



Infrastructure Act 2019

Explanatory note

This explanatory note is not part of the Bill. It is intended to indicate its general effect.

General explanation

This Bill deals with certain classes of infrastructure, specifically those that—

- (a) comprise networks providing a reticulated service;
- (b) comprise roads and other accessways;
- (c) support shipping and aviation transport networks in the Pa Enuu;
- (d) support appropriate land use and management.

These classes of infrastructure are grouped together in this Bill because all of them involve dealings between the general public as property owners, and those who manage that infrastructure. The Bill, in a comprehensive way, addresses the resulting relationships and provides for the balancing of public and private interests.

Roading, ports, airports, the provision of fresh water, power, telecommunications, and the disposal of both waste water and storm water are all essential facilities and services. Together, they make up much of the network of infrastructure on which our health, safety, and enjoyment of life depend.

This is a time of increasing pressure on the country's network infrastructure. In the future we will see fresh challenges in meeting the transport, communications, and service delivery expectations of our people.

There are a number of reasons for this including,—

- the increasing numbers of overseas visitors that drive the country's tourism-based economy:

Infrastructure Act 2019

- changing land use patterns that see increasing residential and commercial development:
- technological advances that call for the upgrade of infrastructure:
- rising living standards and expectations of both residents and visitors as to the quality of our infrastructure:
- the need for environmental sustainability:
- the need to address climate change adaptation and resilience issues.

In other countries, zoning, resource management, and associated planning legislation all have an important role to accommodating infrastructure needs. Those tools are not well suited to features of our land tenure. Instead, over the years, those who manage infrastructure have learned to work with landowners and other stakeholders in a more informal way.

The success of those informal methods has seen established operators such as TAU and Telecom/Bluesky deliver increasingly sophisticated services using networks laid over, under, and on, both public and private land. Those operators have enjoyed good cooperation with landowners and occupiers.

Established infrastructure managers have learned the importance of seeking agreement with affected owners and occupiers. The Crown too has traditionally been slow to take land by warrant. Instead, there has been a long practice of seeking to reach agreement with landowners where land is affected by developments that are for the public good.

Recent experience with Te Mato Vai Stage 2 has further emphasized the real benefits of seeking agreement and cooperation with affected stakeholders. The upcoming challenges of waste water collection and treatment will also be best addressed by using the tools of consultation, negotiation, and agreement wherever possible.

At present, infrastructure law and practice is fragmented. This Bill addresses that issue in a comprehensive way. The Bill takes the lessons learned over recent decades and puts in place a simple, straightforward, cross-cutting approach to network infrastructure.

The Bill aims to strike the right balance between the public interest in having good infrastructure, and the constitutionally protected property rights of owners and occupiers who are affected by network infrastructure.

Infrastructure delivery can be a complex process. This bill aims to simplify that process in a way that is easily understandable. Its approach can be summarized this way:

- (a) under existing law, all land in the Cook Islands is available as needed, for infrastructure purposes. However, in line with actual practice, the Bill recognizes that land that is being used for access to infrastructure already should be the preferred location for infrastructure, leaving owners and occupiers to use and enjoy the balance of their land without inconvenience.
- (b) the Bill recognizes that some “accessways” are formal and others are informal. It does this by creating a distinction between a “road” – an accessway for which the Crown has management responsibility – and other accessways, that

are owned and managed by others. It recognizes the role and rights of those who manage roads and more informal accessways as “accessway managers”

- (c) the Bill recognizes ports and airports as essential parts of networks for shipping and airline services. The Bill does, though, make a distinction between “reticulated infrastructure” (in practical terms reticulated service delivery systems for power, water, telecommunications etc), and “stand alone” infrastructure.
- (d) the Bill treats roads (but not other accessways) as infrastructure. It deals with roads, stand-alone infrastructure, and reticulated infrastructure and holds all infrastructure managers, both public and private, to the same standards and applies the same procedures in their dealings with those affected by their activities. This greatly simplifies the current range of differing standards and practices that are found in existing statutes.
- (e) The Bill encourages open consultation and dialogue between and among all stakeholders whenever there is significant work to be done in constructing, altering or maintaining infrastructure.
- (f) The Bill formalizes the existing, successful, approach of having infrastructure managers seek to negotiate and agree matters with affected owners and occupiers of land and with other infrastructure managers or accessway managers.
- (g) The Bill gives both owners and occupiers and infrastructure managers access to the High Court if that is needed. It gives the Court the ability to call a meeting of assembled owners as one means of reaching agreement on matters that are either in dispute or where the number of landowners makes it impractical to have all sign an agreement.
- (h) With due regard to the Constitution, the Bill gives guidance to the Court on principles to be applied to decide when and how compensation should be payable in any case of dispute.

The Bill

Clause 1 sets out the title of the Bill.

Clause 2 provides that the Bill comes into force on 1 October 2019.

Part 1

Preliminary matters

Clause 3 sets out the main purpose of the Bill, namely, providing for the planning, delivery and management of network infrastructure and, in particular, dealing with issues affecting the rights of owners and occupiers of land and of infrastructure managers, when those activities require those parties to interact.

Clause 4 sets out the underlying principles that apply. The provision emphasizes the need for proper standards of construction to meet present and future challenges. It promotes a cooperative approach between all affected infrastructure managers and between those managers and the affected owners and occupiers. It emphasises the objective of managing disputes in a fair, transparent, and accountable way.

Clause 4(1)(h) recognizes the important point that we all enjoy infrastructure and put up with the inconvenience that comes with its presence on land we either own or occupy and with the added inconvenience of its construction, alteration and repair.

Inconvenience and interference with our ownership or occupation of land; for example, having a view that includes a line of power poles, or needing to queue while our right of way is dug up to lay a cable for a neighbour's property, should not ordinarily give us a right to compensation. In a modern society all of us must put up with some measure of inconvenience.

This principle finds full effect in clause 52. However in some cases compensation is payable. Constitutional principles are appropriately recognized and given effect in clauses 52 to 55 of the Bill.

Clause 5 makes it clear the Act binds the Crown; for instance, ICI and Te Aponga Uira o Tumutevarovaro are each, as infrastructure managers, held to the same standards as private operators such as Bluesky.

Clause 6 defines terms used in the Bill. Some definitions are key to understanding the legislation:

- **accessway:** this is any land, whether or not a formal road or right of way, that people use to get from one place to another; this definition is important because, ideally, reticulated infrastructure is placed on, under or above accessways to minimize inconvenience to owners and occupiers in their use and enjoyment of land
- **accessway manager:** a definition that recognizes important stakeholders; amending the Secretary of ICI for Rarotonga roads, Island Governments for other roads, and in the case of privately owned accessways, the relevant owners or users of those accessways
- **associated land:** the Bill recognizes that temporary access may be needed, in some cases, to infrastructure that is located on other land. Land used for this kind of temporary purpose is called "associated land"
- **end point:** the Bill defines reticulated infrastructure and provides guidance as to where a network is considered to end, for the purposes of the legislation
- **infrastructure:** the definition covers a wide range of engineered infrastructure. Certain elements of drainage, storm water, and waste water assets are treated as infrastructure to be actively managed in the same way as other services
- **infrastructure manager** is defined broadly, taking into account both public and private sector managers, and the arrangements for governance in the outer islands
- **occupier** is defined and used in the Bill, recognizing that even if a person does not have an interest in land, that person's occupation of the land may be disturbed or interfered with as the result of the activities of an infrastructure manager. Occupiers therefore have the rights and obligations set out in the Bill.

- **reticulated infrastructure** includes all physical elements of a network
- reticulated service** is defined to allow the Bill to draw a distinction between, (for example, ports and airports), that are stand-alone kinds of infrastructure providing a service to the public, and those other kinds of infrastructure that do so as part of a large network of interconnected physical elements
- road** is defined to draw a clear distinction between roads for which the Crown takes responsibility (as either roads under the Cook Islands Act 1915 or as listed in a roads schedule in regulations made under this legislation), and other accessways. Given the new focus on proper design and engineering of roads and associated drainage, the term “road” is broadly defined
- road drainage** is a term used in the Bill in a way that underscores the need for roads to be proclaimed, designed, and built in a sensible way and takes into account the need for effective drainage to avoid the common and worsening flooding problems following heavy rains
- start point:** the Bill defines reticulated infrastructure and provides guidance as to where a network is considered to begin, for the purposes of this legislation
- storm water drain:** the Bill will apply to a range of storm water infrastructure, some taking the form of a network (as at Te Puka for instance) and some comprising stand-alone storm water drainage. The Bill allows for selective uptake, by ICI, of responsibility for different storm water drains by including those drains in a list of storm water drains that will be set out in regulation.

Clause 7 defines who is to be treated as having an interest in land. The definition takes account of the intention of the Bill to encourage cooperation and dialogue between infrastructure managers and those who own interests in land. This clause also recognises the status of lessees, with a 15-year period stipulated so that in the case of short leases or those with only a short term remaining, the rights of underlying owners are appropriately recognized. The clause also addresses the issue of customary ownership.

Clause 8 formalizes the existing practice of those network operators who deal with owners by negotiation and agreement. That practice is now made compulsory and applies to all infrastructure managers.

Part 2 Roads

Subpart 1—Proclamation and closing of roads *Proclamation of roads*

Clause 9 re-enacts the ability to proclaim or dedicate a road that is currently set out in section 606 of the Cook Islands Act 1915. In repealing the old provisions, the new drafting uses updated language and ties these processes to the scheme of this bill.

Clause 10 retains the substantive effect of section 607 of the Cook Islands Act 1915 which states that when land becomes a road by proclamation or dedication, that does not vest its underlying land in the Crown.

Clause 11 repeats section 608 of the Cook Islands Act 1915, to make it clear that orders of the Land Division do not affect roads.

Clause 12 recognises that because accessways may, in the future, become roads, and will in any case be the preferred location for reticulated infrastructure, the Land Division of the Court should make sure that where access is ordered, it is compliant with the requirements of this bill. In practical terms, it will be the job of the Chief Surveyor to make sure, and certify, that accessways meet those requirements.

Clause 13 (which is modelled on section 609 of the Cook Islands Act 1915) recognises that an accessway may, over time, become used in a way or to an extent that makes it appropriate that it become a road. This provision allows for that to happen. Under the Cook Islands Act 1915, compensation is not payable in such a case. Under the new law, it is recognized that road engineering needs may result in the road being enlarged, and that questions of compensation may arise if that happens. *Clause 13* also allows an owner to offer up land for a road. That offer may carry with it the need for expenditure of public funds to upgrade the road, so this clause allows for the relevant infrastructure manager to decide whether that offer should be accepted.

Clause 14 allows for closing roads. It is modelled on section 610 of the Cook Islands Act 1915 with updated language that is consistent with the rest of this bill

Clause 15 updates section 611 of the Cook Islands Act 1915 and deals with the form of a warrant for roading.

Subpart 2—Roles and functions with regard to roads

Clause 16 identifies who is responsible for roads and sets out what those responsibilities are. Elsewhere in the Bill (*Part 4*) an Island Government may seek assistance from ICI, but in line with the principles of devolution and the provisions of the Island Government Act 2012, the Bill recognizes that prime responsibility for roads in the Pa Enea rests with each Island Government. Road accidents do cause death and injury, and this clause contains a provision that is designed to limit the Crown's liability. The underlying principle is that while the Crown will aim to have safe roads, those who choose to use public roads do so at their own risk.

Right of access to roads and associated land

Clause 17 provides for an infrastructure manager who needs to access land on a temporary basis for purposes associated with roading to do so, using the procedures set out here. This clause reflects existing, informal, practice for the temporary stockpiling of roading materials, off-road parking for road construction equipment, and similar uses of private land. The clause requires notice be given to an owner or occupier before access is exercised if access will require disturbance to the land or vegetation on it in more than a minor way.

Maintenance

Clause 18 As the temporary access rights set out in clause 17 will typically be used most commonly for maintenance purposes, this clause sets out exactly what is meant by maintaining a road, for the purposes of exercising those temporary access rights.

Clause 19 allows the infrastructure manager responsible for a road to remove an obstruction in the circumstances set out in this clause

Part 3
Infrastructure (other than roads)

Clause 20 provides that this part of the Bill deals with infrastructure other than roads
Limited Right of access to infrastructure and associated land

Clause 21 allows all infrastructure managers to exercise temporary rights of access for limited purposes – the provision reflects current practice of service providers such as Te Aponga and Bluesky. The clause requires notice be given to an owner or occupier before access is exercised if access will require disturbance to the land or vegetation on it in more than a minor way.

Clause 22 As the temporary access rights set out in clause 21 will typically be used most commonly for maintenance purposes, this clause sets out exactly what is meant by maintaining infrastructure, for the purposes of exercising those temporary access rights.

Network connections

Clause 23 codifies existing practice, as routinely used in the case of power and telecommunications providers, to allow for connections to be isolated or cut off for technical reasons, and extends those detailed provisions so they apply to all reticulated infrastructure. Notice must be given to customers, except in the case of emergency.

Part 4
The Pa Enuā

Clause 24 gives statutory recognition to the role of an Island Government as the infrastructure manager of its island, while recognizing the ability of the Island Government to delegate that responsibility.

Clause 25 deals with capital works in the Pa Enuā. The clause acknowledges the role of an Island Government while providing checks and balances to make sure the fiscal risks facing the Crown are appropriately managed by ensuring appropriate project management.

Clause 26 continues the role of ICI as a provider of advice and technical support to Island Governments in those areas of infrastructure in which ICI has particular expertise. The drafting recognizes the role that the Airport Authority and Ports Authority play in the case of Aitutaki infrastructure.

Part 5
General rights and obligations

Right of access and right to leave infrastructure in place

Clause 27 sets out in some detail what is included in the rights of access conferred by *clauses 17 and 21* of the Bill and the purposes for which that access can be exercised. Subject to the other provisions of this Act, the right of access includes the right to place and leave infrastructure on under or above the relevant land or accessway. A

right of access is one that may be exercised by the infrastructure manager and by its workers and contractors, but it can only be exercised for purposes that relate directly to the relevant infrastructure.

Clause 28 requires those exercising rights of access to carry evidence to establish the identity of the infrastructure manager they are working for.

Clause 29 makes it clear that once infrastructure is constructed or installed there is a right to leave it in place indefinitely, subject only to the terms of an enduring agreement (that may, for instance, allow for temporary placement of infrastructure), or by order of the Court. *Clause 29* also preserves the position of all existing infrastructure.

General obligations of infrastructure managers

Clause 30 imposes positive obligations on an infrastructure manager to take into account the fact that its activities affect others. The clause sets out a positive obligation on every manager to publicise intended activities and to consult with accessway managers, other infrastructure managers and affected owners and occupiers. These obligations apply in all circumstances except where temporary access for limited purposes is needed (for example the provisions of clauses 17 and 21 which provide for temporary access), and in the case of emergency (clause 42). *Clause 30(5)* mandates the “Dig Once” principle that infrastructure managers seek to follow both for working economies and to minimize inconvenience to others.

Clause 31 imposes an obligation on an infrastructure manager to restore land where damage of any sort is caused (unless an enduring agreement provides otherwise).

Clause 32 imposes an obligation on an infrastructure manager to make sure that infrastructure does not interfere with navigation in any navigable waters.

Protection of roads and other infrastructure

Clause 33 imposes a general obligation on every person whose activities might materially affect the condition of, or access to, infrastructure or any related service. The obligation is one of advising the relevant infrastructure manager of what is proposed, seeking permission for what is proposed, and of complying, if conditions are imposed, with those conditions. *Clause 33* recognizes that while accessways may take many different forms, an accessway should not be connected to a road without the agency having responsibility for that road first giving permission. The reason for this is that connection may have implications for drainage and other matters affecting the use and condition of the road.

Clause 34 sets out the procedural requirements that the infrastructure manager must follow, and gives recourse to a person who may be dissatisfied with the decision of the infrastructure manager.

Using roads and accessways for infrastructure purposes

Clause 35 sets out obligations on an infrastructure manager that wishes to dig up or otherwise carry out work that affects any road or sealed accessway. The infrastructure manager must obtain prior permission. If the permission is not granted or the

conditions are unsatisfactory the infrastructure manager may apply to the High Court for permission or different conditions.

Clause 36 sets out requirements aimed at making sure that the engineered surface of the road or accessway is fully restored and that both during the work and after its completion, obstruction, hazards and interference to normal traffic are minimized.

Vegetation

Clause 37 defines terms used in *clauses 38 to 41* that deal with the issues posed by vegetation that affects infrastructure.

Clause 38 deals with vegetation that is growing on, over or under an accessway, and allows an affected infrastructure manager to trim and remove the vegetation (with the permission of the responsible person) or to request the responsible person do that work instead. The clause also gives rights to affected persons to object to the work being undertaken, if necessary by seeking a court order.

Clause 39 deals with vegetation that is on, under, or above land other than an accessway. The clause allows an affected infrastructure manager to trim and remove the vegetation (with the permission of the responsible person) or to request the responsible person to do the work instead. *Clause 39* also gives rights to affected persons to object to the work being undertaken, if necessary by seeking a court order.

Clause 40 allows an infrastructure manager who is refused permission to trim or remove vegetation to seek a court order allowing that. To discourage unreasonable refusals of permission, the clause provides that if the Court makes the order allowing the work then, unless the Court orders otherwise, the person responsible must pay the for the costs of that work.

Clause 41 addresses the issue of how much vegetation may be trimmed and removed, updating existing law that applies to *Te Aponga Uira* and *Bluesky* and applying it generally. The experience of network operators has identified best practice in this area, and the provision sets out that best practice as a requirement.

Emergency and other powers

Clause 42 sets out powers that an infrastructure manager may exercise in emergency situations. Those situations are set out in the clause which then allows for that manager to take urgent steps, while making provision for oral notice to those affected, where that is possible in the circumstances.

Clause 43 addresses the common problem of an urgent need to clear drains in flooding and heavy rain situations and also imposes obligations on occupiers and owners of land that hosts a storm water drain of any sort.

Part 6

Rights and obligations where land is used for infrastructure purposes

Infrastructure Manager's role when needing land

Clause 44 addresses the situation when an infrastructure manager needs to acquire land or an interest in land, as opposed simply to exercising statutory rights to place

and leave infrastructure (as may be needed, for example, to fence off land). While preserving the right of the Crown to take land by warrant as a last resort. *Clause 44* requires the infrastructure manager first to seek either an enduring agreement or, failing that, a court order.

Clause 45 protects the position of owners and occupiers of land (other than land already in use as an accessway) by requiring that if a road is to be built or some other new infrastructure is installed on that land, it must be done only by agreement or by order of the Court. The provision does not apply where infrastructure is “new” simply because it replaces existing infrastructure at that location.

Infrastructure manager may apply to Court for order concerning land *Clause 46* sets out the procedure to be followed if it is not possible to obtain an enduring agreement with owners for any reason, in effect giving an infrastructure manager the ability to have the Court rule on the matter. *Clause 46* recognizes that in some cases there may be active opposition while in other cases there may be practical difficulties in obtaining agreement due to the number of owners, absent owners etc.

Clause 46 also allows, under the Land (Facilitation of Dealings) Act 1970, the Court to request the Registrar to convene a meeting of assembled owners. This is a procedure with which both owners and court officials are familiar, and is therefore an effective tool for addressing issues of owner consent where there are large numbers of owners.

Clause 47 sets out the Court’s jurisdiction to make an order in a matter brought before it either under *clauses 44, 45, and 46*.

Liability for damage to infrastructure

Clause 48 confirms the common law position that a person who damages infrastructure either intentionally or negligently, must pay for the cost of repairs, the clause illustrates examples of negligence.

Rights of owners, occupiers, and accessway managers

Clause 49 recognises that those whose property hosts infrastructure may have a legitimate reason for requesting its relocation. This clause sets out the rights and obligations of the parties to a request of that kind, and provides a right of redress to the High Court.

Clause 50 sets out who may object to the exercise, by an infrastructure manager, of certain rights by way of an application to the Court. They are—

- an accessway manager, infrastructure manager or occupier or owner of land affected by the exercise, or proposed exercise, by an infrastructure manager of rights of access under *clauses 17 or 21*;
- a person responsible for vegetation or an occupier or owner of adjoining land, affected by an infrastructure manager’s exercise of rights under *clauses 38 or 39*;
- an occupier or owner of land on which there is road drainage or storm water drainage, affected by an infrastructure manager of rights under *clause 45*.

Clause 50 also sets out the procedure that will apply if an application is made to the Court, to protect the objector's rights until the Court has determined the position. The right to apply to the Court under *clause 50* extends to infrastructure managers because, for example, there may be concerns that repair work on one underground network such as water, power, and telecommunications may affect another of those underground network.

Clause 51 sets out the jurisdiction of the Court to make orders on a hearing of an objection of the sort referred to in *clause 50*.

Compensation

Clause 52 sets out the principle to be applied by the High Court in determining applications for compensation under the Bill.

Clause 53 first draws attention to the obligations mandated on both the Crown and the Court by Article 40 of the Constitution (which deals with the acquisition or taking of property). It goes on to confer an entitlement on an affected person to claim, and a jurisdiction on the Court to grant, compensation under this Act, in addition to the jurisdiction of processes under article 40 of the Constitution.

Clause 54 sets out the circumstances in which there is an entitlement to compensation.

Clause 55 sets out a range of cases in which there is no entitlement to compensation, reserving however a discretion on the part of the Court if there is, in fact substantial loss or damage caused in circumstances that satisfy the Court that compensation should be paid.

Part 7

General and miscellaneous provisions

Protection of roads and other infrastructure

Clause 56 deals with the situation in which someone interferes with a road or other infrastructure or is breaching an agreement made with regard to infrastructure, allowing the affected infrastructure manager to require that person to stop what is complained of. If that person does not take remedial action (if required) the infrastructure manager may do so itself and recover the cost of doing so. This clause does not affect criminal liability of the person interfering (see below).

Offences

Clause 57 creates a criminal offence of interfering with infrastructure; this clause is modelled on existing provisions, creating a single offence applicable to all infrastructure and defining what is meant by "interfering" in the particular context of this offence.

Clause 58 creates a criminal offence for the particular protection of service workers who are obstructed from carrying out authorised work under the Act.

Delegation

Clause 59 reflects the practice of infrastructure managers using employees, contractors, and other delegates to undertake work. The clause gives a broad power of delegation to those managers.

Civil proceedings

Clause 60 provides that matters falling for consideration by the High Court are to be heard in the Civil Division, but given the land issues that may fall for consideration, allows for a matter to be heard in the Land Division if the Court thinks that is a more appropriate forum.

Role of CIIC

Clause 61 clarifies the interrelationship between CIIC and those agencies of the Crown that are infrastructure managers, with the aim of allowing prudent management of the fiscal risks facing the Crown in terms of enduring agreements that a Crown agency may enter into. The clause also recognizes, in effect, that CIIC, through CIGPC, owns government assets and before land becomes a government asset CIIC must be involved in the process of acquiring that land.

Notices

Clause 62 makes it clear that an infrastructure manager may satisfy a requirement to give notice to the owners of land by giving notice to any one of those owners living in the Cook Islands or to any of those owners living overseas, who have left an overseas address for service with the High Court in Rarotonga.

Relationship with other legislation

Clause 63 gives the provisions of legislation relating to civil aviation primacy over the provisions of the Bill.

Regulations

Clause 64 confers a broad power to make regulations to deal with the necessarily complex detail of infrastructure related matters.

Transitional and savings provisions

Clause 65 affirms the continuing effect of existing, concluded, agreements between infrastructure managers and third parties.

Clause 66 makes provision as to the effect of agreements between infrastructure managers and third parties that are in the course of negotiation at the time the Act comes into force.

Clause 67 deals specifically with Te Mato Vai issues, in effect preserving the procedures agreed between the Crown, landowners and the Court for bringing Stage 2 to completion under the existing Rarotonga Waterworks Ordinance regime. This is in recognition that proceedings under the Ordinance remain in the High Court.

Clause 68 is a savings provision that affirms the current and ongoing status of existing infrastructure.

Repeals and amendments

Clause 69 repeals the Ministry of Supportive Services Act 1973-74.

Infrastructure Act 2019

Clause 70 provides for a range of related amendments to other legislation.

