

Review of the draft Seabed Minerals Bill 2019 (Cook Islands)



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¹ QS World University Rankings & Performance Ranking of Scientific Papers for World Universities (2018).

² The University of Queensland is ranked first in the world for mining and mineral engineering, 2018 Shanghai Rankings by subject.

Executive summary

About this review

This document is a review of the draft Seabed Minerals Bill 2019 (Cook Islands). The Bill was made available for public consultation in December 2018. The Centre for Social Responsibility in Mining (CSRSM) is undertaking this review, on a voluntary basis, at the invitation of the Seabed Minerals Authority. This review applies CSRSM's multi-disciplinary expertise of the global mining sector. Observations are provided in the spirit of respect and collaboration, in the hope that they will assist minerals governance in the Cook Islands.

Scope and approach

Only the Bill is reviewed. The draft Seabed Minerals Policy and draft Seabed Minerals Sector Strategy are referred to in framing the review, but are not themselves part of the review. The review also excludes Part 8A of the Bill ('Seabed Mining in the International Seabed Area').

The review is guided by four principles: clarity and coherence of the Bill; transparency and accountability; environmental protection; and civic participation. These principles were derived from the draft Policy and draft Sector Strategy.

Key findings and recommendations

The draft Bill sets out a generally coherent framework for the management of seabed minerals in the Cook Islands. It provides a sound basis for further iterations of the Bill. This review identified 20 opportunities to strengthen the design of the Bill. Six major points include:

- **Clarity and coherence:** The practical difference between prospecting and exploration is unclear. Using the descriptor 'low-impact' to define prospecting presupposes knowledge of the impacts of prospecting activities – yet the Policy states that 'lack of data about the deep seabed ... makes it difficult to assess' the impact of seabed mineral activities.
- **Transparency and accountability (1):** The Bill sets out no criteria for granting an exploration or mining licence. The 'qualification criteria' only determine whether a company can be *considered* for a licence. No criteria are provided in the Bill for deciding whether a company should be *granted* a licence. The Bill should hold the decision-maker accountable against specific criteria.
- **Transparency and accountability (2):** Cabinet must approve the Minister's decision to grant an exploration or mining licence. It is unclear whether the Cabinet or the Minister holds ultimate decision-making power. In the interests of accountability, the true decision-maker should be identified.
- **Environmental protection:** The Bill amends the Environment Act. Practically, these amendments could allow Cabinet to exempt seabed mining from environmental impact assessment and environmental approvals. The amendments create a loophole that should be closed, in order to improve accountability and better align the Bill with the Policy objective of 'sustainable environmental management'.
- **Civic participation:** Mechanisms for public consultation before the grant (or refusal) of a licence can be strengthened. The Bill does not specify what information the public is entitled to receive, nor require the Authority to actively solicit public feedback. Enhancing the degree of public participation will help achieve the Policy objective of 'engagement and cooperation between communities and government'.
- **Other:** Search, entry, and inspection powers granted to inspectors are extremely broad. While they mirror comparable NZ statutes, they do not incorporate accountability safeguards present in the NZ statutes. Constructing safeguards against misuse of power would strengthen the Bill.

A summary table of all 20 findings and recommendations appear at the conclusion of this review. CSRSM welcomes follow-up engagement.

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1. Introduction

1.1 About this review

This is an independent review of the draft Seabed Minerals Bill 2019 (Cook Islands) ('the Bill'). The Bill was made available for public comment by the Seabed Minerals Authority ('the Authority'), alongside the following draft documents:

- Explanatory note to the Bill
- Seabed Minerals Policy³
- Seabed Minerals Sector Strategy / Sector Plan,⁴ and
- Part 8A of the Bill ('Seabed Mining in the International Seabed Area').⁵

These documents were released for public review on 22 December 2018,⁶ except for Part 8A of the Bill, which was issued separately on 23 January 2019. The deadline for public comment was initially set for 6 February. The deadline was extended until 27 February, and later extended again to 14 March.⁷

The Centre for Social Responsibility in Mining (CSRМ) is undertaking this review at the invitation of the Authority. CSRМ acknowledges the Authority's statement that 'these documents are still under review and are subject to more amendments'.⁸ This review is provided in the spirit of respect and collaboration, and in the hope that it will contribute positively to minerals governance in the Cook Islands. The review was undertaken on a wholly voluntary basis.

1.2 What does this review cover?

This document reviews the Bill only. The draft Seabed Minerals Policy and Sector Strategy informed the review, but neither is assessed here. The review also excludes Part 8A of the Bill, which is operationally separate from the other parts of the Bill.

The review assesses the Bill against four key principles:

- Clarity and coherence
- Transparency and accountability
- Environmental protection, and
- Civic participation.

These principles were drawn from the Seabed Minerals Policy and Sector Strategy. Guiding questions corresponding to each of these principles are presented in Table 1 (overleaf). Additional observations not falling directly under these four principles are also offered.

³ Version 2 (draft date: 3 January 2019).

⁴ The Seabed Minerals Authority website refers to this document as a 'Plan' (last accessed 24 February 2019). The document itself is entitled 'Seabed Minerals Sector Strategy' (draft 14.1.19, dated February 2019).

⁵ Part 8A appears intended to be part of the Seabed Minerals Bill. It was released on the Authority's website separately from, and at a later date than, the rest of the Bill. Consequently, this review treats Part 8A as a separate document.

⁶ The version of the Bill reviewed herein was issued for public comment on this date.

⁷ An earlier version of this review was submitted to the Authority on 27 February. This version (20 March) incorporates minor editorial amendments and additional information in footnotes.

⁸ Seabed Minerals Authority (Undated). 'Draft Documents'. Online at https://www.seabedmineralsauthority.gov.ck/seabed-minerals/documents_idl=10003_idt=514_id=2730_.html. Accessed 13 February 2019.

Table 1: Principles and guiding questions for this review

| Principles | Guiding questions |
|---------------------------------|--|
| Clarity and coherence | <ul style="list-style-type: none"> Is the Bill coherent on its own internal logic? Does it make sense in the context of seabed mining in the Cook Islands? |
| Transparency and accountability | <ul style="list-style-type: none"> Does the Bill allow the public to access decision-makers' reasoning? Are decision-makers required to account for their decisions? Does the Bill allow for corruption risks? ⁹ |
| Environmental protection | <ul style="list-style-type: none"> Does the Bill adequately provide for the assessment and management of environmental risk and impacts? |
| Civic participation | <ul style="list-style-type: none"> Does the Bill allow for public participation in decisions about seabed mining? Is such participation meaningful? |

The objective of this review is to raise key issues for the Authority (and other stakeholders) to consider in further drafting and consultation rounds. This review does not comment on every provision of the Bill; an absence of commentary in relation to a provision does not imply endorsement of that provision. Additionally, this review does not set out to cover:

- How the Bill interacts with other Acts and policies within the Cook Islands¹⁰
- The legislative history of the Bill and the current Seabed Minerals Act 2009
- Legislative regimes in other jurisdictions
- Seabed mining developments in other jurisdictions, or
- The advisability of seabed mining in the Cook Islands or elsewhere, from a policy perspective.

CSRM welcomes follow-up engagement on any aspect of this review.

1.3 Structure of this review

This review is structured according to the four principles identified above. **Section 2** addresses clarity and coherence in relation to how seabed mineral activities are defined. **Section 3** assesses transparency and accountability in the approvals process (i.e. processes for the grant of permits and licences). Environmental protection is assessed in **section 4**, and **section 5** addresses civic participation. **Section 6** provides additional observations. **Section 7** summarises key findings and provides recommendations.

2. Clarity and coherence: seabed mineral activities

2.1 Definitions under the Bill

Part 4 of the Bill establishes three types of titles: prospecting permits, exploration licences, and mining licences.¹¹ Prospecting permits are regulated under Part 4, Subpart 2, while exploration and mining licenses are regulated together under Subpart 3.¹²

⁹ This review does not suggest actual corruption has occurred. 'Corruption risk' refers to the potential for people to 'abuse ... entrusted power for private gain'. See: Caripis, L. (2017) 'Combatting corruption in mining approvals'. Report written for Transparency International. Online at http://transparency.org.au/tia/wp-content/uploads/2017/11/M4SD_CombattingCorruption.pdf.

¹⁰ Except insofar as the Bill proposes to amend the Environment Act.

¹¹ Retention leases are not a title under the Bill (cf. Seabed Minerals Act 2009), but clause 63 of the Bill provides for rights of retention.

¹² The heading to Part 4, Subpart 3 is 'Licensing of seabed mineral activities...'. This heading is imprecise. As defined in clause 6, 'seabed mineral activities' includes prospecting, but Subpart 3 only relates to exploration and mining.

Clause 6 defines mining, exploration, and prospecting. **Mining** is conceptualised as commercial extraction of seabed minerals, and the construction and operation of associated infrastructure ('mining, processing, and transportation systems').

Exploration includes:

- Searching for seabed minerals in a title area
- Sampling and analysing those minerals
- Testing systems and equipment, and
- Carrying out studies.

Exploration 'does not include mining' – that is, commercial extraction is not exploration.

Prospecting means 'low-impact activities involved in the preliminary search for seabed minerals deposits, including estimation of the composition, size, and distribution of deposits and their economic values, without exclusive rights'.

2.2 Distinction between exploration and prospecting

The Bill does not make clear what practically distinguishes prospecting and exploration. In mining terminology, prospecting and exploration are 'widely considered synonymous', but sometimes prospecting refers to 'the initial, more primitive phase of exploration', which 'can help locate sites that ... may result in an ore deposit discovery'.¹³

For example, the Mining Act 1992 (PNG) treats prospecting and exploration synonymously. Exploration is a 'manner or method of prospecting for the purpose of locating and evaluating mineral deposits'. By contrast, in Queensland, Australia, the Mineral Resources Act 1989 (Qld) treats prospecting as type of exploration. Prospecting is taking 'action to find out about the existence, quality or quantity of minerals on, in or under land' by using handheld instruments only.¹⁴ Exploration includes prospecting, and also extraction and removal of material for testing, using instruments 'appropriate to determine the existence of any mineral'.¹⁵

In New Zealand, the Crown Minerals Act 1991 (NZ) considers prospecting and exploration as different activities. Prospecting is 'any activity undertaken for the purpose of *identifying land* likely to contain mineral deposits or occurrences' (emphasis added), and includes a range of surveying and sampling methods. Exploration is undertaken to *identify mineral deposits*, and includes drilling, dredging and excavations.

The Seabed Minerals Bill appears to distinguish between prospecting and exploration, because it provides separate titles for each type of activity. But the Bill provides little guidance on what constitutes prospecting as distinct from exploration. Clause 44(c) provides the only real distinction: prospecting does not include drilling, the use of explosives, or the introduction of harmful substances into the marine environment. Impliedly, exploration *could* involve these activities, but not necessarily.

Could level of impact distinguish prospecting from exploration under the Bill? Prospecting is defined as 'low-impact activities' (similar to the approach taken by New Zealand); exploration could involve activities of greater impact. The Bill, however, provides no mechanism for determining the level of impact *before* an applicant applies for a prospecting permit or exploration licence. An environmental impact assessment (EIA) under the Environment Act 2003 might be an apt mechanism, but clause 71 suggests that an EIA would be undertaken *after* the applicant has decided between an exploration licence or prospecting permit. The EIA process starts too late for distinguishing prospecting from exploration on the basis of impact.

¹³ Lee-Moreno, Jose L. (2011) 'Minerals Prospecting and Exploration' (Chapter 3.2). In: Peter Darling (ed), *SME Mining Engineering Handbook* (3rd edition). Englewood, Colorado: Society for Mining, Metallurgy, and Exploration.

¹⁴ Mineral Resources Act 1989 (Qld), s 6B.

¹⁵ Mineral Resources Act 1989 (Qld), schedule 2.

Incorporating ‘low-impact’ in the definition of prospecting may be operable for terrestrial mining, where prospecting methods are well established. By contrast, deep-sea mining would be novel for the Cook Islands. The draft Seabed Minerals Policy acknowledges that ‘the lack of data about the deep seabed and its associated ecosystems presently makes it difficult to assess fully the potential impact of SBM Activities [seabed mineral activities]’.¹⁶ Prospecting presupposes a low level of impact, when the basis for assessing the impact of prospecting activities is not rigorously established.

As a matter of clarity and coherence, the practical distinction between prospecting and exploration should be spelt out. Applicants would need to know which title would best fit the activities in mind. Mechanisms for determining ‘low-impact’ (for prospecting permits) should be set out in the Bill, rather than presupposed.

3. Transparency and accountability: approvals process

3.1 Clarifying decision-making for the granting of licences

The Bill establishes a five-step process for the grant (or refusal) of an exploration or mining licence (Table 2). It requires the Authority’s recommendation, plus Cabinet approval, before the Minister can issue a licence.

Table 2: Steps in grant of licence (paraphrased)

| # | Step | Description |
|---|---|--|
| 1 | Authority’s evaluation and recommendation | After the applicant has met the qualification criteria, the Authority ‘evaluate[s] the application against the prescribed evaluation criteria’: clause 50(2). The Authority then makes a recommendation to the Minister. |
| 2 | Minister’s intent | The Minister must decide whether he or she intends to follow the Authority’s recommendation: implied in clauses 55(2) and 56(1). |
| 3 | Authority provides draft licence | If the Minister intends to grant the licence, then the Authority must provide a draft licence to the applicant: clause 56. The Minister must approve this draft before it is given to the applicant. |
| 4 | Cabinet approval | Cabinet must provide ‘its prior approval to the licence terms, in accordance with the recommendation of the responsible Minister’, and may request advice from the Crown Law Office before it provides such approval: clause 57. ¹⁷ |
| 5 | Minister grants licence | The Minister may grant the licence once Cabinet has provided approval: clause 55(3). |

By requiring Cabinet to endorse the Minister’s decision, these steps seem to establish an extra layer of accountability. However, it is not clear what oversight Cabinet really has under the Bill, and consequently the Bill does not compellingly improve accountability. Specifically, it is not clear whether the Cabinet has power to challenge the Minister’s decision. Clause 57(1) says that the Minister makes a ‘recommendation’ to the Cabinet, suggesting that the Minister is providing advice, not making decisions. If the true decision-making power lies with the Cabinet, the Bill should say so.

Conversely, clause 57(1) also states that Cabinet approval is ‘in accordance with’ the Minister’s recommendation. If the Cabinet’s approval must accord with the Minister’s view, then Cabinet approval is merely procedural. Cabinet approval does not add additional *legislative* accountability that can be enforced

¹⁶ Investigations to-date, including those by the Pacific Community (SPC) and the Japan Oil, Gas and Metals National Corporation (JOGMEC), may obviate the need for further prospecting. See generally SPC-EU Deep Sea Minerals Project (<http://dsm.gsd.spc.int>), and Okamoto, N. (2015) ‘Deep-Sea Mineral Potential in the South Pacific Region’. *Journal of MMIJ: Journal of the Mining and Materials Processing Institute of Japan* 131: 597-601.

¹⁷ Because Cabinet is approving licence terms developed by the Authority, Step 4 must follow Step 3; they cannot be concurrent. In clause 55(3), the phrase, ‘and after the Authority has complied with section 56’, is unnecessary. The remainder of clause 55(3) is also unnecessary, because clause 57(1) already makes Cabinet approval a precondition to the Minister’s decision.

in a court (although there may be *political* accountability because the Minister needs to convince the Cabinet to approve the decision). The Cabinet's power to consult the Crown Law Office does not add accountability, because the Bill does not empower Cabinet to do anything with that advice.¹⁸

Overall, who truly decides to grant a licence is not clear. Principles of accountability require the decision-maker to be clearly identified before the decision-maker can be held to account. The Bill should:

- State whether it is the Minister or the Cabinet who makes the decision (cf. a mere recommendation).
- State the basis on which a decision is to be made (see 3.2, Articulating the basis for granting licences).
- Clarify who may supersede another's decision, and whose input is merely advisory or procedural.

Finally, from an applicant's perspective, the Bill does not allow the applicant to discuss or negotiate the licence terms drafted by the Authority in Step 3. Such a negotiation is likely to happen in practice – but not as part of a legislative process. The absence of a formal negotiation mechanism makes 'out of process' decisions likely, creating a corruption risk.

3.2 Articulating the basis for granting licences

The Bill does not set criteria for granting exploration and/or mining licences. Clauses 51 and 52 provide 'qualification criteria for the grant of a licence', but these criteria are threshold tests, the satisfaction of which make the applicant eligible to be *considered*. The criteria do not necessarily inform a final decision to grant or refuse a licence. Clause 50 makes it clear that the qualification criteria form a threshold test only, because the Authority must evaluate the application only *after* the qualification criteria are met.¹⁹

Clause 50(2) says that, '[i]f the applicant meets the qualification criteria, the Authority must evaluate the application against the prescribed evaluation criteria'. No such evaluation criteria are prescribed in the Bill. The word 'prescribed' might refer to regulations made pursuant to clause 113. However, clause 113 is permissive, not prescriptive ('The Queen's Representative *may* ... make regulations...'; emphasis added). There is no guarantee that the evaluation criteria would be developed at all.²⁰

The absence of clear criteria is an issue of accountability. The Minister should be obliged to state how he or she weighed each and every criterion to arrive at the decision.²¹ To enhance accountability, the criteria should be set out in the Bill itself – rather than in regulations – because the Bill requires Parliamentary approval (as do amendments to Acts), whereas regulations do not.

Having evaluation criteria in legislation also allows courts to review the Minister's decision against the criteria. Not having legislative criteria means that judicial accountability mechanisms are difficult to harness; only political accountability would likely be viable.

¹⁸ Additionally, the Cabinet, the Minister, and the Authority as a statutory agency can already refer matters to the Crown Law Office. Clause 57(2) appears only to duplicate an existing power. It does not add an accountability mechanism.

¹⁹ See clauses 50(1) and (2) of the Bill.

²⁰ It is understood that new, forthcoming regulations will specify evaluation criteria. Draft regulations were not available for public comment at the time of the review.

²¹ Clause 58 requires the Minister to publish reasons for a decision, but does not require the Minister to address specific criteria.

3.3 The Authority decides prospecting permits

The Authority grants prospecting permits.²² The Authority is a statutory agency established by legislation.²³ It is not clear from the Bill why it is the Authority, and not the responsible Minister, who decides whether to grant prospecting permits.²⁴ As an elected official, the responsible Minister would be accountable to a greater range of checks and balances than the Authority.

3.4 Articulating the basis for granting permits

The basis for granting prospecting permits is unclear. Clause 40 requires that a permit application: '(a) complies with the prescribed requirements; and (b) satisfies the prescribed criteria'. No such criteria are presented in the Bill; nor does the Bill require such prescriptions to be made. Clause 42 provides criteria for *denying* a prospecting permit. Positive reasons to *grant* a permit are not provided in the Bill.

4. Environmental protection

The management of environmental risks and impacts is likely to receive intense public scrutiny. It has been discussed in the news media,²⁵ and in recent academic literature.²⁶ The draft Seabed Minerals Policy states that seabed mining is 'a frontier industry' and that there 'are many unknowns and legitimate concerns that need to be addressed' for seabed mining 'to progress in a sustainably responsible and effective manner'. Environmental protection is a 'critical priority'.²⁷ The Policy states that a 'lack of data ... may compromise effective environmental management'. The draft Sector Strategy states that exploration activities 'are considered to have low environmental impact',²⁸ and while 'mineral exploitation' has 'been studied extensively', there remain 'varying views and perspectives of the degree to which seabed mineral activities will impact the environment'.

4.1 Interaction with Environment Act

Clause 74 of the Bill states that the Environment Act 2003 applies, and that no right to prospect, explore, or mine is conferred until Environment Act requirements are met. These include the requirement of an environmental impact assessment, pursuant to section 36 of the Environment Act.²⁹

The Bill amends the Environment Act.³⁰ Section 36 of the Environment Act would be replaced with new sections 36, 36A, 36B, and 36C. Section 20 of the Environment Act would be replaced with a new section 20 and section 20A. The amendments are detailed in Schedule 1 of the Bill.

²² Clause 40 of the Bill.

²³ Clause 10 of the Bill.

²⁴ The reason may be that prospecting involves less disruptive activities than exploration and mining – but note the difficulty of presupposing that prospecting would be 'low-impact': see 2.2, Distinction between exploration and prospecting. As noted above in footnote 16, in practice, some applicants may proceed directly to exploration without further prospecting.

²⁵ E.g. Cook Islands News. 2019. 'Fear over seabed minerals law'. February 10. Accessed 24 February 2019. Online at: <http://www.cookislandsnews.com/national/environment/item/71983-fear-over-seabed-minerals-law>.

²⁶ E.g. Aguon, J. and Hunter, J. (2019) 'Second Wave Due Diligence: The case for incorporating free, prior, and informed consent into the deep-sea mining regulatory regime'. *Stanford Environmental Law Journal* 38(1): 3-55; Filer, C. and Gabriel, J. (2018) 'How could Nautilus Minerals get a social licence to operate the world's first deep sea mine?' *Marine Policy* 95: 394-400.

²⁷ To be precise: The Policy states that consistency with 'the primary purpose of the Marae Moana Act 2017' is 'a critical priority'. The Marae Moana Act's primary purpose 'is to protect and conserve the ecological, biodiversity, and heritage values of the Cook Islands marine environment': section 3(1).

²⁸ The Strategy goes on to say, 'See List attached', but no list demonstrating low environmental impact appears to be included.

²⁹ See also clause 7(2)(g) of the Bill.

³⁰ Clause 114 of the Bill.

4.2 Cabinet could exempt seabed mining from Environment Act

The current section 36 of the Environment Act is entitled, 'Environmental impact assessment' (EIA). Mostly, the proposed sections 36 to 36C reproduce the existing section 36 with an improved structure. The proposed section 36(7)(b), however, would be new – and highly problematic. It weakens accountability for decision-making under the Environment Act. Table 3 extracts the relevant provisions for discussion below.

Table 3: Proposed amendment to Environment Act 2003 – EIA provisions

| Sub-s | Text as amended |
|-----------|--|
| 36 | Environmental impact assessment |
| (1) | No person may undertake any activity which causes or is likely to cause significant environmental impacts except in accordance with a project permit issued under this section. |
| (7) | For the purposes of subsection (1) ... (b) regulations may declare any kind or class of seabed minerals activity to be or not to be an activity which causes or is likely to cause significant environment impacts. |

The regulations referred to in section 36(7)(b) would mean regulations developed by the Executive Council,³¹ which comprises the Queen's Representative and Cabinet.³² Because the Queen's Representative acts on the advice of the Cabinet,³³ this provision would effectively allow the Cabinet to exempt from environmental permitting *any* seabed mineral activity, including any activity relating to prospecting, exploration, or mining. This provision is concerning, because:

- **No limit to power:** The Cabinet could suspend the need for environmental impact assessment for any or all seabed mineral activities.
- **No transparency:** The Cabinet need not provide reasons for exempting seabed mining from environmental impact assessment.
- **No scientific basis required:** No input from any advisory group is required for the Cabinet to declare seabed mining as unlikely to cause significant environmental impacts – despite the draft Seabed Minerals Policy acknowledging that 'the lack of data about the deep seabed and its associated ecosystems presently makes it difficult to assess fully the potential impact of' seabed mineral activities.

In other words, while the Bill establishes the Environment Act 2003 as prevailing over the Bill,³⁴ it also changes the Environment Act potentially to allow seabed mining to proceed without the need for environmental impact assessment.³⁵ This amendment to section 36 of the Environment Act runs the risk of circumventing existing regulatory measures designed to ensure environmental protection in seabed mining.³⁶

³¹ Section 70 of the Environment Act confers power to make regulations.

³² Article 22 of the Constitution of the Cook Islands provides for the composition of the Executive Council.

³³ Article 5 of the Constitution: 'The Queen's Representative ... shall act on the advice of Cabinet, the Prime Minister, or the appropriate Minister as the case may be'.

³⁴ Clause 8 of the Bill.

³⁵ It is anticipated that forthcoming regulations will provide greater clarity on what is to be exempt from EIA. However, these regulations have not been released for public comment, and do not form part of this review.

³⁶ No actual intention to circumvent the Environment Act is imputed. The main point is that there is a *risk* of circumvention created by the wide powers conferred to the Cabinet by the Bill, which should be avoided or minimised.

4.3 Removal of Council members for public dissent

The Bill proposes a new section 20 and section 20A for the Environment Act, which together address the composition and function of the National Environment Council. Under these changes, the Minister and Cabinet retain the power to remove Council members who, in dissenting with the majority of the Council, ‘publicly criticises the decision of the majority’. This power is currently provided by section 20(3) of the Environment Act – if amended by the Bill, the provision would be section 20A(1)(b).

Transparency would be better achieved if the Bill removed this power. The role of the National Environment Council is to provide advice to decision-makers, utilising Council members’ knowledge of governance and environmental risk management.³⁷ The ability to remove Council members for public dissent could:

- Prevent the public from learning the expert opinions provided in Council, and
- Discourage otherwise qualified and expert individuals from participating in the Council, thereby denying the Cook Islands government the benefit of such expertise.

4.4 ‘Serious harm to the environment’ as basis for refusing licence

The Authority ‘must not grant a prospecting permit if’ the permit would be likely to ‘cause serious harm to the marine environment’.³⁸ There is no analogous provision for exploration and mining licences.

Clause 54 of the Bill does say that a licence must not be granted if it would lead to ‘a contravention of ... the Marae Moana Act 2017’, or otherwise ‘is not demonstrably in the national interest’. This clause imports a degree of environmental protection, but it only provides a general reference to national interest and the Marae Moana Act. Confidence in the Bill’s ability to protect the environment would be strengthened if the Minister had explicit and specific power to refuse a licence on the grounds of environmental protection.

Note that a licence may be varied, suspended, or cancelled if ‘scientific knowledge or best environmental practice’ rendered seabed mineral activities unacceptably risky or not in the public interest.³⁹ This power does not extend to a refusal of a licence in the first place.

4.5 Whether government must apply precautionary approach and best environmental practice

Entities holding prospecting permits, exploration licences, and/or mining licences must adhere to the ‘precautionary approach’ and ‘best environmental practice’.⁴⁰ Clause 6 defines the precautionary approach; ‘best environmental practice’ is not defined.

It is unclear whether the Cook Islands government must also follow these principles. Clause 7(2) obliges ‘a person or body, *while exercising their right to utilise the marine resources* in the exclusive economic zone or relevant areas, to ... (e) apply the precautionary approach; and (f) employ best environmental practice’. It is unclear whether the italicised text (emphasis added) includes the Cook Islands government.⁴¹ Environmental protection would be strengthened if relevant bodies of the Cook Islands government were explicitly obliged to apply the precautionary approach and best environmental practice.

The Authority is specifically obliged to act in accordance with clause 7(2).⁴²

³⁷ The proposed section 20(5) of the Environment Act establishes the required ‘knowledge and experience’ of Council members.

³⁸ Clause 42(1)(c)(ii) of the Bill.

³⁹ Clause 101(1)(d)(ii) of the Bill.

⁴⁰ Clause 76 of the Bill, referring to Schedule 2 (‘General duties of title holders’).

⁴¹ Clause 6(1) defines ‘person’ as natural and legal persons, while ‘body corporate’ means companies. The Crown is not included.

⁴² Clause 12(a)(ii) of the Bill sets out the duties of the Authority.

5. Civic participation

This section of the review considers whether and to what extent the Bill reflects objectives relating to civic participation. The draft Seabed Minerals Policy has among its objectives:

- 1.2 – ‘We will ensure issuing of licences have clear transparent processes, accessible and able to be understood by the public’.
- 2.1 – ‘We will take all reasonable steps to ensure that the administration of SBM Activities [seabed mining activities] is conducted in participation and consultation with other relevant Government agencies and the Cook Islands community’.

The draft Sector Strategy similarly declares an intention to consult broadly: ‘The Cook Islands, and thus every person in the Cook Islands, owns and is entitled to be involved in decision-making regarding the country’s oceanic resources, so genuine and effective engagement is critical.’ Public engagement is ‘a sign of a healthy participatory democracy’, and necessary to maintain ‘sufficient “social licence” to operate, meaning that there is sufficient majority public and political support to see the project through to completion’.

The Bill sets up mechanisms for informing the public and receiving public feedback, but clearer obligations for the Authority and Minister are needed to give practical effect to the intent of the Bill with respect to civic participation. The following sections elaborate on this observation.

5.1 The public’s entitlement to be informed of licence applications

Clause 53 of the Bill is entitled ‘Licence decision-making: consultation’. Upon receiving a qualifying application for a mining or exploration licence, the Authority is to inform (a) other States and Crown agencies, and (b) the Cook Islands public, about that application.

Other States and Crown agencies are to be provided ‘appropriately comprehensive information’ about the application. What constitutes ‘appropriately comprehensive’ is not defined, but States and Crown agencies presumably have their own channels for obtaining the information they need.

The public is not entitled to ‘appropriately comprehensive information’. The Authority is only obliged to ‘notify the application to the public of the Cook Islands in accordance with the prescribed procedures or otherwise as the Authority considers appropriate’. This wording is problematic for several reasons:

- *What* information must be publicised is not defined. The phrase ‘notify the application to the public’ provides scant guidance.
- No procedures are ‘prescribed’ in the Bill. Draft regulations have not been put forward for consultation.
- The Authority may unilaterally override any procedures that may be prescribed in future, by virtue of the phrase, ‘or otherwise as the Authority considers appropriate’. While it is not uncommon for statutory agencies to have discretionary powers, there are often explicit and extensive conditions to the exercise of such power.

A more transparent mechanism for informing the public would:

- Specify in the Bill what information must be given to the public.
- Specify the channels through the information must be published (e.g. gazette, newspaper, website).
- Either remove the power of the Authority to circumvent procedures without oversight, or make the power subject to explicit and transparent conditions, so that it is invoked transparently and only as a final option in consideration of national interests.

5.2 Active versus passive mechanisms for public feedback

The Bill does not require the Authority or the Minister to actively invite public participation. The Authority must only 'consider any information in relation to that application that is provided ... in response to a notice or notification under this' clause.⁴³ In other words, the Bill creates a passive consultation mechanism.

As a comparative example, in Papua New Guinea, the Mining Act 1992 (PNG) requires the Minister to convene a 'development forum' to hear the views of people affected by the mine. This review does not suggest that the PNG system be adopted for the Cook Islands – it is offered as an example of active consultation entrenched in legislation.

Without an active consultation mechanism, the breadth of feedback received is unlikely to represent broad public support. It would be difficult to argue that a project has a 'social licence to operate'⁴⁴ if only a small cross-section of the Cook Islands public has been engaged with. The degree of participation set up by the Bill is not yet sufficient to meet the participatory objectives declared in the draft Sector Policy and Sector Strategy. The Bill would achieve better public participation if:

- The Authority were required to actively seek public opinion, and
- Such requirements were likely to cover a representative cross-section of the Cook Islands population.

5.3 Minimum periods for public feedback on licence applications

The Bill does not require any minimum period for which public feedback can be submitted.⁴⁵ An oblique reference to such a period appears in clause 53(1)(c): the Authority must consider 'information ... that is provided, within a time period that is specified'. Since no time period is specified in the Bill, the 'prescribed procedures' in paragraph (b) would apply (if any exist); the Authority can also specify any period it 'considers appropriate'. Members of the public require time to: read and understand the information provided; reflect on their response and seek advice; and prepare considered feedback. Robust public participation would involve providing adequate time to comment, and being clear from the outset how much time is available.⁴⁶

The Bill could strengthen public participation by:

- Setting clear timeframes for public feedback, and
- Ensuring timeframes are adequate for considered responses.

Because seabed mining is an emerging sector, the Authority may consider establishing timeframes for public participation that exceed those typically allowed for terrestrial mining.

5.4 Risk of suppression

The above observations can be combined to illustrate a scenario of suppression of public participation. Under clause 53, the Authority could disclose very scant detail about an application to the public, because it can unilaterally decide what disclosure is 'appropriate' and override any prescribed procedures. The Authority could subsequently decline to invite feedback from the public. Some members of the public would probably still write to the Authority, but the feedback received would not be well informed, nor representative of the Cook Islands public. Public feedback could be limited to a very short period, making it difficult to prepare detailed responses. Finally, the Authority could also refuse to publish feedback received from the

⁴³ Clause 53(1)(c) of the Bill.

⁴⁴ Seabed Minerals Sector Strategy (draft 14.1.19), p. 61.

⁴⁵ Clause 53 of the Bill.

⁴⁶ For example, under the Mining Act 1992 (PNG), any person can object to the grant of a 'tenement', and the period for submitting such an objection is 'not less than 30 days after the date on which the application was registered': sections 105 and 107. Again, this review does not endorse the PNG system for the Cook Islands; the example is offered for comparative purposes only.

public, giving the impression that there has been no dissent to a licence application. None of this conduct would contravene the consultation mechanism set out in the Bill.

This scenario is not to suggest that the Authority intends to suppress public feedback. But transparent and accountable governance would require the Bill to construct protections against the risk of suppression. Setting out minimum requirements in legislation would be a key step in ensuring transparency and accountability. These requirements would include those suggested in the preceding three sections of this review. Additionally, the Bill could require the Authority to publish the feedback it has received, within a certain deadline – this transparency mechanism would allow public inspection of others' feedback.

5.5 Standing to seek review of licence decision

Applicants and 'any other interested party with legal standing' may ask the Minister to review the decision to grant or refuse a licence.⁴⁷ The Minister must either affirm or amend the 'recommendation' to the Cabinet 'within the prescribed time of receiving the request'. Judicial review is retained as an alternative avenue of redress outside the Bill.

This provision creates a mechanism whereby the Minister can be asked to reconsider a decision or recommendation, but ultimately make the same decision again. This mechanism is not unusual. The clause can be improved by describing who has legal standing, and setting a clear timeframe for a review application to be made ('the prescribed time' is not clear because no such prescription appears in this Bill).

5.6 Free, prior, and informed consent

The general duties of title holders are set out in Schedule 2.⁴⁸ Title holders 'must obtain free, prior, and informed consent [FPIC], including by way of compensation' from 'marine or coastal users likely to be adversely affected by ... seabed mineral activities'. What rights are conferred by this provision is unclear. If compensation is to be paid, then a process for deciding compensation should be set out. Leaving the basis of compensation undefined creates a corruption risk (e.g. bribery).

What degree of social acceptance constitutes FPIC is not defined. The consequences of *not* securing FPIC is not addressed. For example, how much dissent is sufficient to prevent a title holder from commencing seabed mineral activities? FPIC is a good principle to strive for, but as a legislative duty it requires careful consideration and further detail.

6. Additional observations

6.1 Powers to enter, search, and inspect vessels

Part 7 of the Bill authorises inspectors to enter and search vessels, installations, vehicles, and premises. The scope of these powers is extremely wide, and the power is triggered with few checks and balances. A title holder can seek administrative review of an inspector's actions, but only to determine whether the inspector acted outside the scope of authority – it is the scope of authority that is problematic in the first place.

The Bill appears modelled on New Zealand laws.⁴⁹ The *powers* from these New Zealand laws have been imported into the Bill, but none of the *safeguards* against abuse of power. In particular, the Search and Surveillance Act 2012 (NZ) requires search warrants in most instances.⁵⁰ The Bill does not mention search warrants or other accountability measures.

⁴⁷ Clause 59 of the Bill.

⁴⁸ See also clause 74 of the Bill. Title holders are entities holding a prospecting permit, or an exploration or mining licence: clause 6(1).

⁴⁹ The Bill cites the Search and Surveillance Act 2012 (NZ) and Fisheries Act 1996 (NZ).

⁵⁰ See Search and Surveillance Act 2012 (NZ) Part 4, Subpart 3.

6.2 Seabed minerals regulations and other Acts of Parliament

The Seabed Minerals Bill (or Act, if passed), would prevail over other Acts.⁵¹ Clause 6(2) of the Bill says: ‘unless the context otherwise requires, a reference to this Act includes a reference to regulations made under this Act’. The effect could be to make seabed minerals regulations (which do not pass Parliament) prevail over Acts of Parliament. This inverts the orthodox hierarchy of legislative instruments. It is unclear whether this inversion is intended.

6.3 Repeated use of ‘prescribed’

The word ‘prescribed’ is used frequently in the Bill (nearly 60 times). ‘Prescribed’ means ‘prescribed by regulations under this Act or another Act’.⁵² Regulations making such prescriptions are not yet available for public comment; consequently, consultation draft of the Bill is missing some important detail. In future iterations of the Bill, clarity would be improved by specifying *which* regulations (and which specific provisions within the regulations) are referred to when the word ‘prescribed’ is used.

6.4 Who exercises the power of the Authority?

The Authority holds principal responsibility for administering seabed minerals development. The Authority is tasked with making many decisions and taking multiple actions. Accountability can be sharpened by specifying *who* (which officer) can exercise which decisions. Clearly, the Commissioner would exercise the Authority’s power – what about other staff?

6.5 Minor drafting errors

Several minor drafting errors are raised to provide assistance to the Authority:

- **Cross-referencing errors:** The version of the Bill released for public consultation contains cross-referencing errors. For example, clause 89 of the Bill refers to ‘search powers conferred by ... section 82 or 83’, which relate to payments. The actual reference should be ‘section 87 or 88’. There are multiple similar cross-referencing errors.
- **Director of NES as chair:** Schedule 1 of the Bill sets out proposed amendments to the Environment Act. The proposed section 20(3)(a) of the Environment Act says that the Director is ‘chairperson of the Authority’. Is ‘Authority’ a mistake? ‘Council’ seems to make more sense – it would be a reference to the National Environment Council.
- **Who appoints members of the NEC?** In Schedule 1 of the Bill – the proposed section 20(4)(a) says that the *Director* appoints members to the National Environment Council, while section 20(3)(b) says that the *Cabinet* makes such appointments. There is an inconsistency there.

⁵¹ Except for the Constitution, the Environment Act 2003 and the Marae Moana Act 2017: see clause 8(2).

⁵² Clause 6(1) of the Bill.

7. Summary of findings and recommendations

Overall, the review finds that the Bill is broadly coherent, and has set up a clear framework for the next round of drafting. Further consideration and drafting will ensure that the Bill better reflects the objectives of the Seabed Minerals Policy and Sector Plan. Table 4 summarises the key findings of the review, and provides recommendations for addressing them.

Table 4: Summary of findings and corresponding recommendations

| Section of this review | Finding | Recommendation |
|---|---|---|
| <i>Clarity and coherence: seabed mineral activities</i> | | |
| 2.2 | <p>The distinction between prospecting activities and exploration activities is unclear in the context of seabed mining (cf. terrestrial mining).</p> <p>The use of the term 'low-impact' to define 'prospecting' is unhelpful in a frontier industry like seabed mining, because the Bill provides no mechanism for determining impact <i>before</i> an applicant applies for a prospecting permit or exploration licence.</p> | <p>Clearly state what activities constitute prospecting and exploration.</p> <p>Ensure that <i>activities</i> are described, rather than the presupposed impact of those activities.</p> |
| <i>Transparency and accountability: approvals process</i> | | |
| 3.1 | <p>It is not clear whether it is the Minister or the Cabinet who grants an exploration or a mining licence. Accountability would be improved by clearly stating who is the decision-maker.</p> <p>The licencing process does not formally allow an applicant to negotiate the draft licence terms issued by the Authority. Such negotiation is likely to be conducted outside the regulation of the Bill. Transparency would be improved if the Bill provided a clear process for such negotiation.</p> | <p>If the Minister is the decision-maker, then Cabinet's role needs to be clarified to indicate that its approval is procedural only. Clause 57(1) should be amended so that the Minister is presenting a 'decision', not a 'recommendation' to Cabinet.</p> <p>If the Cabinet is the true decision-maker, then clauses 55 to 57 should be amended to make this design clear.</p> <p>Insert into clause 55 or 56 a process for applicants to discuss the draft terms of licence before submission for Cabinet approval.</p> |
| 3.2 | <p>The Bill sets out no criteria that the Minister must consider when deciding to grant (or refuse) a licence application. The qualification criteria only determine eligibility to be considered, not whether a licence should be granted. Accountability would be improved by ensuring that the Minister answers to legislative criteria enshrined in the Bill.</p> | <p>In clause 55, provide a set of criteria that the Minister must consider when deciding whether to grant a licence.</p> <p>The criteria would also be applied by the Authority, in deciding whether to recommend granting a licence.</p> <p>A similar set of criteria could be created for Cabinet's approval in clause 57.</p> |
| 3.3 | <p>The Authority (not the Minister) decides prospecting permits. As an elected official, the Minister is subject to more checks and balances than the Authority.</p> | <p>In clause 40, consider making the Minister responsible for granting (or refusing to grant) prospecting permit applications. For transparency, the Authority would submit and publish a recommendation to the Minister.</p> |

| Section of this review | Finding | Recommendation |
|---------------------------------|--|--|
| 3.4 | The Bill sets out no criteria for granting a prospecting permit. Only 'prescribed requirements' and 'prescribed criteria' are mentioned. No such prescriptions are available at the time of this review. | As a matter of accountability, ensure that clause 40 sets out clear bases for <i>granting</i> prospecting permits. Note: clause 42 already sets out bases for <i>denying</i> prospecting permits. |
| <i>Environmental protection</i> | | |
| 4.2 | In amending the Environment Act, the Bill would, in effect, grant Cabinet powers to exempt any or all seabed mineral activities from environmental impact assessment. Environmental protections should not be easily circumvented by executive action. | In Schedule 1 of the Bill, remove the proposed section 36(7)(b) as it relates to the Environment Act. |
| 4.3 | The Environment Act allows members of the National Environment Council to be removed for publicly voicing their dissent of a Council decision. This power reduces transparency and robustness of debate. | In Schedule 1 of the Bill, remove the proposed section 20A(1)(b) as it relates to the Environment Act. |
| 4.4 | Criteria for granting an exploration or mining licence are not set out in the Bill (see 3.2 in this review). Decision-makers are not explicitly called to consider environmental impacts, or given a clear mandate to use serious environmental harm as a reason for refusing a licence. | In clause 54 or 55 of the Bill, include environmental impacts as a criterion that the Minister must consider when deciding whether to grant or refuse a licence. |
| 4.5 | It is unclear whether the Cook Islands government must apply the precautionary approach and best environmental practice. Note: clause 12 of the Bill requires the Authority to apply these principles. | Clarify in clause 7 of the Bill that the Minister and the Cabinet are to apply the precautionary approach and best environmental practice in administering the Bill and its regulations. |
| <i>Civic participation</i> | | |
| 5.1 | The public is entitled to be notified of a licence application, but the Bill does not specify what information must be published, nor what procedures must be followed. The Authority has unilateral power to override any procedures for notifying the public, as long as it considers it 'appropriate'. While such discretionary powers are not unusual, they are usually accompanied by conditions that make them exercisable only in certain circumstances. Public reasons for exercising them are often required. Accountability requires the public to be informed. Procedures for public disclosure should be comprehensive and protected in the Bill (cf. regulations). | Remove clause 53(1)(b) as written. In its place, specify: <ul style="list-style-type: none"> • What information the public is entitled to receive about applications for licences, and • The channels through the information must be published. In particular, either remove the power of the Authority to decide unilaterally what information the public should receive, or make it subject to extensive conditions for (a) triggering the power in limited circumstances; and (b) ensuring transparency in the exercise of that power. |

| Section of this review | Finding | Recommendation |
|--------------------------------|--|--|
| 5.2 | The Bill does not oblige the Authority to actively seek public feedback on licence applications. Consequently, feedback may come only from a narrow cross-section of the public. Participatory democracy would be enhanced by processes requiring active solicitation of public feedback. | Insert new provisions (in or around cl 53) that require the Authority to actively seek public feedback (e.g. by way of consultation workshops), and to ensure that feedback is truly representative of the Cook Islands people. |
| 5.3 | The Bill does not provide a minimum period during which feedback from the public must be kept open. | Insert a minimum time period for public feedback, in or around clause 53. As a frontier industry, and in light of global scrutiny on seabed mining in general, consider making timeframes for consultation longer than typical consultation for terrestrial mining. |
| 5.4 | Taking the observations in 5.1 to 5.3 above, there is a risk that the Authority could suppress public input prior to the grant of a licence. While no actual suppression is alleged, accountability in the Bill could be strengthened to reduce this risk. | See above three rows. In addition, insert a provision in or around clause 53, requiring the Authority to publish feedback received. Publication of such feedback should be done in a timely manner, so that the public can read others' feedback to inform their own views <i>before</i> a licencing decision is made. |
| 5.5 | Clause 59 of the Bill empowers parties 'with legal standing' to seek review of the Minister's decision with respect to licensing. Who has standing is not defined, and as written depends on external principles of administrative law. | For clarity, describe who has legal standing in clause 59, and specify the deadline within which a review is to be sought. |
| 5.6 | Title holders must obtain free, prior, and informed consent (FPIC) before starting seabed mineral activities: schedule 2. The Bill is not clear as to what constitutes FPIC, and what degree of dissent is enough to prevent seabed mineral activities. Paying compensation is described as part of obtaining FPIC. The Bill does not specify the basis of determining and paying compensation – this creates a bribery risk. | The Bill should clarify what is meant by FPIC, and set out a comprehensive scheme for the calculation, negotiation, and payment of compensation. Implementing this recommendation will require substantial new provisions. |
| Additional observations | | |
| 6.1 | Powers to enter, search, and inspect vessels, premises, etc. are extremely broad. The provisions in this Bill appear to be imported from NZ statutes, but without the same checks and balances (e.g. the requirement for search warrants). There is a risk of abuse of power. | Rewrite the powers in Part 7 of the Bill, and/or insert accountability measures similar to those found in the NZ statutes cited in the Bill – e.g. Search and Surveillance Act 2012 (NZ). |

| Section of this review | Finding | Recommendation |
|------------------------|---|--|
| 6.2 | It is not clear whether seabed minerals regulations would prevail over other Acts of Parliament (except the Environment Act and the Marae Moana Act). If so, then the orthodox legislative hierarchy (with Acts prevailing over regulations) would be inverted. | Clarify in clauses 8(c) and (d) whether seabed minerals regulations are intended to prevail over Acts of Parliament. |
| 6.3 | The word 'prescribed' is used frequently, but few prescriptions appear in the documents issued for consultation. Consequently, the consultation draft of the Bill is missing important detail. | Ensure that regulations are also put forward for public consultation, alongside the next iteration of the Bill. |
| 6.4 | Accountability would be sharpened if the Bill clarified which officers (other than the Commissioner) can exercise the power of the Authority. | Clarify who can exercise the power of the Authority. A blanket rule could be inserted in clause 21 (Head and staff of Authority), or else specified throughout the Bill. |
| 6.5 | Minor drafting errors are noted for the Authority's convenience. | Rectify the errors identified, if not already done. |

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