281976%29%2039%20MLR%20730), 731-732. In *Director of Public Prosecutions v Luft*, a criminal case under the Representation of the People Act 1949 involving allegedly illegal campaign expenditure, the House of Lords held that in assessing the liability of the person incurring the disputed expenditure, it was sufficient if *one of the reasons which played a part* in inducing the person to incur the expenditure was his desire to promote or procure the election of a candidate. Earlier cases involving the “dominant intention” test were rejected. Lord Diplock said:  
“To speak of a dominant intention suggests that a desire to achieve one particular purpose can alone be causative of human action; whereas so many human actions are promoted by a desire to kill two birds with one stone” (ibid, 41; 5744).  
I have no doubt, as stated earlier, that the dominant purpose of the venture was to gain political support: but on the authority of *Director of Public Prosecutions v Luft* it appears that so long as the “political” purpose was one of the objectives, that, in terms of s 70, would be enough and that this existed here is something of which I am certain.  
(Emphasis added)

[122] In *Luft*, it was argued by counsel that “for the purpose of” referred to the dominant intention of the accused in doing the act complained of. In addressing the ‘dominant intention’ approach, Lord Hoffman noted ([[1976] 3 WLR 32](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1976%5d%203%20WLR%2032) at 41–42):

To speak of a dominant intention suggests that a desire to achieve one particular purpose can alone be causative of human actions; whereas so many human actions are prompted by a desire to kill two birds with one stone. For my part I prefer to omit the adjective “dominant”. In my view the offence under section 63(1) to (5) is committed by the accused if his desire to promote or procure the election of a candidate was one of the reasons which played a part in inducing him to incur the expense.

[123] Lord Fraser of Tulleybelton went further in remarking that the test would even be satisfied where the illegal purpose was “but an insignificant part of a person’s motives in persuading electors not to vote for that candidate” (at 44).

[124] In light of both of the authorities mentioned above, this Court in *Wigmore v Matapo*stated at [37]:

We are persuaded, however, by the logic of Lord Diplock’s approach in the *Luft* case, and by a parity of reasoning hold it to be the law of the Cook Islands, that in a case such as this where there may well have been mixed motives ... it is sufficient if one significant purpose was political.  
(Emphasis added)

[125] In *Ah Him v Amosa*, the Supreme Court of Samoa dealt with a similar question of whether the alleged treating (presentation of money) was made with corrupt intent. The Court said:

It would not be realistic to view the presentations in isolation, divorced from the context in which they were made. The purpose of the meeting in which the presentations were made was clearly in relation to the respondent’s proposed candidacy. The discussion that took place at the meeting was focused exclusively on the respondent’s proposed candidacy and the election. The total amount of money, $1,200 in all, that was given out is not insignificant. The persons to whom the money was given were electors. And the general elections were imminent.  
... [W]e are of the view, for the reasons already given, that in the circumstances of what took place, compliance with Samoan custom was not the only motive, or the dominant motive, behind the presentations. It would be sufficient for the purpose of establishing the intent required for bribery and treating in terms of the Act, if one of the motives which accompanied the presentation of money or food was to induce electors to vote for the respondent: see judgment of Donne CJ in the High Court of [the] Cook Islands in *Re Mitiaro Election Petition*[[1979] 1 NZLR S1](http://www.paclii.org/cgi-bin/LawCite?cit=%5b1979%5d%201%20NZLR%20S1) at S12.

[126] The Court also said later in the judgment in relation to the argument that what the candidate did was entirely in accordance with the requirements of Samoan custom:

We think that when the respondent met with the ‘faletua ma tausi’ and the ‘aualuma’ of Tuanai, he was there principally as an election candidate and not as the holder of the title Maulolo. He was actually out campaigning for his candidacy. The meeting that was held was solely for the purpose of promoting his candidacy. What was said by him at the meeting was all about his candidacy and the up-coming general elections. The money that was given out was not insignificant and it was given to electors. At the time, the general elections were imminent. ... From these circumstances, the inference is irresistible that the real intent of the respondent behind giving the money to the ‘faletua ma tausi’ and the ‘aualuma’ of Tuanai was to induce those electors to vote for him at the general elections.  
... But even if some people may think that the respondent was complying with Samoan custom, if one of his motives in giving out money was to induce the electors at the meeting to vote for him in the general elections, that is sufficient for the purpose of establishing the corrupt practice of bribery.

[127] For the sake of certainty, this Court rules that under Cook Islands law, it is sufficient in cases of mixed motives (or purposes) if *one* of the purposes was the designated illegal purpose.

[128] The Court now returns to consider whether there was any basis upon which the Chief Justice could have drawn the inference that the purpose of the alleged treating did not offend one of the provisions of s 89.

[129] The following facts recorded in the Case Stated are particularly relevant:

[3] The gatherings were campaign meetings. ...  
[4] All three of the gatherings were convened by Mr Hagai’s campaign manager and the CIP Planning committee and at least one of their significant purposes was political, namely, to support Mr Hagai’s campaign for re-election. Each gathering had, as at least part of its aim, the shoring up of support for Mr Hagai’s re-election among his known supporters and, possibly, waverers ...  
[6] Mr Hagai delivered a speech at the first meeting so its political purpose at that point was unmistakable, but the gathering went on for some hours by which time its purpose may have become less obvious. The overt political purpose of the other two functions would only have been discernible by Mr Hagai’s presence and the fact they were organised by the CIP Planning Committee. ... The significance of the political motivation varied. ...  
[14] Mr Hagai sought to curry favour at all the functions, and capitalised on and must be taken to have adopted the organising actions of the CIP Planning Committee. In attending and participating in meetings which the committee organised, which any elector on Rakahanga might attend and which were to boost his chances of re-election clearly amounted to Mr Hagai entrusting the committee with a material part of his election bid. This amounts to other persons directly or indirectly giving or providing food and drink on his behalf.

[130] Additionally, the Court notes the following findings of the Chief Justice in his judgment:

[21] Paragraph (b) of s 89 does not expressly require proof of a corrupt motive but it is clear that such a motive must be proved – and the motive must have a significant political aspect – for the offence of treating under s 89(b) to be found, as its commission is a corrupt practice under ss 2 and 87(1) and, as the Court of Appeal said in *Wigmore v Matapo*, though speaking of bribery, that one the offence is complete, “that then becomes a corrupt practice for the purposes of s 87. There is no additional element of acting corruptly – the mere commission of the acts are declared to be corrupt”. What amounts to “corruption” in the electoral sense is now to be found in the decision of the Supreme Court of New Zealand in *Field v R* where that Court held:  
“...I am of [the] opinion that there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election. I think the word ‘corruptly’ in this statute means not ‘dishonestly’, but in purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in any particular manner. Both the giver and the receiver in such a case may be said to act ‘corruptly’. The word ‘corruptly’ seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offence. I agree with what was said by the learned Judge at the trial, that if the moving cause of giving the money is the voter having voted for the particular candidate, such gift is contrary to the statute, as being given by way of reward for the vote, and therefore corrupt. [Emphasis in *Field*.]”  
...  
[30] All three functions were organised by the CIP Planning Committee on Rakahanga. The committee consisted of Puapii Ngametua Greig (known as “Bundy”), Trainee Maea, Papa Tuteru Taripo, Maggie Taripo, Enua Maea and Ngametua Tarau. All three meetings were held at Mr Hagai’s brother’s home, next door to Mr Hagai’s own home. Although Mr Greig said the functions’ purpose was to get Mr Hagai’s supporters together and suggested the committee meetings were only to plan the food, it is clear the meetings were not just to organise the refreshments. Mr Hagai regarded them as campaign meetings: that was a reasonable description.  
[31] That is clear from a number of factors. The first is that Mr Hagai spoke to all those attending the gathering on 24 May, (and may – the evidence was unclear – have also spoken at the gathering on 31 May). Tiata Tupou recorded the speech, posted it on Facebook and an agreed translation – the speech was in Maori – was produced in evidence. While the speech was, by comparison with contemporary political discourse elsewhere, in reasonably temperate terms, it clearly extolled Mr Hagai’s achievements for Rakahanga in his four years as its MP, lauded the actions of the Government of which he was a member, spoke of future projects assisting Rakahanga and was mildly critical of Mrs Browne. It concluded by saying “we thought we would have a little barbecue, have a few drinks, but ... you have showed a good sign tonight by displaying your interest in bringing me back as your member of Parliament” and, “those of you who want to support me tonight, thank you very much” and, later, “this is my message to all of you tonight, June the 14th, you have only one name to vote for, look for Toka Hagai, cross, then we come home and start our barbecue”.  
[32] In light of that, the conclusion must be that all three gatherings were convened by Mr Hagai’s campaign manager and the CIP Planning Committee and that at least one of their significant purposes was political, namely, to support Mr Hagai’s campaign for re-election. The gatherings had, as at least part of their aim, the shoring up of support for Mr Hagai’s re-election among his known supporters and, possibly, waverers. That was an object with which he agreed. He regarded the speech as one of the best he had made. It was a message intended to encourage people to think about the good things he had done for Rakahanga with the aim that they voted for him if they wished.  
...  
[54] Any possibility that the actions of the CIP Planning Committee might therefore have breached s 89 comes down to their contribution of food and drink at the three functions. And the evidence on that is Mr Greig’s acknowledgment that the committee contributed an unspecified amount of fish, meat and poultry generally while the more specific evidence is that Mr Greig contributed nu to each, Mr Taripo and his wife contributed alcohol to all three functions and Mr Maea contributed ika mata to the second and chicken to the third.  
(Emphasis added)

[131] Bearing in mind the authorities cited and given Williams CJ’s factual findings, we accept the Appellant’s contention that the inference drawn by Williams CJ was insupportable. We are of the view that the only reasonably possible inference that could have been drawn by the Chief Justice was that the purpose of the provision of food and drink (including alcohol) was (at least in part) motivated by political considerations. In the Court’s view, it is not possible to view the purpose of the campaign meeting (and speech) on the one hand, and the purpose of providing food and drink on the other, in isolation from each other.

[132] The Court’s finding is reinforced by the fact that the treating was not insignificant in the context of such a small electorate as Rakahanga (as suggested by the Chief Justice). Further, as noted above, the Court is of the view that s 89 of the Act is strict in its terms and only permits the provision of food and drink in accordance with custom where the act takes place after the close of the polls.

**Relief**

[133] Accordingly, the findings of the Court of Appeal on the questions of law properly identified as necessary for the determination of this appeal can be summarised as follows:

1. The Chief Justice erred in accepting the guidance of s 99 of the Act in addressing the substantive question to be decided in the election petition;
2. The Chief Justice erred in finding that a custom existed that could act as a defence to the treating allegation prior to the close of the poll;
3. The Chief Justice erred in finding that a *de minimis* defence existed in relation to treating; and
4. On the basis of the primary facts as found, the Chief Justice failed to draw the only reasonably possible inference as to the purpose of the treating, namely to procure the election of the Respondent.

[134] On the basis of the above conclusions, the Appellant’s appeal therefore succeeds and the Court, exercising its power (pursuant to s 102(3) of the Act) to reverse part of the Chief Justice’s judgment, hereby finds that the Respondent has engaged in treating under s 89 of the Act.

[135] The consequences of a finding of treating have been set out in s 98 of the Act, which provides:

98. Result of inquiry – (1) Without limiting the Court’s powers under section 96(1), where a candidate who has been elected at any election is found at the hearing of an election petition to have committed any corrupt practice at the election, that candidate’s election shall be void.  
(2) Where it is found by the Court at the hearing of an election petition that corrupt or illegal practices committed in relation to the election for the purpose of promoting or procuring the election of any candidates thereat have so extensively prevailed that they may be reasonably supposed to have affected the result, the candidate’s election shall be void.  
(3) Where at the hearing of an election petition claiming the seat for any person, a candidate is found by the Court to have committed bribery, treating or undue influence in respect of any person who voted at the election, there shall, on a scrutiny, be struck off from the number of votes appearing to have been received by the candidate, the vote of every person who voted at the election and has been provided to have been so bribed, treated or unduly influenced.

**Appellant’s position as to relief**

[136] The Appellant submitted that the Respondent’s election was void under s 98(1) of the Act. Further, the Appellant submitted that, in accordance with s 98(3) of the Act, the Court should (i) determine, on a scrutiny, which of the abovenamed persons cast a vote; and (ii) remove from the vote received by the Respondent the number of votes equal to the number of abovenamed persons the Court determines cast a vote. If that number exceeds 15, the Appellant submitted that the Respondent’s election should be declared void and the Appellant should be declared to have won the seat. Alternatively, if that number is less than or equal to 15, the Respondent’s election should be declared void and a by-election directed.

[137] The Appellant submitted that the following electors attended the first gathering on 24 May 2018 (where the Respondent made a speech), and were provided with food and/or drink at that gathering by the Respondent’s agents (the CIP Planning Committee):[[22]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn22)

1. Tiata Tupou (Main Roll, pg 3);
2. Sema Aratangi (Supplementary Roll, pg 4);
3. Lal Narayan (Supplementary Roll, pg 4);
4. Noa Hagai Teanini (Main Roll, pg 2);
5. Tupou Vakai (voted by declaration);
6. Frances Tupunangaro (Main Roll, pg 3);
7. Tamaro Thorpe (Main Roll, pg 2);
8. Tutero Taripo (Main Roll, pg 2);
9. Maggie Yvette Purea (Main Roll, pg 1);
10. Sharon Marsters (Main Roll, pg 1);
11. Edward Patterson (Main Roll, pg 1);
12. Exham Kareroa-Uriaere (Main Roll, pg 1);
13. Tarau Parua (voted by declaration);
14. Kavana Kavana (Mail Roll, pg 1);
15. Priscilla Kavana (Main Roll, pg 1);
16. Ayvon Takai (Main Roll, pg 2);
17. Bordlan Takai (Main Roll, pg 2);
18. Munokoa Takai (voted by declaration);
19. Matangaro Takai (Main Roll, pg 2);
20. Neti Tarau (Main Roll, pg 2);
21. Mata Dean-Tarau (Main Roll, pg 2);
22. Ngatokoa Elikana (Main Roll, pg 1);
23. Temu Hagai (Main Roll, pg 1);
24. Takai Hagai (Main Roll, pg 1);
25. Tokateru Tarau (voted by declaration);
26. Trainee Maea (Main Roll, pg 1);
27. Tangaroa Rongo (Main Roll, pg 2);
28. Marahua Rongo (Main Roll, pg 2); and
29. Puapii Ngametua Greig (Main Roll, pg 1).

[138] Although the Appellant’s submissions identified further possible attendees at the first and the second gathering (on 24 and 31 May 2018), the Appellant’s submissions on appeal were limited to the 24 May 2018 gathering on the basis that it was the only gathering where the High Court conclusively determined that there was a speech made by the Respondent.

**Respondent’s position as to relief**

[139] The Respondent conceded that, if the treating allegation was made out, the consequences that could follow are set out in s 98 of the Act. The Respondent also raised the possibility of referral of the matter back to the Chief Justice for consideration under s 103 of the Act.

[140] During the hearing, the Respondent noted that the list of attendees identified by the Appellant above included “agents” of the Respondent who provided the food and drink. Accordingly, the Respondent submitted that those attendees could not be found to have treated themselves.

**The Court’s analysis**

[141] As to the Respondent’s submission that some of the attendees identified by the Appellant included those “agents” of the Respondent who assisted in providing the food and drink, the Court has identified a total of three such “agents” from the Appellant’s list of attendees above (being Puapii Ngametua Greig, Trainee Maea and Tuteru Taripo).[[23]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn23) The Court agrees with the Respondent that those attendees could not be found to have treated themselves. However, the Court finds that the remaining list of attendees were treated by the Respondent.

[142] For all the foregoing reasons, the Court makes the following determinations and directions:

1. Having found treating under s 89, the Court determines under s 98(1) of the Act that the Respondent was not duly elected and that his election is void.
2. In accordance with s 98(3) of the Act, there shall, on a scrutiny of the Rakahanga rolls (to be conducted in accordance with s 76 of the Act),[[24]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn24) be struck off from the number of votes appearing to have been received by the Respondent in the final vote count on 28 June 2018, the vote of every person who voted at the election and was proved to have been so treated in attending the campaign meeting on 24 May 2018. For the sake of clarity, the list of persons who have been treated in attending the campaign meeting on 24 May 2018 is set out above at paragraph [[137]](http://www.paclii.org/ck/cases/CKCA/2018/2018_4.html#_Ref531950859) but shall not include Puapii Ngametua Greig, Trainee Maea or Tuteru Taripo.
3. In accordance with s 100 of the Act, the Registrar is directed to refer the whole of the evidence and the exhibits to the Commissioner of Police for further consideration. It will, as always, be a matter solely for the Police, in consultation with their legal advisers, to decide whether to launch a prosecution. In such proceedings a different standard of proof will, of course, apply and the determination made by this Court on the petition is not to be interpreted in any way as foreclosing the independent evaluation and consideration of the matter by the Police.

**Costs**

[143] As to the issue of costs, s 101 of the Act provides:

101. Costs of petition – All costs of and incidental to the presentation of an election petition, and to the proceedings consequent thereon, except such as are by this Act otherwise provided for shall be defrayed by the parties to the petition in such manner and in such proportions as the Court may determine; and in particular, any costs which, in the opinion of the Court have been caused by vexatious conduct, unfounded allegations, or unfounded objections on the part either of the petitioner or of the respondent, and any needless expenses incurred or caused on the part of the petitioner or respondent, may be ordered to be defrayed by the parties by whom they were caused or incurred, whether those parties are or are not on the whole successful.

[144] The Court recalls paragraph [131] of the judgment of the Chief Justice which stated:

[131] Any issue of costs will be dealt with in overall judgment once the current round of election petitions is concluded.

[145] In light of the Court’s findings in relation to this appeal, the Court finds that the Respondent should make a reasonable contribution to the costs of the Appellant in both the High Court and the Court of Appeal.  
[146] Since this Court has not had the benefit of any submissions on the question of costs, the question of costs is reserved. The Appellant is directed to file in this Court submissions as to costs in both the High Court and Court of Appeal within 20 working days following the delivery of this judgment. The Respondent is directed to file submissions in reply within 10 working days of receipt of the Appellant’s submissions.

**Williams P, Barker JA & White JA**

**Research Conclusion**

1.Although other cases researched showed clear elements of corruption specific to each case, cases 12 and 13 relating to the Tata Crocombe versus Collector, Geoffrey Stoddart, in the taxation case, and cases 15 and 16 relating to Tina Browne versus Toka Hagai, in the treating and bribery case, reveals, in my professional experience, that Justice Hugh Williams, the presiding Judge in both cases, is only human and did err and got it completely wrong in his judgement. With due respect to the learned C J Justice Hugh Williams, had the respective appellant, Tata Crocombe and petitioner, Tina Browne, not appealed his judgements, then both original status quos would have remained. This would have been a major travesty and miscarriage of justice. Fortunately, in both cases, successful appeals were ratified by the Appeal Court and justice was fairly and legally restored.

2.Applying the Cressey fraud triangle together with the symbolic Te Toki e te Kaa Rakau concept of unethical cultural and environmental influences, the following conclusions are reached;

(a) The Appeal Court Justices did find the Respondent, Toka Hagai, guilty of the treating and bribery offences in the electoral petition case. In my view, the Respondent was motivated and used the opportunity during the time of the election, to carry out practices of treating and bribery, in order to be re-elected. Were voracity and greed part of his act and approach to win re-election? In my professional view, yes it was. The three preconditions of the Cressey corruption triangle of motivation, opportunity and greed were therefore completed.

(b) Were there instances and situations of unethical cultural and environmental influences impacting and brought about by the respondent, Toka Hagai? Evidence from the Appeal Court confirms instances of unethical influences and practices by the respondent, Toka Hagai. Evidence is produced in points 131 and 132 of the Appeal Courts judgement, to support this. It states;

[131] Bearing in mind the authorities cited and given Williams CJ’s factual findings, we accept the Appellant’s contention that the **inference drawn by Williams CJ was insupportable.** We are of the view that the only reasonably possible inference that could have been drawn by the Chief Justice was that the purpose of the **provision of food and drink (including alcohol**) was (at least in part) **motivated by political considerations**. In the Court’s view, it is not possible to view the purpose of the campaign meeting (and speech) on the one hand, and the purpose of providing food and drink on the other, in **isolation from each other.**

[132] The Court’s finding is reinforced by the fact that the **treating was not insignificant** in the context of such a small electorate as Rakahanga (as suggested by the Chief Justice). Further, as noted above, the Court is of the view that s 89 of the Act is strict in its terms and only permits the provision of **food and drink in accordance with custom** where the act takes place after the close of the polls.

The Appeal Court further concludes in its judgement in point 142, the following;

[142] For all the foregoing reasons, the Court makes the following determinations and directions:

Having found treating under s 89, the Court determines under s 98(1) of the Act that the Respondent was **not duly elected** and that **his election is void.**

In accordance with s 98(3) of the Act, there shall, on a scrutiny of the Rakahanga rolls (to be conducted in accordance with s 76 of the Act),[[24]](http://www.paclii.org/ck/cases/CKCA/2018/4.html#fn24) be **struck off from the number of votes appearing to have been received by the** **Respondent in the final vote count on 28 June 2018**, the vote of every person who voted at the election and was proved to have been so treated in attending the campaign meeting on 24 May 2018.

**Lessons Learnt**

1.There are significant lessons to be learnt from this landmark bribery and treating case that was rightly overturned on appeal. The first relates to the unfortunate lack of awareness by the Chief Justice, Hugh Williams of the application of customary hosting and hospitality of voters during times of election. The Appeal Judges refers to specific instances where the CJ Hugh Williams, **misdirected himself** and therefore pointed in the wrong direction. Points 119 and 120 of the appeal judgement are relevant in this matter and are restated as follows;

[119] Although the threshold is very high in such circumstances, the analysis which follows compels the Court to find that the **Chief Justice had self-misdirected himself in law, such that the only reasonable conclusion contradicted the determination made by him.**

[120] In order to justify the inference drawn that the provision of food and drink (including alcohol) was motivated by customary hospitality considerations, the **Chief Justice considered those acts in isolation from the campaign meetings which he accepted were politically motivated. In doing so, this Court considers that the Chief Justice misdirected himself in law.**

The Appeal Court Judges further stated and reinforced under point 127, as follows;

[127] For the **sake of certainty**, this Court rules that under Cook Islands law, it is sufficient in cases of mixed motives (or purposes) if *one* of the purposes was the **designated illegal purpose.**

2.Secondly, appeals, per se, after considerable review of the intricate details of **matters of law**, as shown in this particular case, can justifiably and ultimately be pursued in the Appeals Court. The petitioner, Tina Browne, together with her legal counsel, having reviewed the evidence and conclusions of the case stated by Chief Justice, Hugh Williams, rightly decided to appeal. Matter of law is seen in judgements as a matter of law where a Judge or Judges makes a decision applying the relevant laws of irrefutable evidence. As sufficiently stated above, the appeal was successful.

**Chapter 7 Regional and International Initiatives to Address Corruption in the Cook Islands and the Pacific.**

Pacific Island governments have since self-government and independence, governed their respective territories with various statutes and sovereign Constitutions. Collectively and in the spirit of the Pacific way, they formed the Pacific Islands Forum, with Australia and New Zealand as members. The plan was to establish anti-corruption institutions that would govern and regulate policies, procedures and guidelines by which member states would adhere to and follow.

**Pacific Islands Forum Secretariat**

The Pacific Islands Forum (PIF) supports the 18 Forum member islands to work together through integrated forms of regionalism in support of sustainable development, economic growth, good governance and security. Its role is policy advice, coordination and ensuring the effective implementation of Forum Leaders decisions. Leading to tangible improvements in the lives of the people in the Pacific. The PIF supports the regional efforts by various development partners in the fight against corruption. The PIF initiated a number of integrity and good governance instruments that Pacific leaders have adopted for the region. These includes the Forum Principles of Good Leadership and the Forum Principles of Accountability. The Forum Economic Ministers (FEMM) meeting adopted additional standards developed by the International Monetary Fund (IMF) as principles of accountability;

* Budget processes to ensure Parliament/Congress is sufficiently informed to understand the longer-term implications of appropriation decisions.
* The accounts of governments, state-owned enterprises and statutory corporations to be promptly and fully audited.
* Loan agreements or guarantees entered into by governments to be presented to Parliament/Congress.
* All government and public sector contracts to be competitively awarded, and publicly reported.
* Contravention of financial regulations to be promptly disciplined.
* Public Accounts Committees of the legislature to be empowered to require disclosure.
* Auditor General and Ombudsman to be provided with adequate fiscal resources and independent reporting rights to Parliament/Congress.
* Central bank with statutory responsibilities for non-partisan monitoring and advice and regular and independent publication of informative reports.

Organizations within the Pacific and Asia established to promote their respective functions which includes anti-corruption measures are the;

1. Pacific Islands Chief of Police
2. Oceanic Customs Organization
3. Pacific Islands Law Officers Network
4. Pacific Association of Supreme Audit Institutions (PASAI)
5. Financial Action Task Force (FATF)
6. Asia Pacific Group on Money Laundering and the
7. ADB/OECD Anti-Corruption Initiative for Asia Pacific.

**Independent Integrity and Anti-Corruption Offices**

Each of the Pacific Island states have their own institutions with the object of fighting corruption. These include Parliamentary Public Accounts Committee’s, Crown Law or Public Prosecutor’s Office, Auditor General’s Office, Police, Police Criminal Investigations Unit, the Ombudsman Office, Financial Intelligence Unit, Serious Fraud Office, Offices of Independent Commission against Corruption (ICAC) and Transparency International Chapters.

States have also started to implement Official Information Act (OIA) legislation and whistle-blower protection legislation.

**New Zealand**

New Zealand criminalizes bribery and corruption in both the public and private sectors, challenging traditional conceptions that corruption is purely a public sector issue. New Zealand has robust anti- corruption laws. Its domestic legislations to fight off corruption in the private sector is through the Secret Commissions Act and for the public sector corruption, through the Crimes Act.

New Zealand signed the OECD Anti-Bribery Convention in 1997 and ratified in 2001. The Convention requires countries to criminalize the offence of foreign bribery. New Zealand signed the United Nations Convention Against Corruption (UNCAC) in 2003 and ratified it in 2015. UNCAC is wider in scope than the OECD Anti-Bribery Convention and is the first global instrument to address corruption in both the public and private sectors. UNCAC requires countries to criminalize a broad range of corrupt conduct, including both domestic and foreign bribery and related offences such as obstruction of justice, embezzlement of public funds and money laundering.

UNCAC obliges countries to adopt coordinated preventative measures such as transparent procurement processes, codes of conduct, open access to public information, effective auditing and accounting standards for the private sector and active engagement with civil society. The implementation of UNCAC is monitored through a peer review process.

In 2004 Leaders of the Asia Pacific Economic Cooperation (APEC) endorsed the Santiago Commitment to fight corruption and ensure transparency. New Zealand was a founding member of APEC which seeks to support sustainable growth and prosperity in the Asia Pacific region. In 2014 the APEC Network of Anti-Corruption Authorities and Law Enforcement Agencies (ACT-NET) was established. The goal of ACT-NET is to act as an informal network for sharing information and exchanging best practices and techniques among anti-corruption and law enforcement authorities in the Asia-Pacific region. New Zealand’s primary corruption agency, the Serious Fraud Office (SFO) is committed to proactively detecting, investigating and prosecuting both public and private sector corruption.

**Australia**

Australia is a party to a number of international instruments aimed at combating corruption.

* UNCAC - the United Nations Convention Against Corruption
* UNTOC – the United Nations Convention Against Transnational Organized Crime
* OECD – the Organization for Economic Cooperation and Development Convention on combating bribery of foreign public officials in international business transactions. In addition, Australia is engaged in the following regional and international forums and initiatives.
* G20 Anti-Corruption Working Group
* OECD Working Group on Bribery
* Asia Pacific Economic Cooperation Anti-Corruption and Transparency Experts Working Group
* Asia Development Bank (ADB) OECD Anti-Corruption Initiative for Asia Pacific.

The Australian governments anti – corruption and bribery policies support ethical business practices and the prosecution of those who engage in illegal practices. This helps to improve Australia’s investment opportunities overseas and its global reputation. Australia has federal and state anti-corruption independent agencies that are responsible for investigating and prosecuting corruption in both the private and public sectors.

**Asian Development Bank (ADB)**

ADB’s country membership stretches from Asia to the Oceania region. ADB is entrusted with public funds to help achieve its vision of a prosperous, inclusive, resilient and sustainable Asia and Pacific region. The Office of Anticorruption and Integrity (OIA) leads the integrity initiatives of ADB through the conduct of investigations, proactive integrity reviews, integrity due diligence and knowledge sharing with ADB’s stakeholders.

OIA’s mandate is underpinned by ADB’s zero tolerance for corruption. It is aligned with ADB’s broader commitment to combat corruption and improve governance as an operational priority of ADB Strategy 2030. In the strategy, ADB reiterated that the ability of countries to develop resilience from disasters and economic shocks stems from institutions and governance, free from corruption and other integrity violations. Through transparent, effective and accountable aid, ADB seeks sustainable and inclusive paths toward sustainable growth and poverty reduction.

**United Nations Development Program (UNDP)**

UNDP works in 170 countries and territories to eradicate poverty, implement the Paris Agreement on climate change and achieve the Sustainable Development Goals (SDG). As part of UNDP’s strategy to strengthen the accountability framework for the organization and to provide opportunities for bringing to light any misconduct, wrongdoing by any individuals for or doing business with UNDP. The Office of Audit and Inquiries (OIA) is the established Office that leads and manages UNDP’s anti-corruption initiative.

Corruption undermines the achievement of all the SDG’s by depleting valuable resources and degrading the quality of public services. For UNDP, financial integrity is a service delivery issue, a development finance issue, and most importantly, a trust issue of citizens in their government institutions. When high level officials exploit public assets, public trust erodes, people are deprived of economic opportunities and democratic institutions are weakened.

UNDP’s work in anti-corruption has been instrumental in advancing the transparency, accountability and integrity agendas at global, regional and country levels. UNDP integrates anti-corruption solutions in service delivery sectors, strengthening the institutional capacity of government institutions, civil society organizations and the private sector to prevent and address corruption, leveraging technology and innovation for integrity and anti-corruption and leading anti-corruption knowledge and global advocacy.

UNDP has six service lines addressing anti-corruption;

1. Anti-corruption for effective service delivery.
2. Integrity for climate, biodiversity and environment.
3. Anti-corruption for conflict prevention and peacekeeping.
4. Transparency and integrity in cities and local authorities.
5. Anti-corruption for economic governance and development financing, and
6. Empowering agents of change for anti-corruption.

**USAID – United States Aid**

Countering corruption is essential to fulfilling USAID’s mission of strengthening democratic societies and advancing a free, just, and peaceful world. To drive inclusive, sustainable, locally led development and safeguard our investments, USAID is making preventing and countering corruption a top priority.

To tackle corruption, within countries and transnationally, USAID, through the Anti-Corruption Center (ACC) is taking concrete actions to mobilize broad-base coalitions and partnerships, elevate anti-corruption considerations in policy making, catalyze innovation and serve USAID and the broader community with technical leadership, support and programs. This includes;

* Expanding USAIS’s efforts to address corruption threats to keep pace with the drivers, enablers and manifestations of corruption, especially transnational corruption.
* Exercising holistic and responsive leadership to marshal USAID’s range of capabilities during pivotal moments for anti-corruption reform and backsliding.
* Countering corruption across sectors to prevent corruption that impedes development progress and tackle corruption from multiple angles.
* Forging new partnership and coalitions to spur and sustain anti- corruption progress.
* Institutionalizing anti-corruption as a priority across the U.S. government and USAID’s strategy, policy, planning processes and frameworks.
* Safeguarding development and humanitarian assistance from corruption risk to preserve public resources for development, protect foreign assistance from diversion and avoid unintended consequences of international aid.

**Organization for Economic Cooperation Development (OECD)**

The OECD has endorsed a Strategy against Corruption – The real cost of Corruption. The OECD stated, “Corruption is now being reported as the number one concern by citizens, causing more concern than globalization or migration.”

Corruption is one of the most corrosive issues in the world today. It wastes public resources, widens economic and social inequities, breeds discontent and political polarization and reduces trust in situations. Corruption perpetuates inequality and poverty, impacting well-being and the distribution of income and undermining opportunities to participate equally in social, economic and political life.

**A Coherent and Comprehensive Integrity System**

Commitment – Top level management develop the necessary legal and institutional frameworks and display high standards of personal propriety.

Responsibilities – Public sector organizations coordinate well with each other, with well- defined responsibilities. It is clear “who does what’.

Strategy – Using data and indicators for evaluation and based on legitimate risks to integrity, a strategy is developed outlining objectives and priorities.

Standards – Rules and public sector values are reflected in laws and organizational policies and are effectively communicated.

**A Culture of Public Integrity**

Whole of Society – Businesses, individuals and non-government entities uphold public integrity and do not tolerate corruption.

Leadership – Managers lead with integrity in public sector organizations; they carve out the ‘integrity agenda’ and communicate it to the organization.

Merit based – The public sector strives to employ professional and qualified people that have a deep commitment to the public service integrity values.

Capacity building – Public officials are skilled and trained to apply integrity standards.

Openness – Integrity concerns are openly and freely discussed in the workplace and it is safe to report suspected violations of integrity.

**Effective Accountability**

Risk Management **–** An effective integrity risk management and control system exists in public sector organizations.

Enforcement – Corruption and other violations to integrity are detected, investigated and sanctioned.

Oversight – Oversight bodies, regulatory enforcement agencies and administrative Courts perform external control.

Participation – A transparent and open government allows for the meaningful participation of all stakeholders in the development and implementation of public policies.

**United Nations – Office of Drugs and Crime – UNODC.**

The UNODC Office is committed to supporting Member States in implementing the 2030 Agenda for Sustainable Development and the 17 Sustainable Development Goals (SDG’s) at its core. The 2030 Agenda clearly recognizes the rule of law and fair, effective and humane justice systems as well as health-oriented responses to drug use are both enablers for and part of sustainable development. For two decades, UNODC has been helping make the world safer from drugs, organized crime, corruption and terrorism.

UNODC is committed to achieving health, security and justice for all by tackling these threats and promoting peace and sustainable well-being as deterrents to them. Because the scale of these problems is often too great for States to confront alone, UNODC offers practical assistance and encourages transnational approaches to action.

Since 2003, the United Nations have adopted the United Nations Convention Against Corruption (UNCAC), member states have used this universal legal anti-corruption instrument as a foundation for global action, providing a comprehensive framework to prevent and combat corruption nationally and internationally. There is now a near-universal ratification of UNCAC with over 190 State Parties signed up. Most importantly, there is a growing number of governments adopting tougher laws and establishing or strengthening policies to fight corruption.

UNODC’s work is based around 5 areas of activity;

* Tackling corruption and its catastrophic impact on societies.
* Strengthening crime prevention and building effective criminal justice systems.
* Strengthening Member States capabilities to confront threats from transnational organized crime.
* Countering Terrorism.
* Supporting Member States in implementing a balanced, comprehensive and evidence-based approach to the world drug problem that addresses both supply and demand.

**PASAI (Pacific Association of Supreme Audit Institutions) and INTOSAI (International Association of Supreme Audit Institutions).**

**PASAI**

The Pacific Association of Supreme Audit Institutions (PASAI) is the official association of supreme audit institutions (government audit offices, known as SAIs) in the Pacific region. PASAI is one of the regional organizations belonging to the International Organization of Supreme Audit Institutions (INTOSAI).

PASAI promotes transparent, accountable, effective and efficient use of public sector resources in the Pacific. It contributes to that goal by assisting its member SAIs improve the quality of public sector auditing in the Pacific to uniformly high standards. To meet that objective, PASAI’s mandate is to;

* Strengthen understanding, cooperation and coordination between its members.
* Advocate the interests of good governance – including transparency, accountability and the need for strong independent SAIs – to governments and others in the region.
* Build and sustain public auditing capacity across the Pacific by sharing knowledge with, and providing support to, its members.
* Assist its members to perform their auditing functions, including through cooperative audits and similar activities.
* Serve as a regional working group of INTOSAI in the interests of all SAIs in the Pacific and beyond.
* Encourage cooperation with other regional working groups and SAIs.

PASAI intends to improve transparency and accountability in managing and using public resources in Pacific Island countries. Specifically, PASAI will organize and provide programs that will;

1. Enable the public accounts of countries in the Pacific region to be audited in a timely manner to recognized high standards.
2. Enhance the impact of audit findings and assist with performance audits, and
3. Raise the capability of SAI’s.

The strategic goals of PASAI under the 2014 – 2024 Strategic Plan are;

* Strategic priority 1: Strengthen SAI Independence.
* Strategic priority 2: Advocacy to strengthen governance, transparency, accountability and integrity.
* Strategic priority 3: High quality audits completed by Pacific SAIs on a timely basis.
* Strategic priority 4: SAI capacity and capability enhanced.
* Strategic priority 5: PASAI Secretariat capable of supporting Pacific SAIs.

The researcher, as the former Director of Audit (Auditor General) of the Cook Islands, was a former Chairman of PASAI and a former Governing Board member of INTOSAI, representing PASAI.

**INTOSAI**

The International Organization of Supreme Audit Institutions (INTOSAI) is an autonomous, independent, professional and nonpolitical organization established as a permanent institution. The seat of INTOSAI and the General Secretariat is Vienna, Austria, which is the official seat of the Court of Audit of the Republic of Austria. Its purpose is to;

* Provide mutual support to SAIs.
* Foster the exchange of ideas, knowledge and experiences.
* Act as a recognized global public voice of SAIs within the international community.
* Set standards for public sector auditing.
* Promote good national governance, and
* Support SAI capacity development, cooperation and continuous performance improvement.

INTOSAI’s mission is to support its members in contributing effectively to the accountability of the public sector, promoting public transparency and good governance, and fostering the economy, effectiveness and efficiency of government programs for the benefit of all. The main aim of INTOSAI is to promote the exchange of ideas, knowledge and experience between its members, the Supreme Audit Institutions (SAIs) of countries around the globe, with other international organizations and stakeholders in the field of government auditing. All Pacific SAIs are members of INTOSAI and receive support in the following areas;

* Professional Standards – Develop, maintain and advocate for professional standards of SAIs.
* Capacity Development – Support SAIs in developing their capacity.
* Knowledge Sharing – Encourage collaboration among SAIs through knowledge sharing.
* Maximize INTOSAI Value – INTOSAI will promote economical, efficient, relevant and innovative working practices, timely decision making and agile governance practices.
* Independence – SAIs shall have the functional and organizational independence required to accomplish their tasks. SAIs shall be provided with the financial means to enable them to accomplish their tasks.
* INTOSAI Framework of Professional Pronouncements – (IFPP) contains three categories of professional pronouncements;

1. The INTOSAI Principles (INTOSAI-P)
2. The International Standards of Supreme Audit Institutions (ISSAI)
3. The INTOSAI Guidance.

* INTOSAI and the United Nations -Sustainable Development Goals (SDGs) – The UN General Assembly resolution of December 2011 recognized the central roles of INTOSAI and SAIs in promoting good governance and accountability. INTOSAI has an important supporting and leveraging role to play in national, regional and global efforts to implement the SDGs and to follow up and review progress that is made. The active engagement of INTOSAI has underscored the indispensable role of independent and capable SAIs in the efficient, effective, transparent and accountable implementation of the 2030 Agenda for Sustainable Development.

**Transparency International (TI)**

Transparency International is a global movement working in over 100 countries to end the injustice of corruption. TI’s holds the powerful to account for the common good. Through advocacy, campaigning and research, TI works to exposing the systems and networks that enable corruption to thrive, demanding greater transparency and integrity in all areas of public life. TI has three Offices.

The International Secretariat Office is based in Berlin and leads and coordinates the global advocacy efforts. Brussels – Office in the European Union champions anti-corruption advocacy towards European Union institutions. Washington DC – Office in the United States works towards ending the country’s role in facilitating transnational corruption work. From partnering with investigative journalists, working with local communities, national and international civil society and addressing global bodies such as the United Nations, World Bank and International Monetary Fund.

**Vision and Mission**

TI’s vision is a world in which government, politics, civil society and the daily lives of people are free from corruption. Its mission is to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society. It does this by forming National Chapters in independent countries. The work of TI has seen international anti-corruption laws adopted, the corrupt brought to justice, companies held to account and individual citizens empowered to make a difference. TI works at 3 levels;

* **Global** – Advocating for anti-corruption policy on a global level through engaging with high-level policy makers, such as the Group of 20 and investigations into grand corruption.
* **National** – Combatting corruption on a national level through TI’s regional chapters, pushing legislation and actively engaging with key government ministries.
* **Local** – Working with individuals and organizations against corruption on a local level by pushing cases through the 60+ Advocacy and Legal Centers.

**What Transparency International Does**

TI focuses on issues with the greatest impact on people’s lives. Ending the abuse of power and impunity for the corrupt is critical and urgent. It means holding the powerful to account and closing down the systems that allows bribery, illicit financial flows, money laundering and the enablers of corruption to thrive. Priorities include;

* Political Integrity
* Following Dirty Money
* Asset Recovery and the Theft of Public Money
* Business Integrity
* Climate Crisis
* Defense and Security
* Extractive Industries
* Foreign Bribery Enforcement
* Grand Corruption
* Judiciary and Law Enforcement
* Land Corruption
* Public Procurement
* Right to Information
* Sustainable Development Goals and Whistleblowing

**Advocacy** – Corruption is widely understood as a root cause of many of the biggest challenges facing the world today. TI strives towards a world where the power to make decisions affecting people’s lives is held to account and serves the common good. To achieve this, TI addresses loopholes in legislation and regulation, push the powerful to act with integrity and seek redress for those who are robbed of a chance to live an equitable and just society.

TI’s efforts to explore the root causes of corruption over the past decades have resulted in impactful social accountability tools and systemic national reforms spearheaded by national country chapters. Corruption is not a problem contained within any country’s borders. At the core of the abuse of power lie systemic flaws that are further exacerbated by the transnational nature of corruption. TI’s global agenda focuses on issues that cut across sectors and borders and require addressing through a combination of legislation, enforcement and justice mechanisms.

**Research** – To end corruption, one must first understand it. That’s why looking at what causes corruption and what works against it is important. TI has pioneered tools and methodologies to measure corruption as a vital first step to exposing and ultimately reducing it. At the global level, TI produces comparative data measuring the prevalence of corruption, citizen’s experiences and attitudes towards it. At the national, local and sector level, TI investigates the specific manifestation of corruption, its causes, its consequences and what works to reduce it. TI has two flagship research tools that measure corruption around the world;

1. The **Corruption Perceptions Index** (CPI). The annual CPI ranks countries by their received levels of public sector corruption, according to experts and business. The CPI has been widely credited with putting the issue of corruption on the international policy agenda.
2. The **Global Corruption Barometer** (GCB) supplements the CPI by surveying ordinary citizens around the world. Since its introduction in 2003, the world’s largest public survey on corruption has collected valuable data about the experiences and perceptions of tens of thousands of people.

**Transparency International – Corruption Perceptions Index (CPI) Rankings for top 25 Countries and Pacific Island Countries (2022).**

The CPI ranks countries around the world by their perceived levels of public sector corruption, scoring on a scale of 0 for highly corrupt to 100 for very clean.

**Rank Country Score**

1 Denmark 90

2 Finland 87

2 New Zealand 84

4 Norway 84

5 Singapore 83

5 Sweden 83

7 Switzerland 82

8 Netherlands 80

9 Germany 79

10 Ireland 77

10 Luxemburg 77

12 Hong Kong 76

13 Australia 75

14 Canada 74

14 Estonia 74

14 Iceland 74

14 Uruguay 74

18 Belgium 73

18 Japan 73

18 United Kingdom 73

21 France 73

22 Austria 71

23 Seychelles 70

24 USA 69

25 Bhutan 68

**Pacific Island Countries**

**Country CPI Rank Global Corruption Barometer**

New Zealand 2 N/A

Australia 13 34% of people who thought corruption

increased in the previous 12 months.

Cook Islands No TI chapter.

Fiji 53 68% of people who thought corruption

increased in the previous 12 months.

Kiribati No TI chapter. 55% of people who thought corruption

increased in the previous 12 months.

Niue No TI chapter.

Nauru No TI chapter.

Papua New Guinea 130 96% of people who think corruption is a big

problem. 54% of people paid a bribe in the

previous 12 months. 57% of people who

were offered a bribe in exchange for their

vote in the last 5 years.

Samoa No IT chapter.

Solomon Islands 77 97% of people who think corruption is a big

problem. 21% of public service users who

paid a bribe in the previous 12 months. 25%

of people offered a bribe in exchange for their

vote in the last 5 years.

Tonga No TI chapter.

Tuvalu No TI chapter.

Tahiti – French Polynesia No TI chapter. 16% of people who think corruption is a big

problem. 11% of public service users who

paid a bribe in the previous 12 months. 23%

of people offered a bribe in exchange for their

vote in the last 5 years.

Vanuatu 60 73% of people who think corruption is a big

problem. 21% of public service users who

paid a bribe in the previous 12 months.25%

of people offered a bribe in exchange for their

vote in the last 5 years.

Wallis & Futuna No TI chapter.

**Research Conclusion**

National and International cooperation and collaboration in the fight against corruption has grown in strength over the past decade. Leaders have taken a strong stance against corruption at the international and regional level in order to reinforce and sustain good governance and democracy.

**CHAPTER 8 – CONSEQUENCES OF CORRUPTION**

The issue of corruption has been well published over the past decades and has become increasingly significant, which has attracted renewed world-wide public interest, from governments, academics and policy makers. In my view, corruption has manifested itself in the Cook Islands, since self-government, through various mechanisms, such as weak institutions, dishonest leadership, poor oversight agencies and an empathy towards political nepotism and chronic favoritism. This is also well documented in, ‘Cook Islands Politics’ the Inside Story. R. Crocombe (1979).

Whilst this research has reviewed the causes of corruption from the perspective of Dr Donald Cressey’s fraud (corruption) triangle theory, economists and academics have undertaken empirical research on the causes of corruption, in other generic areas. An important body of knowledge was acquired through theoretical research done in the 1970s by Jagdish Bhagwati, Anne Krueger, and Susan Rose-Ackerman, among others (Mauro,1996). A key principle is that corruption can occur where free market economies has created opportunities for the appropriation of rents (that is excessive profits). This is the result of government regulations and public officials having discretion in allocating them.

The consequences of corruption, given the need for secrecy, reduces economic growth in the form of, decreasing tax revenues, lowering the quality of public services and infrastructure, causing officials to engage in rent-seeking rather than productive activities, misrepresenting and reducing government expenditure. This research, however, acknowledges the above consequences of corruption from a macro level. My analysis views these consequential conditions from a Pacific community micro level, such as the Cook Islands.

In my view, the consequences of corruption from a micro level, in the Cook Islands society is more profound and devastating. This situation is significant due to the smallness and close-knit community and ancestral ties within and amongst each tribal clan. The ‘Ariki’ or chief and ‘Koutu Nui’ or sub chief, system of traditional lineage and hierarchies of families, are mostly related either through tribal lineage or through inter-marriage and adoption. All Cook Islanders belong to a lineage of a tribal Ariki or chief and with its relevant Koutu Nui or sub chiefs such as the mataiapo, rangatira and kavana.

My observations, from occupational experiences and literature, I have identified and articulated such from a micro level. The scenario of actual, potential and perceived consequences of corruption committed by an offender, are grouped in the following categories;

1.**From the Offender’s Perspective.**

The consequences of breaking the law due to white collar corruption or a similar serious crime, will have grave and calamitous effects on the offender. The judgement from being found guilty could lead to a monetary fine, probation, or incarceration with a permanent criminal record. Personal guilt and shame will follow as a result of the offender’s actions. The offender will try to cope with emotional difficulties which may lead to feelings of stress, anxiety, depression and in some cases, mental health problems. This will eventually impact the individual’s self-esteem, and, in some cases, they may not be fully accepted by the community and will have difficulties returning into the community and finding a job.

**2.From the Offender’s Family’s, Village and Tribal Perspective.**

The shame on the family will bring hurt and inner suffering that will create some instability in the household. The ripple effects of the offender’s actions, will be felt by close members in the village and community. This will also affect the offender’s traditional leaders, the Ariki or chief and Koutu Nui clan and wider grouping of village leaders. This may disturb village and community gatherings as affected families and tribal members withdraw from public meetings. It may lead in some instances, of the offender, leaving the village and going overseas for an extended period of time.

**3.From the affected Employer and External Perspective.**

As the above corruption cases have demonstrated, the offenders are senior officials, who are intelligent, qualified and hold positions of trust and authority. Once the offender is found guilty and charged, the employer, in this case, a government department or agency, will feel aggrieved as the organization’s reputation has been tarnished. The procurement and payment system with its internal controls will be found to be compromised and well below acceptable operating standards.

The Chief Executive Officer or the Head of Ministry in most cases is the offender, or if not the offender, will feel betrayed, irritated and annoyed that the Office is the focus of public attention. Recent corrupt cases have revealed that the offenders are senior public officials, such as a Head of Ministry and a Crown Agency, holding positions of trust and authority. Continuous unethical conduct by senior government Ministers and officials can lead negative news and social media, resulting in undesirable reputational damage in Government with the loss of confidence from within the country and from outside.

**Pacific Corruption by Transparency International (2021).**

Is the Pacific Islands region the most corrupt region in the world? A new report by Transparency International found that in some Pacific Island nations more than 90 percent of people believe corruption is a serious problem.

The report, which relies on a survey of over 6,000 people across 10 countries and territories, found that not only do people believe corruption is rife but many have experienced it firsthand.

Around a third of people interviewed said they had recently paid a bribe to receive public services – a higher rate than any other region. One in four respondents said they have been offered a bribe for their vote in national or local elections, with 15 percent saying they’ve received threats of retaliation if they did not vote a specific way.

Kiribati, the Federated States of Micronesia, and Papua New Guinea ranked worst on vote-buying and bribes paid for public services.

The report notes that “sextortion,” whereby an official requests sexual acts in exchange for essential government service, is widespread, with 38 percent of respondents across the region saying they or someone they know has personally experienced it within the last five years.

French Polynesia and New Caledonia ranked worst on sextortion, with 92 percent and 76 percent of respondents in those countries, respectively, stating they have experienced this form of corruption themselves or know someone who has.

The Solomon Islands and Papua New Guinea ranked worst for perception of corruption, with 97 and 96 percent respectively believing that corruption is a big problem in government. A third of all people interviewed across the Pacific think that most or all members of parliaments and staff in heads of government’s offices are involved in corruption.

The Solomon Islands and Papua New Guinea also had the highest percentages stating a belief that corruption is a big problem in business, at 90 and 82 percent respectively. Transparency International notes in its report that a corruption hotspot appears to be government contracts. Companies involved in extracting natural resources are of particular concern.

“In Solomon Islands – one of the largest exporters of tropical wood globally – many senior government leaders have held direct interests in logging concessions. There has been collusion between political leaders, public officials and the timber industry, with recent cases implicating senior officials and politicians,” the report notes.

Pacific-wide, 68 percent believe that businesses rely on money or connections to obtain government contracts, while 40 percent believe that the government is often run by a few big interests.

Chair of Transparency International’s Board of Directors, Delia Ferreira Rubio, said: “This new data reveals for the first time the high levels of corruption directly experienced by people in the Pacific, which points to a pressing need for reform.”

Earlier this month, Transparency Solomon Islands reported that three officials working at the country’s High Court were alleged to have received bribes totalling up to $11,000.

Last year, Papua New Guinea police arrested former Prime Minister Peter O’Neill, who was charged with misappropriation, corruption, and abuse of office.

In 2019, Victor Rory, who worked in the prime minister’s office in Vanuatu, was found guilty of embezzling development funds, including more than AU$182,000 from European Union funded projects.

The Cook Islands does not have a Transparency International Chapter, however, reports and media releases on general and specific corruption from the Cook Islands News and independent sources have been reported on the internet and websites throughout the region and globally.

In the Cook Islands, between March 2016 and February 2024, the former Minister of Marine Resources, Hon Teina Bishop and the former Deputy Prime Minister, Hon Robert Tapaitau have been convicted of corrupt practices. Hon Teina Bishop was sentenced and imprisoned for corruption and Deputy Prime Minister Hon Robert Tapaitau is awaiting sentencing in April 2024 by Chief Justice Keane. Two senior public officials, a Head of Ministry and a Crown Agency CEO, have also been convicted of theft of public funds, conspiracy and forgery and will be sentenced in April 2024.

To show the prevalence and exposure of corruption in the Cook Islands, I managed to obtain an important public poll and media release undertaken by the Cook Islands News prior to the 2022 general elections.

**Cook Islands News Release prior to the General Election of 2022.**

**Corruption** has come out by far as the biggest issue facing the country in a political poll conducted by Cook Islands News. The poll asked one per cent of the population, “What do you think is the most pressing issue facing the country?” Thirty - nine per cent of the population said finance mismanagement and corruption was the biggest issue. The second was Covid-19 recovery and health at 16.7 per cent, followed by minimum wage and inflation at 15 per cent, and climate change and environment at 13.3 per cent. Following this was roading and infrastructure (9.2 per cent) and human rights issues including LGBTQ+ (2.5 per cent).

Political scientist Dr Bryce Edwards, of Victoria University in Wellington, said he had never seen any other poll around the world show such strong concern about **financial mismanagement and corruption** in a country. “It suggests that there is significant dissatisfaction with politicians and the political process. This element of the Cook Island News poll should be a real wake-up call to the politicians,” Edwards said.

“It really is a highly negative problem, and suggests that the Cook Islands is going to need **significant reform in politics to fix this problem**. “It’s unlikely that the election itself is going to change people’s minds about this concern.”

Edwards said the poll showed the extent that **Cook Islanders were unwilling to put up with corruption and mismanagement.** “It’s always a tribute to a population when they have identified wrongdoing amongst politicians and officials and are very clearly willing to state this is the leading problem.

“Elsewhere in the world – and to some extent in countries like New Zealand and Australia – the public is more complacent about these types of issues, and not because they are not a problem in those countries.” He said if the election result is not seen to fix the problem of financial mismanagement and corruption, then the Cook Islands could be in for a period of political turmoil. “The public dissatisfaction could end up being channelled into other more non-official forms of politics – this could amount to civil society, churches, and non-parliamentary groups pushing for reform through avenues such as **protest and demonstrations against corruption and mismanagement.** “So political candidates would be wise to learn from this poll and adjust their campaigning and commitments to try to convince the electorate that they will address the problem in a meaningful way.”

The President of Citizens Against Corruption (CAC), Paul Allsworth, said he was not surprised by the poll results. Allsworth, who is also running for the Cook Islands United Party in Mitiaro, said the poll correlated to the reality of corruption in the Cook Islands. “It’s a big issue, the problem I see it’s the silent majority not screaming out like New Zealand and Australia.” He said **corruption was becoming a bigger issue in the country.** “We’re going down a really dangerous path and it needs change. The current administration won’t do it. “The corruption levels will only change if there’s a change of government and that’s quite loud and clear.”

Citizens Against Corruption is currently seeking a judicial review via the Court of Appeal over the reinstatement of Deputy Prime Minister Robert Tapaitau, who is facing charges of theft as a servant and conspiracy to defraud. Cook Islands Anti-Corruption Committee chairman Garth Henderson said it was reassuring to learn that a majority of those polled did not tolerate finance mismanagement and corruption. However, he said it was not the major issue it has been portrayed as.

“Alleged financial management and corruption has been made an election issue and has captured the general public awareness,” said Henderson, who is also the Secretary of the Ministry of Finance and Economic Management.

“Many allegations have been made publicly by sources across all media sources but with few details.” **Henderson said corruption was a complex social, political and economic phenomenon that affected all countries**. “At election time, it’s an attractive crowd puller similar to ‘hard on crime’ or ‘war on drugs’ is in other countries.” Henderson said the National Anti-Corruption Strategy was probably the best means of addressing public perceptions of financial mismanagement and corruption through an apolitical lens.

Democratic Party leader Tina Browne said the Party had consistently raised the top three issues in the political poll – with **financial mismanagement and corruption being the Party’s main concern.** “The absence of good governance is unacceptable and people want change for the better,” Browne said. Cook Islands United Party leader Teariki Heather said the Prime Minister had failed to address the country’s level of corruption. Heather said Cook Islands Party leader Mark Brown had left it to Henderson to talk about corruption on his behalf. “**What is clear to the public is the loss of trust and confidence in the Government,”** he said.

“For the past four years, there has been **too many scandals and corrupt activities within Government circles.** “Added to this poor situation, is **the lack of in-depth scrutiny and review by Government and senior officials.”** Heather said he would “undertake urgent reviews to protect public money and resources”.

END.

**Chapter 9 - Conclusions and Recommendations**

The majority of the corruption cases reviewed confirms and supports the preconditions of fraud and corruption as described by the Cressey fraud and corruption triangle model. The preconditions elements of motivation, opportunity and greed prevailed throughout the white - collar cases researched. The unethical cultural and environmental influences affecting each case was metaphorically portrayed through the 4th element of Te Toki e te Kaa Rakau concept, symbolizing their respective unification.

Although there are many external and internal layers of prevention, deterrence, agreements, legislation, regulations and policies directly and indirectly conferred in the fight against ‘corruption’, there appears to be materially nothing that can deter, minimize and stop serious fraud and corruption from occurring.

Clear examples of corruption cases disclosed in the research thesis reveals various ways and methods of manipulation, concealment, coverup, camouflage, instigation and implementation of fraud and serious white - collar crime in the Cook Islands public sector. I will summarize, how each researched corruption case was able to obtain access, infiltrating and ‘**beating the system’** thereby circumventing political, financial and management controls prevailing at the time of the alleged offences;

1.Albert Henry, fly-in voter’s corruption – **High level political collusion.**

2.Sheraton Italian Loan – **Unauthorized sanction by senior officials.**

3.Michael Benns, theft of public funds - **Secret commissions** **and concealment.**

4.Basilio Tutai, theft of public funds – **Falsifying and concealment.**

5. Tepure Tapaitau, MP, breach of electoral act - **Double dipping, concealment.**

6.Edward Drollett, theft of public funds - **Secret commissions, concealment.**

7.Matapo vs Wigmore MPs – electoral act corrupt practices – **Treating.**

8.Peri Vaevaepare, Minister – Misuse of public funds – **Diverting project funds.**

9.Albert Numanga – theft of public funds – **Falsifying and concealment.**

10.Attempt to Nationalize Fuel System – **High level political abuse of power.**

11.Import of Soft Drinks by CITC, **Wrongful customs tariff & conflict of interest.**

12.Tata Crocombe Tax Inquiry – **Tax assessment and no grounds for improper conduct.**

13. Tata Crocombe, Successful Appeal – **Abuse of power, conflict of interest and improper conduct.**

14. Teina Bishop, former Minister, Misuse of public funds – **Misuse of fishing licenses and corruption.**

15. Tina Browne vs Hagai, Electoral petition, **Dismissed and no grounds for treating.**

16. Tina Browne vs Hagai, successful Appeal – **Treating and misdirection by Judge.**

From my technical experiences and qualified knowledge in investigating a range of white – collar fraud and corruption cases in the Cook Islands public sector, over the past 20 years, politicians and senior public officials will use their position of trust and authority to find ways to misuse, misappropriate, steal or divert public funds for personal or political gain. The results being that the opportunity, motivation and greed avails itself in these uncommon circumstances. The prevailing unethical cultural and environmental conditions affecting each case researched are envisaged through the Te Toki e te Kaa Rakau concept.

In my view, I would sufficiently acknowledge that the human behavior traits and attitudes in the key preconditions of the fraud triangle as fittingly described by Dr Donald Cressey are fundamental ingredients that are irrefutable in his model. Greed, motivation and opportunity are the key underlying provocations in the **‘front-end’** segment of fraud and corrupt practices.

Reviewing the flow of public funds, for both cash and for corrupt intended resources, from a historical perspective, is becoming more apparent and clearer, in my view, that a forensic approach in the **‘front-end’** of preventing corruption is virtually near impossible. After careful analysis, and reviewing all the corrupt cases researched using the **Cressey fraud triangle** together with the symbolized ‘**Te Toki e te Kaa Rakau’,** emanating the elements of unethical cultural and environmental indicators, a more **innovative and transformational** **approach** is required. This planned approach will target the **‘back-end’** segment of the intended corrupt payment activity prior to its execution.

**The Consolidated Firewall and Safety Net – CFSN** – Translated, Ai Paruru e te Akamatakiteanga Kupenga. Refer page 492 - Figure 7.

The implementation of a consolidated firewall and safety net through an information technology software program, in addition to the existing computerized payments system, will provide a back-stop and barricade for unusual and sensitive payments. The consolidated firewall and safety net system or CFSN is intended to act as a corruption detection software program that will instantly data mine, analyze, filter, screen and report all requisitions and payments that are extraordinary, materially out of place, politically sensitive, suspicious and unusual and highly questionable in context. However, the CFSN will only be effective if all agencies and government ministries channel all online payments systems through one terminal for consolidation. Payments that fall into the above categories will be ‘red flagged’, isolated and reported for further review and examination. If the payments meet the desired threshold and transaction guidelines then it is processed for payment, if it doesn’t, then it is rejected. All rejected payments are followed up for its intent and explanation from the source and entity.

**Is the CFSN system guaranteed and foolproof?**

The simple answer is no! There are two scenario’s that are external to the operations of the CFSN that may hinder and by-pass corruption detection controls.

1.**Collusion** – collusion is the secret or illegal cooperation or conspiracy between people or an organization, in order to deceive or defraud. A person in-charge with high authority and responsibility is able to over-ride controls with an outside party in order to approve a payment.

Collusion is one of the most difficult types of corruption to expose as it involves high ranking people in high - ranking positions, that takes advantage of their position of trust, to obtain illicit gains.

2.**Bribery –** refers to the offering, giving, soliciting or receiving of any item of value as a means of influencing the actions of a public official of legal duty. Bribery is usually difficult to track and trace unless ‘red flags’ are gradually disclosed along the audit trail, only if suspicion is raised through a whistleblower and evidence is unveiled.

Possible controls to over-ride collusion and bribery offences, is to totally remove the involvement of politicians and senior officials from undertaking any participation in high level agreements, contracts and Government to private business arrangements.

**Artificial Intelligence or AI**

This developing and emerging intellectual system, with future possible research to investigate the application of AI in the prevention and deterrence of corruption in procurement and payments systems. Basically, to explore how AI and other emerging technologies can be integrated to enhance the possible tracing and elimination of corrupt practices within financial management systems BEFORE it takes place. This will only be possible if all procurement and payment systems are connected into one generic online system that is transparent and can be accessed by auditors and forensic examiners.

**Corruption Challenges for the Future**

Given the scale and complexities of various forms of corruption in the Cook Islands public sector, from 1979 to 2018, one of the most pressing questions and policy issues are, what methods and measures are needed to curb and prevent corruption? To answer this problematic question, I have clustered four major areas that requires significant synergy and collaboration from all concerned stakeholders;

**1.Internal Factors – Individual**

There needs to be more educational training and awareness in the virtues of ethical conduct and morals in the community. This could start in the schools and community groups, non-government organizations and the Churches. There must be the political will by Government to sponsor and publicize this program. The Church and community leaders have a major role to participate in this initiative.

**2.External Factors – Environmental conditions – policies and procedures**

Robust and strong anti-corruption policies and procedures must be promoted and enhanced in both the public and private sectors. Community leaders and anti-corruption champions must lead a coordinated determination to bring about change in society. Robust and effective whistle-blower legislation must be implemented to better protect the silent officials who disclose corruption in the public sector.

**3.Legislation – The Parliamentary and Judiciary Arm of the Law**

Legislators have the mandate to effect real change by introducing effective legislation to combat corruption. A Whistleblower Protection legislation is needed to protect and safeguard brave individuals who expose corruption. These changes can be enforced through the justice system of the High Court.

**4.Independent Oversight Bodies**

The appointment of political supporters to Government oversight Boards such as the Public Expenditure Review Committee or PERC and other oversight bodies, such as the Anti-Corruption Committee of Government, headed by heads of Ministries and Agencies, should be discouraged.

An independent oversight agency based on the New Zealand Serious Fraud Office model is the most appropriate and best practice approach in the Commonwealth. International best practice endorses that effective and efficient public sector organizations, cannot review itself, due to the lack of independence and in general, integrity. The United Kingdom, Canada, Singapore, Australia and New Zealand are leaders in anti-corruption institutions and this has reflected in their respective high rankings in the Transparency International Corruptions Perceptions Index.

**Concluding Remarks**

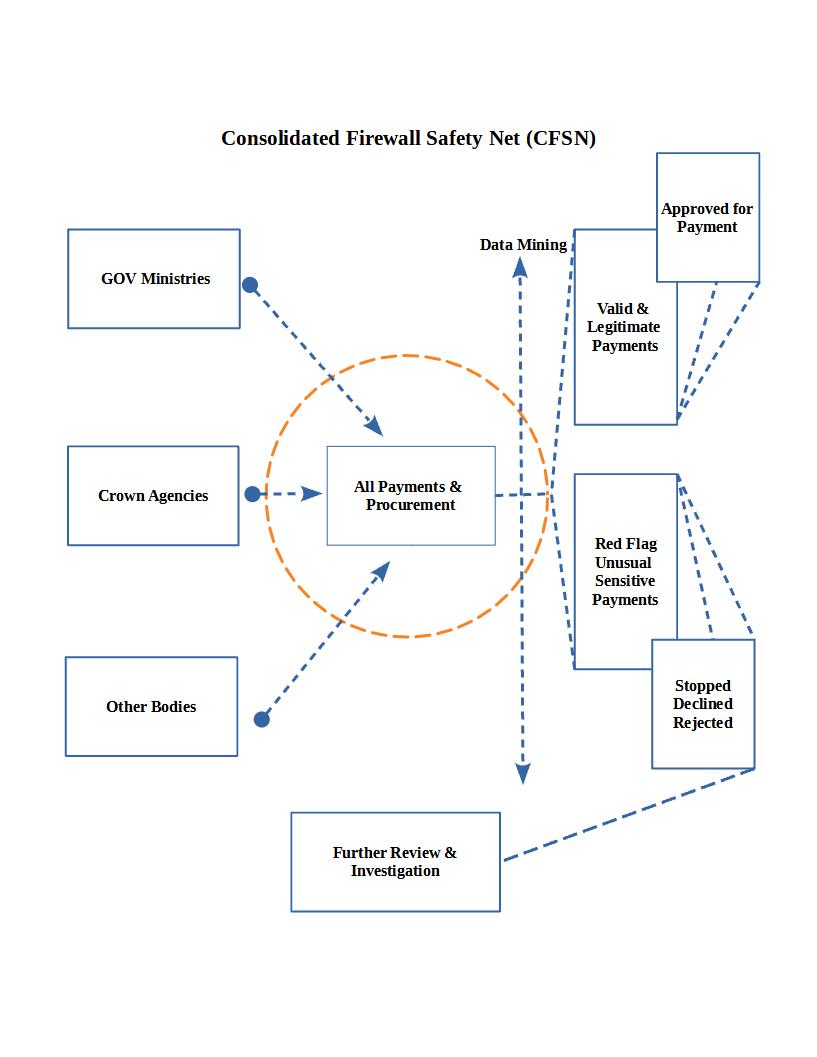
As my research is unique for the Cook Islands and in the Pacific region, being a first of its kind that has predominantly focused on the causes and consequences of corruption in the public sector, based on the **Cressey fraud and corruption triangle model** with adaptation from the hypothetical, **Te Toki e te Kaa Rakau concept**, capturing the unethical cultural and environmental conditions. In my view, the major findings have wider implications on the behavioral psychology of public and private officials that engage in corrupt practices for personal and private gain. This phenomenon is not restricted to the Cook Islands and the existing data and information from international organizations dealing with corruption, this has regional and global significances.

This research thesis has, in detail, described the various intricacies of the causes and consequences of corruption in the Cook Islands public sector. I began the research period from 1978, for two reasons. The first, the 1978 fly-in voter scandal by the former Premier, Albert Henry, was a landmark Court decision by a Chief Justice that completely changed the election result due to corrupt practices. Secondly, from self-government in 1965 to 1977, there was no major fraud and corruption cases recorded in the Cook Islands.

Through the application of qualitative research methods and the extraction of actual white-collar corruption cases, I have uncovered some unknown insights into the reasons why and how corrupt politicians and senior public officials commit such offences and crimes. The significance of my research and the implications of the key findings and conclusions, suggest that potential areas for further research in this field is essential for the study of good (and bad) governance in public administration. Also further research into the behavior and psychology of white -collar perpetrators that carry out corrupt practices.

Further review and research are critical to investigate the intrinsic characteristics of the motivation, opportunity, voracity and greed carried out by white collar public officials that compels them, to commit fraud and corruption. The extrinsic and fundamental motives of perpetrators allure due to unethical cultural and environment surroundings is reflective of the political administration and environment. As corruption is a major world-wide and Pacific catastrophe that is largely man-made with the intent of causing socio-economic harm, regional and international institutions should collaborate with regional governments and anti- corruption agencies to strengthen and develop preventative measures, criminalization and law enforcement. This will potentially minimize and aim to eliminate, the waste of public resources and the restoration of public trust.

**Figure 7 – The Consolidated Firewall and Safety Net Software (Below).**



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**Appendix A: Survey Questionnaire**

SMALL ISLANDS DEVELOPING STATE: THE COOK ISLANDS – THE CAUSES AND CONSEQUENCES OF CORRUPTION IN THE PUBLIC SECTOR – 1978 – 2018.

SURVEY QUESTIONAIRE.

Kia Orana.

My name is Paul Raui Pokoati Allsworth, a PhD doctoral student at the Atlantic International University (AIU). This questionnaire is part of my research for my thesis towards my PhD. The topic of my research is Corruption in the Cook Islands Public Sector, its causes and consequences, from 1978 to 2020.

So, what is corruption? One, common general definition of corruption in the public sector is the “misuse of public position for personal benefit”. It can also be the abuse of power and authority for personal benefit.

I have Diploma’s in Accounting and Management and a Master in Public Administration (MBA) from the University of the South Pacific. I am a Certified Fraud Examiner, a member of the Association of Certified Fraud Examiners (ACFE) and member of the NZ Institute of Internal Auditors. I was a former Director of Audit for over 12 years. I have worked in the Cook Islands Public Service for over 30 years and I am now doing private consultancy work.

Over the past 6 years, I have been collecting data and information relating to this project. The purpose of this questionnaire is to ask you about your personal experiences and perception of corruption in the public sector and in general, the community. Your valuable feedback will assist me in gathering and assessing the information relevant for my research.

The information provided will be collated and analyzed for the purposes of this research thesis only. I do not require your name or any identification. I have received ethical clearance from AIU to not disclose, any of the sources of my information. However, the information collected will assist part of my thesis.

The survey will take about 45 minutes of your time. It is important that you share your experiences and provide your thoughts and answers to the questions. I will need your feedback within the next few days or so, after you have completed it. Thank you very much for taking the time and effort to complete this questionnaire. Kindly contact me once you have completed the questionnaire. Should you have any queries, I can be contacted on mobile number 58850 or on email acsitiki@gmail.com.

INTRODUCTION

1. Village or Island in which you are residing…………………………
2. Age………
3. Gender, M or F
4. Principal or main occupation…………………………… (please indicate if retired) ……………………….
5. Work experience……………………total years working.

6.Religion…………………………(optional)

7.Highest academic qualification achieved……………………………

QUESTIONNAIRE

1. Do you believe that the virtues of honesty and integrity are important? Circle Yes or No.
2. Explain why these virtues important?

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1. Do you believe corruption is a serious matter in the Cook Islands public sector? Circle Yes or No. Explain, why or why isn’t important?

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1. What do you perceive are the major types or forms of corruption in the public sector?

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1. What do you perceive are the major reasons for corruption in the public sector?

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1. In your view, what are the best ways to address corruption in the public sector?

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1. Do you believe that Members of Parliament and Government officials should have signed codes of conduct and ethics in their respective workplaces? Circle Yes or No.
2. Explain why such ethical codes are important in the workplace?

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1. Have you personally come across an unethical or corrupt issue within the public sector, or with a colleague? Circle Yes or No.

Explain the unethical or corrupt issue you have encountered and how was it resolved?

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1. Have you come across any employee or employer who was involved in any unethical or corrupt activity? Circle, Yes or No?

If yes, briefly explain what took place and how was it resolved?

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1. In your view, what do you believe drives some people to commit unethical or corrupt practices in the public sector or the work- place?

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1. What measures do you believe needs to be implemented in the public sector or the workplace to minimize and try to combat corrupt practices from occurring?

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1. If you were an employer and in the process of interviewing and recruiting staff, how would you ask important questions such as integrity, personal values and honesty? This relates to trying to employ honest staff.

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14.Finding out the attitude and behavior of a potential employee’s is difficult. How would you go about trying to find this out before an interview?

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15.Would you report a staff member, a close friend or a family member in a workplace, who has misappropriated funds from the workplace due to financial struggles, or other reasons? Circle, Yes or No.

Explain your answer, either why you would or why you wouldn’t report.

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16. What is your perception of leaders in Government holding high positions such as Heads of Ministry, CEO, Board members, MPs and Cabinet Ministers?

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17. Explain why you have rated or commented on them in the manner you have perceived them?

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18. In a small country such as the Cook Islands, families are an integral and important part of the community. Do you believe that close family members, say, relation to an MP, Cabinet Minister or a HoM, should be employed in high positions, because of their political connections and affiliations? Explain your comments.

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19.Would you agree that employment on merit, such as relevant skills, qualifications and work experiences, should be more important than any political or family connection or affiliation? Circle Yes or No and kindly explain below.

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20. Our culture and cultural environment influencers and impacts on the way we do things, how we engage, who we employ and undertake various tasks in the workplace. Do you believe cultural practices has a part to play when staff and employees in general, engage in corrupt practices? For example, a gift is traditionally seen as a gesture of goodwill. But in the modern day management, it could be seen as a bribe? Does culture influence people’s behavior? Explain, your comments.

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21. How would you rank accountability, that is, making staff, people and government accountable for their actions? Explain your comments.

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22. How would you rank transparency, that is having an open and honest person, staff or government? Explain your comments.

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23. The Church and a person’s religious beliefs plays an integral role in a person’s character. In your view, does this part affect a person’s motives and objectives in carrying out unethical and corrupt practices? Explain your comments.

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24. Dr Donald Cressey, a distinguished criminologist from the United States, in the 1970’s, implemented the fraud and corruption triangle, on why people commit occupational wrongdoing and fraud. These are;

1. Motivation or Pressure – a perceived un-shareable financial need.

2. Opportunity – a perceived opportunity to commit fraud or a corrupt practice.

3. Rationalization/Greed – justification to themselves why their fraud is justified and ‘okay’.

Do you agree with Dr Cressey’s analysis? Circle Yes or No.

Explain your comments and any other influencers or attributes other than the above, why people behave in such a manner?

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25. In order to curb corruption, in the public sector, or the community, what actions would you implement to tackle these major issues? And how would you go about doing it?

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26. Are there any other comments, either specifically or in general, you want to elaborate on corruption, public maladministration in the public sector or other relevant subject matters on governance?

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This is the end of the survey. I fully appreciate your sincere comments and suggestions towards this research project.

Meitaki ranuinui.