



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

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

Your Majesty,

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

Respectfully,

Commissioner Warwick Andrew C.B.E. , C.R.H.
CHAIRMAN



Commissioner Richard James
NAVAL ARCHITECT



Commissioner Michael Handfield
MASTER MARINER



Dated: 31st March 2010



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

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Honourable Tu'ilakepa
The Speaker
Legislative Assembly of Tonga
NUKU'ALOFA

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EXECUTIVE SUMMARY

Princess Ashika - Japan

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

Princess Ashika - Fiji

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

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

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

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

In the years leading up to the MV Princess Ashika’s eventual departure from Fiji, the condition of the vessel steadily deteriorated. The owners resisted fulfilling the requirements of the Fiji Marine Board surveyors in regard to repairs and maintenance. Some major repairs, required by the surveyors following the vessel’s dry docking at the end of 2008, were never carried out.

In August 2003, the MV Ovalau II, a vessel of similar design to MV Princess Ashika and also owned and operated by Patterson Brothers Shipping Company Limited, foundered off the Nananu-i-Ra Passage in Fiji. A Marine Court of Inquiry in the Fiji High Court in 2005 found a cause to be the poor condition of the vessel.

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

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

Princess Ashika - Tonga

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

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

During every one of the first four voyages in Tonga the MV Princess Ashika's sides were breached by the sea and required steel plates welded on to replace the highly corroded and holed plating. Despite the regular damage to the ship and the regular ingress of sea water onto the cargo deck with the resulting damage to cargo, it appears that this did not cause any concern with the operator's management.

The fatal final voyage commenced and ended tragically on 5th August 2009. MV Princess Ashika departed Nuku'alofa at about 16:35 hrs with 96 passengers, 32 crew and 110 tonnes of cargo. As the vessel cleared the shelter of the land, water started to enter the cargo deck around the bow ramp and via holes in the deck of the crew mess room. The water continued to build up as the evening progressed due to the poor drainage in the cargo deck. The crew on watch made regular safety rounds of the vessel and reported to the officer on navigation watch. This is fully described later in the Report but suffice to say here, the accumulation of sea water on the cargo deck was not prevented by the crew, nor was any serious action taken to remove the water.

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

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

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

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

The reasons why the loss of lives attained such magnitude

The high loss of life was due to a number of factors, but mainly the following. Firstly, the crew failed to appreciate the danger and take actions to prepare to abandon ship such as sending a PAN urgency message to summon assistance, issue lifejackets, and prepare life

rafts. Secondly, the design of the passenger lounge did not allow easy egress, trapping most inside. Thirdly, the rapid rate of the final capsizing.

The Search and Rescue

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

Causes of the Disaster

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

Broadly put, the causes were:

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

At the heart of the above causes was:

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

Design of the MV Princess Ashika

In 1972, the MV Princess Ashika was built in Japan for service in the Inland Sea of Japan as a short range, smooth water, passenger and vehicle carrier. Even if the vessel had been new, the design was totally unsuited for service in the open seas in Tonga, because of its “open”

construction. It had inadequate bow design, absence of freeing ports to allow drainage of water from the vessel and no enclosed cargo area.

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

Seaworthiness of MV Princess Ashika

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

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

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

The MV Princess Ashika was regularly inspected, for many years, by surveyors and officers of the Fiji Islands Maritime Safety Administration (FIMSA). The FIMSA files demonstrate that the vessel was in a terrible state of disrepair and had been deteriorating rapidly over a

number of years. We adopt, as an accurate opinion and assessment of MV Princes Ashika, the remarks made by a FIMSA surveyor involved in the annual survey of the vessel on 16th December 2008, where he said:

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

The Circumstances Leading to the Purchase of the MV Princess Ashika

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

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

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

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

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

On 17th March 2009, the Board of Shipping Corporation and Lord Dalgety QC considered, at a formal Board meeting, an option paper with costings. The meeting was Chaired by Hon.

'Alisi Taumoepeau. Mr. Jonesse as Managing Director was present, as was Rev. Tevita Haukinima (as a Director) and Lord Dalgety QC (as Company Secretary). It was clear to all at the meeting that realistically there were only two options in relation to the MV Olovaha. That is, either maintaining the MV Olovaha in service or replacing the vessel without delay.

The Directors unanimously resolved to:

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

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

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

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

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

- “(1) *to recommend to His Majesty’s Government that they purchase the MV Princess Ashika.*
- (2) *to remit to the Managing Director to negotiate with His Majesty’s Government (for submission to the Board for approval) terms for a time charter by service of the new vessel to Shipping Corporation of Polynesia, preferably in NYPE (New York Produce Exchange) format.*

- (3) *to authorize the Managing Director to travel to Fiji as required to assist with survey, inspection and acquisition of the new vessel.” (Exhibit 507)*

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

The Cabinet resolved by Resolution No. 2:

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

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

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

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

Notwithstanding the advice of the Solicitor General, Mr. Karalus proceeded to sign a cash unconditional contract for the purchase of the MV Princess Ashika, on behalf of the Government, from Patterson Brothers Shipping Company Limited. The contract was signed in Mr. Karalus’s office on 8th May 2009. He asked for Ms. Mone, the CEO and Secretary for Transport, to also sign it. He organised for it to be witnessed by Mr. Jonesse. The purchase price pursuant to the contract was FJD\$600,000. It effectively provided, as signed, for the

entire purchase price, represented by a deposit of FJD\$90,000 and the balance FJD\$510,000 to be paid by 8th May 2009. The contract provided that the Government of the Kingdom of Tonga was required to pay the entire purchase price irrespective of the condition, merchantability and fitness for purpose of the vessel.

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

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

Failure to conduct Due Diligence by Shipping Corporation of Polynesia Limited

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

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

- Before a prospective owner of a vessel, such as MV Princess Ashika, was going to purchase the vessel, proper due diligence needed to be conducted.
- He knew that the Government of Tonga was the proposed purchaser.
- The single shareholder of the SCP was the Government of Tonga.
- Proper due diligence would include an independent survey conducted by a person of appropriate qualifications and experience; an independent valuation and checking and verifying documents in relation to the vessel.
- The Ministry of Transport would not be independent for the purposes of conducting any survey.
- The failure to carry out independent due diligence prior to the purchase was a major contributing factor to the disaster.

- The MV Princess Ashika was clearly unseaworthy and unsafe prior to its purchase and continuously until it sank on 5th August 2009.
- The purchase price of FJD\$600,000 (plus 15% tax) was a significant investment on behalf of the Government.
- There were serious question marks raised at SCP Board meetings about the reliability and seaworthiness of the MV Olovaha, which needed to be replaced.
- The main source of income of SCP was dependent upon the successful operation of a single ferry, which was temporarily intended to be the MV Princess Ashika
- SCP was always intended to be the operator of the replacement vessel.
- He was aware that there were numerous offences if owners or operators failed to protect the safety of life at sea.
- He “*overlooked*” that the definition of “*owner*” under the *Shipping Act* effectively covered an “*operator*” such as SCP.
- SCP had an obligation to ensure that it did not send a ship to sea which was unseaworthy and, in his words, it would be “*a stupid thing to do*”. (T 6222 – 6227)

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

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

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

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

In fact, no independent due diligence was conducted on behalf of SCP even to the time of the sinking of the vessel on 5th August 2009.

Mr. Jonesse, the CEO and Managing Director of SCP, clearly misled the Board and Company Secretary of SCP as to the condition of the MV Princess Ashika, as he did others. His conduct and actions were deplorable. The members of the Board and Company Secretary of SCP well knew that the papers he regularly presented to the Board were “*terse*” and did not contain sufficient information to make an informed decision. The Board and Company Secretary should have insisted that independent due diligence be conducted to avoid, as occurred, being misled at the time that the recommendation was made on 21st April 2009 for the Government to purchase the vessel. Even without having independent due diligence being conducted, they should have been more vigilant. If they had, the vessel should never have been purchased or operated.

Failure to conduct Due Diligence by the Government

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

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

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

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

Princess Ashika on behalf of the Government. These are both serious failings that should never have been allowed to occur.

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

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

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

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

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

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

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

for Transport, had authority under the *Shipping Act* to detain the vessel. He should have done so.

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

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

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

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

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

If Mr. Karalus had properly carried out his duties and responsibilities as the Minister of Transport, the MV Princess Ashika should never have been purchased. Having arrived in Tonga on 1st July 2009, if Mr. Karalus had acted responsibly, the MV Princess Ashika should never have been allowed to sail. Mr. Karalus cannot avoid his duties and responsibilities as Minister by simply saying that Mr. Jonesse misled him or that he relied on others. If he had

properly carried out his duties, independent due diligence would have been conducted on behalf of the Government. It would thus have been patently obvious that any statements made by Mr. Jonesse to the Minister as to the favourable condition of the vessel or the maintenance of it, were false, just as were many of the statements Mr. Karalus made to others. Mr. Karalus well knew, irrespective of what Mr. Jonesse told him, at least by the time the vessel sank on 5th August 2009, that the vessel was “no good”.

Evidence leading to any criminal act contributing to the disaster.

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

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

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

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

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

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

Evidence leading to any civil responsibility for the disaster

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

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

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

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

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

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

Proposals to Promote Maritime Safety

The Commission's Term of Reference "(f)" states as follows:

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

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

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

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

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