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

NO: OA 6/00

IN THE MATTER OF	**Electoral Amendment (No 2) Act 1999**
AND	
IN THE MATTER OF	**Declaratory Judgments Act 1994**

BETWEEN	**Inatio Akaruru of Pukapuka Politician**
	First Applicant
AND	**Cook Islands Party**
	Second Applicant
AND	**Nooapii Tearea in his capacity as Deputy Chief Electoral Officer**
	First Respondent
AND	**Honourable Members Terepai Maoate, Norman George, Ngamau Munokoa, Robert Woonton, Tangat Vavia and Jim Marurai**
	Second Respondents

Counsel: Mr H Puna for Applicants
Mr H C Mitchell for Respondents

Judgment of the Chief Justice

Dated the 8 **day of** August **2000**

1. This is an application for declaratory orders that the words " with the approval of Cabinet" in section 3 of the Electoral Amendment (No 2) Act 1999 ('the amending Act') are ultra vires the Constitution of the Cook Islands and void and of no effect. If no such order is made then and in the alternative orders are sought requiring the Respondents to take certain defined steps towards the holding of a by-election in the constituency of the Island of Pukapuka and the Island of Nassau ('the by-election').

2. The background to this application begins with the general election held on 16 June 1999. The result of that in the Pukapuka Nassau constituency ('the constituency') was an equality of votes. After a recount the Chief Electoral officer declared Tiaki Wuatai elected. Inatio Akururu applied for an inquiry into the election result. On 13 July 1999 the Court declared Mr Wuatai not qualified and Mr Akururu was declared elected. On 11 August 1999 the Appeal Court declared the election void and ordered a by-election. On 29 September 1999 that by-election was held and Mr Akururu was declared elected. Mr Wuatai then applied for an inquiry into that by-election. On 3 December 1999 the High Court declared the by-election void and ordered a further by-election, the by-election at the heart of these proceedings.

3. On 22 December 1999 the amending Act was passed and came into force on assent by the Queen's Representative. The long title to the amending Act is "An Act to amend the Electoral Act 1998 by making special provision for the holding of a By-election in the Constituency of the Island of Pukapuka and the Island of Nassau." It provides among other things for a timetable for the by-election to be appointed by the Chief Electoral Officer with the approval of Cabinet. It contains special provisions about the obligation of voters to enroll afresh in the constituency, the compiling and printing of a roll for the by-election and the publication of notices to bring to the attention of persons qualified to be on that roll of the changes made by the amending Act and the obligations created by it. It is a piece of special legislation to deal in a unique way with the by-election.

4. On 18 April 2000 the Applicants began proceedings under number PL33/00 against the Chief Electoral Officer and the Second Respondents for mandamus to compel the parties to appoint a date and the Cabinet to approve the date of the by-election. It is alleged by affidavit in these proceedings that the Cabinet is deliberately delaying the by-election to enable it to affect in its favour the constituency roll. On 10 May 2000 the respondents filed a statement of defence which made a claim that Cabinet was not accountable because the Speaker had not published a declaration that the seat was vacant in accordance with s. 8(4) of the Electoral Act 1998. On 12 May 2000 the matter came before Williams J. He was informed that the Chief Electoral Officer had resigned a few days before and nobody had been appointed in his place. Williams J gave directions and a timetable order for the conduct of the proceedings. In an addendum he suggests the possibility that the amending Act may be unconstitutional and allowed the Applicants time to amend their claim accordingly.

5. On 19 May 2000 Applicants filed these proceedings OA 6/00. Subsequently by consent the earlier proceedings PL 33/00 were adjourned sine die and it was agreed that the present proceedings be dealt with by written submissions instead of an oral hearing. The applicants have filed in support of the application two affidavits by Sir Geoffrey Henry. Both Counsel have furnished written submissions. These submissions were in accordance with a timetable agreed in a telephone conference before me on 18 July 2000. The final reply by the Applicants was to be made by 28 July. Since then further submissions have been filed in Court and transmitted to me on 3 and 7 August. These have been read by me but I have ignored them in this decision because they are not properly to be received and they do not raise any matter of a nature which might not have been foreseen or arose out of new material not properly included in the final reply by the Applicants. On the other hand the affidavit sworn on 2 August 2000 by the Deputy Chief Electoral Officer has been read and will be referred to in this judgment. It is not contentious in the matter of construction of the statute but states some facts which have a bearing on the general disposal of the matter.

6. The question in issue in these proceedings is purely a matter of statutory construction. It arises because the power of Parliament to make laws for the peace, order and good government of the Cook Islands is made subject to the provisions of the Constitution, (Article 39(3) of the Constitution). By Article 39(4) an Act may not be inconsistent with the Constitution. The underlying complaint of the Applicants is that the Cabinet has deliberately delayed the by-election for its own party political

purposes. In his affidavits Sir Geoffrey Henry asserts his views on this topic. There was a suggestion by Mr Puna recently that some further factual matters about the resignation of the Chief Electoral Officer would shed light on this topic. I have no doubt that these concerns of the applicants are not relevant to the issue in this application. They cannot help in the construction of the statute and the decision as to its inconsistency if any with the Constitution.

7. The applicants argument as I understand it is that the timetable provisions in the amending Act and in particular the relegation of the appointing of the various times to the Cabinet, through its approval of the decision of the Chief Electoral Officer, are inconsistent with the Constitution on two grounds. The first is that there is inconsistency with Article 27(3) which requires subject to some other Articles that " the mode of electing Members of Parliament shall be as prescribed by Act". The second is that on a proper reading of the provisions of the Articles that the scheme of the Constitution in reference to general elections and thereby to by-elections does not allow for delay or the insertion of a discretion by Cabinet. It is said that the amending Act allows the introduction of political considerations into the calling of the by-election and thus may permit abuse of the process which is inconsistent with the meaning and intent of the Constitution. Reference is made to what is described as the democratic and constitutional right of the electors of the constituency to representation in Parliament without delay.

8. It is important to note that the amending Act is a unique piece of legislation passed by Parliament to deal with a single and singular situation. Because of the particular provisions of the Electoral Act coupled with the remote situation of the constituency there have been special difficulties in holding the general election and the by-election there. The purpose of the amending Act is to avoid these difficulties and to provide a special regime for this one by-election. Clearly the process intended under the amending Act required some planning and careful timetabling to ensure the process was carried through lawfully and successfully. As this was to be the third occasion that the expense of an election was to be undertaken it was not unreasonable that some regard should be given to the appropriate time for that undertaking. The applicants acknowledge that there is nothing unconstitutional in Cabinet having a say in when a by-election is to be held. That must be right since it is answerable to the electors as a whole for the expenditure of the Government of the Cook Islands.

9. The amending Act read with the principal Act, the Electoral Act 1998, certainly does prescribe the mode of electing members in the by-election. The question is whether the grant to Cabinet of the right to approve the decisions of the Chief Electoral Officer creates the situation that the mode of electing members in the by-election is no longer as prescribed by Parliament.

10. There is no constitutional or statutory prescription as to the time for holding a by-election except in the one case set out in s. 44 (3). Indeed in all cases there is a discretion left to the Chief Electoral Officer to appoint the date. This is the necessary result of giving that officer the power to appoint the day without any limit or prescription as to time.

11. The Constitution does not provide anywhere for by-elections. It does provide for general elections. They must be held within 3 months after any dissolution of Parliament. The Electoral Act provides for by-elections. They are to follow the declaration of vacancy of the seat of any Member, s.32. If the vacancy is less than six months before the expiry of the 5 year term of Parliament the seat remains vacant until the next general election. The seat could remain vacant for 9 months. If the vacancy occurs earlier than 6 months than it is for the Chief Electoral Officer to fix the date for the by-election. That has to be done 'forthwith' but the date so to be appointed is left to the decision of the Officer. I note that in s.32 (2) there is an express grant of a discretion to the Officer to fix an appropriate date for a by-election in the Overseas Constituency. That makes clear what is implicit in the case of other by-elections.

12. A general election is a different case to a by-election. On dissolution of Parliament the whole of the electorate is unrepresented except by a caretaker Government and members who remain in office until the day immediately preceding the day on which Members elected at the next general election take office. There is a need to provide a clear and limited timetable in such a case. In the case of a vacancy requiring a by-election there is not the same urgency. The particular constituency is

unrepresented in Parliament but there is a Parliament which is not merely holding over but is fully constituted. I do not consider that the prescription of time for a general election has any implied force or effect to require a similar timetable for a by-election. In this case with its special legislation there is no reason to connect the Constitutional timetable for general elections to this by-election. Parliament has deliberately and specifically legislated for this one time by-election. It has prescribed, with the principal Act, the mode of the election. The addition of the Cabinet discretion to that of the Chief Electoral Officer has not created an inconsistency with the Constitution. The mode of election is prescribed by Act even though the timetable is subject to a decision outside the express words of the Act. The fact that there is added a further exercise of discretion to that of the Officer and thus a joint decision as to the timetable does not mean that the mode of election is not as prescribed in the amending and the principal Act. The discretion and joint decision does not create an inconsistency as to time because I do not accept that the Constitution does make any provision expressly or impliedly as to the time for a by-election. I believe that in the circumstances of this constituency and the electoral difficulties and disputes that have occurred the amending Act and its provisions are a sensible and constitutional means to resolve the whole matter.

13. There is not in issue on the pleadings any challenge to the actual conduct of the Cabinet of its discretion and decision on the timetable. There may be grounds for a claim about that though I do not encourage any further issue of proceedings. Suffice to say that the claimants no doubt could have had some grounds for complaint if the Cabinet had acted in such a way as to show that it was not going to hold a by-election or was delaying it unduly. Now that an election is to take place any such complaint would have no merit unless accompanied by evidence of some electoral fraud or misfeasance which was likely to taint the by-election and its result. The difficulty is, and was a difficulty on the alternatives pleaded by the applicants, that any finding or orders which voided the amending Act or part of it or required some now and replacing timetabling for the by election would put back the whole arrangement setting back the by-election to begin anew.

14. The orders and declarations sought by the applicants as to the alleged ultra vires point are refused.

15. The Applicants sought alternate orders if the first orders were refused. These were to require the Respondents to appoint and approve the various dates required under the amending Act toward the holding of the election. These were sought at a time when the date of the election was still undecided. However as appears in the submissions of the Applicants dated 10 July 2000 the date of the by-election had then been appointed for 28 September 2000. Now as appears from the affidavit of the Deputy Chief Electoral Officer the dates for the last day for nomination of candidates and the date for the closing of the special Constituency Roll have been fixed and approved at 8 September. The date and time in which objections by electors and the Registrar made under the Electoral Act 1998 shall close have likewise been fixed and approved at 13 September 2000 at 4.00 p.m. There may be some question as to the length of time these dates allow for the various procedures that follow any objection in relation to the closing and printing of the roll and the date of the election. That is not relevant to the question before me. The fact is that steps have been taken toward the holding of the by-election in seeming accordance with the amending Act. The alternative orders sought by the Applicants have been superceded by the actual events. Any order by the Court would be of no benefit or use and might indeed serve to delay even further the holding of the by-election.

16. In the result all the orders and declarations sought by the Applicants are refused. I reserve the question of costs. If necessary counsel may make submissions thereon.

I. M Greig C J