

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

OA NO 1028/2022

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

NIMETI NIMETI, as Executive
Officer of the Manihiki Island
Government acting as
Infrastructure Manager

Applicant

JOINT MEMORANDUM OF COUNSEL

MAY IT PLEASE THE COURT

1. This joint memorandum is filed by the parties as indicated in the hearing of 23 February 2023 and as noted in Your Honour's Minute No 4, just to hand.
2. Counsel can confirm that subject to the outstanding issues identified in Your Honour's Minute, counsel expect to be in a position to invite the Court for orders to be made under section 47 of the Infrastructure Act 2019, on the terms detailed in the form of Enduring Agreement filed with this Memorandum;

Overview

The position reached to this point may be summarised this way:

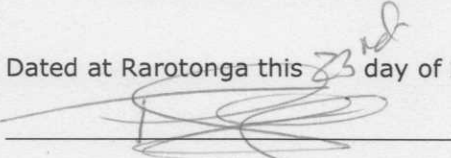
- a. Attached is the current draft of the Enduring Agreement which will be put up on the websites as directed over the course of the day; Mr Arnold and Mr Vaevae were able to talk last evening and following that Mr Arnold passed a copy of that draft on, along separately with ICI's updated general scope of works.

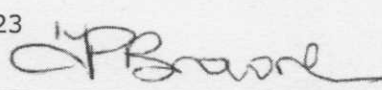
- b. One small matter that bears noting is that the Enduring Agreement is for an indefinite period; it is not an alienation limited to 60 years; conversely, if its terms are breached or the land is no longer needed, its life may be considerably shorter; Technological changes in air travel and the looming threats of Climate Change and sea level rise are likely to influence the duration of its use as an aerodrome.
 - c. Leaving aside the remaining issues in contention., the consent position reached envisages that steps will be taken to ensure customary owners have the opportunity to have title to their lands investigated and thus the making of freehold orders for the airport lands; the Crown has agreed to assist in that regard in the manner set out in the draft order
 - d. If landowners of all the airport lands are then (or subsequently) incorporated under the Land (Facilitation of Dealings) Act 1970 and if that Incorporation calls for the Crown to execute an Enduring Agreement, then the Enduring Agreement will be largely in the terms of that which forms a schedule to the draft order, and it will be substituted for the order itself.
 - e. The parties are agreed as to the undesirability of having part of the airport lands utilised under this order, and part under the Enduring Agreement; they also recognise their common interest in there being a representative body of airport owners if owners can agree among themselves; it is for these reasons that the parties agree that incorporation should be seen as a prerequisite to an executed Enduring Agreement superseding this order.
 - f. The parties recognise that the current form of the Enduring Agreement references customary land, but are confident that in the context of any subsequent execution, at which point the land will be native freehold land, the Court and the parties, at the time, will be able to conform the executed Enduring Agreement to reflect both the change of the lands' status and the incorporation.
 - g. Side clearance zones will be used for aircraft operations during the construction period, as required, to allow uninterrupted availability of the airport to Bandierante aircraft operating to the special dispensation requirements of Civil Aviation legislation that apply to emergency flights. Parties agree that this is necessary and appropriate.
 - h. In terms of "adequate compensation", landowners have agreed to substantial compromise, noting in this regard the further and final valuation of Mr Eggelton, that is now considered appropriate both as to methodology and assessment:
 - i. Specifically, the parties are agreed that the "bundle of rights" represented by this consent order and the Crown's commitments as set out in the form of Enduring Agreement should be held by this Court to be "adequate compensation" in all the circumstances of this case. The agreed financial terms are as set out in the form of Enduring Agreement attached to the draft order.
3. The form of Enduring Agreement has, as introductory provisions, a summary of the history of this matter and the wishes and intentions of the Crown and landowners;


the parties confirm that summary may be accepted by the Court as an agreed summary of facts, for the purposes of making the order now sought.

4. The form of Enduring Agreement reflects the fact that it will take effect as part of this Court's orders and, accordingly, provisions relating to execution have been removed. In this circumstance, and noting that the document is intended to bind the Crown specifically through both ICI and CIIC, Mr Arnold and Mr Herman, respectively, have sought and obtained authority to sign this Memorandum to confirm that is the intended effect of the order.
5. The Crown having agreed to resource a sitting in Manihiki of the Land Division of the High Court once the Saab operations commence, on the basis set out in the draft order, the parties respectfully seek the support of the Chief Justice in ensuring the allocation of a Judge in advance of that, so that necessary preliminary work can be undertaken prior to that sitting.
6. This is a matter of particular concern to the Crown; it has been asked to meet the reasonable legal costs of both Mrs Browne and Mr Holmes in connection both with this application and their appearances in Manihiki. The draft order provides for those to be as agreed, or failing agreement as determined by Your Honour.
7. The Crown, however, has agreed to this on the basis that there is in fact substantial agreement as to ownership so that consent orders can be confidently anticipated; parties do note the overlapping representation of Mr Holmes and Mrs Browne as advised by landowners; that may foreshadow some greater degree of dispute between and among owners.
8. The Crown embraces landowner choice to convert customary land to native freehold land, and will meet those reasonable costs of counsel as part of the 'package' of compensation/consideration for these owners. It cannot, however, agree to fund contending claimants in any disputes as to ownership; the assistance of the Court, by way of directions, will be needed to draw a clear distinction between these two aspects of the investigation process; this is accepted and agreed as a matter of principle by landowners.
9. The matters above, and the draft order and lease have been agreed by counsel as a basis for seeking further directions from the Court; this joint memorandum and those attachments will be forwarded Mr Vaevae at the same time as it is filed; all parties before the Court therefore look forward to receiving the comments and considered view of the Court to the proposed orders and form of Enduring Agreement.

Dated at Rarotonga this ^{23rd} day of February 2023


Counsel for the Applicant, Mr Arnold


Counsel for the Customary Landowners, Mrs Browne


Counsel for the Customary Landowners, Mr Holmes


Counsel for CIIC, Mr Herman

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TIM ARNOLD P.C
Solicitors
Avarua
Rarotonga

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ORDERS PURSUANT TO SECTIONS 44 AND 47 OF THE INFRASTRUCTURE ACT
2019

Before His Honour the Chief Justice, Patrick... Keane
day, the day of February 2023

UPON READING the Application filed in these proceedings;

AND NOTING the subsequent compliance with directions issued by the Court as to notification of the Application and to ensuring appropriate representation of customary landowners of the affected land;

AND HEARING both Counsel for the Applicant and those acting for customary landowners, and from such of those owners choosing to appear in person

AND NOTING the position of agreement reached in the joint memorandum of counsel filed

AND NOTING the appearance of Mr Arnold for the Applicant with authority to bind Infrastructure Cook Islands and of Mr Herman for Cook Islands Investment Corporation with authority to bind that Corporation

AND BEING SATISFIED

- a. the construction of the new infrastructure is reasonably necessary and given that the affected lands currently host and adjoin the existing runway, the use of alternative land would involve the Applicant in unreasonable costs or technical difficulties; and
- b. as the affected lands are customary land it is not feasible to identify and communicate with all possible owners of the lands
- c. the Applicant has taken all reasonable steps to obtain the consent of all owners required to be served and has complied with other relevant requirements of this Act;
- d. the conditions of the order sought are fair and reasonable to all parties;
- e. given the public interest in a prompt and accurate determination of the respective rights and interests of customary owners, and their wish to have freehold orders made for their individual lands, provision should be made for a prompt judicial determination of those matters; and
- f. generally, as to the circumstances of the case

NOW ORDERS THAT:

- A. Under the powers of the Court conferred by sections 44(2) and 47 of the Infrastructure Act ("the Act"), on the terms detailed in the Enduring Agreement attached to this Order.
- B. That work is to be carried out in accordance with the approvals obtained under the Environment Act 2003;
- C. The Crown must ensure that at all times during the construction period, either the airstrip itself is available, or failing that, one or other of the side clearance zones, are available to enable a Bandierante aircraft (or similar) to land and depart the airport, to carry out, safely and lawfully, any necessary emergency flight.
- D. That Enduring Agreement may, at any time after due incorporation of landowners of all the lands to which this order applies, be executed by that Incorporation and the Crown must, in that circumstance, likewise execute that Enduring Agreement; parties have leave to apply to this Court to resolve any dispute as to changes to that draft Enduring Agreement rendered necessary by any change of law occurring between the date of this order and the date of the execution of the Enduring Agreement.
- E. For so long as that Enduring Agreement remains unexecuted by the incorporation, the rights of the Applicant will be those conferred by the Act and those rights are to be exercised in accordance with the Act and with this Order.
- F. Upon full execution of the Enduring Agreement, its terms will supersede those of this Order, and the relationship between the parties will be governed, except insofar as inconsistent with the terms of the Act, by that Enduring Agreement. Nothing in this paragraph affects the validity or effect of anything done in reliance

upon this Order, nor to affect any accrued rights or liabilities of parties under this Order.

- G. The Crown having undertaken to fund the necessary special session of the Land Division of the High Court, sitting in Manihiki, directly the airstrip is complete and open for regular air services by Saab aircraft, the Registrar of the High Court is to schedule such a sitting at the earliest practicable opportunity on the basis:
 - a. That sitting will be for no less than five sitting days; and
 - b. The business of the Court will have, as its priority, the applications for the making of freehold orders for the Manihiki Airport land; and
- H. The Crown will meet the reasonable legal costs of both Mrs Browne and Mr Holmes in connection both with this application and their appearances in Manihiki as detailed in the Enduring Agreement, or failing agreement as determined by the Court.
- I. Leave is reserved for any party presently before the Court to apply for further orders and directions, these proceedings to lie in the Court for the duration of the construction and the holding of the anticipated Land Division session, for that limited purpose.

DATED at Rarotonga this day of February 2023

BY THE COURT

(Deputy) Registrar of the High Court

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