

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)**

OA

/2022

IN THE MATTER OF the Infrastructure Act 2019

AND

IN THE MATTER OF certain lands that comprise and adjoin the
Manihiki Airport

AND

IN THE MATTER OF the need for an order of the Court to allow
the construction of new infrastructure on
those lands

AN APPLICATION BY JOHN MARY NIMETI NIMETI, as
Executive Officer of the Manihiki Island
Government acting as Infrastructure
Manager

Applicant

MEMORANDUM OF COUNSEL

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MAY IT PLEASE THE COURT

1. This memorandum is brought in support of the application for directions as to service.
2. The substantive application arises out of the urgent need to start work on the long-delayed upgrade and extension of the Manihiki airport, which serves both that island and Rakahanga.
3. The affidavit of John-Mary Nimeti Nimeti, the Applicant, filed in support of this application, and the recitals to the draft (informally signed) Enduring Agreement sets out the history of this matter.
4. In brief, alongside the logistical difficulties of an ambitious project of this sort in such a remote location, there has been the Crown's wish to acquire some right or interest in the affected lands, given the importance of this public asset for transport and communication to and from the Northern Group.
5. It had been thought the impracticality of determining the identity of owners of what is – entirely – customary land – would compel the taking, by warrant, of the entire area.

6. However, one aim of the Infrastructure Act 2019 is to treat the taking of land by warrant (and consequential extinguishing, in this case, of the customary ownership) as a last resort.
7. Customary owners of the lands residing on Manihiki have been strongly supportive of this project to upgrade the Airport for many years. In fact the majority of the affected land has been used continuously for airport purposes since the mid-1980s (almost 40 years) without the need for the Crown to take any formal interest in the land. Questions have been asked, though, about the need for the Crown to take the land.
8. Against this background, an Enduring Agreement was prepared in draft. The document remains a draft and the purported execution by the on-island customary owners in May 2022 is entirely informal; it is though, a clear and strong indicator of a willingness – of customary owners on the island at least – to support and embrace this concept and the project.
9. It will not, though, be practicable to have owners bind themselves by way of Enduring Agreement. Under the Act, customary owners on those islands over which the Land Division does not exercise jurisdiction are competent to do so. However, in the case of Manihiki, the Act (see section 7(1)(d)) recognises the role of the Court in determining the issue of ownership and thus of the standing of owners, validly, to execute an Enduring Agreement.
10. It is for this reason that the assistance of the Court is sought. Although customary owners on Manihiki cannot bind themselves under the Act by way of an Enduring Agreement, there is good reason to prepare such an agreement: section 8(3) of the Act provides:

If the Court makes an order under section 47, that order is to be treated as if it were an enduring agreement, unless or until, and only to the extent that, it is subsequently varied by agreement between the parties or by the Court.
11. Since the Applicant comes to Court seeking an order under section 47, it is clearly appropriate that so far as practicable, he take the necessary steps to take up all matters that would be found in an Enduring Agreement.
12. As to service; the Applicant, living and working on the island, has a good understanding of those there who regard themselves as customary owners. However, he recognises that there are likely other customary owners that are absent from the island, either elsewhere within the country or overseas (most likely in New Zealand or Australia).
13. He understands there are many, overseas, who have blood links to these lands. Whether or not, as a matter of custom, they are now regarded as owners, the Act was drafted broadly, to allow all wishing to be heard on a matter such as this an opportunity to do so.
14. Specifically, section 46 provides that any of the following may give evidence and address the Court in support of, or opposition to, the application:
 - a. the applicant:
 - b. every person served with notice of the application:

- c. any person who satisfies the Court that the person would be affected by the proposed work to a greater degree than a member of the public generally.:

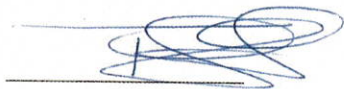
15. In the circumstances of this case, and seeking to balance the need to progress matters quickly, with the rights of customary owners to have notice of what is in prospect, it is proposed, for the reasons set out in the Applicant's affidavit, that notice of this application be given as follows:

- a. that copies of the substantive application, the Applicant's affidavit, and the draft Enduring Agreement (specifically, a copy of that informally executed be held at the Island Administration Office (Corporate Services) office in the village of Tauhunu and at Island Administration Office (Corporate Services) office in the village of Tukao, available for public viewing during normal office hours in each case.
- b. That there be public notice in the Cook Islands News, Cook Islands Herald, and on Cook Islands Television (on three separate occasions at least five days apart) notifying customary owners and others having an interest in the lands, an opportunity to view the materials either in hard copy at the Avarua Courthouse during normal working hours or by accessing PDF copies on the website of Infrastructure Cook Islands at <http://ici.gov.ck>
- c. That the notice also be passed to the moderators of the following Facebook and other social media sites with a request that it be posted in order to bring it to the attention of those who are, or may believe themselves to be customary owners of the land or otherwise affected by the making of an order:
 - i. Facebook- Manihiki Whanau; and
 - ii. Facebook- Manihiki Henua Queensland Inc'; and
 - iii. Facebook/Messenger- Principal G Nehemia (President of Manihiki Association in Auckland, New Zealand); and
 - iv. Facebook/Messenger- Terry Tuhe (President of the Manihiki Community in Sydney, New South Wales, Australia).

16. It is suggested that the Notice (the form of which is to be approved by the Registrar both as to its English and Cook Islands Maori language versions) provide that any person who wishes to be heard on the application should give notice to the Registrar with a copy to be served on the Applicant's solicitor not later than 31 August 2022.

17. The Court will note that the Applicant seeks to have a meeting convened as contemplated by section 46 (3) of the Act. Counsel anticipates that in advance of the next call of this matter, notification of this application in the manner now sought would allow the Applicant to advise the Court as to the nature and extent of interest in the application beyond those on the island itself who are already closely engaged in the process.

Dated at Rarotonga this 25th day of August 2022



Counsel moving