



NIUE
RESPONSIVE FUND
MATERIALS

LAND COURTS BENCH BOOK



Foreword

Fakalofa lahi atu

It is my privilege to introduce the *Niue Land Court Bench Book*.

The *Bench Book* is a carefully constructed and highly useful judicial tool. It is for the guidance of Commissioners. I commend it, not because it is a full and complete explanation of the judicial process but because it is a highly useful handbook and will help Commissioners avoid most of the pitfalls in judicial decision-making. It is not prepared by the Judges of the High Court of Niue and does not operate as a judgment or create a precedence.

It has been said that in a democracy, the courts belong not to the judges and the lawyers, but to the citizens. There is no better proof of this statement than where citizens themselves are the judges. The office of Commissioner of the High Court is therefore an extremely important part of Niue's judicial system, and this office carries with it a heavy burden of responsibility towards the citizens of Niue.

Every Commissioner, whether newly appointed or experienced, must have a sound understanding of their judicial and constitutional position, as well as a thorough understanding of the fundamental principles of Land Division matters, of the rules of evidence, and of the procedure of the Court. This *Bench Book*, which will support a programme of training and provide an ongoing reference resource for Commissioners, will greatly complement the inherent wisdom and abilities of the Commissioners of our jurisdiction. It is constructed in a manner so that it can be applied on a day-to-day basis in the administration of justice in Niue.

I hope that the Commissioners will read it carefully and regularly re-read it.

I commend and congratulate those who have been involved in the planning and construction of the *Bench Book*. I would like to thank Deputy Registrar Darren Tohovaka, National Coordinator for the Niue Judicial Education and Development Committee, and Tina Pope for their excellent work in the production of the *Bench Book*, under the oversight of the Secretary for Justice and Registrar of the Niue High Court, Justin Kamupala, and with assistance from Deputy Registrar Celina Tiakia. I acknowledge and appreciate the financial and technical assistance from the governments of New Zealand, through MFAT, and Australia, through the Federal Court of Australia, and particularly thank the Pacific Judicial Development Programme (PJDP) for making this publication possible.

Fakaue lahi
Monuina mai he Atua

P J Savage
Chief Justice
8 June 2012



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Chapter 1: The legal framework

This chapter provides some useful information about the legal framework in which Commissioners work, including important principles that you must understand as a judicial officer. It sets out the constitutional framework of Niue and describes the courts and sources of law in Niue.

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1 The Constitutional framework of Niue

1.1 Niue's Constitution

Niue's Constitution came into force on 19 October 1974 and is found in the Niue Constitution Act 1974.

The Constitution details the basic elements of Niue's system of government by defining:

- the roles, responsibilities and powers of the Executive, the Assembly and the Judiciary;
- the organisation and structure of the legal system; and
- the requirements of citizenship and details related to finance, land and leadership.

See "4.2 The Constitution", below, for more information.

1.2 The doctrine of separation of powers

The Constitution gives effect to the doctrine of separation of powers. This doctrine states that there should be three distinct and separate branches of government.

1. **The Executive: administrator and policy maker.**
2. **The Legislature (the Assembly): law maker.**
3. **The Judiciary: interpreter of law and finder of facts; charged with the application of the law to particular cases.**

Each branch of government checks the roles and functions of the other branches. This maintains the balance of power between the three branches and prevents the improper use of power.

1.3 The branches of government in Niue

Head of State

The executive authority of Niue is vested in Her Majesty the Queen of New Zealand. New Zealand's Governor-General is her representative in relation to Niue. See Art 1 of the Constitution.

The Executive

The role of the Executive is to formulate and implement government policy. The Executive effectively runs and controls the affairs of the country in accordance with the law.

The Executive and the legislature are separate and distinct even though they have many people and positions in common.



The Executive is made up of the Premier and the Cabinet of Ministers.

- The **Premier** is a member of the Niue Assembly. He or she is elected by a majority of the members of the Assembly who are present and voting at the first meeting of the Assembly after a general election.
- The **Cabinet** has four members. It is headed by the Premier and consists of three other Ministers who are:
 - from the Assembly;
 - nominated by the Premier with their consent; and
 - appointed by the Speaker of the Assembly.

The Premier allocates which Minister will look after each government department. This includes the Minister that looks after the Justice Department and the Judiciary.

The Assembly of Niue (the legislature)

The Assembly is established under Article 16 of the Constitution.

The Assembly:

- has 14 members elected from village constituencies;
- has six members elected by persons from a common electoral role;
- is presided over by a Speaker, who is elected by the Assembly; and
- is dissolved every three years unless it has been dissolved earlier.

The Assembly's role is to "make laws for the peace, order and good government of Niue, subject to the Constitution". In doing this, the Assembly:

- approves the expenditure of money;
- conducts debates on bills and enacts statutes; and
- provides a forum for political debate.

Note that the Constitution gives immunity to members of the Assembly when they are acting in their official capacity. No civil or criminal proceedings can be instituted against a member of the Assembly for:

- exercising their powers in conducting the business of government; or
- words spoken in the Assembly or included in a report or paper to the Assembly; Article 24(2) and (3) of the Constitution.

The Judiciary

The Judiciary is the third branch of government. It:

- is an **independent** body which is responsible for interpreting and applying the laws made by the Assembly of Niue;
- develops and interprets case law; and
- resolves disputes of fact and law between individuals, and between individuals and the State.

The Judiciary is made up of Judges, Commissioners and Justices in the High Court, and Judges in the Court of Appeal and the Sovereign in Council (the Privy Council in England).



1.4 How the branches of government check and balance each other

The Executive—that is the Cabinet—formulates policy, which can only be put into action through the passing of laws. It is the Assembly that makes the law and so the support of the Assembly is required. The Judiciary interprets the laws and applies the law to particular cases.

This is the fundamental basis of our legal system. It is not for the Premier or Cabinet Ministers, or indeed any other person, to say what the law is. That is the task reserved exclusively to the courts.

In interpreting statutes, Judges also add to the law by stating principles which amount to law. Where the Assembly does not accept those principles, it can pass a further statute to change them. Thus Niue has a system whereby the Assembly makes the laws, the courts interpret them, and if the Executive (Cabinet) is not satisfied, they can ask the Assembly to change it. We can see from this that the system balances itself.

Independence of the Judiciary

The independence of the Judiciary is an important element of the doctrine of separation of powers and is vital for maintaining the balance of power. Although the Executive allocates funds, premises, supporting staff and services for the Judiciary, judicial officers must be independent and free from all political or other influence in carrying out their duties and in making decisions. They stand between the Executive and the people.

The independence of the Judiciary is protected by:

- the Constitution;
- the processes of appointment and removal of judicial officers, and their conditions of appointment; and
- immunity from civil actions.

For example, a Commissioner cannot be removed because, for example, a Minister disagrees with their decision. They can only be removed for inability or misbehaviour, and this requires a recommendation from the Chief Justice.

1.5 Local government

Village Councils provide governance at a local level. They are elected under the Village Councils Ordinance 1967 and s 50 of the Niue Act 1966.

Village Councils have the power to make bylaws: s 51 of the Niue Act 1966. The bylaws can relate to such things as village planning, housing and control of animals. See the Village Councils Ordinance 1967.

Note that many of the matters that once could be dealt with through village bylaws have now been legislated by the national government. Village Councils do not have a great deal of involvement with the Land Court except, for example, if there is a wider community interest in a particular piece of land (for example, land to be set aside for church purposes) or if the Court directs the Village Council to hold a meeting to help in a dispute over land.



2 Niue's court system

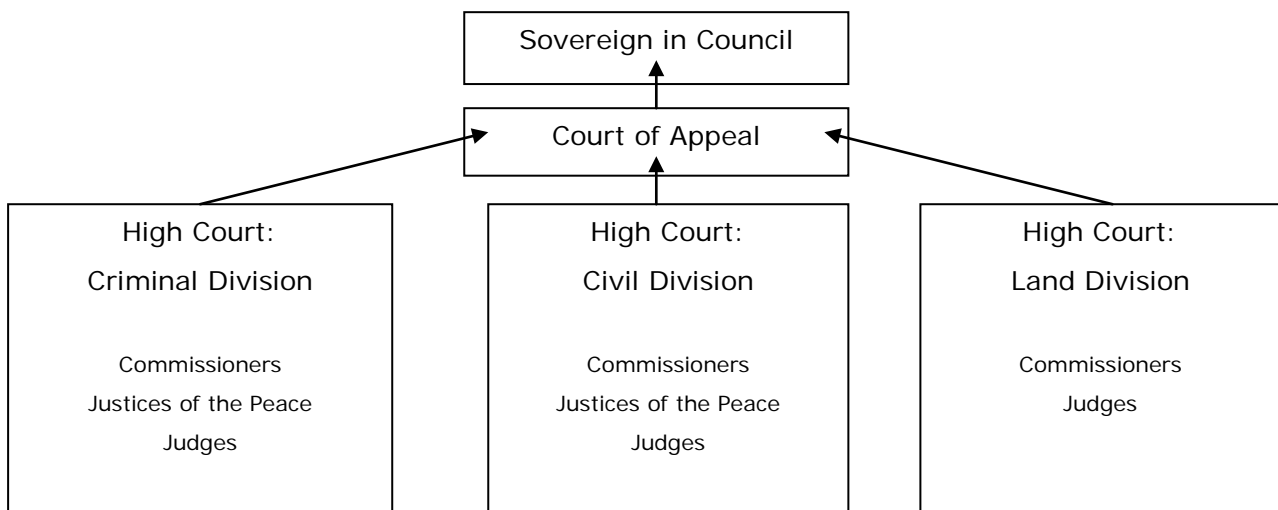
2.1 General characteristics of the court system

Three courts have jurisdiction in Niue:

- the High Court;
- the Court of Appeal; and
- the Sovereign in Council (the Privy Council).

The Court system is **hierarchical**. This hierarchy is essential to the doctrine of precedent (see below at "4.4 Common law") and provides an appeal system which allows decisions to be reviewed by more senior courts. This helps prevent inconsistency within the courts and provides a check and balance system for the fair administration of justice.

2.2 The structure of the court system



2.3 A brief description of the courts

The High Court

The High Court has original jurisdiction to hear all criminal, civil and land matters as is necessary to administer the law in force in Niue.

The High Court is divided in to three divisions:

- Criminal Division;
- Civil Division; and



- Land Division.

Each division of the High Court has the jurisdiction to hear and determine proceedings that, by virtue of any enactment, are to be heard and determined by that division or, in certain circumstances, are determined by the Chief Justice.

In addition to three divisions, there are also three types of judicial officers that sit in the High Court. These are:

- Judges;
- Commissioners; and
- Justices of the Peace.

These judicial officers have different powers.

See Chapter 2 "The Land Court" for a description of the Land Court's jurisdiction.

The Court of Appeal

The Court of Appeal is Niue's highest Court and was created in the 1992 amendments to the Constitution Act. Articles 55A and 55B of the Constitution set out the grounds for—and manner of—appeal to the Court of Appeal from a decision of the High Court.

The Court of Appeal may hear appeals from Judges of the High Court in civil, criminal and land matters, subject to the provisions of the Constitution: Article 55A(1) Constitution Amendment Act (No. 1) 1992.

The Sovereign in Council (Privy Council)

Appeals from a decision of the Court of Appeal may be made to "Her Majesty in Council". Appeals are heard at her discretion, as she thinks fit. Although the Sovereign is the Queen of the United Kingdom, in effect it is the Judicial Committee of the Privy Council that hears the appeals. See Article 55(2) of the Constitution.

3 Judicial conduct and ethics

As a Commissioner of the High Court, you have sworn the following oath on appointment:

I swear by Almighty God that I will well and truly serve Her Majesty as the Head of State of Niue, Her heirs and successors, in accordance with the Constitution and the law, in the office of Commissioner; and I will do right to all manner of people, without fear or favour, affection or ill will. So help me God.

The judicial role is a public one and your conduct will be under public scrutiny. The respect and confidence of the public in the justice system requires that Commissioners respect and comply with the law, and conduct themselves in a manner which will not bring themselves or their office into disrepute.

You should be familiar with the *Niue Judicial Code of Conduct* and apply the principles in your work and life.



4 The law

4.1 Sources of law

The sources of Niuean law are, in order of priority:

- The Constitution;
- Acts of the Assembly;
- Regulations;
- Niuean custom;
- The common law of Niue.

4.2 The Constitution

Where the Constitution is found

The Constitution is found in the first and second schedules of the Constitution Act 1974 and came into force on 19 October 1974. The first schedule contains the Niuean version and the second schedule contains the English version.

The Constitution is supreme law

The Constitution is the **supreme law** of Niue: s 4(1) Constitution Act 1974. Neither Parliament nor the courts can make laws which contravene the provisions contained in the Constitution. Any statute or regulation which is inconsistent with the Constitution is invalid, by virtue of Article 28(4) of the Constitution. All other laws are to be interpreted and applied subject to the Constitution and, as far as practicable, in such a way as to conform to the Constitution.

Judicial officers interpret or decide the meaning of certain provisions in the Constitution, so the Constitution is affected by developments in the common law.

The Constitution is entrenched

The Constitution and the Constitution Act 1974 can only be amended by the Assembly in accordance with the requirements under Art 35 of the Constitution.

Niuean land in the Constitution

The Constitution contains special provisions in relation to Niuean land. Article 33 limits the ability of the Assembly to pass bills that concern customary title, alienation or acquisition of Niuean land without a report from a Commission of Inquiry on the legal, constitutional and policy issues raised.



4.3 Legislation

Legislation is law that is passed or authorised by the Assembly. Legislation consists of:

- statutes (Acts); and
- subordinate legislation (regulations and rules).

If legislation is inconsistent with the Constitution, it can be declared void.

Legislation is interpreted by judicial officers and may be affected by developments in the common law.

Acts

The Acts that apply in Niue are:

- Acts of the Niue Assembly since 1974;
- Acts of the New Zealand Parliament, extended to Niue before 1974, that have not been repealed by the Assembly since 1974; and
- Acts of New Zealand Parliament, since 1974, that have been expressly requested and consented to by the Niue Assembly.

The Niue Act 1966 is the principal statute which applies in Niue. It sets out provisions regarding:

- the legislative and executive functions of government;
- the operation of the High Court;
- criminal offences, responsibility and procedure; and
- the law of evidence.

The Niue Act 1966 has been amended several times to reflect the changing needs of Niue. The Niue Amendment Act (No 2) 1968 should be read together with the Niue Act. It is primarily concerned with the Land Court.

Statutes made by the Niue Assembly become law in Niue when a majority of the members of the Assembly vote in favour of the bill. The bill must be endorsed and signed by the Speaker and the Clerk of the Assembly.

Legislation can be found in the Consolidated Laws of Niue 1990 and in the Acts themselves. See www.paclii.org/databases.html#NU.

Subordinate legislation

The Assembly may delegate some legislative functions to Cabinet in order to give effect to an Act the Assembly has passed. Cabinet may then make rules and regulations for that purpose.

Rules and regulations of Cabinet shall have effect when they have been signed by the Premier or the Clerk of Cabinet: Article 13 Constitution.

Understanding and interpreting legislation

It is your job, as a Commissioner, to **interpret** and **apply** legislation.



The Interpretation Act 2004 applies except when the Act specifically states otherwise or where the context of the Act requires a different interpretation.

The Interpretation Act sets out the main principle of interpretation: **the meaning of an Act must be ascertained from its text, in light of its purpose and in its context.** It also sets out definitions of a number of words which may assist when considering an Act, where they are not defined in the Act itself.

Acts generally contain a section at the start which defines the meaning of certain words and phrases. Definitions for words are found at the beginning of the Act (and sometimes at the beginning of each Part within the Act, such as in the Niue Act). If the word or phrase is not defined, then check s 5 of the Interpretation Act 2004 to see if the word is defined there. If not, the word or phrase may be given its natural and ordinary meaning. Note that the Amendment Act and the Land Act provide a number of definitions in s 2, and the Land Court Rules in r 2.

When interpreting a word or phrase, consider:

- definitions in the Act (if any);
- how it has been used in the particular Act and section (that is, the context it has been used in);
- what purpose the Assembly had in passing the law;
- table of contents;
- headings to Parts and sections;
- examples and explanatory materials; and
- the organisation and format of the Act.

An English or legal dictionary may also be helpful.

When an Act says the Court “may” do something, that means the power may be exercised or not, at your discretion. For example, see s 10(1) of the Land Act. Note that you must always exercise your discretion to give effect to the will of the legislation; it is not an unfettered discretion.

When an Act says you “shall” do something, this means you must. You have no choice. For example, see s 10(2) of the Land Act.

You must always be aware of various amendments that have been made to the legislation. When an amendment comes into force, it will change particular sections in particular Acts. You need to be aware of any changes to the Acts you deal with in the Land Court.

4.4 Common law

Common law is the law that is made and developed by courts. It is also called “case law” or “judge-made law”.

Sections 672 and 673 of the Niue Act 1966 specifically provide that English common law and equity shall apply in Niue as it existed in 1840, if it is not inconsistent with the Act or the circumstances of Niue.

Judges in the High Court, Court of Appeal and Privy Council can make and develop case law:

- where no legislation exists to deal with matters in that case; or
- by interpreting existing legislation.



The development of the common law does not mean that Judges can make arbitrary decisions. They must apply the law as it is set down in legislation, follow the doctrine of precedent (see below) and give reasons for their decision.

Doctrine of precedent

The doctrine of precedent requires lower courts to follow decisions of higher courts in the hierarchy, unless the material facts in the case are different. Cases of a similar type are therefore decided in the same way, giving certainty to the law. It is through this process of making decisions based on previous decisions that the body of common law has been built up.

Commissioners must follow decisions of High Court Judges, the Court of Appeal and the Privy Council. When there is no relevant Niuean decision, then New Zealand or English cases may provide assistance.

4.5 Customary law

Customs are rules of conduct established by long use.

The Niue Amendment Act (No 2) 1968 and the Land Act 1969 place some emphasis on “custom and usages” in relation to land.

Niue Amendment Act (No 2) 1968:

23 Niuean customs to be recognised

Every title to and estate or interest in Niuean land shall be determined under Niuean custom and any Act of the Assembly or other enactment affecting Niuean custom.

Land Act 1969:

10 Determination of title

(1) The Court shall determine every title to and every interest in Niuean land according to the customs and usages of the Niuean people, as far as the same can be ascertained.

The Land Court must consider customs and usages when making its decision in relation to Niuean land. These are not written down or defined but are generally understood. However, sometimes you may find, for example, one village has a different understanding of customary practices to another, and you will need to consider the evidence and make your ruling accordingly.

Note that if custom is inconsistent with the written law it will not apply.



Chapter 2: The Land Court

This chapter describes the Land Division of the High Court, “The Land Court”. It sets out the nature, composition and jurisdiction and powers of the Court. Finally a brief overview of land registration in Niue is provided.

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1 Introduction

The High Court is the Court where most people come into contact with the judicial system. The Court is divided into three divisions:

- Civil Division;
- Criminal Division; and
- Land Division.

This *Bench Book* considers only the Land Division of the High Court, generally known as the Land Court.

2 Governing legislation

The Constitution establishes the High Court. The Niue Amendment (No 2) Act 1968 (the "Amendment Act"), the Land Act 1969 (the "Land Act") and the Land Court Rules 1969 (the "Land Court Rules") govern the proceedings of the Land Court. There are a few provisions in the Niue Act 1966 that apply to the Land Court.

The Land Registration Regulations 1969 may also be relevant – they relate to the registration process within the Registry and may be of interest.

3 Composition of the Land Court

The Land Court is presided over by Judges and Commissioners.

3.1 Judges

The High Court has one or more Judges, each of whom is appointed under the provisions of the Constitution. If only one Judge is appointed, he or she shall be the Chief Justice of Niue. If more than one Judge is appointed, then one will be chosen to be Chief Justice: Article 39(2) of the Constitution.

Each Judge of the High Court, or any two or more Judges, may at any time in Niue or beyond Niue exercise all powers of any division of the High Court unless the Constitution or other law provides otherwise: Article 37 of the Constitution.

Articles 41 to 45 of the Constitution and ss 29 and 31 of the Amendment Act set out the provisions relating to appointment, tenure, salary and removal of Judges.

3.2 Commissioners

Articles 46 to 50 of the Constitution and ss 30 and 31 of the Amendment Act set out the provisions relating to appointment, tenure, jurisdiction, remuneration and removal of Commissioners.



Appointment

Commissioners may be appointed by Cabinet and hold office for as long as specified in the warrant of appointment.

They will possess desired qualities and a good appreciation of Niuean customs in relation to land and other land-related matters and be of good standing in the community.

The office of Commissioner may, with the approval of the Public Service Commission, be held concurrently with any other office in the public service or any other position or employment. However, a Commissioner who is a member of the public service shall not, in the exercise of his or her functions as a Commissioner, be under the control of the Niue Public Service Commission.

None of the following people may be appointed as Commissioner of the Land Court.

- The Registrar.
- Members of the Assembly.
- Officers of a political organisation.
- Undischarged bankrupts.
- People with criminal records (except for minor traffic offences).
- Ministers of religion.

Tenure of office

No person who has reached the age of 68 years shall be appointed to or continue to hold office as a Commissioner. However, nothing done by a Commissioner in the performance of his or her functions shall be deemed invalid by reason only that:

- he or she has reached the age of retirement; or
- his or her term of office has expired.

A Commissioner may resign in writing to the Premier.

Removal

A Commissioner shall not be removed from office except by Cabinet, acting in accordance with a recommendation of the Chief Justice.

The only grounds upon which a Commissioner can be removed from office is:

- inability to discharge the functions of his or her office due to infirmity of mind, body or any other cause; or
- misbehaviour.



3.3 Other officers of the Court

Other officers of the Court include:

- the Registrar;
- the Deputy Registrar; and
- administrative officers.

Registrar

The Registrar of the High Court:

- keeps the records of—and in relation to—all proceedings of the High Court; and
- performs administrative duties with respect to the Court that the Chief Justice directs.

Deputy Registrar

A Deputy Registrar of the High Court possesses, exercises and performs the same powers and functions and duties as the Registrar, subject to the control of the Registrar. Every reference to the Registrar of the High Court, so far as possible, applies to the Deputy Registrar: s 38(3) of the Amendment Act.

Administrative officers

A number of administrative officers work to support the Land Court, including clerks and interpreters.

4 Special nature of the Land Court

4.1 Niuean land

There are special protections for Niuean land in the Constitution and other Acts which reflect the importance of customary joint ownership of land in Niue. Article 33 restricts the Assembly's powers to make laws relating to Niuean land without establishing a Commission of Inquiry to report on the legal, constitutional and policy issues raised by the proposed legislation. There is compulsory registration of instruments affecting or relating to any land (with the exception of a few specified short-term arrangements), and there are strong restrictions on the the alienation of Niuean land.

The Land Court has **exclusive jurisdiction** to investigate the title to Niuean land and to determine the relative interests of the owners or occupiers of any such land: s 22 of the Amendment Act.

Every title and estate or interest in Niuean land must be determined under **Niuean custom** and any enactment affecting Niuean custom: s 23 of the Amendment Act.

4.2 Inquisitorial nature of the Land Court

The role of the Judge or Commissioner in the Land Court is different than the role of the Judge, Commissioner or Justice in the other divisions of the High Court.



- The Land Court reflects a type of **inquisitorial** legal system. The judicial officers take a more active role in the hearing, examining parties and witnesses. The Court actively works to ascertain the truth rather than 'referee' a contest conducted by the parties and their lawyers. The rules of evidence are less formal.
- The other divisions reflect the **adversarial** legal system. The parties define the issues to be dealt with and control what evidence is to be called. The judicial officers are more 'passive' in that they do not test either party's evidence nor question witnesses except to clarify their understanding. The judicial officers ensure strict compliance with procedures and rules of evidence, 'leaving' the parties to present their case. Proceedings can often reflect a competitive struggle to win.

5 Language of the Court

All documents filed in or issued from the Court may be either in English or Niuean: Rule 104 Rules of the High Court, by virtue of s 735(3) Niue Act.

6 Jurisdiction and powers

6.1 Jurisdiction defined

"Jurisdiction" is the power and authority to hear or determine a particular matter.

Courts may only act within their jurisdiction, as defined by law.

If a court hears a case or makes a decision that it has no authority or power to make, then it acts outside its jurisdiction. Consequently, the decision and any orders it makes are not lawful and are invalid.

6.2 Jurisdiction of the Land Court

Section 47 of the Amendment Act sets out the general jurisdiction of the Land Court. Note that the jurisdiction is an **exclusive** one, that is, no other court or body can deal in such matters except the Land Court (and the higher Courts on appeal or review): s 22 Amendment Act.

Where the Acts, rules and regulations refer to a Judge of the Land Court, this applies also to Commissioners of the Land Court, subject to the limits to their jurisdiction set out below.

Section 47A of the Amendment Act specifically limits the ability of Commissioners to exercise the jurisdiction of the Court, in that the **nature of the application** determines the size of the panel which may hear and determine the matter.



At least **two** Commissioners sitting together are required to exercise the power to:

- hear and determine any application for the appointment of a Leveki Magafaoa in respect of any Niuean land: s 47(1)(c);
- hear and determine any claim to recover damages for trespass or any other injury to Niuean land: s 47(1)(d);
- grant an injunction against any person in respect of actual or threatened trespass or other injury to Niuean land: s 47(1)(e);
- grant an injunction prohibiting any person from dealing with or doing any injury to any property which is the subject-matter of any application to the Land Court (that is, Niuean land): s 47(1)(f);
- create easements in gross over Niuean land: s 47(1)(g); and
- make any order recording the determination of any matter relating to land or any interest in it, whether provided for in this Act or other enactment: s 47(1)(h).

Five Commissioners sitting together may exercise **any of those powers and also** are required to:

- hear and determine any application to the Land Court relating to the ownership, possession, occupation, or utilisation of Niuean land, or to any right, title, estate, or interest in Niuean land or in the proceeds of any alienation of it: s 47(1)(a);
- determine the relative interests of the owners or the occupiers in any Niuean land: s 47(1)(b); and
- authorise the survey of any land: s 47(1)(i).

In the course of the proceedings on any application, the Court may also proceed to exercise any other part of its jurisdiction as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act.

However:

- if the exercise of other powers requires a larger panel of Commissioners, this may require the Court to adjourn the application until an application for the other matter(s) is made and determined by a panel of five Commissioners, or decline to deal further with the matter and require that it (and the other matters) be dealt with by a Judge under s 47B of the Amendment Act; and
- if the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Land Court also has exclusive jurisdiction over adoption matters: s 95 Amendment Act.

Note that Cabinet may also confer jurisdiction in any matter exclusively affecting the rights of Niueans in any property: s 48 Amendment Act.

6.3 Powers of the Land Court

The Court may (r 26 of the Land Court Rules):

- dismiss an application;
- grant an application, in whole or in part;
- give leave to extend, amend or withdraw an application in whole or in part, upon such terms as it thinks fit.



Note that if the Court dismisses an application because the applicant did not appear or prosecute the application properly, the applicant may make a fresh application in respect of the same matter. The Court may also reinstate the dismissed application.

Where proceedings have been commenced before Commissioners, they may at any time before a final decision has been made (s 47B Amendment Act):

- decline to deal further with the matter and require that it be dealt with by a Judge (by way of a rehearing); or
- adjourn proceedings and refer a question of law that has arisen during proceedings to a Judge.

7 Land registration

The Land Register is the record of all land transactions in Niue. Each separate section of land (whether Crown land or Niuean land) has a separate section in the Register and entered there are the name, area and a plan certified by the Registrar. The substance of every Court order or other instrument relating to the land (which is required by enactment to be registered) is entered by the Registrar.

A few instruments do not need registering, that is:

- a lease or occupation order for a period of no more than two years;
- a transfer, security charge or other instrument disposing of any lease, being a lease for a period of no more than two years;
- a will;
- any appointment of a special representative.

Instruments of alienation affecting Niuean land must be confirmed by the Court before they can be registered.

Until instruments requiring registration are entered into the Land Register, they have no effect to create or extinguish or transfer or charge any interest in land.

Ownership of land is determined by ascertaining the Magafaoa of the land by reference to the common ancestor of it (or by any other means which clearly identifies the Magafaoa).



Chapter 3: The hearing

This chapter provides general information about hearings in the Land Court, including the nature of hearings, roles and conduct of Commissioners and others at the hearing, pre-hearing processes and preparation, and Court protocols. The general structure of a hearing is provided, along with guidance for dealing with disruption and misbehaviour.

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1 Introduction

All hearings in the Land Court are formal, whether they involve just a single party, or two or more parties.

All such hearings are to be conducted in a courtroom. However, in proceedings relating to land disputes, part of the hearing may have to be conducted on the land in question where inspection of that land by the Court is necessary. This is called a site visit.

The Court may comprise:

- The Chief Justice or a Judge;
- at least two Commissioners; or
- a panel of five Commissioners.

The Court composition for the hearing of any case by Commissioners cannot be changed until the Court has given its final decision. This means that those Commissioners who start to hear the case must continue to hear the case until their final decisions are made.

The panel is chaired by the most senior Commissioner, but every Commissioner hearing the case has an equal voice in all aspects of the hearing.

Hearings follow procedures that are a combination of custom and court convention.

- Parties are required to apply in writing and give oral and/or documentary evidence to support their claims.
- Commissioners will question parties and their witnesses and try to assist parties to resolve the issues.
- Parties may cross-examine witnesses.
- The Court applies customs and usages, and law affecting custom.

Where such customs and usages do not apply, the Court proceeds in such a manner as seems "just and convenient in that particular case": s 43 Niue Amendment Act (No 2) 1968 (the "Amendment Act").

2 Roles

2.1 Roles of the Registrar and Court Registry staff

All things being ready (applications prepared, signed, sworn, filed, published and served on all other parties, and the date, time and place of hearing duly notified, in accordance with the requirements of the law), the Registrar and Court Registry staff:

- conduct a thorough and methodical research of the full information on the history of the matters in dispute and forming the basis of proceedings;



- prepare and give to the sitting Commissioners a comprehensive and factual report on the background of the case, including:
 - certified true copies of every application;
 - certified true copies of previous related decisions;
 - related written agreements;
 - notices of publication and service;
 - maps, plans of survey carried out or sketch plans prepared during inspections;
- make available all related files and registers for perusal and examination by the Court;
- immediately inform the Court on any development likely to affect the hearing of the case, for example, the non-service of documents or notices on parties;
- attend to any arrangements relating to the hearing as the Court may direct;
- generally provide administrative support including, among other things:
 - traditional welcoming of parties and the public;
 - swearing of parties;
 - collecting written statements from parties;
 - reading party statements in open Court;
 - interpreting aspects of proceedings where necessary.

You will be attended by the Registrar/Clerk of the Court who produces all documents and court records when required during the hearing.

2.2 Roles of the Commissioners

Commissioners sit as a panel, so it is important for those on the panel to agree to a process for handling hearings and out-of-court deliberations.

Since views from the Bench should be seen to be as one, the accepted practice is for the panel to be presided over by the most senior Commissioner.

The Chair

The role of the Chair is to manage the proceedings. From the perspective of the public and those in the courtroom, he or she is in charge of the courtroom. This involves (unless delegated to another Commissioner):

- handling all procedures;
- issuing all directions, summons, decisions and orders;
- announcing all decisions of the Court;
- asking questions from the Bench to witnesses (note that any Commissioner may do this);
- ensuring all before the Court understand what is going on and are treated with respect;
- structuring and guiding any panel discussions out of Court, ensuring the discussions are purposeful and relevant and all Commissioners have the opportunity to be heard.

The Chair should know the Commissioners' strengths and weaknesses and make the most of their strengths and expertise whenever possible. He or she should ask the opinions of each Commissioner, listen to them and treat each contribution as important.



The Chair may ask other Commissioners to undertake specific tasks, for example, taking evidence, announcing the decisions of the Court and referring to legislation and this *Bench Book*.

Other Commissioners

The role of the other Commissioners involves:

- listening attentively and taking notes to prompt their own memory when the case is discussed by the panel;
- appropriately drawing the Chair's attention to particular matters of significance or procedure;
- undertaking tasks as required by the Chair, for example, recording the proceedings in the Minute Book;
- questioning parties and witnesses, as necessary;
- working in partnership with the Chair and other Commissioners to decide the case.

2.3 The role of the parties

The role of each party involves:

- presenting themselves at the hearing;
- tending their written statements to the Registrar/Clerk of the Court before or on the date of hearing, and in good time before proceedings begin;
- informing the Court of their leader/representative/counsel and witnesses;
- presenting their case, including producing any documentary evidence;
- answering Commissioners' questions during examination;
- making statements (written or oral) in reply to issues or matters raised by other parties;
- cross-examining other parties' witnesses.

3 Preparing for a hearing

Always arrive for court sittings in good time. This will ensure that you have time to study the list and to mentally prepare for Court. It will give the Registrar/Court Clerk time to explain the nature of the cases to be heard that day, produce the files for you to read, and advise you of any problems. Going through the list will often help you spot some potential problems, such as a party who is well known to you. If you have any relationship to a party or have any interest in the matters in question, you must not hear the case.

Before the Court convenes:

- ensure you have considered the files you will be dealing with;
- note who the parties are;
- make sure you have the relevant legislation at hand;
- note the issues in dispute and the relief sought;
- check that appropriate notice has been given; and
- agree the roles for the Commissioners on the panel.



4 Ethics and the rules of natural justice

A fundamental principle in our justice system is that justice should not only be done but should be seen to be done. In your role as Commissioner, you should always consider how the citizen sitting in court may see what is done. In other words, you must be objective about the things you do and say in Court.

There are also fundamental rules of natural justice which must always be considered when conducting hearings. You must consider your actions and adopt another approach if these rules are in any way prejudiced. The following two rules must always be considered.

- 1.No one may be a judge in their own cause.
- 2.Affected parties have the right to be heard.

4.1 No one may be a judge in their own cause

You must not have any interest in—or bias or prejudice about—the question at issue before the Court of which you are a member.

A financial or personal interest, however slight, disqualifies you from presiding. This disqualification is strictly interpreted by the Court and so you should decline to act in such situations.

The following are examples of interest that could disqualify you.

- Family relationships between you and a party or witness.
- An employment relationship or membership of some organisation involved in the proceedings.
- Personal hostility or personal friendship between you and a party, or group or section of the community.

See the *Niue Judicial Code of Conduct* for more guidance.

Exceptions

Note the following exceptions to the rules that no one may be a judge in their own cause.

Necessity: For example, when no other Commissioners are available *and* when hardship may result if the case is not dealt with promptly.

Insignificant possibility of conflict of interest or bias: If the matter giving rise to a possibility of conflict is insignificant or a reasonable and fair-minded person would not be able to make an argument in favour of disqualification, you may hear the case.

Consent: A party may consent to a Commissioner hearing and deciding the case although the Commissioner may have a personal interest.

In any of these instances, you should always state in open Court the fact of your interest and ask whether any of the parties has any objection. If there is an objection, you should immediately withdraw. For example, a Commissioner may commence the hearing of a case without knowing or realising that one of the witnesses is a personal friend until that witness is about to give evidence. In that case, the hearing should be abandoned and recommenced before other Commissioners, unless consent is given by both parties.



Always make sure there is a note in the record that the interest has been stated and the reason for continuing to sit (for example, parties have consented or the matter is so slight as to make it inappropriate to excuse yourself).

4.2 Affected parties have the right to be heard

It is a well-established principle, evolved from common law, that parties and the people affected by a decision should have a full and fair opportunity to be heard before a decision is made.

This principle focuses on the **procedural** steps implemented by the Court. The purpose of the principle is to ensure that you consider all relevant information before making a decision.

Under this principle, you have to consider what has to be done to allow a person to be heard. This extends to allowing the person sufficient notice to prepare their case, to collect evidence to support their case and to rebut or contradict the other party's evidence.

Note that a person may be heard but the view they have expressed does not have to prevail. You are entitled to reject it for what might be a good reason. The relevance and weight of the information is to be determined by you.

There are three aspects to the principle.

1. Prior notice

- You should be satisfied that adequate notice has been given, as prescribed by law. Rule 7 of the Land Court Rules sets out the requirements relating to service.
- Notice must be sufficient to allow the person to prepare their case. Where you are not satisfied that a party has been given sufficient notice for this, adjourn the matter to allow them more time.

2. Fair hearing

- The way the hearing is managed and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard.
- The rule is that you should hear all sides of a matter. This includes allowing a party the opportunity to hear, contradict and correct unfavourable material, and allowing further time to deal with a new and relevant issue.
- It always requires you to ensure you have all the relevant facts and materials before deciding.

3. Relevant material disclosed to parties

- All relevant material should be disclosed to the parties. Those likely to be affected by a decision must have the opportunity to deal with any unfavourable material that you propose to take into account. In practice, the Court Registry staff ensure that all materials are copied to the parties.



Before a hearing is concluded, you should ask yourself, “has each party had a fair opportunity to state their case?”

5 Courtroom conduct for Commissioners

5.1 Start on time

Start Court on time and rise at the expected time. This is not only for you and your colleagues' benefit but also for the parties, their representatives and Court Registry staff.

5.2 Courtroom conduct

You should exhibit a high standard of conduct in Court so as to reinforce public confidence in the Judiciary.

- Be courteous and patient.
- Be dignified.
- Be humble—if you make a mistake, you should apologise. There is no place on the Bench for arrogance.
- Continually remind yourself that a party is not simply a name on a piece of paper. The parties are looking to the Court to see justice is administered objectively, fairly, diligently, impartially and with unquestionable integrity.
- Never make fun of a party or witness. A matter which may seem minor to you may be very important to a party or witness.
- Show appropriate concern for distressed parties and witnesses.
- Never state an opinion from the Bench that criticises features of the law. Your duty is to uphold and administer the law, not to criticise it.
- Never say anything or display conduct that would indicate you have already made your decision before all parties are heard.
- Do not discuss the case or any aspect of it outside of the panel.

His Honour Judge White has stated:

If there comes a moment on the bench when you feel your patience is being over extended, or you find yourself a little short on courtesy, it might be helpful to recall:

- (i) that judging at all levels is a most privileged occupation – there is hardly a day on the bench when you will not, by a judgment or order, greatly affect some person's life; and
- (ii) that whether the case before you lasts ten minutes or ten days, it will be of supreme importance to those involved, and it may their only experience in a lifetime of the judiciary.



5.3 Maintaining the dignity of the Court

Ensure that all people appearing before the Court treat it with respect by:

- keeping order in Court; and
- being polite and respectful and expecting the same from them.

Deal effectively with unruly parties, witnesses and spectators by:

- decisive and firm action;
- dealing promptly with interruptions or rudeness; and
- clearing the Court or adjourning if necessary.

See "12 Disruption and misbehaviour", below, for guidance on managing disruption.

6 Court protocol

6.1 Modes of address

Commissioners would normally be addressed as "Your Worships" or "Sir" or "Ma'am.

Commissioners must also address those who appear before the Court politely by referring to them as Mr, Mrs or Miss.

It is always good practise to ask the Registrar/Court Clerk to ascertain who is appearing for whom. Lawyers and representatives who are not already known to Commissioners should introduce themselves; if they do not it would be quite proper to ask them to do so.

6.2 Dress

There are no specific rules about how Commissioners should dress. However, you should dress in a manner in keeping with the responsible nature of your duties.

The standard of dress of parties varies considerably. No comment should be made about unorthodox dress. Nor must unorthodox dress affect the impartiality with which parties are treated. If you feel that comment must be made, proceed with caution. It is better to say "Mr X, are your dark glasses worn for medical reasons?" or "Mr X, is there any particular reason why you are wearing dark glasses in the courtroom?", rather than ordering the glasses to be removed. There may be very good reasons why they are being worn, for example, they may have an eye infection or be wearing light-sensitive prescription glasses.



7 The Court record

7.1 The file

The file should contain the following things.

- The application.
- Information relating to the property in question, including, a plan of the survey and certificate of title.
- Genealogy information.
- Conditions/terms of the Leveki Magafaoa.
- Investigation report completed by Court Registry staff.
- Correspondence, for example, notices, written consents and minutes of meetings of Magafaoa, memorandums, emails.
- Submissions.
- If previous hearings:
 - the Judge's/Commissioners' directions, if any;
 - Court minutes;
 - orders of the Court.

Check that all the necessary documents are on the file and the details within each are correct.

You should read through the file before the hearing and note any discrepancies or any new developments.

7.2 Keeping the record

The official record of the Court is the Minute Book. This holds notes of the proceedings, and all orders, directions and other decisions of the Court.

Neatness, precision and full information are essential.

Standard information includes:

- name of the parties;
- name of counsel or other representatives;
- notes of the proceedings;
- all directions;
- any conditions;
- a list of witnesses;
- the orders and directions made.



8 The procedures of the Court

8.1 Land Court Rules 1969

The Land Court Rules 1969 (the "Land Court Rules") set out the processes and forms for the Land Court. You should be familiar with these.

Note that:

- the "Court" means the panel presiding;
- where the Rules do not extend and there is no guidance on a matter under legislation, the Court should proceed "as it thinks fit and shall dispose of the matter as nearly as may be in accordance with any rules affecting any similar case or, if there be no such rules, in such manner as the Court thinks best calculated to promote the ends of justice" and "in such manner as seems just and convenient in that particular case: s 43 Amendment Act and r 48 Land Court Rules;
- failure to comply with the Rules does not render any proceedings void unless the Court so directs, although the Court may set aside proceedings (in whole or part) as irregular, or amend them in any way: r 6 Land Court Rules.

8.2 How proceedings are commenced

Rule 12 of the Land Court Rules sets out how proceedings are commenced, that is, by way of written application by:

- any person claiming to be interested in Niuean land or any person authorised by Cabinet on its behalf : s44 Amendment Act; or
- the Registrar: s 52 Land Act 1969.

The application should be in form 1 or similar, and set out:

- the full names, address and occupation of the applicant;
- each statutory provision, section of the Niue Amendment Act and rule in reliance of which the application is made;
- the nature of the order sought;
- the grounds on which the application is made;
- the full names of the person filing the application; and
- a Niuean address at which notices and other documents relating to the application may be served on the applicant.

Every application must be signed by the applicant or their agent and filed at the Court office. Every application must have attached to it all documents that are required to be filed with it, such as the required consents. The Registrar must attach to each application all particulars and extracts from the records of the Court as necessary to enable the Court to deal effectively with the application at the hearing: r 14 Land Court Rules.

Note rr 15, 16 and 18 relating to applications on behalf of persons under a disability.



The Registrar may refuse to accept an application if he or she thinks the application is not properly made.

8.3 Service and notice

In order for all those with an interest to have the opportunity to be heard before a decision is made by the Court, the Registrar gives notice of all applications (except *ex parte* applications—see below) in the *Gazette* at least 14 days of the hearing of an application: r 19 of the Land Court Rules.

Then any person interested in or may be affected by any application has a chance to file a notice of intention to appear. See "8.4 Who may appear and be heard", below.

At least three days before the commencement of the hearing, the Registrar gives in writing notice of the time and date to:

- the applicant;
- those who have filed a notice of intention to appear; and
- anyone else the Registrar thinks fit, or a Judge or Commissioner directs to be served.

The Court may require the Registrar or the applicant or any other party to proceedings to give such notice as the Court thinks necessary to anyone that appears to the Court to be affected by the application: r 21 Land Court Rules.

Rule 7 covers how notices are served.

Ex parte applications

An exception to the requirement for notice is in respect of an *ex-parte* application.

The term "*ex parte*" is a Latin phrase meaning "something made in the interests of one side only", so an *ex parte* application is one that the Court can determine on the evidence of the applicant only and there is no need to notify or inform other parties.

Apart from those relating to procedural matters, the only applications that may be made *ex parte* are those for interlocutory injunctions (short term orders requiring another to do something or preventing them from doing something, until the full application is heard by the Court). See "14 *Ex parte* applications" in Chapter 4 "Common applications".

8.4 Who may appear and be heard

Anyone interested in or affected by an application is entitled to appear and be heard: r 23(1) Land Court Rules. Note that "interested in" means having a real interest at stake, not just mere curiosity.

Anyone who is not named in an application and who wishes to be a party to and be heard on an application should file a written notice (in form 3) before the hearing starts, of their intention to appear, stating (r 23(2)(a) Land Court Rules):

- whether they support or oppose the application;
- the grounds of their support or opposition; and



- a Niuean address for service.

However, they will not be prevented from appearing and being heard just because they have failed to file a notice of intention to appear. In that case, the Court may set “reasonable and proper” conditions as it thinks fit: r 23(2) Land Court Rules.

The Crown, the Minister or the Registrar are entitled to appear and be heard on any application without filing or giving any notice of intention to appear: r 23(3) Land Court Rules.

Parties may appear personally or, by leave of the Court, by an agent or representative. Note that “leave of the Court” means the permission of the Court.

If the applicant fails to appear, the Court may dismiss the application, but at a later date, the applicant may reapply or the Court may reinstate the application: r 26 Land Court Rules.

8.5 Overview of the hearing procedure

Entering the courtroom

The Registrar/Court Clerk leads the full panel into the courtroom, calling out “All stand for their Worships” or words to that effect.

The Commissioners walk onto the Bench in a dignified manner, face the public gallery, bow slightly, and then sit.

The Registrar/Court Clerk announces “This sitting of the High Court Land Division for [date] is now in session”. He or she then introduces the Commissioners.

The Commissioners may choose to start the proceedings with a prayer from a member of the public.

The Registrar/Court Clerk calls the first case. If the parties are present, they come forward and sit at counsels’ tables.

The Commissioners must ensure that one of the panel is given the responsibility of recording what is said by the parties in the Minute Book. All Commissioners should take their own written notes to refresh their memories later.

Structure of the hearing

Remember that the hearing of Land Court matters is dealt with under the **inquisitorial** system rather than the adversarial system which is used in the criminal and civil courts. That means that Commissioners should inquire into the matter in dispute by gathering information. The parties should be clear that the Commissioners have a dual role of investigation and adjudication, and that any agreement or order is binding on all parties, subject, of course, to the right of appeal or review.

However, the hearing should still run in a structured way.

There are four main parts:

1. Preliminary matters.

- Introductions.



- Explanation of the process.
- Any preliminary matters to be dealt with.

2. Gathering the information.

- Applicant's case: evidence, cross-examination, questions from the Bench.
- Objector's case: evidence, cross-examination, questions from the Bench.

3. Assisting the parties to resolve the dispute (if any).

4. Making a decision.

1. Preliminary matters

The Chair:

- welcomes the parties and their supporters, introduces the Commissioners on the panel and seeks introductions from leaders/representatives/counsel;
- explains the nature of the hearing and what will occur;
- addresses and rules on any preliminary matter raised by any party, for example, amending an application, unavailability of parties, adjournment, unless he or she considers that circumstances warrant discussion of any such matter by the full panel;
- admits the inclusion of additional parties upon the application;
- announces the order in which parties will be called;
- ascertains from each party the names of their leaders and witnesses;
- gives a brief explanation about how the hearing will be conducted.

2. Gathering the information

Applicant presents their case

The applicant is called to present their case first. They provide their evidence by oral testimony and/or documents. They may also call witnesses to give their evidence.

NOTE: Before giving testimony all witnesses must either be sworn or permitted to make an affirmation if they elect to do so: r 27. No witness can be forced to take an oath on the Bible if it is against their religion or conscience.

Cross-examination

If there are matters in dispute, the objector is called to ask questions on and only on the evidence that the applicant submitted (referred to as the "cross-examination").

The objector is also given the opportunity to cross-examine witnesses produced by the applicant in support of their application.



Questions during cross-examination must relate to the evidence actually produced by the applicant. The purpose of such questioning is to raise doubts as to the truth of the evidence submitted by the applicant.

Questions from the Bench

The Bench may also ask questions at the completion of cross-examination of the applicant and his or her witnesses.

Objector's case (for matters in dispute)

At the completion of the applicant's case and cross-examination, the objector is then given the opportunity to present their case to the Court, by giving their testimony and providing other evidence in support of their objection.

Cross-examination and questions from the Bench will also follow in the same manner as mentioned earlier.

Upon completion of the examination of all parties, each party should be given limited time to make statements (oral or written) in reply to important points raised by other parties during the Court's examination.

See "9 Gathering information: The fact-finding phase of the hearing", below.

3. Assisting parties to resolve the dispute

Given the nature of disputes in the Land Court—they can be highly personal and parties have to continue to live alongside each other—it is best if the parties themselves can come to an agreement. It is always a good idea to adjourn to allow the parties to attempt to resolve disputes before retiring to make your decision. The Registrar or other Court Registry staff can facilitate a meeting of the parties to that end.

See "10 Assisting the parties to resolve the dispute", below, for general guidance on what you and Court Registry staff can do to facilitate a resolution.

4. Making a decision

See Chapter 6 "The decision" for guidance.

8.6 Hearing matters "on the papers"

You may be expected to consider applications "on the papers" at times. This will be in relation to:

- undisputed applications, for example, the consented appointment of a Leveki Magafaoa; and
- *ex parte* applications.

Although considering matters on the papers avoids the formality of an open sitting of the Court, your responsibility is greater because the process is not carried out in public.

The volume of paper placed before you, the absence of parties and the informality of sitting at a desk may tend to cause you to act almost as a rubber stamp. You must constantly remind yourself that you are acting as a judicial officer and you must exercise the same judgement, care and skill as you would in open Court.

You must ensure all relevant documents are attached to the application and be satisfied that the appropriate order should be made.



8.7 Adjournments

An adjournment is an order by which proceedings are postponed, to be continued at a different time or place before the same Court. The power to grant an adjournment during the course of proceedings is provided for under r 11 of the Land Court Rules.

During the course of proceedings there may be a number of breaks for a variety of reasons, for example:

- something needs to be done by Court Registry staff before the hearing can progress;
- there is a disruption in proceedings and a break is needed;
- Commissioners wish to discuss some issue in chambers or to take a short break for some other reason;
- scheduled meal breaks;
- Commissioners want time to make the decision in chambers.

Adjournments may be either *sine die* or to some other time or place: r 11(3). "*Sine die*" means without any day appointed for the resumption of the business on hand, so an adjournment *sine die* is an adjournment without appointing any day to resume the hearing. If the matter is adjourned *sine die* it may resume at such time and place and upon such notice to the parties and others as the Court may direct: r 11(5). However, it is **good practice to clearly state a time, date and place** for the matter to resume.

Any party to proceedings may apply for an adjournment—and the Court may set conditions if it thinks fit—or the Court may grant an adjournment of its own motion.

On the application of a party

The Court may be asked for an adjournment by any of the parties if they are unable to proceed with the case. Sometimes another party may dispute a request for an adjournment.

The party seeking an adjournment should show "good cause" before an application for adjournment is considered. Good cause includes, but is not limited to, the reasonably excusable absence of a party or witness.

Adjournment should generally not be allowed due to a lack of preparation by one of the parties. However, parties must be given a reasonable opportunity to prepare their case and if no adjournment would mean that there is not a fair hearing, then grant the adjournment. Note the difference between an unprepared applicant and other parties who are unprepared. It can be reasonably expected that the person making an application should be prepared.

The rules of natural justice dictate that an adjournment may be granted in any case where:

- an application is brought, and the Court is satisfied that inadequate notice has been given to a party; or
- inadequate time has been given to enable a party to prepare their case.

Unnecessary adjournments should be avoided as they waste the time and resources of the Court and other people in the case, and in some cases lead to long delays. Every effort should be made to advance the case before you, so consider the merits of each application for adjournment before granting it.

On the Court's own motion

At any stage in the proceedings the Court may adjourn the proceedings to refer a question of law to a Judge, or for hearing and determination in its entirety by a Judge: r 39(8) and s 47B of the Amendment Act.



There will be other instances where it is appropriate for the Court to adjourn proceedings on its own motion, such as lunch breaks, when there is disruption or misbehaviour, the need for an interpreter, the need for some evidence to be produced, and to enable the parties to attempt settlement of the issue.

9 Gathering information: the fact-finding phase of the hearing

9.1 Purpose of this phase of the hearing

The fact-finding phase of the hearing, including examination by Commissioners of every party to the proceedings, is most important. This is central to the operation of the Land Court.

The purpose of this part of the hearing is to draw out the facts that are relevant to the issues at hand and to enable the Court to arrive at a finding of facts which will ultimately form the basis of its final decision.

It serves other useful purposes as well.

- It lets the parties on each side of the dispute express their feelings about the issues, uninterrupted.
- It gives each set of parties an opportunity to hear how the other side sees the situation.
- It helps develop trust and co-operation between the Commissioners and the parties.

Failure to bring out the relevant facts is inexcusable. That is the central purpose of the fact-finding phase of the hearing.

9.2 Some guidance

The art of conducting skilful examination of parties and witnesses in a hearing cannot be learned from any textbook. Skilful examination is a measure of ingenuity, innovation, common sense and experience. However, here is some guidance you may find useful.

Direct the parties to speak directly to the Commissioners

At the fact-finding stage of the hearing, you are trying to get each set of parties to tell you how they see the situation. You want them to concentrate on their evidence, and to start listening to each other. If a speaker from one of the groups is looking at or confronting the other parties at this stage, this may provoke a slanging match (tauamuamu) which may be difficult to break up.

It is more likely the parties will keep to their account of the dispute if they are speaking directly to the Commissioners, and if you maintain eye contact with them, than if they voice all their hostility and concerns directly to the other party.

Let the parties tell their stories

It can be tempting to probe and question the parties as they tell their stories. In practice, pursuing a particular line of questioning at an early stage can interfere with the parties' recollection of significant facts. It can impede the



disclosure of useful information relating to the issues. Your job is to help the parties deal with their dispute, and to ensure that each side has an opportunity to tell their side of things. Leave your questioning until later if you can.

Clarify the issues and sequence of events

The parties will often relate events in a rambling and out-of-sequence way. You can greatly assist the resolution process by helping the parties clarify significant events and what they want.

Summarise and report back to each party in turn. Summarising:

- acts as a check that you are following the statements of the parties accurately;
- assures each of the parties that you understand their perceptions; and
- relays to the party who is waiting to speak what the person opposite has said. The opposing party may be more likely to 'hear' what you as a neutral figure are reporting than what is being said by the opposing party.

Deal firmly with interruptions

Turning the head or body towards the speaker, or raising ones hand slightly, will probably be sufficient to stop interruptions. Reminding parties that the Commissioners will hear the views of each party will also usually be effective. Assure the person interrupting that they will be heard, but that at present the Commissioners are listening to someone else.

Prevent repetition and lengthy speeches

The parties must be able to tell their stories freely but they need to do so only once. Parties who repeat the same matters again and again should be stopped. Similarly parties who want to make speeches need to be kept to the point.

Speaking

Make sure you know what to say before you say it.

Always express yourself simply, clearly and audibly. It is important that:

- the party examined and every other party understands what is happening in the Court and why it is happening;
- the Commissioners and Court Registry staff are able to hear what is being said for accurate note-taking; and
- the public in the courtroom are able to hear what is being said.

Use simple language without jargon and avoid a patronising or unduly harsh tone.

Listening actively

Be attentive and be seen to be attentive in Court. Maintain eye contact with the speaker.

Make accurate notes.



Questioning

Ask questions that are simple, brief and to the point for extracting the truth and/or exposing any falsehood. Deal fully with the relevant matters and issues of the case. You need to ensure all the relevant facts can be ascertained.

Avoid interrupting during submissions. If possible, wait until the party has finished their submissions. Likewise, avoid interrupting a party or witness half way through an answer, unless it is necessary to bring them back on track.

Never:

- allow your questioning to descend into an argument with a party or witness;
- try to persuade or influence a party to agree on a settlement or reconciliation in the course of your examination;
- express or attempt to impress your own opinion on a party.

Avoid making long unnecessary statements.

It is unwise and improper to make a show of prolonged questioning of a party when there is no reason to believe that any further meaningful information can be gained.

Dealing with parties who do not understand

You may be confronted with unrepresented parties who do not appear to understand what the proceedings are about. It is your responsibility to ensure that the parties understand the matters in issue and the procedures of the Court.

Take care to explain:

- what is expected when the party comes to speak; and
- to an applicant, that they have to tell you what they want and why.

Dealing with language problems

The Registrar/Court Clerk should be able to translate from Niuean to English and from English to Niuean. In any case a translator should be available.

10 Assisting the parties to resolve the dispute

Agreed settlements, as opposed to imposed orders, have distinct advantages for the affected parties. There tends to be less tension among the parties and community at large, and orders by consent are more likely to be complied with.

Commissioners and Court Registry staff can assist the parties to resolve the dispute.



10.1 Adjourning to consider settlement options

Commissioners can adjourn to allow a facilitated meeting once the information-gathering phase is over. The Registrar or a Court Registry staff member facilitates this meeting. Make it clear to the parties that they will be given an equal opportunity to be heard, without interruption, and that views must be able to be expressed openly and freely. Parties are free to leave at any time but if they do so they forfeit the opportunity to resolve the matter by settlement and the Court will then make the decision.

The agreed outcome must comply with the law, for example, they cannot agree that Mr X from Auckland will be the Leveki Magafaoa because he does not live in Niue and that does not comply with the law, and they cannot agree away their children's interests to land.

10.2 Some ideas for facilitating settlement

Here are some general notes on facilitating settlement. Remember, these are not for the information-gathering phase of the hearing, but rather the facilitated discussion between the parties.

Go through the sequence of events of the dispute.

Stress the positives:

- Focus on the joint benefit of an ongoing relationship.
- Focus on a common objective or theme.
- Identifying shared and compatible interests as "common ground" or "points of agreement" is helpful.
- Focus on 'interests' rather than 'positions'. This tends to direct the discussion to the present and future, and away from the difficulties of the past.
- Focus on areas of agreement before moving on to disputed issues. This may help the parties to see that there is more common ground than they previously realised.
- Affirm and name existing goodwill and continue to build rapport.
- Acknowledge points of principle.
- Acknowledge the strengths of each party's arguments and their right to their point of view.
- Affirm the positive aspects of other related matters.
- Point out the benefits of settlement.
- Reframe the parties' accounts of the dispute to encourage them to see it from another angle.

Identify the underlying problem/s.

- Break them down into manageable areas if the issues are complex.

People are the all-important focus.

- Concentrate on settling the people rather than the dispute.
- See if an apology is warranted and helpful.
- Allow the parties the opportunity to save face.



- Address power imbalances, for example, one party may be highly educated and articulate and another may be shy and fearful. Assist the weaker party to express what they need to say.

Generate options.

- Ask how the parties think that the hearing can move on.

10.3 If agreement is reached

If the parties agree and the outcome is lawful and the Court accepts it, then the Court records the order in the Minute Book and that becomes the order. You should ensure there is no ambiguity; the order has to be clear, cover all the necessary matters and must match with what the parties actually agreed to.

The Commissioners may decide that the agreement is not in the interests of justice and does not have to make the order.

10.4 If the parties cannot agree

If the parties cannot agree, the Commissioners retire for discussion, and makes a decision.

11 Making and delivering the decision of the Court

See Chapter 6 "The decision".

12 Disruption and misbehaviour

12.1 What you can do when people misbehave in the courtroom

Courtrooms can be highly emotional places. At times, a party or a member of the public may behave in a disruptive manner. Most times, "judicial deafness" or a stern remark will be appropriate, but at times you will need to exert your authority more strongly.

Parties and members of the public who do not behave while in Court will usually respond to polite but firm requests to stop the offending behaviour. Failure to respond should be followed by a warning and a threat to have them removed from the Court or charged with contempt.

Take a moment to assess the situation first. Sometimes emotional people want to have a brief rant and will then calm down. You might express some understanding of the strength of emotion they feel and then emphasise the need for dignity and respect in a courtroom and state that further outbursts may lead to their removal. Speak sternly if necessary. If the misbehaviour continues you will have to have the persons concerned removed and dealt with. Do not allow yourself to become involved. Retain your firmness, dignity and courtesy at all times and do not leave the Bench (except of course to remove yourself from potential danger if a situation escalates).



12.2 Contempt of court defined

See ss 58 to 66 of the Amendment Act.

Contempt in the Land Court is defined in s 58 of the Amendment Act:

58 Contempt of Court defined

- (1) Every person is guilty of contempt of the Land Court who—
 - (a) Knowingly disobeys any order of that Court or of a Judge of it, otherwise than by making default in the payment of any sum of money payable under such an order; or
 - (b) Uses any abusive, insulting, offensive or threatening words or behaviour in the presence or hearing of the court; or
 - (c) Assaults, resists, or obstructs, or incites any other person to assault, resist or obstruct, any constable or officer of the court in serving any process of the court or in executing any warrant or order of the court or of a Judge of it; or
 - (d) By any words or behaviour in the presence or hearing of the court, obstructs in any manner the proper and orderly administration of justice in the court; or
 - (e) Does any other thing which elsewhere in this Act or in any other enactment is declared to be a contempt of the Land Court; or
 - (f) Aids, abets, counsels, procures, or incites any other person to commit contempt of the Land Court.

- (2) Every person shall be guilty of contempt of the Land Court who—
 - (a) Having been served with a summons requiring him to appear before the Land Court at a time and place mentioned in the summons, neglects or fails without sufficient cause shown by him to appear or to produce any document which he is so required to produce; or
 - (b) Whether summoned to attend or not, is present in court and, being required to give evidence or to produce any document then in his possession, refuses, without sufficient cause shown by him, to be sworn or to give evidence or to produce that document; or
 - (c) Having been sworn to give evidence in any proceedings, neglects or fails without sufficient cause shown by him to appear at such time as the Court directs for the purpose of giving further evidence in the proceedings.

12.3 Contempt of court is a last resort

Commissioners have the same power as a Judge to deal with contempt of court. You should only use contempt of court in very serious cases. Some guidelines are:

- unless the action or conduct is deliberate or intentional, no contempt has been committed;
- sometimes it may be more prudent not to hear an involuntary remark (called “judicial deafness”);
- in many situations, a calm but firm attitude by the Commissioners will prevent behaviour developing to a situation where an order of contempt is needed;
- if there is any further interruption or misbehaviour, the person concerned may be ordered out of Court, and if they fail to leave immediately, they may be removed by a constable. If they leave but then re-enter they may be charged with contempt of court.



The guide to the exercise of the power has been stated by the Privy Council as follows:
This power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a Court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised.

Only use contempt of court as the very last resort.

12.4 Procedure for contempt of court

If you hear or see behaviour amounting to contempt, you may direct a constable, officer of the court or anyone else to arrest the person and bring them before you to explain him or herself and offer an apology or reason why they should not be convicted of contempt. Generally a sincere apology will suffice. If they do not accept the alleged behaviour or do not accept that it amounts to contempt, they must be given a hearing on the matter. Only in extreme cases would you convict, in which case you may impose a penalty of imprisonment for up to six months or a fine not exceeding one penalty unit (that is, \$100).

If contempt is committed out of the sight or hearing of the Court, for example under s 58(2)(a) for failing to appear on a summons, you may issue a warrant for that person's arrest to appear to face the charge of contempt of court.

Contempt proceedings are not brought in the usual way by laying an information. No written charge is prepared. If the Commissioners consider that what a person has said or done is serious enough to deal warrant contempt proceedings, take the following steps.



1. The Commissioners should ask a constable to take the person into custody. The person is then arrested by the constable and brought forward towards the Bench and asked their name and address.
2. Advise the person what the alleged contempt is. If he or she apologises, take the matter no further.
3. Advise the person that he or she will be held in custody until he or she has received legal advice.
4. Order a police constable or Court officer to take the disruptive person into custody.
5. Arrange for counsel to see the person while in custody and to advise him or her that he or she will be brought before the Court after a suitable period for contemplation, to be dealt with for contempt of court.
6. Once there has been time for such consultation, and a period of time for the person to consider his or her position, he or she should be brought back before the Court.

Often an apology and time spent in custody will suitably resolve the matter, but if that apology is not forthcoming, or the matter is disputed, then you will need to conduct a hearing to establish the contempt and, if established, to consider an appropriate penalty. It may be beneficial to organise experienced counsel to assist the Court in the prosecutorial role, should the issue of contempt be contested.

7. If the contempt is established, offer the person the chance to apologise. An apology plus a short (1-2 hour) period in custody should be sufficient. If no apology is made, record a formal finding that the contempt is established, hear submissions in mitigation and impose a suitable sentence. The Registrar will advise you about any necessary warrant of commitment.



Chapter 4: Common applications

This chapter provides guidance for many of the common applications Commissioners will encounter.

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Introduction

This chapter provides a ready reference for some of the common applications you will encounter in the Land Court.

1. Application for the determination of title to and interest in Niuean land.
2. Application for the appointment of a Leveki Magafaoa.
3. Application to change the Leveki Magafaoa.
4. Application for confirmation of alienation of land (including applications relating to leases, sales and security charges).
5. Application for the appointment of a receiver.
6. Application for an occupation order (including application for a certificate that an occupation order has terminated).
7. Application for an order of partition.
8. Application for an exchange order.
9. Application for a reservation order.
10. Application for an order vesting land for Church purposes.
11. Application for an easement.
12. Application for an order vesting land from a closed road to owners of adjoining land.
13. Application for an interlocutory injunction.
14. *Ex parte* applications.
15. Applications from—and relating to—the Registrar.
16. Application for adoption orders.

There are other applications that may be made, which are not covered here.

1. Application for an order restoring the effect of a lost instrument: s 9 Land Act.
2. Application for a declaration that land is subject to the land development provisions in Part 16 of the Niue Act 1966.
3. Application for an interlocutory order for directions or with reference to any other interlocutory matter in the proceedings (interlocutory matters are those dealt with before the final disposition of the case): r 12(12) Land Court Rules 1969.
4. Application for an order that the applicant be appointed the agent of a person under a disability: r 16(1)(a) Land Court Rules 1969.
5. Application for an order appointing a guardian *ad litem* for a person under a disability: r 17(1) Land Court Rules 1969.
6. Application for an order that a summons to a witness be issued: r 29(1) Land Court Rules 1969.

The following abbreviations are used throughout this chapter.

- The "Land Act" means the Land Act 1969.
- The "Amendment Act" means the Niue Amendment Act (No 2) 1968.
- The "Land Court Rules" means the Land Court Rules 1969.

The guidance in this chapter does not operate as a judgment or create a precedent, and is not a replacement for considering and interpreting the legislation yourself.



1 Application for determination of title to and interest in Niuean land

1.1 Introduction

The applications

This section includes applications for:

- determining who the common ancestor is;
- determining the boundaries of the land in question;
- determining the members of the Magafaoa; and
- determining the relative interests of the Magafaoa.

These applications are always heard together with an application to appoint a Leveki Magafaoa (see 2 below).

1.2 Who may apply?

Any Niuean claiming interest may apply

Any Niuean claiming to be interested in Niuean land or any person authorised by Cabinet on its behalf may apply: s 44 Amendment Act.

A duly appointed agent may make an application on behalf of a person under a disability: r 16 Land Court Rules.

1.3 Composition of the Court

Five Commissioners must preside

Five Commissioners must preside over applications for determination of title to and interest in Niuean land: s 47A Amendment Act.



1.4 What the Court can do

Powers of the Court

The Court has **exclusive jurisdiction** to hear and determine any application relating to, among other things, the title to and interest in any Niuean land: s 47(1) Amendment Act.

The Court may **dismiss** or **grant** an application in whole or in part or give leave to **extend**, **amend** or **withdraw** an application in whole or in part: r 26(1) of the Land Court Rules.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act. If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.

1.5 Guidance

Determined according to customs and usages

The Court must determine every title to and every interest in Niuean land according to the customs and usages of the Niuean people, as far as that can be ascertained: s 10(1) Land Act.



Rights of adopted persons

Note the effect of adoption orders on interests to Niuean land: s 16 Adoption Act 1955.

- In all respects, the adopted child will be deemed the child of the adoptive parent, as if the child had been born to that parent in lawful wedlock.
- The adoptive child ceases to be the child of his or her existing parents and they cease to be the parents of the child.
- All rights of the adopted child or another in any deed, instrument or will made **before** the adoption order or intestacy (where the testator or intestate has died) remain in place, unless there is express provision in the deed, instrument or will stating otherwise: s 16(2)(d) Adoption Act 1955.
- The adopted child acquires the domicile of his or her adoptive parent(s) and will be afterwards determined as if the child had been born in lawful wedlock to the adoptive parent(s).

Note that generally no adoption **by Niuean custom** (as opposed to the current formal legal process) has any force or effect: s 92 Amendment Act. The one exception is where a child was adopted before 1 April 1916 by Niuean custom and between that date and 4 December 1921 the adopting parent had died. In that case, the adoption has the same operation and effect as was attributed by Niuean custom: s 93 Amendment Act.

What the Court may require

The Court may require any of the following.

- A plan of the survey of the land affected to be attached to the application: s 10(2) Land Act.
- All claims relating to the land (whether by the applicant or by any other person) to be made in writing within a certain time period. After that time has expired no further claims may be admitted except by leave of the Court: s 10(3) Land Act. "Leave of the Court" means permission from the Court.
- Any person having an interest in an application to lodge with the Court a statement in writing setting out any one or more particulars of the following matters: s 11 Land Act.
 - (a) The boundaries of the portion of the land which he or she claims.
 - (b) The grounds of the claim.
 - (c) The genealogical tables showing descent from the ancestor or ancestors through whom title is claimed, down to and including all persons admitted by the claimant as entitled with the claimant under their claim.
 - (d) The names and the approximate location of cultivations, villages, burial places, with names of relatives of the claimant and persons included in their claim who have been there, and any other places or marks of historical interest.



- (e) Any other proof or signs of occupation of or connection with the land by the claimant and other persons included in their claim.

How ownership is determined Ownership is determined by ascertaining and declaring the Magafaoa of the land by reference to the common ancestor of it or by any other means which clearly identifies the Magafaoa: s 12 Land Act.

Magafaoa defined "Magafaoa" is defined in s 2 of the Land Act as "the family or group of persons descended from a common ancestor, including any person who has been legally adopted into the family, who at any given time are recognised as entitled by Niuean custom to any share or interest in the land, and excludes a former member of the family legally adopted into some other family. Where Niuean land is owned by a single person exclusively, that person is the Magafaoa of the land."

Court may ascertain the members of the Magafaoa Upon application at any time after the ownership of land has been determined, the Court may ascertain or declare the several members of the Magafaoa and their relative interests in the land. However, the Court may only do this for the purposes of allocating moneys derived from the land or any other purposes relating to the Land Act: s 13 Land Act.

The relative interests are to be expressed in shares or decimal points of a share.

Court may appoint a suitable Leveki Magafaoa The Court may appoint a suitable person to be Leveki Magafaoa of the land if:

- no application to appoint a Leveki Magafaoa is received within a reasonable time after the ownership of the land has been determined by the Court; or
- applications are signed by less than a majority of the Magafaoa who are 21 or older, then.

See below at 2.5.

2 Application for appointment of a Leveki Magafaoa

2.1 Introduction

Application may be made for order appointing Leveki Magafaoa When the ownership of any land has been determined, application may be made for an order appointing a Leveki Magafaoa of that land: s 14(1) Land Act.

The application for the appointment of a Leveki Magafaoa is usually heard



together with the application for determination of title to and interest in land (see 1 above).

2.2 Who may apply?

Adult members of Magafaoa may apply Any member of the Magafaoa who is 21 years or older may apply in writing: s 14(1) Land Act.

A duly appointed agent may make an application on behalf of a person under a disability: r 16 Land Court Rules.

2.3 Composition of the Court

Two Commissioners unless other applications heard Two Commissioners may preside over applications for the appointment of a Leveki Magafaoa, but when the application is accompanied by any other application that requires a panel of five Commissioners, then the Registrar will set the matter down for a panel of five Commissioners or a Judge.

2.4 What the Court can do

Powers of the Court The Court has **exclusive jurisdiction** to, among other things, appoint a Leveki Magafaoa: s 47(1) Amendment Act.

The Court (r 26(1) Land Court Rules and s 16 Land Act):

- **must appoint** the person named in the application in certain circumstances and **may appoint** a different person than the person named in the application in certain circumstances;
- may **dismiss** the application in whole or in part;
- upon such terms as the Court thinks fit, may give leave to **extend, amend** or **withdraw** an application in whole or in part.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act (but note the number of Commissioners required for the exercise of certain specific powers). If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.



2.5 Guidance

Relevant legislation See ss 14 to 16 of the Land Act.

Matter will not be programmed without consents and minutes Before an application for appointment of Leveki Magafaoa will be programmed for the Court to determine, evidence by way of written consents of members of the Magafaoa or minutes of meetings approving the application must be filed.

If the case comes before the Court without consents and minutes it will be automatically adjourned to the next Court: Direction of Chief Justice dated 13 April 2006.

When the Court *must* appoint the person named in the application If the application is signed by a majority of the members of the Magafaoa, the Court "shall" (that is, **must**) issue an order appointing the person names in the application as the Leveki Magafaoa of that land. Note that it does not matter whether the members of the Magafaoa are resident in Niue or not; however they must be 21 years or older: s 14 Land Act.

When the Court *may* choose the Leveki Magafaoa If no such application is received within a reasonable time after the ownership of the land has been determined by the Court or applications are signed by less than a majority of the Magafaoa who are aged 21 or older, then the Court **may** appoint a suitable person to be Leveki Magafaoa of the land.

A "suitable person" is any person who is domiciled in Niue (that is, their ordinary home is in Niue), and whom the Court is satisfied is reasonably familiar with the genealogy of the family and the history and locations of Magafaoa land. The Court may expressly limit their powers in such manner as it sees fit. But note that if the person so appointed is not a member of the Magafaoa, they will not by virtue of their appointment acquire any beneficial rights in the land. It is a good idea to make this clear, both to the members of the Magafaoa and to the person appointed, when making the order.

Court may consider views of absent member The appointment of a Leveki Magafaoa may not be questioned on the grounds that any member of the Magafaoa was absent from Niue, but the Court **may** consider any representation made in writing by any member so absent.

Powers and obligations of Leveki Magafaoa Appointing the Leveki Magafaoa is an important step. They make significant decisions on behalf of the members of the Magafaoa. Under s 15 of the Land Act, the Leveki Magafaoa has the power to control the occupation and use of the land under Niuean custom, and the power to alienate the land (in accordance with and subject to Part 3 of the Land Act): s 15 Land Act.

However, they also have an obligation to consult with the members of the Magafaoa—whether resident in Niue or not—according to Niuean custom, and must in particular meet the requirements of s 17(3) of the Land Act in relation to the sale and lease of land and the giving of security charges over the land.



Section 17(3) limits the Leveki Magafaoa's powers of alienation to:

- transferring the land to the Crown under and subject to s 43;
- leasing the land under and subject to ss 26 and 29; and
- giving a security charge over the land under and subject to ss 26 and 32.

3 Application to change Leveki Magafaoa

3.1 Introduction

Court may remove and replace Leveki Magafaoa Sometimes the members—or some of the members—may have concerns about the way the Leveki Magafaoa is performing their duties. This may be due to incapacity, inability, lack of consultation or acting outside of their powers.

The Court may remove and replace a Leveki Magafaoa in any of these situations and, on the death of the Leveki Magafaoa, may appoint a replacement.

3.2 Who may apply?

Adult members of Magafaoa may apply Any member of the Magafaoa who is 21 years or older may apply in writing: s 14(1) Land Act.

A duly appointed agent may make an application on behalf of a person under a disability: r 16 Land Court Rules.

3.3 Composition of the Court

Two Commissioners may preside Two Commissioners may preside over applications for the removal and replacement of a Leveki Magafaoa, but when the application is accompanied by any other application that requires a panel of five Commissioners, then the Registrar will set the matter down for a full panel of five or a Judge.



3.4 What the Court can do

Powers of the Court

The Court has **exclusive jurisdiction**, among other things, to hear and determine the application to remove and replace a Leveki Magafaoa: s 47 Niue Amendment Act.

The Court may (r 26 Land Court Rules and s 16 Land Act):

- **dismiss** the application, that is, **refuse** to remove the Leveki Magafaoa (with or without directions and conditions);
- **grant** the application, that is, **remove** the Leveki Magafaoa and **appoint a new Leveki Magafaoa**;
- upon such terms as Court thinks fit, give leave to **extend, amend** or **withdraw** an application in whole or in part.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act (but note the number of Commissioners required for the exercise of certain specific powers). If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.

3.5 Guidance

When the Court may remove a Leveki Magafaoa

The Court may remove from office any Leveki Magafaoa if (s 16(1) Land Act):

- in its opinion they cannot by reason of mental or physical disability or for any reason carry out their duties satisfactorily; or
- they are shown to have exercised their powers otherwise than in accordance with Niuean custom or in accordance with equity and good conscience; or
- they tender their resignation in writing to the Registrar.

“Equity and good conscience” in this context means fairly, given the facts and circumstances of the case.

When the Court may appoint a replacement Leveki Magafaoa

Upon the death or removal from office of any Leveki Magafaoa, a new Leveki Magafaoa may be appointed in the same way as set out in 2 above: s 16(2) Land Act.



4 Application for confirmation of alienation of land

4.1 Introduction

Instruments of alienation must be confirmed by the Court and registered With some exceptions outlined below, all instruments of alienation of Niuean land must be confirmed by the Court and registered before they take effect.

The Court staff will often assist parties to draw up the relevant instruments and get them ready for the Court to consider. This is not a mere rubber-stamping exercise by the Court; it must consider the instrument and ensure the appropriate conditions are met as set out in Part 3 of the Land Act.

4.2 Who may apply?

A party to an instrument of alienation may apply A party to an instrument of alienation may make an application to the Court for confirmation of that instrument: s 23 Land Act.

A duly appointed agent may make an application on behalf of a person under a disability: r 16 Land Court Rules.

4.3 Composition of the Court

Five Commissioners must preside Five Commissioners must preside over applications for confirmation of alienation of Niuean land: s 47A Amendment Act.

4.4 What the Court can do

Powers of the Court The Court has **exclusive jurisdiction** to hear and determine any application relating to, among other things, alienation of Niuean land: s 47(1) Amendment Act.

The Court may (s 28 Land Act and r 26(1) Land Court Rules):

- **confirm** or **refuse** to confirm the instrument of alienation;
- **dismiss** the application in whole or in part;
- with the consent of all parties to the instrument of alienation, **alter** the instrument so that it may be confirmed;
- upon such terms as the Court thinks fit, give leave to **extend**, **amend** or **withdraw** an application in whole or in part.

The Court may **determine the division of proceeds** from alienation of land and direct that a **lower commission** be paid to the Court: ss 20 and 21 Land



Act.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act. If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.

4.5 The general rules about alienation

Alienation defined

"Alienation" is defined in s 2 of the Amendment Act as, in relation to Niuean land, "the making or grant of any transfer, sale, gift, lease, licence, easement, profit, mortgage, charge, encumbrance, trust or other disposition, whether absolute or limited, and whether legal or equitable; and includes a contract to make any such alienation; and also includes the surrender or variation of a lease, licence, easement, or profit and the variation of the terms of any other alienation as hereinbefore defined."

Section 17 of the Amendment Act adds: "a contract of sale or timber, minerals, crops, or other valuable things attached to or forming part of any Niuean land, or being produce of it, shall be deemed to be an alienation of that land, unless the thing so sold or agreed to be sold has been severed from the land before the making of the contract". Any crop which attains maturity and may be harvested within two years from sowing or planting is not considered a "crop".

No one but the Leveki Magafaoa, Cabinet, the Registrar and the Land Court can alienate Niuean land

No person shall be capable of making any alienation of Niuean land or of any interest in it, except Cabinet (taking/buying for public purpose) or the Leveki Magafaoa, the Registrar or the Land Court: s 24 Amendment Act; Part 3 Land Act.

Section 15 of the Land Act gives the **Leveki Magafaoa** the power to alienate the land (in accordance with and subject to Part 3 of the Land Act): s 15 Land Act. The Leveki Magafaoa may (s 17(3) Land Act):

- transfer the land to the Crown (under and subject to s 43 Land Act);
- lease the land (under and subject to ss 26 and 29 Land Act);
- give a security charge over the land (under and subject to ss 26 and 32).

The **Registrar** may act as agent for the Magafaoa to execute renewals of a lease when it is difficult or impossible to obtain execution from the Leveki Magafaoa: s 30 Land Act.

Cabinet may take or acquire Niuean land for public purposes in certain circumstances: s 51 Land Act, ss 11 and 16 Amendment Act, ss 14 and 15 Electric Power Supply Act 1960.



The **Land Court** may make the following orders alienating Niuean land:

- Order appointing a receiver: s 31 Land Act (see 5 below).
- Occupation order: s 31 Land Act (see 6 below).
- Partition order: ss 34 to 39 Land Act (see 7 below).
- Exchange order: ss 40-42 Land Act (see 8 below).
- Order setting apart any Niuean land as a reservation for communal purposes: ss 44 to 46 Land Act (see 9 below).
- Order vesting Niuean land for church purposes: s 26 Amendment Act (see 10 below).
- Order creating an easement or right of way: ss 47 and 89 Amendment Act (see 11 below).
- Order vesting land from a closed road to owners of adjoining land: Part 7 Amendment Act (see 12 below).
- Declaration that Niuean land is subject to land development provisions: Part 16 Niue Act 1966.

Compulsory registration—but not until confirmed by the Court

Apart from some minor exceptions (see below), every instrument relating to the title to land must be registered. However, no instrument of alienation affecting Niuean land can be registered **until it has been confirmed by the Court**: ss 4 and 22(1) Land Act.

The exceptions are (ss 4(1) and 22(3) Land Act):

- any lease or occupation order of no more than two years' duration;
- any transfer, security charge or other instrument disposing of any lease of no more than two years' duration;
- any will;
- any appointment of a special representative;
- any arrangement or decision of the Leveki Magafaoa to give the right to use land for a period of no more than two years.

Interest in Niuean land not to be taken in execution

No form of judicial process may take in execution—or otherwise render available—any person's interest in Niuean land for the payment of debts or liabilities (whether in favour of the Crown or any other person): s 18 Land Act. This does not affect the operation of any security charge or other charge to which the land is or may be subject.

Restrictions on disposition of proceeds of Niuean land

Except as provided below, no assignment, charge or other disposition shall be given over the proceeds of any rent, purchase money or other money which is—or may become—receivable in respect of Niuean land or any interest in it: s 19(2) Land Act.

The exception is an assignment of any rent, purchase money, cropping proceeds or other money which is or may become receivable in respect of



Niuean land, or any interest of the Magafaoa in it, may be given **in the approved form** by the Leveki Magafaoa or (in respect of their personal interest) by a member of the Magafaoa or by any lessee or licensee **only to the Crown or any lending institution approved by Cabinet**: s 19 Land Act.

Purchase money, rents or other proceeds of alienation

All proceeds from any alienation, whether by way of purchase money, rent or otherwise, must be paid to the Registrar for distribution to the Leveki Magafaoa or the persons entitled to it. The receipt of the Registrar is sufficient discharge for any money paid, as if the money had been paid to the persons entitled to it.

All money so paid into the Court shall, after any necessary deduction, be paid out of the Court to the Leveki Magafaoa or the persons entitled to it as determined by any order of the Court: s 20 Land Act.

The Registrar may charge a commission of five per cent, but the Court may direct that a lower rate of commission be paid. The Court must have regard to the amount of money paid, the number of persons entitled to it, and any other relevant matters: s 21 Land Act.

4.6 Confirming instruments of alienation

No alienation by Leveki Magafaoa until confirmed

No alienation of land by the Leveki Magafaoa shall have any force or effect unless and until it has been confirmed by the Court: s 22(1) Land Act. Note that this does **not** apply to arrangements or decisions of the Leveki Magafaoa by which any person is given the right to use any land for a period of **no more than two years**: s 22(2) Land Act.

The disposition of proceeds or security charges by members of the Magafaoa does not have to be confirmed—but must be registered: s 4(1) Land Act.

No confirmation if application is out of time

The Court may not grant confirmation of an instrument of alienation by the Leveki Magafaoa unless the application for it is made by or on behalf of a party to the instrument of alienation **within six months after the date of execution** of the instrument by the Leveki Magafaoa: s 23 Land Act.

How confirmation is granted

Confirmation is granted by order of the Court. A certificate of confirmation must be endorsed or otherwise written on the instrument of alienation and signed by the Registrar (acting under the authority of the order), and sealed with the seal of the Court: s 24 Land Act.

Effect of confirmation

Once they are registered and confirmed (if valid), instruments of alienation take effect as from and including the date at which they would have taken effect if no confirmation had been required: s 25 Land Act.

The Court must be satisfied of certain things before confirming

Section 26 of the Land Act sets out the matters that the Court must be satisfied of before confirming any alienation.



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1. That the instrument of alienation has been executed in the manner required by the Land Act.
 2. That the alienation is not contrary to equity or good faith, or to the interests of the persons alienating or to the public interest.
 3. That, having regard to the relationship (if any) of the parties and to any other special circumstances of the case, the rental or consideration (if any) for the alienation is adequate.
 4. That any lease of more than five years' duration and any security charge has been agreed to by the majority of the members of the Magafaoa (whether resident in Niue or elsewhere).
 5. That the alienation is not otherwise prohibited by law.

1. That the instrument has been executed in the correct manner

The execution of an instrument must be attested by a person authorised to take statutory declarations under s 720 of the Niue Act 1966 (s 7 of the Land Act), that is:

- any Judge, Commissioner, Registrar or Deputy Registrar of the High Court;
- the Controller of Customs; or
- any practitioner entitled to practice in the Niuean courts.

The attesting witness:

- must add their place of abode and calling, office or description;
- must certify that the instrument has been explained to the party whose signature is attested and that person appeared to understand its contents;
- cannot attest any instrument which enables them to acquire or dispose of any interest;
- cannot sign as an attesting witness unless the date (or dates) of execution is stated in the instrument.

However, the Court may confirm an instrument of alienation notwithstanding any informality or irregularity in the mode of execution if, having regards to the interests of all the parties, it is satisfied that the informality or irregularity is immaterial: s 26(2) Land Act.



Note that no confirmation of alienation shall be questioned or invalidated on the ground of any error or irregularity in the procedure by which it was applied for or granted: s 26(3) Land Act.

2. That the alienation is not contrary to equity or good faith, or to the interests of the persons alienating or to the public interest.

"Equity and good faith" in this context means fairly, given the facts and circumstances of the case.

3. That, having regard to the relationship (if any) of the parties and to any other special circumstances of the case, the rental or consideration (if any) for the alienation is adequate.

"Consideration" in this context means the compensation, price or thing of value given for the alienation.

This, again, is about what is fair in the circumstances. The Court must ensure that members of the Magafaoa are not subjected to unfair or unjust behaviour.

Note that in some situations there will be no consideration given, for example, where land is set aside for some purpose in service to the community or public good.

4. That any lease of more than five years' duration and any security charge has been agreed to by the majority of the members of the Magafaoa (whether resident in Niue or elsewhere).

The applicant must provide evidence that the majority of the members of the Magafaoa (21 years or older) agree to:

- any lease of more than five years' duration; or
- any security charge.

The Court may grant an adjournment to enable to applicant to seek the necessary consents, or dismiss the application.

5. That the alienation is not otherwise prohibited by law.

The instrument cannot, for example, enable the sale of the land.

Confirmation of instruments

When any valid contract to grant or renew a lease, or any other valid contract



under contracts that have already been confirmed

of alienation, has been duly confirmed, the confirmation of any lease or other instrument of alienation **under that contract** shall, if the instrument is duly executed under the Land Act, be granted by the Court **as a matter of right**: s 27 Land Act.

This means that the tests listed above do not have to be applied again. As long as the instrument of alienation is duly executed and the original contract has been confirmed, then the Court **must** confirm the subsequent instrument of alienation.

Court may alter instruments with consent

On an application for confirmation, the Court may make such alterations as may be thought necessary in order to justify confirmation, and then confirm it: s 28 Land Act.

All parties to the instrument must consent to the alteration. This may require a brief adjournment to allow parties to confer.

Appeal to Court of Appeal

A party may appeal to the Court of Appeal any decision of the Court to grant or refuse confirmation of alienation, or from any variation by the Court to the terms of any alienation: s 22(2) Land Act.

4.7 Leases

General provisions regarding leases (that are *not* to the Crown)

No lease of Niuean land can be for more than 60 years, including any term or terms of renewal to which the lessee, may be entitled: s 29(1) Land Act. The two exceptions to this general rule are:

1. **With the prior written approval of Cabinet, leases may be granted for** afforestation purposes or for the purpose of erecting commercial or industrial buildings **providing for a renewal period taking the total term beyond 60 years if the right to such period(s) is expressed to be conditional upon the performance of the earlier term or terms of certain specified covenants as to the planting and care of trees, or to the erection in permanent, materials of substantial improvements: s 29(3) Land Act.**
2. **A lease may be granted for public purposes or church purposes for a period not exceeding 60 years with perpetual rights of renewal or with other rights of renewal taking the total period beyond 60 years. The lease must be expressed to be for public purposes or church purposes and shall provide for the termination of the lease if the land ceases to be used exclusively for these purposes: s 29(4) Land Act.**

Every lease must take effect in possession within one year from (and including) the date of the first execution of it by any party to it: s 29(2) Land Act.



No lease for Niuean land can make provision for the payment to the lessee of compensation for improvements made by them on or to the land: s 29(5) Land Act.

Every lease of Niuean land must be in the form approved for use by the Registrar: s 29(6) Land Act.

Compulsory registration once confirmed by the Court Leases of over two years must be confirmed by the Court and registered: ss 4 and 22(1) Land Act. See 4.6 above.

Lessee may apply for order directing Registrar to execute renewal The lessee under any lease of Niuean land who claims that they are entitled to a renewal of their lease and that it is difficult or impossible to obtain execution of an instrument of renewal from the Leveki Magafaoa, may apply to the Court for an order directing the Registrar to execute, as agent of the Magafaoa, an instrument of renewal in accordance with the terms of the lease: s 30(1) Land Act. The Court would usually ask for proof of the impediment to execution, and seek the consent of the Magafaoa.

When the order is made, the Registrar has full authority in accordance with the terms of the order to execute the renewal of the lease as if he or she were the duly appointed agent of the Magafaoa: s 30(2) Land Act.

4.8 Sales

Niuean land may be transferred to the Crown Niuean land may be alienated **to the Crown** by way of transfer by an instrument of transfer executed by the Leveki Magafaoa and confirmed by the Court: s 43(1) Land Act.

Members of Magafaoa and their shares must be ascertained The Court must not confirm the instrument of transfer until the members of the Magafaoa and their shares are ascertained by the Court: s 43(2) Land Act.

Majority (or all) of Magafaoa must consent On the application of the Crown or Leveki Magafaoa, the Court must be satisfied that the majority of the members of the Magafaoa—or where there are fewer than five members, all of the members of the Magafaoa—whether resident in Niue or elsewhere, consent to the terms and conditions of the sale: s 43(3) Land Act.

Absent members Any members of the Magafaoa of the land affected by the sale who are absent from Niue may forward their consents or objections in writing to the Registrar, or appoint in writing some person to appear and speak on their behalf in the Court: s 43(5) Land Act.

Where some members object If some members of the Magafaoa of the land object to the sale of the land to



the Crown, the Court may make a partition order setting apart the shares of the members objecting if it is satisfied that the land can be economically subdivided: s 43(3) Land Act. See below at 7 for guidance on partition orders.

Compulsory registration – but not until confirmed by the Court Sales of Niuean land to the Crown must be confirmed by the Court and registered: ss 4 and 22(1) Land Act. See 4.6 above.

Effect of confirmation and registration When an instrument of alienation of Niuean land to the Crown is duly confirmed by the Court and registered, the land becomes Crown land: s 43(6) Land Act.

4.9 Security charges

Security may be given by way of security charge Security over:

- Niuean land
- any interest of the Magafaoa in any land
- the interest of any nature of any person in Niuean land

— may be given by means of a security charge created under s 32 of the Land Act or any other enactment: s 32(1) Land Act.

Security may not be given over Niuean land in any other way.

Security may be given only to Crown or approved lending institution Security may **only** be given to the Crown or a lending institution approved by Cabinet (that is, the Niue Development Bank): s 32(2) Land Act.

How security is given The security must be created by an instrument in an approved form executed by the Leveki Magafaoa or by the other person giving the security and registered under Part 1 of the Land Act: s 32(3) Land Act.

Security charge executed by Leveki Magafaoa must be confirmed Any security charge executed by a Leveki Magafaoa is subject to confirmation by the Court: s 32(3) Land Act. See 4.6 above.

Compulsory registration Every security charge for a period of more than two years must be registered once it is confirmed by the Court: ss 4 and 22(1) Land Act.

How charges are enforced No charge or security charge over Niuean land or any interest shall be enforceable by sale of the land or interest charged: s 32(5) Land Act.



The holder of the security charge would usually apply for the appointment of a receiver if the terms of the charge are not complied with. See 5 below.

5 Application for appointment of receiver

5.1 Introduction

Court may appoint a receiver The Court may enforce a charge or security charge by appointing a receiver in respect of the land or interest charged: s 33 Land Act.

5.2 Who may apply?

Holder of charge may apply The holder of a security charge (that is, the Crown or Niue Development Bank) may apply for the appointment of a receiver.

5.3 Composition of the Court

Five Commissioners must preside Five Commissioners must preside over applications for the appointment of a receiver: s 47A Amendment Act.

5.4 What the Court can do

Powers of the Court The Court has **exclusive jurisdiction** to hear and determine any application relating to, among other things, the appointment of a receiver: s 47(1) Amendment Act.

The Court may (s 56 Amendment Act, r 26(1) Land Court Rules):

- **appoint** or **refuse** to appoint a receiver;
- **dismiss** the application in whole or in part;
- upon such terms as the Court thinks fit, give leave to **extend**, **amend** or **withdraw** an application in whole or in part.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act. If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.



The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.

5.5 Guidance

Must be proof of default Proof of the default of the terms of the charge must be provided by the applicant: s 33 Land Act.

What receiver may do Unless the Court otherwise orders, the receiver is entitled to the possession of the property, and to the receipt of the rents and profits: s 56 of the Amendment Act.

The receiver's role is to enforce the charge over the land, that is, to take possession of the land and receive all of rents and profits associated with the land, so that the terms under the charge may be satisfied: s 56(2) Amendment Act.

6 Application for occupation order

6.1 Introduction

Court may make occupation orders The Court may make occupation orders in respect of Niuean land. An occupation order enables the personal use of the land in question by a person or persons (and in some cases their successors) for their lifetime or some specified term: s 31(5) Land Act.

6.2 Who may apply?

Leveki Magafaoa or a member of the Magafaoa may apply The Leveki Magafaoa or a member of the Magafaoa desiring the order, or both, may apply for an occupation order: s 31(2) Land Act.

A duly appointed agent may make an application on behalf of a person under a disability: r 16 Land Court Rules.

6.3 Composition of the Court

Five Commissioners must preside Five Commissioners must preside over applications for determination of occupation of Niuean land: s 47A Amendment Act.



6.4 What the Court can do

Powers of the Court

The Court has **exclusive jurisdiction** to hear and determine any application relating to, among other things, occupation of Niuean land: s 47(1) Niue Amendment Act.

The Court may (s 31 Land Act, r 26(1) Land Court Rules):

- **make** or **refuse** to make an occupation order;
- **dismiss** an application in whole or in part;
- upon such terms as the Court thinks fit, give leave to **extend**, **amend** or **withdraw** an application in whole or in part.

The Court may specify certain **covenants or conditions**, for example, the occupation order may be limited to the lifetime of the applicant and then revert back upon their death.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act. If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.

6.5 General rules about occupation orders

Matter will not be programmed without consents and minutes Before an application for an occupation order will be programmed for the Court to determine, evidence by way of written consents of members of the Magafaoa or minutes of meetings approving the application must be filed.

If the case comes before the Court without consents and minutes it will be automatically adjourned to the next Court: Direction of Chief Justice dated 13 April 2006.

Must be a description and plan of the area

The application for an occupation order must be accompanied by a description and plan of the area to be occupied: s 31(2) Land Act.

Minimum area of occupation

The area in question must be no less than 20 perches in the case of a village site and no less than two acres for a plantation area, unless the area concerned has already been defined by survey and used or occupied as a separate section:
s 31(4) Land Act.

Joint occupation orders

Every occupation order of a village site shall, if possible, be made in favour of a husband and wife jointly: s 31(6) Land Act.



What an occupation order may provide for An occupation order may be made for the personal use of the person or persons for whose favour it is made for their lifetime, or for some specified term of years, or granted on terms that it passes to their successors under Niuean custom: s 31(5) Land Act.

It may **not** provide for rental or premium to be paid: s 31(7) Land Act.

The occupation order may provide for its termination and the revision to the Magafaoa of the land affected **if** the beneficiary or beneficiaries:

- cease(s) to make full use of the land for any period of not less than two years (which may be specified in the occupation order);
- is/are absent from Niue for any period of not less than two years (which may be specified in the occupation order), otherwise than with the prior written approval of Cabinet for the purpose of training, education or instruction;
- fail(s) to perform any special covenants (which may be specified in the order); or
- surrender(s) their occupation rights by executing an instrument in the approved form: s 31(8) Land Act.

6.6 Termination of occupation orders

Court may issue certificate that occupation order terminated The Leveki Magafaoa or the Registrar may apply to the Court for a certificate that the order has for any of the above reasons terminated. If the Court is satisfied that the order was terminated under s 31(8), it may give a certificate that the order has terminated: s 31(9)(a) Land Act. That certificate may be registered: s 31(9)(b) Land Act.

7 Application for order of partition

7.1 Introduction

Court may partition land The Court may partition off a piece or pieces of Niuean land.
See ss 34 to 39 of the Land Act.

7.2 Who may apply?

Any Niuean claiming interest may apply Any Niuean claiming to be interested in Niuean land or any person authorised by Cabinet on its behalf may apply: s 44 Amendment Act.

A duly appointed agent may make an application on behalf of a person under a



disability: r 16 Land Court Rules.

7.3 Composition of the Court

Five Commissioners must preside Five Commissioners must preside over applications for partition orders: s 47A Amendment Act.

7.4 What the Court can do

Court's powers The Court has **exclusive jurisdiction** to partition Niuean land: s 34(1) Land Act.

The Court may (ss 34 to 37 Land Act, r 26(1) Land Court Rules):

- **make** a partition order, and **apportion** rights and obligations and **appoint** Leveki Mangafaoa in respect of partitioned land;
- **refuse** to make a partition order;
- **dismiss** the application in whole or in part;
- upon such terms as the Court thinks fit, give leave to **extend**, **amend** or **withdraw** an application in whole or in part.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act. If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.

7.5 Guidance

No application may be heard until previous applications signed and sealed No application for the partition of Niuean land may be heard or determined by the Court until all previous partition orders made with respect to the same land have been sealed and signed: r 12(9) Land Court Rules.

Matter will not be programmed without consents and minutes Before an application for a partition order will be programmed for the Court to determine, evidence by way of written consents of members of the Magafaoa or minutes of meetings approving the application must be filed.

If the case comes before the Court without consents and minutes it will be automatically adjourned to the next Court: Direction of Chief Justice dated 13 April 2006.



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| Court may refuse to partition | The Court's power to partition is discretionary. It may refuse to exercise it in any case where it thinks that partition would be inexpedient (that is, not practical, suitable or advisable) in the public interest or in the interests of the Mangafaoa or other persons interested in the land: s 34 Land Act. |
| Court may apportion rights and obligations | <p>When a partition order is made, the Court may apportion or adjust as between the partitioned pieces all rights, obligations or liabilities arising from any lease, occupation order or charge to which the land is subject at the date of the partition: s 35(1) Land Act. This may be done in the partition order or in any subsequent order made on the application of any person interested or the Registrar, or on the Court's own motion.</p> <p>However, the Court must not make any apportionment or adjustment without the consent of each and every:</p> <ul style="list-style-type: none">• lessee of the land;• person having an interest in the land, by virtue of an occupation order under s 31; and• person or body in whose favour a security charge created under s 32 subsists over the land or over any interest in the land: s 35 Land Act. |
| The Court may allocate portions of the land | Where the Leveki Mangafaoa wishes to allocate a portion of the land to a member of the Mangafaoa, or the Mangafaoa has become unduly large, or in cases of irreconcilable family disputes, the Court may partition the land among groups of members of the Mangafaoa on what appears to the Court to be the general desire of the persons concerned to be just and equitable: s 36(a) Land Act. |
| The Court must avoid unsuitable partitions | The Court must avoid, as far as practicable, the subdivision of any land into areas which, because of their small size or their configuration or for any other reason, are unsuitable for separate ownership or occupation: s 36(b) Land Act. |
| The Court may appoint new Leveki Mangafaoa | The Court may appoint new Leveki Mangafaoa in respect of the pieces of land affected by partition orders: s 36(c) Land Act. |
| Court may combine several areas of land | When the Mangafaoa of one area of land is also the Mangafaoa of any other areas of land, the Court may, for the purposes of partition between groups of members of the Mangafaoa, treat those several areas as a single area owned by them and make an order or orders of partition accordingly: s 37 Land Act. |
| Rights, charges and interest carry over to new land allocation | If the share or interest of any person (interest A) is subject to any right, charge or interest vested in any other person (interest B), that interest B shall (subject to any apportionment or adjustment made under s 35) attach to and affect the land or interest that is allocated by the partition order to the owners of interest |



A: s 38 Land Act.

The Registrar records particulars in the Land Register

When any land is partitioned by the Court, the Registrar must give effect to the partition by entries in the Land Register, recording particulars of any new section created under the order and to the extent necessary for cancelling or amending any former entry: s 39 Land Act.

Checklist

- Have all previous partition orders been sealed and signed? (If not, do not partition.)
- Would it be inexpedient in the public interest or in the interests of the Mangafaoa or other persons interested in the land? (If so, do not partition.)
- Is the land suitable for partitioning? Is it large enough? Is it configured so as to make it suitable for partition? (If not, do not partition.)
- Is it appropriate to partition the land among groups of members of the Mangafaoa? If so, what is the general desire of the persons concerned? Would it be just and equitable?
- Check what other interests there are over the land in question. Are those people or organisations represented or have they made their views known? Do they consent to any proposed apportionment or adjustment? (If not, adjourn to allow time to seek their views.)
- Are there existing interests that need to be explicitly attached to the partitioned land?
- Appoint Leveki Mangafaoa.
- Are there multiple areas owned by Mangafaoa that may be treated as one?
- Order that appropriate changes are made to the instruments on the Register affected by the partition.



8 Application for exchange order

8.1 Introduction

Interests may be exchanged Any interest in Niuean land may be exchanged for an interest in any other Niuean land or Crown land: s 40(1) Land Act.

8.2 Who may apply?

Any Niuean claiming interest may apply Any Niuean claiming to be interested in Niuean land or any person authorised by Cabinet on its behalf may apply: s 44 Amendment Act.

A duly appointed agent may make an application on behalf of a person under a disability: r 16 Land Court Rules.

8.3 Composition of the Court

Five Commissioners must preside Five Commissioners must preside over applications for the exchange of land: s 47A Amendment Act.

8.4 What the Court can do

Powers of the Court The Court has **exclusive jurisdiction** to hear and determine any application relating to, among other things, the exchange of Niuean land: s 47(1) Amendment Act.

The Court may (s 40(1) Land Act and r 26(1) Land Court Rules):

- **make or refuse** to make an exchange order;
- **dismiss** the application in whole or in part;
- upon such terms as the Court thinks fit, give leave to **extend, amend** or **withdraw** an application in whole or in part.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act. If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.



8.5 Guidance

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| Conditions that must be satisfied | <p>Before making an exchange order the Court must be satisfied that (s 41 Land Act):</p> <ul style="list-style-type: none">• the exchange is not detrimental to the interests of the Magafaoa affected by it; and• either:• the interests to be exchanged are in its opinion approximately equal in value; or• where they are so unequal in value as to require this course, a sufficient sum of money by way of equality of exchange has been actually paid or sufficient security for the payment of it has been given; and• the majority of the members of the Magafaoa—or where there are fewer than five members, all the members of the Magafaoa—(whether resident in Niue or elsewhere) consent to the exchange; and• the Minister consents to the exchange of any Crown land. |
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| Effect of order of exchange | <p>An order of exchange transfers and vests the respective interests expressed to be exchanged: s 42(1) Land Act.</p> <p>When any Crown land becomes vested in a Magafaoa by an order of exchange, the land becomes Niuean land: s 42(2) Land Act.</p> |
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9 Application for reservation order

9.1 Introduction

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| Court may create reservations | <p>The Court may set apart Niuean land as a reservation for the common use of village residents, church or other group for a specified purpose.</p> <p>See ss 44 to 46 of the Land Act.</p> |
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9.2 Who may apply?

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| Leveki Magafaoa may apply for reservation and any Niuean claiming interest may apply for revocation/variation | <p>The Leveki Magafaoa (with the consent of the majority of the members) may apply for a reservation order: s 44(1) Land Act.</p> <p>Any Niuean claiming to be interested in Niuean land or any person authorised by Cabinet on its behalf may apply for the revocation or variation of a reservation order: s 44 Amendment Act.</p> |
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A duly appointed agent may make an application on behalf of a person under a disability: r 16 Land Court Rules.

9.3 Composition of the Court

Five Commissioners must preside Five Commissioners must preside over applications for reservation orders: s 47A Amendment Act.

9.4 What the Court can do

Powers of the Court

The Court has **exclusive jurisdiction** to hear and determine any application relating to, among other things, the reservation of Niuean land: s 47(1) Amendment Act.

The Court may (ss 44(1) and 45 Land Act and r 26(1) Land Court Rules):

- **make** or **refuse** to make a reservation order;
- **revoke** or **vary** a reservation order;
- **dismiss** the application in whole or in part;
- upon such terms as the Court thinks fit, give leave to **extend**, **amend** or **withdraw** an application in whole or in part.

The Court may **vest** any reservation in any body corporate or in one or more persons **in trust**, and may **appoint** trustees: s 46 Land Act.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act. If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.



9.5 Guidance

Court may set aside land for a reservation The Court may make an order setting apart any Niuean land as a reservation for the common use of:

- the residents of a village; or
- a church; or
- other group or institution,

— for such purpose as a burial ground, fishing ground, village site, landing place, place of historic interest, source of water supply, church site, building site, recreation ground, bathing place or any other specified purpose whatsoever: s 44(1) Land Act.

What the Court must be satisfied of

Before making the order, the Court must be satisfied that:

- the majority of the members of the Magafaoa who are ordinarily resident in Niue consent: s 44(1) Land Act; and
- the members of the Magafaoa who are not ordinarily resident in Niue will not suffer undue hardship as a result of the proposed order: s 44(2) Land Act.

“Undue hardship” means hardship which amounts to an injustice.

Court may revoke or vary reservation order

The Court may revoke or vary a reservation order in respect of:

- the boundaries of the land included in the reservation; or
 - the purposes of the reservation: s 45(1) Land Act.
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Vesting land back to Magafaoa after revocation/variance

Any land that ceases to be reservation land vests back to the Magafaoa who had ownership immediately before the reservation was ordered (or their successors). The Court may make an order vesting the land in the Magafaoa found by it to be entitled to the land and, if necessary, ascertain the members of the Magafaoa and their relative interests: s 45(2) Land Act.

Court may vest reservation in body corporate or persons

The Court may by order vest any reservation in any body corporate or in one or more persons in trust to hold and administer it for the benefit of the persons or class of persons for whose benefit the reservation is constituted, and may appoint a new trustee or new trustees or additional trustees: s 46 Land Act.



10 Application for an order vesting land for Church purposes

10.1 Introduction

Court may vest land for Church purposes The Land Court may make an order vesting land in any body corporate to hold and administer it for specified Church purposes.

10.2 Who may apply?

Leveki Magafaoa or owners may apply The Leveki Magafaoa, or where there is none, the owners of the land may apply: s 26 Amendment Act.

A duly appointed agent may make an application on behalf of a person under a disability: r 16 Land Court Rules.

10.3 Composition of Court

Five Commissioners must preside Five Commissioners must preside over applications for orders vesting land for Church purposes: s 47A Amendment Act.

10.4 What the Court can do

Powers of the Court The Court has **exclusive jurisdiction** to hear and determine any application relating to, among other things, the vesting of Niuean land for Church purposes: s 47(1) Amendment Act.

The Court may (s 26 Amendment Act and r 26(1) Land Court Rules):

- **make** an order vesting land for Church purposes and **impose** terms and conditions;
- **refuse** to make an order vesting land for Church purposes;
- **dismiss** the application in whole or in part;
- upon such terms as the Court thinks fit, give leave to **extend, amend** or **withdraw** an application in whole or in part.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act. If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.



10.5 Guidance

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| What the Court must be satisfied of | Before making the order, the Court must be satisfied that (s 26(1) Amendment Act): <ul style="list-style-type: none">• the land has been at any time given or set aside by the Leveki Magafaoa or—where there is no Leveki Magafaoa—by the owners exclusively for Church purposes for the benefit of its adherents; and• the Church is a Christian church; and• the Leviki Magafaoa or owners are willing that the land be exclusively so used in perpetuity (that is, for an unlimited period of time); and• no sufficient alienation or disposition of the land by way of lease or otherwise has been made to give effect to the gift. |
| Court may make order(s) and set terms and conditions | The Court may make one or more orders, subject to such terms and conditions as it thinks fit to impose, vesting the land in such body corporates nominated by the applicant: s 26(2) Amendment Act. |
| Evidence to support application | All records, instruments, reservations and generally all acts of authority relating to the giving or setting aside of land for Church purposes in force at 1 November 1969 may be accepted by the Court as evidence in support of any application for an order vesting land for Church purposes: s 28 Amendment Act. |
| Effect of the order | The order takes effect according to its tenor (that is, as it is intended to) and the land vests in the body corporate without any transfer or other instrument of assurance: s 26(3) Amendment Act. |

11 Application for an easement

11.1 Introduction

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| Court may declare land to be subject to a right to traverse it | An easement is a right held by a person or persons over land owned by another. The Court may declare any land to be subject to a right of the public or of any person or class of persons to travel across that land for the purpose of gaining access or improved access to any other land, subject to any conditions which may be prescribed by the Court: s 89(1) Amendment Act. |
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11.2 Who may apply?

Any Niuean claiming interest may apply

Any Niuean claiming to be interested in Niuean land or any person authorised by Cabinet on its behalf may apply: s 44 Amendment Act.

A duly appointed agent may make an application on behalf of a person under a disability: r 16 Land Court Rules.

11.3 Composition of the Court

Two Commissioners may preside

Two Commissioners may preside over applications for an easement: s 47A Amendment Act. However, when the application is accompanied by any other application that requires a panel of five Commissioners, then the Registrar will set the matter down for a panel of five Commissioners or a Judge.

11.4 What the Court can do

Powers of the Court

The Court has **exclusive jurisdiction** to hear and determine any application for an easement: s 47(1) Amendment Act.

The Court may (ss 47(2) and 89(1) Amendment Act, r 26(1) Land Court Rules):

- **create** an easement and **prescribe** (or vary) conditions and **order** compensation;
- **refuse** to create an easement;
- **dismiss** the application in whole or in part;
- upon such terms as the Court thinks fit, give leave to **extend**, **amend** or **withdraw** an application in whole or in part.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act (but note the number of Commissioners required for the exercise of certain specific powers). If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.

11.5 Guidance

Rights to cross land subject to obligations

An easement will be subject to any conditions the Court prescribes: s 89(1) Amendment Act. For example, the Court may specify that no trees may be planted on the access way, specify the size of it, limit the rights to certain persons or class of persons, and so on.



The rights of any person under such an order shall be subject to an obligation not to cause any damage to the land affected by the order or any crops or improvements on it: s 89(2) Amendment Act.

Court may define the route and add or vary conditions

The Court may, at the time of making the order, or at any time afterwards, define by reference to a plan or map the route to be followed over the land. Where that is done after the making of the easement order, the Court may impose additional conditions or vary any conditions already made: s 89(3) Amendment Act.

Consent of Cabinet needed for Crown land

No order shall be made declaring a right of access over Crown land except with the consent in writing of the Cabinet: s 89(4) Amendment Act.

Easements do not affect the ownership of land

The declaration of any right of access over any land does not affect the ownership of the land: s 89(5) Amendment Act.

Court may amend or cancel easement

Any order made under s 89 may at any time be amended or cancelled, if the Court thinks fit: s 89(6) Amendment Act.

Court may order compensation

The Court may order the payment of compensation to persons with an interest in the land, as it thinks fit: s 47(2) Amendment Act.



12 Application for an order vesting land from a closed road to owners of adjoining land

12.1 Introduction

Cabinet may create and close roads A road is any land which has been declared a road by Cabinet under Part 7 of the Amendment Act: s 84(1) Amendment Act.

Cabinet may by warrant declare any land as a road or, except where it would deny access to other land, close any road: ss 87 and 90 Amendment Act.

Roads are Crown land with public right of way When land has been declared a road it vests in the Crown, subject to the public right of way, and the Crown creates, maintains and controls it: ss 84(2) and 85 Amendment Act.

The Land Court may vest land from a closed road to owners of adjoining land Where any road has been closed under s 90 the Land Court may vest the whole or any portion of the closed road in the Leveki Magafaoa or owners of any adjoining land that was Niuean land at the time the road was constituted: s 90(2) Amendment Act.

12.2 Who may apply?

Cabinet may apply Cabinet may apply for the order: s 90(2) Amendment Act.

12.3 Composition of the Court

Five Commissioners must preside Five Commissioners must preside over such applications: s 47A Amendment Act.

12.4 What the Court can do

The Court has **exclusive jurisdiction** to hear and determine any application relating to the ownership of Niuean land: s 47(1) Amendment Act.

The Court may (s 90 Amendment Act, r 26(1) Land Court Rules):

- **vest** the whole or a portion of the land and **order the title be amended** accordingly;
- **refuse** to vest the land;
- **dismiss** the application in whole or in part;
- upon such terms as the Court thinks fit, give leave to **extend, amend**



or **withdraw** an application in whole or in part.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act. If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.

12.5 Guidance

Land becomes subject to same interests and encumbrances

That land so vested becomes subject to any reservation, trust, right, title, interest or encumbrance to which the land with which it is incorporated is subject to: s 90(3) Amendment Act.

Title may be amended

The Court may amend any existing title to include in it that land: s 90(4) Amendment Act.

The Registrar may make all necessary entries or amendments in the Land Register: s 90(4) Amendment Act.

13 Application for interlocutory injunction

13.1 Introduction

The Court may be asked for an injunction

Sometimes the Court will be asked for an injunction, that is, an order of an equitable nature, requiring a person to do or refrain from doing a particular action. Section 47 of the Amendment Act gives the Court jurisdiction to grant an injunction against any person in respect of actual or threatened trespass or any other injury to Niuean land (s 47(e)), and to grant an injunction prohibiting any person from dealing with or doing any injury to any property which is the subject-matter of any application to the Land Court: s 47(f) Amendment Act.

Most often the Court will be asked for an interlocutory injunction, which is an injunction granted before or during proceedings for the purpose of keeping matters in the status quo—or the existing state of affairs—until a decision is given on the merits of the case.

13.2 Who may apply?

Any Niuean claiming interest Any Niuean claiming to be interested in Niuean land or any person authorised



may apply by Cabinet on its behalf may apply: s 44 Amendment Act.

Where title has not been registered, an action or other proceeding may be brought by or on behalf of the Crown as if the land were Crown land, for the purpose of (among other things) preventing trespass or injury to Niuean land: s 25 Amendment Act.

13.3 Composition of the Court

Two Commissioners may preside Two Commissioners may preside over applications for injunctions: s 47A(2) Amendment Act. If the application is accompanied by other applications requiring five Commissioners to preside, the Registrar will set the matter down for a full panel of five Commissioners or a Judge to hear.

13.4 What the Court can do

Powers of the Court The Court has **exclusive jurisdiction** to hear and determine any application, among other things, for an interlocutory injunction affecting Niuean land: s 47(1) Amendment Act.

The Court may (ss 47(e) and (f) Amendment Act, r 26(1) Land Court Rules):

- **grant** the injunction and **impose** conditions and **make** directions;
- **refuse** to grant the injunction;
- **dismiss** the application in whole or in part;
- upon such terms as the Court thinks fit, give leave to **extend**, **amend** or **withdraw** an application in whole or in part.

In the course of the proceedings, the Court may also proceed to **exercise any other part of its jurisdiction** as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act (but note the number of Commissioners required for the exercise of certain specific powers). If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may **order costs** and require the deposit of money as **security for costs** under rr 35 and 36 of the Land Court Rules.

13.5 Guidance

Examples of common situations where injunction may be sought Common situations where injunctions are sought are to prevent another person from planting crops or further planting on land that has been cleared for that purpose, or to prevent the burial of a deceased person on a particular piece of land.



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| Application may be made <i>ex parte</i> | An application for an interlocutory injunction may be made <i>ex parte</i> , that is, on the application and evidence of only one party without notice to the other party: r 12(11) Land Court Rules. |
| Where possible the application should be on notice | An injunction on an <i>ex parte</i> application should not be made unless there is a case of urgency and the Court's refusal would cause detriment to the party applying. The interests of justice must require the application to be determined without serving notice on the other parties. Where possible it is better to hear interim injunction applications on notice and to obtain the input of the other side. |
| Full disclosure of all relevant circumstances required | In <i>ex parte</i> applications, counsel has a duty to make full disclosure to the Court of all known relevant circumstances . If the applicant is not represented, make this requirement very clear to the applicant. |
| Facilitate resolution by making appropriate directions as to service | <p>If persuaded that an <i>ex parte</i> order is justified, give thought to what directions you can make to facilitate ultimate resolution at the time it is granted. Consider the following points.</p> <ul style="list-style-type: none">• A direction that the substantive application be served with the injunction order would be the norm. The direction should be clear that it encompasses the affidavits supporting the injunction application.• It is a good idea to direct that the matter be called up on the next appropriate court day. Make sure you record the relevant details as it is likely to come up before a different panel. <p>If the application "just makes it" as far as passing the fundamental tests for granting an <i>ex parte</i> application is concerned, grant relief for a very limited period of time, perhaps until the day following or the day after that, and schedule the matter accordingly if possible. This puts real pressure on the successful applicant to achieve immediate service, opening the way for the other party to have an early opportunity to respond. If both parties then turn up, an orderly future for the dispute can be managed.</p> |
| There must be a tenable (real) cause of action | <p>As an absolute minimum to the exercise of the discretion to grant an injunction, the Court should be satisfied that the party seeking the injunction has a legal cause of action.</p> <p>It is not enough to have suffered some wrong. It must be a wrong for which the Land Court is empowered to make an order in relation to, both as a matter of jurisdiction and the general law.</p> |
| Guiding principle is the overall justice of the case | The guiding principle for the exercise of the discretion is the overall justice of the case. Considerations, such as the balance of convenience and existence of a serious question, are merely guides to be used in deciding where the overall justice lies. The Courts have conventionally approached the inquiry in two stages. |



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1. Is there a serious question to be tried in the substantive dispute between the parties?
 2. If so, then does the balance of convenience (taking into account the status quo, the urgency of the matter and the consequences faced by the respective parties) favour the grant or refusal of relief?

In considering these issues, the Court does not carry out anything resembling a hearing of the merits of the dispute. It is a tentative appraisal of the overall situation finding the balance of convenience.

Status quo

A relevant consideration will be the status quo before the acts complained of, that is, the position when the other party embarked on the activity sought to be restrained.

Other considerations

There are other considerations going to the overall justice.

- Prejudice to third parties and questions of public interest.
 - Adequacy of damages. The general rule is that if damages are an adequate remedy then an injunction should not be granted.
 - Delay. As with all discretionary relief, if an applicant comes before the Court complaining that their rights are infringed and those rights have not been promptly pursued, the application will not be looked upon favourably.
 - Appropriateness of injunctive relief. It is usually better to encourage the parties, by means of suitable timetabling orders, to get on and litigate their substantive proceedings if that is possible and just.
 - Whether any inconvenience or injury may be suffered while waiting for the substantive hearing as a result of an interim injunction being granted or refused and, if such an injunction is refused, whether it would be possible at the final hearing to compensate for breaches that have occurred.
 - Whether an injunction will finally dispose of the issues between the parties, thereby creating an injustice to the respondent.
-



14 *Ex parte* applications

| | |
|--|--|
| Most applications on notice | Most applications would normally be required to be notified to interested parties in accordance with r 19 Land Court Rules. |
| <i>Ex parte</i> applications may be heard without notice | <p>The exception is in respect of <i>ex parte</i> applications. The term <i>ex parte</i> is a Latin phrase meaning "something made in the interests of one side only". So an <i>ex parte</i> application is on the application of one side only and the other parties are not informed.</p> <p>The Court may choose to hear an <i>ex parte</i> application, without notification, at any time and place specified by the Court: r 20 Land Court Rules.</p> |
| Which applications may be made <i>ex parte</i> | <p>The following <i>ex parte</i> applications are specifically allowed by the Land Court Rules.</p> <ul style="list-style-type: none">• Application for an interlocutory injunction (see 13 above).• Application for an interlocutory order for directions or with reference to any other interlocutory matter in the proceedings (interlocutory matters are those dealt with before the final disposition of the case): r 12(12) Land Court Rules.• Application for an order that the applicant be appointed the agent of a person under a disability: r 16(1)(a) Land Court Rules.• Application for an order appointing a guardian <i>ad litem</i> for a person under a disability: r 17(1) Land Court Rules.• Application for an order that a summons to a witness be issued: r 29(1) Land Court Rules. |
| Orders from <i>ex parte</i> applications are interim orders | By their nature <i>ex parte</i> applications are for interim orders, that is, orders in place only until the substantive merits of the matter can be argued in Court. |
| Refer to 14 above for guidance | Procedural-type <i>ex parte</i> applications would generally be granted. For applications that will affect another person's substantive rights, refer to "13. Application for interlocutory injunction" above for guidance. |



15 Applications from—and relating to—the Registrar

Registrar may state case, refer question or apply for directions The Registrar may state any case or reserve any question for the consideration of the Court, or apply for directions: s 52 Land Court Act.

Appeal from Registrar's decision Any person aggrieved by a decision of the Registrar may appeal to the Court, which may confirm, quash or vary the Registrar's decision.

16 Application for adoption order

16.1 Introduction

Land Court presides over adoptions The Land Court has jurisdiction over adoptions. See Part 8 of the Amendment Act and the Adoption Act 1955.

16.2 Who may apply?

Any person may apply Any person may make an application, whether living in Niue or not and including spouses jointly: s 95 Amendment Act.

A duly appointed agent may make an application on behalf of a person under a disability: r 16 Land Court Rules.

16.3 Composition of the Court

Five Commissioners must preside Five Commissioners must preside over applications relating to adoptions.

16.4 What the Court can do

Powers of the Court The Court has **exclusive jurisdiction** to make adoption orders: s 95 Amendment Act.

The Court may (ss 95 and 100 Amendment Act, s 16(2)(a) Adoption Act 1955, r 26(1) Land Court Rules):

- **make or refuse** to make an adoption order and **set terms and conditions** as it sees fit and **make affiliation or maintenance orders** in respect of the child;



- vary or discharge an adoption order;
- dismiss the application in whole or in part;
- upon such terms as the Court thinks fit, give leave to extend, amend or withdraw an application in whole or in part.

In the course of the proceedings, the Court may also proceed to exercise any other part of its jurisdiction as it thinks necessary or advisable, without the need for further application: s 44(2) Amendment Act. If the Court intends to exercise a power not obviously contemplated by the application, the parties must be notified of that intention and given the opportunity to be heard on it.

The Court may order costs and require the deposit of money as security for costs under rr 35 and 36 of the Land Court Rules.

16.5 General principles

Adoption by custom has no legal effect No adoption by Niuean custom shall be of any force or effect: s 92 Amendment Act.

The one exception is where a child was adopted before 1 April 1916 by Niuean custom and between that date and 4 December 1921 the adopting parent had died. In that case, the adoption has the same operation and effect as was attributed by Niuean custom: s 93 Amendment Act.

Any child may be adopted The Court may make an adoption order in respect of any child: s 95 Amendment Act. The child may be Niuean or European (the Act is silent as to other ethnicities) and he or she may be living in Niue or elsewhere.

Who may adopt The order may be made in respect of the adoption by the mother or father of the child, either alone or jointly with their spouse: s 95(3) Amendment Act.

Payments for adoption unlawful Except with the consent of the Court, it is unlawful for anyone to give or receive—or agree to give or receive—any payment or reward for making the arrangements for an adoption or proposed adoption: s 96 Amendment Act.

16.5 Guidance

Definitions See s 91 for definitions of “adopted child”, “adoption order”, “adoptive parent”, “child” and “father”.

Restrictions Before making any adoption order, the Court must be satisfied that (s 97(1) Amendment Act):

- the child to be adopted is under 21 years old (when the application was filed);



- the applicant—or at least one applicant in a joint application—is 25 years or older and is at least 21 years older than the child, or is the mother or father of the child;
- an unmarried applicant is at least 30 years older than the child;
- where the child is a girl and the sole applicant is male, the applicant is the father of the child, or there are special circumstances which justify the order;
- the child, if over 12 years, consents to the adoption;
- the applicant is a fit and proper person to have the care and custody of the child and of sufficient ability to maintain the child, and the adoption will not be contrary to the welfare and interest of the child.

In order to satisfy itself on the above matters, the Court must call for a report by Cabinet or an officer of the Public Service nominated by Cabinet: s 97(2) Amendment Act.

While the adoptive parent is alive and the adoption order remains in force, no one else may adopt the child except the husband or wife of the adoptive parent: s 97(3) Amendment Act.

Consent of parents usually required

No adoption may be made without the consent of all living parents of the child. It makes no difference whether the child was born in lawful wedlock or not. However, the Court does not need such consent if it is satisfied that (s 98(1) Amendment Act):

- the child has been deserted by that parent; or
- the parent is unfit to have the care and custody of the child; or
- the consent of that parent should be dispensed with for any other reason.

You will need to make the reasons for not requiring consent clear.

Consent must be in writing and witnessed by one of the following persons listed in s 78(1) of the Niue Act (s 98(2) Amendment Act):

- a Commissioner of the High Court;
- a solicitor of the High Court of New Zealand;
- the Registrar [or Deputy Registrar] of the High Court;
- a postmaster;
- the financial secretary; or
- a medical officer.

Where the application is made by either a husband or wife alone, consent must be given by the spouse of the applicant unless the Court is satisfied that they are living apart and that separation is likely to be permanent: s 98(3) Amendment Act.



Effect of adoption order

See s 16 of the Adoption Act 1955.

An adoption order has the following effect.

- It confers the surname of the adoptive parent on the adopted child, with such first or Christian name as the Court may fix (if the applicant asks).
- In all respects, the adopted child will be deemed the child of the adoptive parent and the adoptive parent will be deemed the parent of the child, as if the child had been born to that parent in lawful wedlock.
- The adoptive child ceases to be the child of his or her existing parents and they cease to be the parents of the child.
- Any existing adoption order is deemed to be discharged.
- All rights of the adopted child or another in any deed, instrument or will made before the adoption order or intestacy (where the testator or intestate has died) remain in place, unless there is express provision in the deed, instrument or will stating otherwise: s 16(2)(d) Adoption Act 1955.
- The adopted child acquires the domicile of his or her adoptive parent(s) and will be afterwards determined as if the child had been born in lawful wedlock to the adoptive parent(s).
- Any affiliation order or maintenance order in respect of the child and any agreement (except in the nature of a trust) which provides for payments for the maintenance of the adopted child no longer has effect, except where the child is adopted by his or her mother alone or jointly with her husband.

An adoption order **does not**:

- prevent the making of affiliation or maintenance orders in respect of the child;
- alter the rules against forbidden marriage and incest between the adopted child and his or her natural parents and relations;
- affect the race, nationality or citizenship of the adopted child;
- prevent the recovery of arrears due under any order or agreement as at the date it ceases to have effect.

As far as possible the relationship to one another of all persons is determined under s 16(2) of the Adoption Act 1955.

Adoption is final in matters relating to succession

Court of Appeal and a number of High Court judges have said that adoption is **final** in matters relating to **succession**. It is a good idea to explain this to applicants for adoption.



Variation or discharge of adoption order

On the application of any adoptive parent or adopted child, the Land Court may vary or discharge any adoption order and set any terms and conditions: s 100(1) Amendment Act.

The Land Court may, subject to any terms and conditions, discharge any adoption order made in any place outside Niue if the adopted person is living in Niue **and** every living adoptive parent is domiciled in Niue (that is, their ordinary home is in Niue): s 100(2) Amendment Act.

No application for discharge may be made without the prior approval of Cabinet: s 100(3) Amendment Act.

The Court may not discharge an adoption order or adoption unless the adoption order was made by mistake as to material fact caused by a material misrepresentation to the Court or any person concerned: s 100(3) Amendment Act.

Where the Court discharges an adoption order or adoption, it may confer on the [ex-adopted] person such names as it thinks fit, although it does not have to, in which case the names of that person will not be affected by the discharge: s 100(4) Amendment Act.

Effect of discharge

Section 20 of the Adoption Act 1955 which outlines the effect of the discharge of an adoption order.

- The relationship to one another of all persons is determined as if the adoption order or adoption had not been made.
- Any appointment as guardian of the adopted child which was made while the adoption order or adoption was in force ceases to have effect.
- No change in the child's domicile occurs by reason only of the discharge **except** where the natural parent resumes custody of an infant, in which case the domicile of the child is determined as if neither the adoption order/adoption nor discharge had been made.
- Any affiliation order, maintenance order or agreement for payment of maintenance which ceased to have effect when the order or adoption was made resumes.
- For the purposes of any other deed or instrument (except a will) made while the order or adoption was in force, or the will or intestacy of anyone who died while the order or adoption was in force, or of any vested or contingent right of the adopted child or anyone else under such deed, instrument, will or intestacy, the order or adoption is deemed to continue on force.

Note that the discharge of the order or adoption does not affect anything lawfully done or the consequences of anything lawfully done while the order or adoption was in force.

Adoptions by Cook Islands Land Titles Court

See ss 94 and 101 of the Amendment Act relating to adoptions under the Cook Islands Amendment Act 1921 and by the Cook Islands Land Titles Court.



Chapter 5: Evidence

This part discusses the rules of evidence applying in the Land Court.

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1 Introduction

Evidence refers to the information used to prove or disprove the facts in issue in Court.

The law of evidence is a complicated collection of rules and principles of law which control what methods can be used for proving facts to a Court and what facts are allowed to be proved to a Court (admissibility). If the evidence put forward by any witness is not admissible, then it may not be received or taken into account by the court in arriving at its decision.

Under s 43(2) of the Niue Amendment Act (No 2) 1968 (the "Amendment Act") the Court has the discretion to proceed in such manner which "seems just and convenient" in any particular case, whether or not evidence is admissible at common law (see below).

Although the common law rules of evidence do not have to be strictly adhered to, they do apply unless it otherwise seems just and convenient for the Court to disregard them.

2 Admissibility of evidence

Although not common, given the inquisitorial nature of the Land Court, counsel or a party may raise questions or objections as to the admissibility of evidence.

If there are questions or objections to the admissibility of evidence, ask the parties to make submissions and deal with them in the following manner:

- The party objecting must state the grounds of the objection.
- The other party must be given an opportunity to reply.
- Then rule on the objection.

If you disallow the objection, note the objection and your ruling.

If you allow the objection and hold the evidence to be inadmissible, you must take great care to disregard that part when making your decision at the conclusion of the hearing.

- In your decision at the conclusion of the case, you should record the objections to evidence and whether you ruled the evidence admissible or inadmissible and on what basis.

Generally, consider the following.

Relevance

Is the evidence clearly irrelevant to the issues of the case? If so, you might decide to exclude it.

Weight

Upon evidence being ruled admissible, you must then determine what weight (that is, the amount of importance) the evidence should be given.



Hearsay statements

A witness is usually not permitted to give evidence of what some other person (who is not produced in court) has said if what is reported by the witness is offered as the truth of what has been said by that other person.

This is known as **hearsay** and is generally not permitted. For example, a witness saying that another person said he had moved the survey pegs is not admissible as evidence to prove that person actually moved the survey pegs, because the witness did not see it with her own eyes.

However, if the witness is reporting what the other person said only to prove the fact that the other person **said** it (and not for the purpose of proving the truth of what the other person said), then it is not a hearsay statement.

The key thing is to consider what the witness reporting the out-of-court statement is trying to prove. If it is said that what was said is true, that is hearsay. If it is simply trying to prove that the statement was in fact said, it is not hearsay. There are very few occasions where the latter is the case.

The reason for the hearsay rule is that the truthfulness and accuracy of the person whose words are spoken to another witness cannot be tested by cross-examination because that person is not or cannot be called as a witness.

Previous statements

There are two primary forms of previous statement:

- 1 **A previous consistent statement, which is intended to show that a witness who is being challenged about the truth of their evidence has been consistent in what they have said about the matter.**
- 2 **A previous inconsistent statement, which is intended to show that a witness has changed their story and so is unreliable.**

Previous consistent statements

Previous consistent statements are generally **not admissible**. The reason for this rule is to avoid having huge volumes of repetitive material to shore up a witness's testimony. Simply reiterating the same thing does not make it any more reliable.

There are **two exceptions** to the previous consistent statements rule. Previous consistent statements will be admissible:

- to meet allegations of recent fabrication or of a witness's inconsistency, where that allegation has been supported by a reference to a previous inconsistent statement; or
- where it can be shown that the statement is reliable, and the statement provides information to the Court that the witness is unable to recall.

Note that if the witness's testimony is silent on a matter that a previous statement touches on, the previous statement would be admissible.



Previous inconsistent statements

The primary purpose of producing a **previous inconsistent** statement is to undermine the credibility of the witness by showing that he or she has previously said something different. Such statements are highly relevant and are **admissible**.

Opinion evidence

Witnesses may generally only give evidence of facts they personally observed and not evidence of their opinion. A statement of opinion is only an inference drawn by that person from the facts.

Sometimes the borderline between fact and opinion is a very narrow one, and you must exercise ordinary common sense in deciding whether or not the evidence is admissible and (if so) what weight you should give it.

Expert witnesses are, however, allowed to give opinion evidence if:

- they are qualified to do so; and
- if the matter requires such expertise.

Experts may be, for example, a surveyor, the Registrar (on some Registry process), or an expert on genealogy.

Before the expert witness gives opinion evidence they should explain in full what their qualifications are and then list the facts upon which they base their opinion. If those facts put forward by the expert are not facts that the Commissioners accept as proved, then the opinion evidence is of no use.

3 Credibility of witnesses

Credibility refers to whether the evidence given by a witness is believable and, if so, to what extent it is believed. For example, the testimony by a witness may be admissible, but the Court may not believe what is said by the witness or doubt the truth of what the witness has said.

4 Types of evidence

Evidence may be presented to the Court in various forms. The main types encountered in the Land Court are:

- testimony;
- documents; and
- real evidence.

4.1 Testimony

Testimony is usually statements made to the Court by a witness or to statements made in affidavits, which are offered as evidence of the truth of what is stated.

Rule 27 of the Land Court Rules 1969 (the "Land Court Rules") requires that the evidence of witnesses at a hearing must be given orally and on oath or affirmation.



The value of oral evidence is that you can observe:

- the demeanour of the witness;
- the delivery;
- the tone of voice;
- the body language; and
- the attitude towards the parties.

You must ensure that at every stage of the proceedings, you take down in writing oral evidence given before the Court or that which you deem material.

Evidence by affidavit or declaration

Under r 27 of the Land Court Rules, the Court may accept evidence given by affidavit or declaration. Affidavits made in Niue must be made in accordance with s 78(1) of the Niue Act 1966 (the "Niue Act").

They must be sworn before:

- a Commissioner of the High Court;
- a solicitor of the High Court of New Zealand;
- the Registrar or Deputy Registrar of the High Court;
- a postmaster;
- the financial secretary; or
- a medical officer.

If an affidavit is made outside Niue, it must be made under the rules in force in the High Court in New Zealand.

Declarations made in Niue must be made in accordance with s 720 of the Niue Act, that is, on the correct form in front of:

- any Judge, Commissioner, Registrar or Deputy Registrar of the High Court;
- the Controller of Customs; or
- any practitioner entitled to practice in the Niuean courts.

Declarations made outside Niue must be made in accordance with the New Zealand Oaths and Declarations Act 1957 relating to declarations, that is, in the correct form in front of:

- a barrister and solicitor of the High Court in New Zealand;
- a Justice of the Peace;
- a notary public;
- the Registrar or Deputy Registrar of a New Zealand Court;
- a member of Parliament; or
- one of various authorised public servants or 'legal executives'.



4.2 Documents

Documentary evidence is information contained in written documents. These may include books, maps, plans and reports, drawing, photographs, and other written matter such as wills, leases, and so on.

The usual rule is that documents, when admitted as evidence, must be accepted or proved for what they are. For example, if a survey plan of a land is presented it is accepted as such, although if the Court is in doubt it may obtain the testimony of the surveyor to prove that plan is the one for the particular land in question.

Section 7 of the Land Act sets out the requirements for instruments that are required to be registered under the Land Act.

- They must be attested by a person authorised to take statutory declarations under s 720 of the Niue Act 1966 (see 4.1 above).
- No person may attest the signature of any part to any instrument by virtue of which that person acquires or disposes of any interest, that is, the person attesting the signature must be independent.
- The attesting witness must add to their signature, their place of abode and calling, office or description, and must certify that the instrument has been explained by them to the party whose signature is attested and that person appeared to understand its contents.
- The date of execution must be stated in the instrument and no person may sign the instrument as an attesting witness unless the date of execution has been stated in the instrument. Where the instrument is executed on different dates by several parties, the date of execution by each party must be stated in the instrument.

Generally, if an original document is available and can be produced, it should be produced. If the original has been lost or destroyed or there is some other good explanation as to why the original cannot be produced, a copy may be produced.

Section 51(9) allows the Court to cause duplicates of any order to be marked "Duplicate", sealed and signed, and that will have the same evidentiary value as the order of which it is a duplicate.

Rule 14 of the Land Court Rules requires the Registrar to endorse or annex to each application such particulars and extracts from the records of the Court as may be necessary to enable the Court to deal effectively with the application at the hearing of such application.

4.3 Real evidence

Real evidence usually refers to material objects or items which are produced at trial.

Often little weight can be attached to real evidence, unless it is accompanied by testimony identifying the object and connecting it to the facts in issue.

In some cases, the Court may have to inspect a material object out of Court when it is inconvenient or impossible to bring it to court.



4.4 Exhibits

When real evidence or documentary evidence is introduced in court, it becomes an exhibit. For the purposes of the hearing, each exhibit is marked with an exhibit note, for example, Exhibit A, B and so on.

Once an article has become an exhibit, the Court has a responsibility to preserve and retain it until the hearing is concluded.

The Court must ensure that:

- proper care is taken to keep the exhibit safe from loss or damage; and
- the other parties are given reasonable access to it for inspection and examination.

5 Assessing the evidence

See Chapter 6 "The decision" for guidance on assessing evidence in order to make a finding of the facts.



Chapter 6: The decision

This chapter provides guidance for decision-making. It outlines the important principles of justice that ensure a fair outcome and addresses ways to make effective decisions. A structured approach to decision-making and delivery is outlined. Rehearings, appeals and reviews are briefly covered.

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1 Introduction

If at the end of the hearing the parties are not able to agree on the best course of action and settle the matter between them, it is the Commissioners' collective responsibility to make a decision.

Every decision of the Land Court:

- shall be determined under Niue custom and any laws affecting Niue custom;
- is in accordance with the opinion of the majority of members present;
- must include reasons for the decision;
- is recorded in the Minute Book;
- is to be pronounced in open Court; and
- is drawn up under seal of the Court and signed by the Registrar.

2 Powers of the Court

Rule 26 of the Land Court Rules 1969 (the "Land Court Rules") and ss 44(2) and 47 of the Niue Amendment Act (No 2) 1968 (the "Amendment Act") empower the Court to:

- dismiss or grant any application, in whole or part;
- give leave to extend, amend or withdraw an application, in whole or in part;
- exercise any other part of its jurisdiction as necessary, without further application and upon such terms as it thinks fit, including:
 - determining interests in the land;
 - granting injunctions;
 - creating easements; and
 - authorising the survey of any land.

The Court may set conditions and a time for those to be satisfied as part of any order: s 51 Amendment Act. The Court should also emphasise to all parties to such orders that non-compliance can have adverse effects to the parties' interests, especially for those who do not comply.

In the course of proceedings, the Court may make (or authorise to be made) in any order, warrant, record or other document made, issued or kept by the Court, any amendment necessary to give effect to the intended determination of the Court or to record the actual course and nature of any proceedings in the Court: r 34 Land Court Rules.



3 Principles governing decision-making

The decision-making part of the hearing is the last important opportunity for the members of the Court to ensure absolute adherence to the underlying judicial principles of conducting a fair hearing, and ultimately to arrive at a just and reasonable decision, in accordance with the findings of facts and the law applied to those findings of fact.

There are four principles which collectively translate into the general duty to act fairly.

1. Decision-makers must act lawfully.
2. Affected parties have a right to be heard.
3. Decision-makers must be free from bias.
4. The decision must be reasonable.

The principles are intended to ensure:

- the fair, unbiased and equal treatment of all people; and
- the exercise of any discretion only on reasoned and justified grounds.

Adhering to these principles does not guarantee that the Court has made a good decision. It does mean, however, that it is likely to have followed a process that is designed to introduce the relevant and critical factors, and exclude prejudice and irrelevant material and considerations.

3.1 You must act lawfully

This principle is concerned with what the governing legislation or rules require (jurisdiction and procedure).

There are several aspects to the principle of lawfulness.

- You must act within the authority of the law.
- You must take into account all the relevant considerations and ignore irrelevant considerations.
- You must not give away your decision-making power. Only the members of the panel can make the decision and you must not have discussions with people who are not part of your panel. You must make your decision only on the evidence presented in Court.

3.2 Affected parties have a right to be heard

A party affected by a decision must have a full and fair opportunity to be heard before the decision is made.

The purpose of this principle is to ensure that the Court considers all relevant information before making its decision.

3.3 You must be free from bias

You should not allow your decision to be affected by bias, prejudice or irrelevant considerations.



You must not have an interest in the matter from which it might be said that you are biased.

- It is not necessary to show actual bias, the appearance of bias is sufficient.
- Bias might be inferred where there is a relationship to a party or witness, a strong personal attitude that will affect your decision, or a financial interest in the matter.

3.4 The decision must be reasonable

This principle relates to the substantive outcome rather than the process followed. The decision itself must be reasonable in the particular circumstances.

Clear statements of the reasons for the decision will assist.

3.5 Consequences of a breach of the principles

If these principles are not adhered to, your decision may be reviewed.

There are other consequences of breaching the principles. These include:

- undeserved expense, hardship and emotional turmoil for the aggrieved parties;
- a loss of faith in the system of justice by the aggrieved party;
- ongoing problems from a disgruntled litigant;
- wider problems relating to the public's confidence in the court system.

4 The decision-making process

4.1 Deliberations

At the end of the formal hearing, if parties have not been able to come to agreement, the Commissioners retire to discuss the evidence produced by parties and to make their decision.

Commissioners should always remember that the decision is **their responsibility and theirs alone**, and they should not receive any input from anyone else about their decision. They should not be influenced by any pressure or knowledge of fact that they may have that does not arise from the material debated in open Court in reaching their decision. (In fact, it would be unwise to discuss the case so even *after* the decision is given.)

However, the Court may, at any time before a final decision has been made, decline to deal further with the matter and require it to be dealt with by a Judge, or adjourn the proceedings and refer a question of law to a Judge (and then resume deliberations after the Judge has dealt with that question): s 47 Amendment Act.

The Chair will lead discussions. He or she must demonstrate good leadership qualities, professionalism and an impartial attitude.



Where disagreement on any aspect is apparent, sufficient and fair opportunities should be given to each Commissioner to give reasons in support of their view. Note that the right to be heard is not only for parties and witnesses to a hearing, but is extended equally to the Commissioners. Every Commissioner has an equal voice.

Commissioners must work in partnership and with understanding and open minds. No one should overpower or force their opinion on other Commissioners.

The final decision shall be that of the majority of the Commissioners.

If Commissioners present are equally divided in their opinion:

- the Court must not make a decision and refer all the opinions of the Commissioners to the Chief Justice; and
- the Chief Justice will consider the opinions and endorse a particular opinion, which will be the decision of the Court: s 47C Amendment Act.

4.2 Burden and standard of proof

It is the **applicant/s** who must prove their case; they have the “burden of proof” (although remember that the Court has the power to exercise any of its jurisdiction without further application, so it is not limited by the terms of the application). They must prove their case to the required “standard of proof”, that is, on the **balance of probabilities**. In other words, they must prove that it is more probable than not that their claim is correct.

If the scales are evenly balanced then the applicant, who bears the burden of proof, has not proved their case and it should be dismissed.

4.3 A structured approach

You must not reach a conclusion before all the evidence and arguments have been heard and considered. The way to do this is to employ a **structured approach**.

There are three tasks involved in structured decision-making.

1. **To be clear with what the Court is being asked to do.**
This is what the application is asking for.
2. **To determine what the facts of the case are—what happened; what did not happen.**
To determine the facts, you will need to assess the credibility of the witnesses and the reliability of their evidence.
 - **Credibility:** “Is the evidence believable?” “Can it be believed?” “Is the witness being honest?”
 - **Reliability:** “Should I believe the witness?” “Is the evidence accurate?” “Could the witness be mistaken?” “How good is their memory of what happened?”

When considering oral evidence, take into account not only **what** has been said but also **how** it has been said. Your assessment of the demeanour of a witness can be a valuable aid in judging his or her credibility and reliability.



You may accept parts of the evidence of a witness and reject other parts.

3. **To make your decision, according to the law.**

Decision-making is a process of applying the facts as they have been found to the relevant law and custom.

In most cases heard by Commissioners, the main problem is to find the **facts**, and this involves a careful study of the evidence on the points at issue. The Commissioners must try to resolve this by deciding which parties or witnesses are to be believed or trusted, while bearing in mind the applicant's burden of proof.

Occasionally there may be argument as to what the **customs and usages** are in a particular area, or an interpretation of the relevant **legislation**. You have to make a decision on that first and then apply the facts, as you have found them to be, to the law, as you have found that to be.

4.4 **Duty to provide reasons**

It is the duty of Commissioners (or any Court for that matter) to provide reasons supporting whatever decision they reach. The duty to provide reasons is fundamental and all judicial officers are obliged to give reasons.

The reasons need not be lengthy but where the issue involves a finding of fact, the Commissioners should state what evidence they accept and what evidence they reject and give brief reasons why they prefer one version of the facts to another. They should also state briefly their findings on the particular facts in dispute. If a point of law is involved, they should also state their opinion on that question.

4.5 **Decision-making checklist**

The checklist of questions on the following page may assist the decision-making process.



Decision-making checklist

Identify what you are being asked to do

- What is the Court being asked to decide?



Identify law and custom and usage

- What is the specific power the Court is acting under? Does it have jurisdiction to hear this matter and in these circumstances?
- Is there agreement as to the customs and usages that apply?



Identify issue/s

- What are the considerations the Court must take into account and be satisfied of in order to make its decision?



Identify relevant facts

- Is there material which falls short of establishing itself as a “fact”?
- Which facts are relevant to the decision?
- Have all parties received a fair opportunity to state their case and rebut evidence produced by the other side?
- Has the Court disregarded irrelevant facts?
- Does the Court need more information?



Weigh up facts

- Are any facts more relevant than others, and if so, why?



Apply law and custom to facts

- Do the facts support each ground or issue the Court must consider, to the standard required?
- Is there a need to exercise any other part of the Court’s jurisdiction, beyond what the applicant has asked for?



Reach tentative decision and test it

- Has the Court given proper consideration to all parties’ representations? Is this apparent from the decision?
- Has the Court ensured that none of its considerations are improper or irrelevant?
- Is the reasoning sound? Does it support the outcome?
- Is the Court satisfied that, from an objective standpoint, all interested parties have been treated fairly and the decision is a reasonable one?



Write decision

- Are the reasons for the decision appropriate and clearly set out?
- Does it contain or reflect the finding of facts agreed on by the Commissioners?



Deliver decision

- What is the best way to structure the decision?
- Is the decision clear and able to be understood by the parties?



5 Delivering the decision

5.1 General procedures

See ss 51 to 57 of the Amendment Act, which outline the required procedures relating to the decision.

The substance of final orders must be pronounced in Court (and will take effect from that day). A minute of the order is at that time entered in the Minute Book.

As soon as practicable the order is drawn up in writing (by the Registrar, in Form 6 unless the Court directs otherwise), sealed and dated as at the date of the minute and signed by the Registrar on the authority of the Commissioners' orders. Note that there must be a plan of the land affected by the order drawn or endorsed on the order before it is signed and sealed: r 32 Land Court Rules.

The Court or Registrar may require any party in whose favour the order has been made to submit a draft of the order to the Registrar: r 31 Land Court Rules. In practice the orders of the Court are normally drafted by the Registrar or Court Registry staff.

Note that the orders are not issued until time for any rehearing or appeal has expired—or any actual rehearing or appeal has been disposed of—except with the leave of the Court.

5.2 Making the decision

The Commissioners should reach their decision in chambers and make brief notes of their reasons. There is no set formula for delivering the decision, but the following format may be useful.



Decision-making format

| |
|---|
| <p>1. Introduction</p> <p>Note the application/s, the applicant(s), parties appearing and any representatives or counsel, and identify the issues.</p> <p>2. The facts</p> <ul style="list-style-type: none">• Facts not in dispute• Facts in dispute• The finding on the facts in dispute• Reasons for preferring a party's evidence over that of another party <p>3. The law</p> <ul style="list-style-type: none">• The law including custom and usage and any relevant case law <p>4. The decision</p> <ul style="list-style-type: none">• The application of the law, customs and usage and any precedents to the facts• The orders made |
|---|

This will be useful both for the record in the Minute Book and for delivering the decision orally in Court.

Your reasons should leave no doubt that your decision is based on the law as applied to those facts established by evidence in open Court.

5.3 The effect of the order

See ss 51 to 54 and 57 of the Amendment Act.

Any order affecting or relating to the title to land may be registered against the title to that land.

The validity and operation of all intermediate orders, instruments, proceedings and transactions will be determined according to the orders.

Any orders determining or affecting the title to Niuean land (or any estate or interest in it) binds everyone who has an interest in that land, whether or not they are parties to or have notice of the proceedings.

Note that no order is invalid just because of any error, irregularity or defect **in its form**. However, if the substance of the order was made **outside of your jurisdiction**, then that would be invalid.



6 Rehearings, appeals and reviews

6.1 Rehearings

See s 45 of the Amendment Act and r 30 of the Land Court Rules.

On the application of any person interested (**within 14 clear days** of the making of the order or determination), the Land Court **may** grant a rehearing of any matter, either wholly or in part. Note that:

- this is not limited to the parties;
- the Court may refuse to grant the rehearing; and
- the Court may set any terms as to costs and otherwise as it thinks fit.

A rehearing is appropriate when there has been a 'misfiring' of justice for some procedural reason, for example, a witness could not attend due to an accident, or new evidence has been discovered.

On rehearing, the Court may affirm, vary or annul its former determination, and may exercise any jurisdiction which it might have exercised on the original hearing. However, once an order has been signed and sealed, it cannot be varied or annulled by Commissioners.

6.2 Appeals

See ss 45 and 47D of the Amendment Act and rr 39 to 41 of the Land Court Rules.

Any party may appeal from any order or decision of Commissioners to a Judge of the High Court, **within 28 clear days** after the date of the order or decision appealed from. When an appeal is filed, the Commissioners must stay further proceedings on the order or decision appealed from, unless the Judge otherwise orders.

Appeals are made on the grounds that a decision is wrong, rather than some procedural issue.

Note that:

- when any rehearing is granted, the period allowed for an appeal does not commence to run until the rehearing has been disposed of by a final order of the Court; and
- no appeals from Commissioners' decisions go to the Court of Appeal; they go only to a Judge of the High Court.

You have a duty to assist in the compilation of a full record of the hearing before you so that it can be properly understood by a superior court, and to that extent you must keep proper notes.

6.3 Reviews

Parties have the same general right that all people subject to decisions pursuant to a statutory power have: the right to apply for a judicial review of the decision by the Court of Appeal.

The focus in a judicial review is on the **process** by which the Commissioners have reached a decision.



Generally, it focuses on ensuring the procedure followed was fair and the decision reasonable. The Court of Appeal will consider an appropriate remedy if the process is shown to be flawed or the decision unreasonable. The Court of Appeal cannot impose a new decision, but it can quash the original decision and require the Land Court to reconsider the matter in light of its determination.