



PARLIAMENT OF THE COOK ISLANDS

SEABED MINERALS BILL 2019

EXPLANATORY NOTE

This note does not form part of the Bill but is intended to indicate the effect of the clauses.

The purpose of this Bill is to enable the effective and responsible management of the seabed minerals of the Cook Islands in a way that also—

- (a) is consistent with international rules and principles recognised by the Cook Islands:
- (b) provides a stable, effective, and efficient regulatory framework:
- (c) promotes transparent, informed, co-operative, and consultative decision-making:
- (d) seeks to maximise the benefits of seabed mineral activities for present and future generations of Cook Islanders.

In order to achieve its purpose, this Bill, among other things—

- (a) replaces the existing legal framework (the Seabed Minerals Act 2009) with a streamlined legal framework:
- (b) creates an improved regulatory system and continues to provide for an Authority to monitor, and manage the Cook Islands involvement with seabed mineral activities:
- (c) continues the register of titles and provides for the registration of dealings and interests in titles:
- (d) introduces a licensing panel (that operates independently) to make recommendations to the responsible Minister on whether to grant or decline applications for licences.
- (e) clarifies the interaction between this Act and national law relating to environmental impact assessments, project permitting, and environmental management:
- (f) provides for the payment of royalties or other revenues derived under this Act, into a sovereign wealth fund, and the payment of fees:
- (g) provides for and regulates sponsored activities in the international seabed area:
- (h) provides for the management of information.

Contents of the Bill

Part 1

Preliminary matters

Part 1 sets out preliminary matters.

- Clause 2** provides that the Act comes into force on a date appointed by the Queen's Representative by Order in Executive Council.
- Clause 6** relates to interpretation. Key terms used in the Bill include **applicant, Authority, Committee, environment, exploration, incident, licence, licensed area, licensee, licensing panel, licensee, mining, precautionary approach, prospecting, prospecting permit, prospector, regulated activity, seabed minerals, seabed minerals activities, serious harm, title, title area, and title holder.**
- Clause 7** A notable clause is clause 7 which requires persons making decisions under the new Act to seek to apply the UN convention of the law of the sea as well as other regional and international agreements.
- Clause 8** relates to the application of the Act.

Part 2

Cook Islands Seabed Minerals Authority, Licensing Panel, and Advisory Committee

Subpart 1—Cook Island Seabed Minerals Authority

- Clauses 10 to 21** continue the Seabed Minerals Authority, and provide for its operations in similar terms to the provisions of the Seabed Minerals Act 2009.

Subpart 2—Licensing panel

Subpart 2, clauses 22 to 34 creates a new licensing panel to evaluate applications for licences and make recommendations to the responsible Minister as to whether those applications should be granted or declined. That body, the majority whose members are required to have substantial experience in relevant fields of expertise, have the task of making recommendations to the responsible Minister on the grant or decline of licences. The panels task is to consider those applications after the Authority has undertaken due diligence on the applicant, and determined that they satisfy the qualification criteria and the fit and proper person criteria. The panel is required to operate independently. The purpose of having a licensing panel is to ensure that applications are considered and evaluated on the basis of merit, and without regard to irrelevant considerations.

Subpart 3—Cook Islands Seabed Minerals Advisory Committee

Subpart 3, clauses 35 to 40 creates a new Seabed Minerals Advisory Committee whose role is to assist the Authority by providing community and stakeholders perspectives on seabed minerals policy.

Part 3

Areas available for seabed mineral activities within Cook Islands national jurisdiction

Part 3, clauses 41 to 50 sets out rules for the allocation of areas for seabed minerals activities within the Cook Islands national jurisdiction. These rules are similar to those in the comparable provisions of the Seabed Minerals Act 2009. However, various provisions currently located in the Seabed Minerals (Prospecting and Exploration) Regulations 2015 are elevated from those regulations into this Bill because of their importance (for example clauses 46 to 48).

- Clause 45** requires the Authority to make a public announcement of a tender process and provides for when that announcement is to be made.
- Clause 46** provides for the amendment of the invitation to apply and the tender documents, or the cancellation of the tender in certain circumstances.
- Clause 47** regulates the conduct of tenders.
- Clause 48** makes continuing provision for a cadastre and register of titles.
- Clause 49** requires the Authority to regularly update the cadastre and register of titles.
- Clause 50** requires the cadastre and register to be open for public inspection.

Part 4

Issuing of permits and licences for seabed mineral activities

Part 4, clauses 51 to 89 sets out the rules for granting prospecting permits and exploration and mining licences. The key changes to the processes for dealing with exploration and mining licence applications are as follows:

- the Authority undertakes due diligence on the applicant, and determines whether they satisfy the qualification criteria and the fit and proper person criteria (see clauses 58 to 66):
- the licensing panel is given the task of evaluating applications for licences and making recommendations to the responsible Minister (see clauses 68 to 75):

- the powers of the responsible Minister and Cabinet are in general limited to accepting or rejecting the licensing panel's recommendations. (In other words the responsible Minister and Cabinet cannot give licences to applicants who the licensing panel does not recommend the grant of a licence). The responsible Minister can on one occasion only refer back to the licensing panel for reconsideration a recommendation to grant that the responsible Minister does not agree with (see clauses 70 and 71). After reconsideration the responsible Minister is required to refer the licensing panels recommendation to Cabinet for decision:
- the regime regarding rights of retention arising from an exploration licence (clause 79) are simpler than the comparable provisions in the Seabed Minerals Act 2009:
- a number of important provisions from the Seabed Minerals (Prospecting and Exploration) Regulations 2015, (for example clauses 62, 66, and 75 which relate to the content of an application for a licence, consultation to be undertaken before decisions are undertaken and the review of licence decisions, respectively), are included in this part because their importance is such that they should be included in primary legislation rather than in regulations.

Part 5

Duties and responsibilities of permit and title holders and licensees, etc

Part 5, clauses 90 to 97 sets out the duties of permit holders, titleholders, and licensees. There is a new provision (clause 90) that clarifies the interface between this Bill and the Environment Act 2003.

Clause 92 is to be read in conjunction with Schedule 2 (which sets out a title holder's general duties).

Part 6

Financial arrangements

Part 6, clauses 98 to 102 sets out the financial arrangements for permit holders, title holders, and licensees. This Part (see clause 100) also contains more detail than the Seabed Minerals Act 2009 about the management of the sovereign wealth fund, which is to be established to receive royalty payments from title holders.

Part 7

Enforcement powers

Powers of entry and search

Part 7, clauses 103 to 118 sets out the enforcement powers of the Authority. These powers are included in primary legislation, rather than regulations, to facilitate parliamentary scrutiny of whether the provisions strike the right balance between the need to ensure the seabed minerals regime is enforceable on the other hand and the legitimate rights and interests of permit holders and licensees or the other hand.

- Clause 103** sets out the powers of entry and examination that may be used for regulatory purposes.
- Clause 104** sets out the powers of an inspector for law enforcement purposes. The main distinction between the 2 types of powers, is that regulatory powers may be used routinely, whereas law enforcement powers only apply in general if an inspector has reasonable grounds to believe that an offence is being committed or has been committed against the Act or the regulations.

Carrying out search powers

- Clause 105** sets out the search powers of inspectors
- Clause 106** sets out the powers of persons called to assist an inspector.
- Clause 107** provides that items of uncertain status may be seized.
- Clause 108** sets out other powers of inspectors.
- Clause 109** sets out various duties of inspectors (which are designed to avoid unwarranted intrusion into the activities of licensees and permit holders).
- Clause 110** enables title holders to seek a review by the responsible Minister of an inspector's exercise of.
- Clause 111** requires a title holder, its associates, and affiliates to facilitate the exercise of powers by an inspector.

Directions

- Clause 112** enables the Authority or an inspector to issue a direction requiring persons to take corrective actions, to prevent contraventions of the Act or Regulations, prevent serious risk of harm to life or to the marine environment, make payments of money, and provide information in relation to matters under the Act.
- Clause 113** provides that non-compliance with a direction under clause 112 makes the person who was subject to the direction liable to pay a pecuniary penalty not exceeding \$500,000.
- Clause 114** gives the Authority power to take any action necessary to give effect to a direction under clause 113.

Pecuniary penalties

Clause 115 empowers the Seabed Minerals Commission to bring civil proceedings to obtain a pecuniary penalty. Under **Clause 115(5)** criminal proceedings may not be brought in respect of the same conduct that is already the subject of an order to pay a pecuniary penalty. This is to prevent “double jeopardy” occurring.

Administration action

Clause 116 empowers the Authority to take administrative actions in response to material or repeated breaches by a licensee of various requirements.

Clause 116 (2) lists 7 administrative actions that may be taken.

Clause 117 sets out the grounds for variation, suspension, or cancellation of a licence.

Clause 118 sets out the procedures that the Authority must follow before varying, suspending, or cancelling a licence, to ensure that the requirements of natural justice are observed before adverse actions are taken against licensees.

Part 8**Seabed mining in international seabed area**

Part 8, clauses 119 to 167 provides for seabed mining in the international seabed area. The objectives of this Part are to—

- (a) enable the Cook Islands to act as a sponsoring State for the purposes of engaging in ISA seabed mineral activities in the Area:
- (b) empower the Cook Islands to participate in ISA seabed mineral activities whether directly, through a body corporate established under this Act, or through sponsorship of a third party contractor with the ISA:
- (c) establish a clear and stable legal operating environment for persons sponsored or engaged by the Cook Islands to undertake ISA seabed mineral activities in the Area:
- (d) ensure that ISA seabed mineral activities are carried out only by entities that are under the Cook Islands’ effective control, and in a manner that is consistent with the rules of the ISA and the Cook Islands responsibilities under the UN Convention on the Law of the Sea, and other applicable requirements of international law:
- (e) implement measures to maximise the benefits of ISA seabed mineral activities for present and future generations.

Part 9

Miscellaneous

Part 9, clauses 168 to 178 sets out miscellaneous provisions.

Clause 168 provides that the responsible Minister, public officials, and others who perform functions under this Act are not liable for actions done in good faith.

Other notable provisions in this Part include—

- clause 176 (which deals with conflicts of interest); and
- clause 178 (which sets out regulation making powers). Clause 178, amongst other matters, enables the making of regulations to provide for consultation and sharing of information, where appropriate, between the Authority or the licensing panel and groups such as the Marae Moana Council and the Technical Advisory Council established by the Marae Moana Act 2017. This is intended to encourage the synchronisation of activities under this Act and the Marae Moana Act 2017.

Part 10

Transitional and savings provisions

Part 10, sets out transitional and savings provisions.

Schedule 1

Schedule 1, sets out the process the responsible Minister must follow when appointing members of the licensing panel. The Minister is obliged to appoint a selection panel who will consider applications and make recommendations. The process set out in *Schedule 1* is similar to that set out in the Public Service Act 2009 for the selection of the Public Service Commissioner.

Schedule 2

Schedule 2, sets out the general duties of title holders. It makes similar provisions to that currently set out in the Seabed Minerals Act 2009.

Schedule 3

Schedule 3, sets out amendments to other Acts. The amendments to the Environment Act 2003 make significant changes to the provisions constituting the Natural Environment Council (section 20 of the Environment Act 2003). These changes are designed to ensure that there is adequate representation on this Council of—

- the Northern and Southern groups of the Cook Islands;
- traditional leaders;
- the Cook Islands community and the private sector;
- persons with expertise in environmental matters, the law of the Cook Islands, and economics.

A new section 36AA of the Environment Act is inserted, which will enable activities with environmental impacts to be categorised as Tier 1, Tier 2, and Tier 3 activities, depending on the significance of their environmental impacts. The controls imposed on such activities are intended to increase depending on their categorisation with those activities with the most significant impacts being subject to the greatest controls. Changes are also made to section 36 of that Act (which describes when project permits are required).
