

Submission on Cook Islands Seabed Minerals Bill 2019 Consultation Draft

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1. Introduction

1.1 I am a Reader in Law at Victoria University of Wellington and have been teaching law for approximately 25 years. I am an enrolled barrister and solicitor of the High Court of New Zealand and a certified independent Commissioner for the New Zealand Ministry for the

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Environment and thus qualified in New Zealand environmental decision-making. I am also a member of the IUCN World Commission on Environmental Law. I am currently engaged as a consultant to Iorns & Co, Barristers. I have a few areas of research specialties, spanning public international law, environmental law, indigenous rights and statutory interpretation. I teach resource management law and the law of New Zealand's Exclusive Economic Zone and Continental Shelf ('EEZ & CS'), as well as statutory interpretation. In 2014 and 2016 I advised the iwi Ngaa Rauru in respect of applications by Trans-Tasman Resources Ltd to mine iron sands from the seabed off the coast of Taranaki in Aotearoa New Zealand, including writing an extensive opinion on the precautionary principle in New Zealand's EEZ and CS Act 2012 and on adaptive management under that Act. I have published two articles on New Zealand's EEZ and CS Act and have a third book chapter on it in press, and my article on the precautionary principle in the Act won a 2015 New Zealand Resource Management Law Association Publication Award. I have two other Resource Management Law Association Publication Awards (2016 & 2018), an IUCN Senior Education Award in Environmental Law (2019), and a Victoria University of Wellington Research Excellence Award (2018). I am qualified to comment on the Consultation Draft of the Cook Islands Seabed Minerals Bill 2019.

1.2 I have been engaged by Te Ipukarea Society to provide some comments on the Consultation Draft of the Cook Islands Seabed Minerals Bill 2019. Below are my comments. I begin by outlining what I consider the relevant factual and legal context (in sections 2-4, below). My comments on the provisions in the Draft Bill are contained in section 5, in order that the provisions appear in the Bill. The final section provides some additional, broader suggestions for the Bill. In relation to my comments in section 5, below, I evaluate the Draft Bill against some of the contextual factors earlier identified, most notably international law and the Secretary for the Pacific Community (SPC) guidelines on a regulatory and legal framework

for deep seabed mining, also the Cook Islands Marae Moana Act 2017. I identify some typographical errors in the Bill, discuss and suggest alternative wording for some provisions, query some of the powers and institutions proposed, and suggest some additional provisions.

1.3 Overall, there are some significant improvements in this Bill, over the current legislation. However, there are issues with – and room for improvement in relation to – ministerial powers, transparency and public information for the purposes of the rule of law, plus greater consistency is needed with international law. It is also recommended to have greater consistency with the SPC guidelines and with other existing Cook Islands legislation.

2. Context for the Bill: Seabed Mining in the Pacific

2.1 This Bill arises in the context of a so-called “goldrush” for valuable seabed minerals, located largely in the Pacific Ocean. For example, the International Seabed Authority that manages such mining in areas that are outside state jurisdiction has issued 29 deep seabed mining exploration licenses, 22 of which are located in the Pacific Ocean.¹ States are also beginning to exploit deep sea minerals within their jurisdictions, including in the Pacific. For example, Papua New Guinea, Tonga and Fiji have begun such activities.

2.2 There are potentially great financial benefits to be gained from the exploitation of the minerals available. In the context of climate change and other pressures on the ocean’s living resources from which Pacific Ocean states currently derive income, it is extremely desirable to not only diversify state income but to potentially substantially increase it. In the case of the

¹ See, eg, Julian Aguon & Julie Hunter, "Second Wave Due Diligence: The Case for Incorporating Free, Prior, and Informed Consent into the Deep Sea Mining Regulatory Regime" 38 *Stanford Environmental Law Journal* 3 (2018), at 5.

Cook Islands, it has been estimated that there are 10 billion tonnes of polymetallic manganese nodules in the exclusive economic zone, at 3000–6000 m deep.² The revenue from their exploitation could amount to tens of billions of dollars and thus has the potential to create a Sovereign Wealth Fund and provide for the income of future generations.³

2.3 However, as with most land-based mining, there is also significant environmental degradation associated with seabed mining. While there are a range of seabed mining methods proposed, depending on the mineral and the area it is to be taken from, all the methods effectively involve destroying the seabed which is being mined as well as affecting areas outside that which is being mined. The dumping of the waste and unwanted material back to the seafloor typically produces large sediment plumes which can interfere with light and thus photosynthesis for marine algae and thus disturbance of whole food chains, as well as the clouds of waste dust (etc) affecting visibility and purity of the water itself, driving fish and other marine animals elsewhere. While this is a relatively new area of activity, the few studies that have been done have shown both “immediate adverse impacts on ecosystem health, species abundance, and biodiversity”, as well as “little to no recovery of mined locations, even years after the experimental operations concluded”.⁴ Moreover, recent research suggests that much of the damage to the benthos would be permanent.⁵ I.e., it would be worse than on land where replanting and remediation can be required; the conditions in the deep sea mean that damage could not be remediated. It therefore needs to be kept in mind that, when a deep sea area is mined, it needs to be treated as being permanently sacrificed in return for the income to be received from the minerals recovered. It is thus necessary to carefully delineate appropriate

² See, eg, the Cook Islands Seabed Minerals Authority website, “Frequently Asked Questions”. <https://www.seabedmineralsauthority.gov.ck>.

³ See, e.g., Rupert Neate, ‘Seabed Mining Could Earn Cook Islands ‘Tens of Billions of Dollars’, *The Guardian*, 5 Aug 2013.

⁴ See, Aguon & Hunter, above n 1, at 10.

⁵ *Idem*.

zones that can be sacrificed and to ensure that collateral damage outside those zones – such as from sediment plumes or chemicals used in production – is kept low enough that it does not adversely affect ecosystems and human interests outside those zones.

2.4 It must also be noted that some people believe that, as guardians of the natural world, humans do not have the moral right to make such sacrifices and destroy such parts of the living world upon which we depend, even if we construct legal regimes that allow us to do so. There is also an increasing number of people who are concerned that we may not be in a physical position to destroy any more of the world's biodiversity for fear of destroying the basis of life upon which we depend. Even if we may have been able to make such sacrifices in the past, the world's biodiversity has declined precipitously, losing more than 50% of vertebrates since the 1970s, for example, and it continues to face increasing numbers of extinctions. Biodiversity is now threatened from many sources, from climate change to pollution to clearance for human habitation and agriculture, yet we don't know scientifically where the tipping points are, not just for species but particularly for ecosystems. It is thus arguable that sacrificing any large areas that could house biodiversity, especially unstudied ecosystems, is particularly unwise in the face of threats to the stability of the earth's natural systems. It is extremely unfortunate for Small Island Developing States (SIDS) that it is the developed world that has caused the problems requiring such restraint even on the part of those who have not contributed to the problems; but that is still the position that the world faces and no one can ignore it.

2.5 Despite such fears and reservations about making such sacrifices, there is huge worldwide commercial interest in conducting deep seabed mining activities, while at the same time there is difficulty for SIDS to develop the expertise needed to manage such activities within the timeframe required. As a result, the Secretariat of the Pacific Community, in

partnership with the European Union, has developed a regional legislative framework to help guide Pacific states in their development of national laws to manage and regulate deep seabed mining. This is a helpful framework designed to comply with international law as well as good practice, while also encouraging the exploitation of deep sea minerals for commercial purposes. It is noted that the *SPC Framework* has been criticised for not taking enough account of indigenous rights and interests and for not being cautious enough in terms of preventing environmental degradation when so little is known about the biological and ecological values of the deep sea floor.⁶

2.6 The experience in the Pacific to date with the regulation of seabed mining has illustrated some difficulties that SIDS may have with regulating and managing deep seabed mining activities. For example, Papua New Guinea began such mining activities early, without “a functioning legislative framework” to regulate it, and has suffered adverse environmental impacts and adverse cultural impacts without the financial benefit to compensate for such impacts.⁷ Even though it is one of the larger Pacific island nations, it has encountered obstacles to monitoring, enforcement, and collecting revenue, including this being due to a lack of administrative capacity as well as weak internal financial controls, plus alleged corruption.⁸ Tonga has apparently had difficulties with their internal capacity to collect revenue, monitor activities and enforce compliance with permits, hampered by insufficient money for environmental compliance.⁹ Moreover, early licenses were approved without any public consultation but, unfortunately, adverse effects from only exploratory mining activities have

⁶ See, eg, *Resource Roulette: How deep Sea mining and inadequate regulatory frameworks imperil the Pacific and its peoples*. A Report by Blue Ocean Law and the Pacific Network on Globalisation (2016), and Aguon & Hunter, above.

⁷ See, eg, *Resource Roulette*, at iii-iv and 32-35.

⁸ *Resource Roulette*, at 30.

⁹ *Resource Roulette*, at iii & 19-21.

already impacted Tonga’s fisheries, and full mining activities threaten to disturb them further.¹⁰ Fiji began deep seabed exploration activities before it had legislation in place to govern them and proceeded without sufficient public consultation. The regulatory capacity of the state has been said to be insufficient to assess or monitor the activities; indeed, the Fijian government has failed to “monitor and regulate onshore mining” as well as “monitoring its coastal fishery and biosecurity regimes”, so it is expected to have great difficulty monitoring activities on the deep seafloor.¹¹ Finally, a lack of transparency and alleged corruption poses risks for effective management of deep seabed mining activities.¹²

2.7 It must also be noted that there are also lessons to be learned from land-based mining in developing countries including Pacific SIDS. For example, land-based mining in PNG and Nauru have seen transnational corporations based in the developed world profit enormously from the resources in these Pacific states, while outsourcing pollution and other environmental degradation as well as causing internal domestic conflict, arguably leaving these Pacific nations in a worse state than had the mining not taken place. The key is to set up a regime that prevents such damage rather than try to reverse it later, as it may be irreversible.

2.8 The Cook Islands is in a good position to learn from and thus avoid the mistakes of other countries in this area. The *SPC Framework* provides helpful guidance for the creation of a legislative and regulatory regime, and the Cook Islands can call on the assistance of New Zealand in regime creation. It has the first Pacific legislative regime in the Seabed Minerals Act 2009 and the creation of a Seabed Minerals Authority, plus it is at the forefront of modern marine management with its adoption of the marine spatial planning approach contained in the

¹⁰ *Resource Roulette*, at iii & 19-22.

¹¹ *Resource Roulette*, at 42-43.

¹² *Resource Roulette*, at 43.

Marae Moana Act 2017. It has a strong civil society, with customary laws protected in the Constitution and an apparently widespread commitment to environmental guardianship and protection for the benefit of current and future generations. In order to achieve this in the context of deep seabed mining, it will be key to both establish a strong legal regulatory regime and to ensure that any laws properly adopted are given their full effect through the allocation of appropriate resources for implementation.

3. Context for the Bill: SPC Framework

3.1 As mentioned above, the Secretariat of the Pacific Community, in conjunction with the European Union, has developed the *Pacific-ACP States Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation* (the *SPC Framework*).¹³ The *SPC Framework* provides extensive guidance to Pacific states on the minerals themselves, legal rights to them and balancing competing interests, to international and regional legal obligations and how to implement international law, how to delineate maritime zones, establish and manage a fiscal regime, establish and manage environmental protective provisions, public participation, judicial oversight, capacity building, safety issues and other miscellaneous matters. It provides suggestions for the substance of legal and regulatory provisions and explanations of why they are suggested. It has been suggested that it could be improved, particularly by being more protective of human rights, but also in not being cautious enough in the face of a lack of information about the deep sea ecosystems and their contribution to global system such as the climate system.¹⁴ It is thus therefore necessary to accept that they are at least a minimum standard for good practice in the development of state legal and regulatory deep sea minerals

¹³Prepared under the SPC-EU EDF 10 Deep Sea Minerals Project (1 ed, July 2012).

¹⁴ See, eg, *Resource Roulette*, above n6.

activity regimes, even if individual states could go further than the suggested requirements upon the wishes of their people.

3.2 The *SPC Framework* discussion of implementation of the precautionary principle, best environmental practice, and adaptive management in domestic legislation is outlined below, [4.13]-[4.15] & [4.17]. In addition, where relevant, my submissions on the draft Bill below make reference to the equivalent guidance in the *SPC Framework*.

4. Context for the Bill: Cook Islands

4.1 There are particular features of the Cook Islands' legal and factual background which need to be taken into account in considering how to tailor a deep seabed mining regime that best fits Cook Islanders' needs. While I will not undertake a comprehensive survey, three of these are outlined below.

Cook Islands Customary Law

4.2 I suggest that the first such feature is the Constitution and important status given to customary law: "Parliament shall have particular regard to the customs, traditions, usages, and values of the indigenous people of the Cook Islands" and such customary law has effect unless inconsistent with statutes or the Constitution itself.¹⁵ In addition, the Constitution also privileges the role of the Aronga Mana as customary tiaki and as authorities on customary law. The Cook Islands Court of Appeal has held that, absent specific legislative direction, this does not require the government to consult specifically with the Aronga Mana about fisheries in the

¹⁵ Constitution of the Cook Islands, Article 66A.

Exclusive Economic zone, beyond 50 nautical miles, as custom was not traditionally exercised so far from the coast.¹⁶ But it might be possible to require such consultation in respect of activities offshore that might affect customary activities such as fishing; while “practical difficulties of such an obligation” could weigh against that,¹⁷ this may be something that is required by international indigenous human rights law, for example.¹⁸

Marae Moana Act 2017

4.3 The Marae Moana Act 2017 (MMA) is also a significant feature of Cook Islands law in relation to the delimitation of zones where mining can be undertaken. The MMA implements an integrated management approach for Cook Islanders to decide what activities will be allowed where within the marine jurisdiction of the Cook Islands and the production of a marine spatial plan. This approach was adopted due to the increasing competing pressures for cultural, recreational and economic uses of the marine space, as well as recognition of the need to protect biodiversity and marine ecosystems. The primary purpose of the MMA is to protect and conserve ecological, biodiversity, and heritage values of the Cook Islands marine environment. There are two primary ways in which it does this: the first is to establish a 50 nautical mile permanent marine protected area around all islands of the Cook Islands. All seabed minerals activities and large-scale commercial fishing in these areas are prohibited; the second is by determining through a consultative and scientific process where the different activities in the marine space beyond 50 nautical miles will be allowed to occur, including whether any other areas need to be set aside for environmental protection purposes.¹⁹ While the marine spatial

¹⁶ *Frahmeine et al v A-G* CA 1/18 (26 Sept 2018), at [147], [150].

¹⁷ *Frahmeine et al v A-G* CA 1/18 (26 Sept 2018), at [148], [150].

¹⁸ See, eg, Aguon & Hunter, "Second Wave Due Diligence", above n 1.

¹⁹ The six different types of zones available are listed in Art 23, Marae Moana Act 2017. The fifth is "an ocean habitat preservation zone" for the protection of "sensitive and ecologically valuable pelagic and benthic habitats

plan will not decide or zone for where mining activities can or will be undertaken, it does provide for where they may not be undertaken. For example, one of the zones available is a “seabed minerals activity buffer zone to provide for the protection of pelagic, benthic, coral reef, coastal, and lagoon habitats of the marae moana by prohibiting all seabed minerals activities, while allowing other ecologically sustainable uses”.²⁰ The marine spatial planning process has begun but the plan will not be finalised until 2020.

4.4 It was initially envisaged that the marine spatial plan would be created before areas were opened up for deep seabed minerals activities, including any exploration, if only because the marine spatial plan would determine where such activities cannot take place for ecological sustainability reasons. This changed in 2018 with the significant rise in mineral prices, particularly cobalt, which has led to a renewed interest by both private companies and the Cook Islands government in beginning exploration, even before the marine spatial plan has been researched, let alone adopted.

4.5 I gather that some research on the Cook Islands extended continental shelf has been completed by NOAA’s Deep Ocean exploration program, but the plan was for research agencies to be engaged by the Cook Islands government to research the Exclusive Economic zone for the purposes of developing a marine spatial plan. In the absence of an agreed research program, and with the increased mining interest, it is now proposed that the private companies in their exploration phase will gather primary data about the marine area to assist the marine spatial planning process. It is hoped that such companies will use recognised expert research institutions in this area and undertake appropriate research on the biology and ecology of not

by prohibiting potentially damaging activities”, and the sixth is “a national marine park zone” for strict environmental preservation purposes.

²⁰ S 23(c).

just the benthos but the whole marine environment, thus presumably including ocean currents and temperatures and the species that inhabit it, particularly ones that could be affected by any deep sea mining activities, including sediment plumes. It is noted that the Technical Advisory Group, created to assist Marae Moana Council to implement the MMA, is currently the body with the most expertise in the overall use of the Cook Islands marine space. The TAG includes as a member the chair of the Mineral Seabed Authority, as well as a representative of each of the National Environment Service, the Ministry of Marine Resources, Ministry of Transport, relevant NGOs, the Office of the Prime Minister, and the House of Ariki or Koutu Nui.

Relevant international law

4.6 A third matter relevant to the Cook Islands legal background is the decision relating to the purse seining agreement recently decided by the Cook Islands Court of Appeal.²¹ This decision identified key aspects of international law that are relevant to the Cook Islands government's regulation and management of activities in the exclusive economic zone and on the continental shelf. For example, the Cook Islands is a party to the United Nations Convention on the Law of the Sea (UNCLOS). Article 206 of this Convention requires states to undertake environmental impact assessments in certain situations. The precise requirement is:

When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessment in the manner provided in Article 205.

It is noted that the threshold for action is fairly low: *reasonable grounds* for believing that activities *may* cause the effects concerned; effects do not have to be determined as likely. The duty is just said to be to assess the potential effects; the Court held that this is not materially

²¹ *Frahmeine et al v A-G* CA 1/18 (26 Sept 2018), per Williams P, Barker JA, & Patterson JA.

different from – i.e. effectively the same as – undertaking an environmental impact assessment pursuant to the Cook Islands Environment Act 2003.²² The Court of Appeal noted that such an environmental impact assessment is consistent with normal duties on decision-makers to be “sufficiently informed” about the matters that might affect a decision.²³

4.7 The Cook Islands also has duties under the United Nation Straddling Fishstocks Agreement to adopt a precautionary approach to protect the marine living resources and preserve the marine environment.²⁴ This includes an obligation on the Cook Islands to be more cautious when information is uncertain, unreliable or inadequate, and it may require action even in the absence of adequate scientific information, as the absence of information is not to be used as a reason for postponing or failing to take conservation and management measures in respect of fisheries.²⁵ This is relevant to any possible effects of seabed minerals activities on straddling fish stocks.

4.8 There is also a requirement under general, customary international law on all states:²⁶

to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact on a transboundary context, in particular on a shared resource.

This would not apply to effects on the minerals themselves, but to transboundary effects such as from pollution and/or on relevant marine species. The Court held that this requirement under customary international law may be worded slightly differently by this authority but there was in fact “very little material difference between” this requirement and that under Article 206

²² At 71].

²³ At [27], quoting Taylor, *Judicial Review: A New Zealand Perspective* (2 ed, LexisNexis, Wellington, 2010) at [15.52].

²⁴ At [46].

²⁵ *Idem*.

²⁶ [At [51],

UNCLOS.²⁷ As part of an environmental impact assessment, a state is “required to act diligently and in accordance with the precautionary principle”²⁸, and these requirements apply despite the inclusion in Article 206 of the qualifier “as far as is practicable”.²⁹

4.9 The Court of Appeal has determined that a precautionary approach is not applied if there is no evidence provided or considered upon which to base a decision that it has come to. For example, if a decision-maker is required to “take into account” all relevant environmental information, including the best scientific evidence available of effects on interested parties, then information on those aspects must not only be presented but also considered.³⁰

4.10 The Court held that:³¹

both the requirement to carry out an EIA [Environmental Impact Assessment] and the requirement to take the precautionary approach are important obligations. This view is particularly strengthened considering the inclusion of these obligations within various binding treaties (to which the Cook Islands is a State party) as well as under customary international law.

The effect of non-compliance with these obligations may not always be enough to warrant a quashing of a decision or other remedy, particularly where there are significant effects on third parties and where the benefits may be insignificant; but non-compliance will be enough to justify judicial review and awarding of costs against the Crown for such action.

²⁷ At [63].

²⁸ At [61].

²⁹ At [67].

³⁰ At [129]. Note also the Court’s definition of “take into account”: “that a decision-maker must consider the matters which are required to be taken into account, give due weight to them, but ultimately having done so has a discretion and coming to a decision”. At [110].

³¹ At [181].

*The precautionary approach in the marine environment*³²

4.11 The precautionary approach and/or the precautionary principle has a lengthy history at international law; further, it has been applied by courts worldwide, including in New Zealand, for many years under different laws and policies, and including in the marine environment. There is thus plenty of material for useful comparison with different formulations of it. There are many different formulations of the precautionary approach or principle; that in Principal 15 of the Rio Declaration reflects the “uniform core message” and this is thus the most widely adopted precautionary principle formulation globally. However, its formulation when used in different settings varies. Application in the marine environment has been widely recognised as requiring a stronger precautionary approach than other settings, and the Rio Declaration Principal 15 is typically not used. This is primarily due to the fact that less is known about the marine environment itself, with more reliance for predictions of future effects of marine activities on scientific modelling that is necessarily incomplete. They may represent the best scientific knowledge available today, but that itself is incomplete. Thus legal formulations of the principle requiring stronger environmental protection have been chosen for the marine environment worldwide (including in New Zealand’s EEZ Act). Moreover, where the pollution of the marine environment is concerned, duties are even stricter and it has been widely accepted that the strictest regimes will apply; some even include the reversal of the burden of proof.³³

³² For more detail on the section see, e.g. Catherine J Iorns Magallanes and Greg Severinsen, “Diving in the Deep End: Precaution and Seabed Mining in New Zealand’s Exclusive Economic Zone” (2015) 13 NZJPIL 201. See also *Expert Evidence of Catherine Iorns Magallanes and Dale Scott in support of Te Kaahui o Rauru*, Submission to the decision making committee appointed to hear the marine consent application by Trans Tasman Resources Ltd to undertake hiring or extraction and processing operations offshore in the South Taranaki Bight (24 January 2017). Copy on file with author, available on request.

³³ See, eg, the OSPAR Commissions Prior Justification Procedure which prohibits “dumping industrial wastes in the North Sea except where it is shown both that there is a no practical alternatives on land and that it causes no harm to the marine environment.” Agenda 21 (1992, Rio) also prohibits “storage of radioactive waste near the marine environment unless scientific evidence shows that it poses no unacceptable risk to people and the marine environment or does not interfere with other legitimate uses of the sea”.

4.12 What is perhaps more notable about the use of the precautionary approach in domestic legislation is the translation of the general principle at international law into more specific duties on decision-makers and others who are obliged to apply a precautionary approach, so that they more clearly understand what is required of them and are thus less likely to make reviewable mistakes. In summary, the key elements to work through in applying to any given set of facts, include:

- (1) The threshold of threat of harm – such as whether significant or serious adverse effects to human health or to the environment might result;
- (2) the level of risk and the certainty about that risk or level of harm that might result: some evidence is needed of a risk, mere speculation is not enough, but an amount significantly lower than the level of a legal burden of proof; thus, for example, a risk would not need to be “likely”; sometimes it simply refers to “where there are threats of serious or irreversible damage”,³⁴ or the use of “likely” is accompanied by a reduction of the proof required, such as “reason to believe” or “reason to assume” that damage is likely. These levels will be lower – ie more cautious - for seabed mining activities, such as being phrased as “reasonable grounds to believe that there may be a threat”;
- (3) that at the appropriate levels of harm and risk (ie appropriate for the situation and activities in question), action must be taken to address the risk and to favour caution;
- (4) that such action and caution must be exercised in favour of environmental protection;
- (5) the more uncertain the threat is, the more cautious we must be in our action taken:
 - (i) *at the strong end of the response spectrum*, where the potential harm may be high and/or the lack of knowledge about their nature and potential to manifest is also high, a decision-maker should decline a decision; and
 - (ii) *at the mid-point of the response spectrum*, again, on the basis of moderate harm and uncertainty and even high harm and moderate uncertainty, conditions could be imposed that require certain effects to be avoided (and if they cannot be

³⁴ see, e.g., the 1990 Bergen Declaration.

avoided then the activity is not allowed);

- (iii) *at the low end of the response spectrum*, where the potential harm is low to medium and the associated uncertainty is low but still persistent, conditions to avoid and/or mitigate (if avoidance is not possible), and measures capable of overcoming lower levels of uncertainty, such as adaptive management, may be appropriate.

(6) harm minimisation: given the lack of knowledge about the functioning of the marine environment, all harm to the marine environment must be minimised as much as possible rather than seeking to identify levels of tolerable insult.

4.13 This strong precautionary approach is reflected in the *SPC Framework*. While it refers to the International Seabed Authority's Mining Code, which does refer to "principle 15 of the Rio Declaration, and best environmental practices",³⁵ it goes further and states, in relation to Pacific State legal frameworks:

"The legislation therefore should apply the precautionary approach by requiring decision-makers to take into account the best available information; to identify any uncertainty or insufficiency in the information available; and to exercise caution when the information is uncertain or insufficient (remembering that the absence of information or certainty does not necessarily imply the absence of knowledge).

The *SPC Framework* further suggests that there should be a reversal of burden of proof in some circumstances and that the operator should take financial responsibility and monitoring:

"Where there is a possibility of an adverse effect, the provision of evidence that the nature or extent of this will be acceptable should rest with the DSM operator (i.e. the company carrying out the activity), who should demonstrate safety to human health and ecosystems; take financial responsibility for precautionary behaviour; undertake continuing monitoring of activities to remove the remaining uncertainties; and distribute findings."

³⁵ In 18.15,

4.14 The SPC Framework provides other examples of how the precautionary approach might be incorporated into deep seabed mining decision making, including:

18.23 Other examples of how the precautionary approach might be incorporated into DSM decision-making include the following:

- Comprehensive baseline research requirements in the exploration/mining licence, e.g., on the rate of encounter of new species per sample collected, or on genetic studies of species at the proposed mining sites.
- Regular reporting of data on environmental impacts (e.g., levels of emissions like noise, light, sediment plumes, and invasive species), and pre-emptive action (e.g. use of best available technology) to avert serious harm to the marine environment.
- Creation of marine protected areas in proximity to the mining footprint...
- A requirement to introduce aspects into the DSM mining methods which encourages regeneration of biota.
- An incremental approach to a DSM activity where impacts are uncertain, e.g., staged work programmes, that allow activities to be scaled up or down or cancelled, depending on observed results, or permitting trial mining (or validation sampling) on a small scale, rather than immediately authorising commercial-scale activity.

4.15 The *SPC Framework* discusses the inclusion of an adaptive management approach in a seabed mining regime as part of applying a precautionary approach:

18.22 Adaptive management: which could be described as ‘learning by doing’ – is appropriate where there is uncertainty and so is a principle that P-ACP States can follow in their pursuit of applying the precautionary approach. An adaptive management approach allows activities to proceed, provided they are carefully monitored and adjusted as information improves. Where no established practice exists, an adaptive management approach allows the DSM operator to fill the vacuum with a novel methodology. Adaptive management is implemented through ongoing monitoring and assessment of the operator’s activities, and by amending or improving the plan of work (including methods of mitigation) in cases where new information requires changes in approach. An adaptive management approach should also feed into policy and law development, as the regulatory framework for DSM is likely to require ongoing amendment as new scientific knowledge is obtained, and practical experience developed

4.16 As an illustration of an application in a deep seabed mining regime, for example, the New Zealand EEZ Act spells out the steps that the precautionary approach requires of a decisionmaker under the Act in approving an application for a permit, including in the context of seabed minerals activity, and provides more guidance in making the decision itself. Moreover, a stricter approach was adopted because of the sensitivities of the marine environment. The relevant provision in that Act is:

61 Information principles

- (1) When considering an application for a marine consent, a marine consent authority must—
 - (a) make full use of its powers to request information from the applicant, obtain advice, and commission a review or a report; and
 - (b) base decisions on the best available information; and
 - (c) take into account any uncertainty or inadequacy in the information available.
- (2) If, in relation to making a decision under this Act, the information available is uncertain or inadequate, the marine consent authority must favour caution and environmental protection.
-³⁶
- (5) In this section, **best available information** means the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time.

This provision was drafted with the benefit of substantial advice and input, including from New Zealand government agencies, the NZ Parliamentary Commissioner for the Environment, and NGOs covering a range of views, including environmental protection and mining industry groups.

³⁶ There are additional provisions requiring an adaptive management approach to be considered, but these are not available where waste will be dumped into the marine environment; thus it will not apply to seabed mining activities with a sediment plume. But these provisions are:

- (3) If favouring caution and environmental protection means that an activity is likely to be refused, the marine consent authority must first consider whether taking an adaptive management approach would allow the activity to be undertaken.
- (4) Subsection (3) does not—
 - (a) apply to an application for—
 - (i) a marine dumping consent; or
 - (ii) a marine discharge consent; or
 - (iii) a marine consent in relation to an activity referred to in [section 20\(2\)\(ba\)](#); or
 - (b) limit [section 63](#) or [64](#).

Best environmental practice

4.17 Another concept commonly employed as part of a requirement on resource activities is the international law standard of best environmental practice. This is also addressed in the *SPC Framework*, which outlines the requirement and provides examples of how it might be implemented in a deep seabed mining regulatory regime:

18.24 Best environmental practice: It is also an international law requirement of States involved with DSM activities to ensure the employment of ‘best environmental practice’, which can be summarised as “the application of the most appropriate combination of environmental control measures and strategies” (adopting wording used in the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic). It generally refers to widely accepted norms or customs of environmental and risk management. The concept originally focussed upon technical and physical aspects (also known as ‘best available technology’) but has since evolved to take into account a wider remit of concerns for social, community and gender issues.....

18.26 It should be established by the legislation, regulations and licence documentation that, not only is the DSM operator’s obligation to satisfy the requirement of best environmental practices, but also to provide the State (via its Regulating Authority) with reporting information to confirm that best practices are being employed.

18.27 Best environmental practice will invariably be determined by the specific DSM activities involved and will be proportionate to their risk and scale. Best environmental practice should be incorporated into the licence terms, and the Regulating Authority’s decision-making framework. It also requires open reporting and verification in the field (e.g. by use of independent observers) that best environmental practice is being followed. Examples of best environmental practices in the context of DSM would be:

- following the guidelines and recommendations of the ISA, as a minimum;
- to adopt a series of control strategies to protect the marine environment – including biodiversity offsets (e.g., buffer zones or protected areas) where environmental damage is unavoidable;
- to require from DSM operators use of the best technology for assessing the environment with minimal environmental impact (e.g., the use of autonomous underwater vehicles (AUVs) for mapping and monitoring, and remotely operated vehicles (ROVs) for sampling and imaging);
- engaging the right expertise and capacity building through establishing partnerships and collaborations;

- standardisation of methods and robust information management (e.g., good data archiving and access and following best practice designs for environmental surveys); and
- submitting scientific and technical information to the CBD Secretariat's repository on ecologically or biologically significant areas

5. Comments on the Consultation Draft of the Seabed Minerals Bill

Overall, the proposed Seabed Minerals Bill 2019 is an improvement on the current Act in a number of respects, most notably the additional references to environmental standards and principles and the inclusion of references to the MMA. However, even these improvements could be strengthened. Further, there are some gaps and uncertainties which amount to drawbacks, particularly around Environmental Impact Assessments. The comments below follow the Bill as presented. The comments include reference to the *SPC Framework*, where relevant.

- **s 5** states “All rights to the seabed of the Cook Islands and its mineral resources are vested in the Crown to be managed by the Cook Islands Seabed Minerals Authority...”: “its” is presumably referring to the seabed, but the way it comes after “Cook Islands” makes it look as though it is referring to the Cook Islands’ mineral resources, not just those of the seabed (i.e., including those on land). This would not fit with a purposive interpretation but I would still insert “seabed” after “its”, in order to be safe on such an important statement of ownership.

- **s 6, definition of ‘environment’**: instead of cross-referencing to the definition and the Environment Act 2003, this definition should be repeated here. If a change is made to the Environment Act definition, it can easily be changed here as well. This makes it easier to understand what the coverage of the term is, just by reading this Act, making legislation more

publicly accessible, and it means that decision-makers under this Act are less likely to make a mistake in interpretation.

- The definition in the Environment Act refers to physical features of the natural world:

"Environment" -

(a) Means the ecosystems and the equality of those ecosystems as well as the physical, biological, cultural, spiritual, social and historic processes and resources in those ecosystems; and

(b) Includes -

(i) land, water, air, animals, plants and other features of human habitat; and

(ii) those natural, physical, cultural, demographic, and social qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes;

It is thus odd for the s 6 definition in the Bill to also include information about an ecosystem. For example, if a provision refers to protection of the environment, it would be odd to think that you also trying to protect genetic and geological information about that ecosystem. In other legal systems and statutes, parties have been able to use such provisions against their intention and it would be wrong for an environmentally protection provision to be used to protect, for example, a company's arguably proprietary interest in information it has discovered about the ecology as a result of research undertaken on the marine environment for the purposes of mineral exploration. There may be a good reason to include this provision, but I am not sure what that might be. I would suggest that the government explain the benefit of this definition.

- **s 6 definition of "incident"**: this is a good provision with a helpfully broad coverage. I note that (d) is so broad that it may give rise to differing interpretations, particularly under (ii). While I agree that it is hard to provide otherwise in legislation, it may be helpful for a Crown legal officer to provide some guidelines or opinion on what these applicable obligations under international law are, for the benefit of decision-makers under the Act.

- **Definition of "marine environment"**. This is an excellent definition, covering a broad range of relevant aspects.

- **Definition of “Precautionary approach”:** This definition is the minimum reference to precaution possible and, as discussed above, reference solely to Principle 15 of the 1992 Rio Declaration is not appropriate for a seabed mining activity. As the *SPC Framework* elaborates, it needs to provide more detail about what it means for a decisionmaker or an operator to be cautious. Thus the *SPC Framework*, when translating the general principles of international law into domestic legislation, suggests that the individual components are separately identified, such as the need to use the best available information (or best environmental practice or technology, depending on who is subject to the duty) and what being precautionary means in terms of the result for a decision or action. This Bill does not specify any more detail other than providing the generic principle from international law, and not even one that is particularly applicable to the marine environment.

Even the provisions in the WCPO Convention relating to fish stocks, which are a renewable resource, provide more detail on how to apply the precautionary approach. It specifies an obligation to be more cautious when information is uncertain, unreliable or inadequate in addition to the general statement that the absence of information is not to be used as a reason for postponing or failing to take conservation and management measures, among other details of application of the approach.³⁷ It is similar with other international conventions in relation to marine activities. Moreover, very few of the *SPC Framework* examples (in 18.23) of how the precautionary of approach might be incorporated into decision-making appear to be included.

I suggest that more thought be given to providing more guidance for decision-makers and operators on how to implement the precautionary approach. It is better to put positive duties

³⁷ See, eg, the discussion in *Frahmeim et al v A-G*, above, at [102] – [105].

into the legislation and apply this to deep seabed mining rather than leave it vague and open to challenge. Thought could be given to using the New Zealand formulation, or at least paying more attention to the different elements in the *SPC Framework*.

I note that the precautionary approach in this Bill is not only used to guide government decision-making; it is also used in Schedule 2 as a duty on mineral activities titleholders. In Schedule 2, this application is better identified, with the requirement to “employ best environmental practice including best available technology, in accordance with prevailing international standards in order to avoid, remedy, or mitigate the adverse effects of regulated activity on the marine environment”. However, even this provision does not implement all of the recommendations in the SPC Framework, notably the need to demonstrate safety on the part of the operator. The SPC recommendations should be implemented throughout the Bill.

- **Definition of “seabed minerals”**: this ‘means the mineral resources of any part of the deep seabed’; however section 5 on ownership just refers to the seabed, not the deep seabed. This difference sets up a potential conflict of interpretation of these terms and I’m not sure if that is intentional. The drafters may wish to remove the word “deep” in this definition and only refer to “seabed”.

- **Definition of “serious harm”**: This definition is much more important than it may appear. What is significant is that it only covers harm that is above what is actually or likely to be permitted under the Environment Act. It must be noted that this does not accord with the normal meaning of ‘serious’. While it is perfectly common for statutory definitions to be used to slightly alter a common and ordinary usage of a word, and there are some places in this Bill

where this meaning is appropriate, there is at least one place where I suggest that it is not used correctly.

First, it is used appropriately in the following places:

- **s 51**, ‘Qualification criteria for grant of licence’, where the applicant must be able to “cover the costs of any potential liability arising from accidents, pollution, or any other serious harm occurring as a result of the regulated activity”. It makes sense for the Act to only require liability for harm over and above what is permitted.
- It is similarly appropriate in **s 80**, Liability of titleholders, where each titleholder must indemnify the Crown for the financial burdens listed arising out of “accidents, pollution, or other serious harm to the environment caused by any regulated activity” – i.e. harm above what was permitted.
- It is appropriate in **s 96**, where a direction may be issued for a person to “take corrective action in relation to any circumstance that has resulted in, or presents a risk of, serious harm to life or to the marine environment”.
- It is also appropriate in **Schedule 2, cl 5**, where a titleholder must obtain additional consent for a high-risk activity:

The title holder must obtain the prior written consent of the Authority before proceeding with any regulated activity if evidence arises that to proceed is likely to cause serious harm to—

- (a) the marine environment; or
- (b) the safety, health, or welfare of any person; or
- (c) other existing or planned legitimate sea uses, including, but not limited to, marine scientific research.

I suggest that it is not appropriately used in **s. 7 re international law**. This is generally an excellent provision in that it explicitly requires compliance with Cook Islands obligations under international law, including UNCLOS, and helpfully lists some of those obligations. However, I suggest that the obligation to conduct a prior environmental impact assessment in (g) does not

meet the international law requirement with its use of “serious harm” that way that it is defined in s 6. The requirement to conduct an environmental impact assessment definitely applies to activities likely to cause serious harm to the environment; but if that definition only refers to effects beyond that which has been or is likely to be permitted under the Act, this effectively says that an EIA does not need to be undertaken. This provision is therefore suggesting that the international law obligation to conduct an EIA depends on what will be permitted under the Environment Act 2003, which is clearly not correct. (See the discussion above at [4.6] in relation to the obligation on the Cook Islands to conduct an EIA, such as was defined by the Court of Appeal in the purse seining case.) In terms of substance, the Environmental Act EIA procedure in s36 is required for an ‘activity which causes or is likely to cause significant environmental impacts’. Yet it appears that an activity may still be approved and a permit could be issued, possibly subject to conditions, even for an activity with significant environmental impacts if the decision-makers feel it is justified. Thus the statement about international law only requiring an impact assessment of an activity that will likely cause harm that is over and above a significant damage under the Environmental Act is an incorrect statement of that international law. This only occurs because of the various definitions employed, and it is only in a section on principles to be applied; so it could be thought of as not significant. However, as this is possibly relevant to interpretation of the Act, thought should be given to correcting this. It could be done very easily if another term was used such as “significant environmental impacts” as used in the Environment Act, or “significant adverse impact” as quoted by the Court of Appeal.

It is not clear whether the apparently circular use of “serious harm” is appropriate in s **42**,

Denial of prospecting permit:

- (1) The Authority must not grant a prospecting permit if—
 - (c) the terms of the prospecting permit would, in the Authority’s reasonable opinion, be likely to—
 - (iii) cause serious harm to the marine environment or human health or safety;

This section obliges the Authority to refuse a prospecting permit if it is likely to cause harm beyond what would be permitted under the Environment Act. But if, at the prospecting application stage, it was already suggested that the activity was likely to cause that kind of harm, it would be unusual for such an activity to be allowed under the Environment Act in the first place.

There are other places in the Bill which presumably use “serious” in its normal and ordinary meaning, such as s **101**, reference to a serious breach, and to a serious risk to the marine environment. However, I suggest that there would be a query about the interpretation of s **101(1)(c)**: whether “serious risk to the marine environment” was equivalent to a “risk of serious harm to the marine environment”. There are valid arguments for each interpretation: that it means serious damage in the normal sense, which could include damage even within which was permitted, or it means serious harm within the definition of the Bill and only covers damage above that which is permitted under the Environment Act. This is the kind of issue that could be argued in court and it would be better to clarify in advance to prevent such disputes over interpretation.

I finally note in relation to the definition of “serious harm” that the definition of the precautionary approach in s6 refers to serious damage, not serious harm. It is appropriate to not use the statutory definition of “serious harm” here, because the precautionary approach applies to serious damage in the ordinary sense, not only to damage above which would be permitted

by the Environment Act. But such differences may not be apparent to an ordinary reader of the legislation, especially with the use of “serious” in different places in the Bill used in the two different senses – i.e., when it is used in relation to harm, it means only above what is permitted; but when it is used in relation to damage or risk or breach, it takes its ordinary meaning and is not limited by the statutory meaning. That goes against the principle of simplicity and transparency in statutory drafting. Some effort should be made to alter and simplify the uses of these terms.

- **s 10(1) Cook Islands Seabed Minerals Authority:** it appears that the name of the Cook Islands Seabed Minerals Authority is stated incorrectly here and is missing the word “Seabed”.

- **s 12(d) Duty of the Authority to share information:** this provision appears reasonable, even with the qualification “as appropriate in the circumstances”. However, there appears to be no overriding duty or principle of the presumption of open information, nor a presumption that all information submitted in an application is available to the community to assess as part of the public consultation process. The experience in Aotearoa New Zealand with applicants for seabed minerals consents has been mixed. The most recent application made by Trans-Tasman Resources Ltd had significant amounts of technical information redacted when it was made available for public consultation, at the request of TTRL on the basis of commercial confidentiality. However, those wishing to independently assess the likely environmental impacts of the activities were hampered through this lack of information. The refusal and redaction was taken to court under judicial review, and the complainants won, with the court ordering disclosure of the information due to the need for public scrutiny.³⁸ Thought should therefore be given to the inclusion of an assumption of disclosure even for material that an

³⁸ *Kiwis Against Seabed Mining Inc v Environmental Protection Authority* [2016] NzEnvC 217.

applicant might claim is commercially sensitive, if it is necessary in order to assess the likely environmental effects. The public should have the right to this information and not have to take a judicial review case against the Authority in order to understand the activities applied for.

- **s 14 Minister's directions to the Authority:** The Seabed Minerals Authority is clearly not independent of the Minister in terms of policy or decision-making. For example, s 14 appears to enable the Minister to direct the Authority to approve or recommend for approval an exploration or mining licence. This is because the only decisions exempted from such direction are those in relation to prospecting permits or regulation of an existing title. It is already the case that the Minister and Cabinet has the final decision on prospecting and mining licenses, whereby the Authority may only recommend a result (see s 55). I suggest it is thus inappropriate to also allow the Minister to direct the Authority as to what it may recommend to the Minister. The legislation has the appearance of setting up a semi-independent Authority to investigate the appropriateness of any particular application, but then enables even that semi-independence to be undermined. This is not technically a violation of the separation of powers because it is all within the Executive branch of government. But it violates transparency of decision-making and is misleading in suggesting that the Authority will make recommendations on an application on its merits according to the legislation, and not be swayed by a political decision. The final decision can always be made for political (e.g., including financial) reasons when it rests with the Minister anyway; but transparency of decision-making suggests that the Authority's recommendations to the Minister should be independent of the Minister's opinion.

- **s 17 Information management:** This provision makes all information disclosure at the discretion of the Authority. This is against the New Zealand position, as mentioned above,

whereby information must be disclosed if the public needs it in order to independently evaluate and comment on the likely effects of the activity being applied for. It is up to the government to choose to do this, but it is arguably against the public interest.

In relation to information that is reasonably required by other Cook Islands government agencies, it appears that these agencies need to ask and demonstrate that it is reasonably required first, and then it is still within the discretion of the Authority to release it or not. For example, in relation to the functioning of the Marae Moana regime, the TAG is required to decide where mining should not be allowed because of its effects, and this regime adopts the principle that information is assumed to be available unless there are good grounds to withhold. I suggest that an exception to the need to demonstrate reasonable requirement can be made at least for the Marae Moana bodies; there could instead be a presumption that this particular body reasonably requires that kind of information.

It would also be good practice to give more guidance for the Authority on how it should exercise its discretion, including presumptions of transparency in decision-making and public access to information, especially given the importance of integrated marine management.

An alternative amendment providing some guidance could be to change “may also” in 17(2) to “should” (or similar exhortatory word).

- S 18 Offence for information disclosure: The offence in s 18(2) for knowingly or recklessly disclosing information in breach of an existing prohibition or commercial sensitivity is understandable to include. However, including the term of five years imprisonment is particularly onerous for what could effectively simply be a financial loss. There are other provisions in this Act which have only financial penalties and not prison terms, and I query whether this s 18 provision is consistent with those other provisions. Moreover, given the New

Zealand experience where commercial sensitivity was claimed by an applicant and found by the Court to not be enough to justify the withholding of the information,³⁹ there is the risk that errors could be made about which information this applies to. It is acknowledged that there is a test of reasonableness in relation to commercially sensitive information, thus narrowing its scope; but considering that this is likely to apply to those who want to assess environmental effects through the use of all information about an activity, this provision may go a little too far in cracking down on the use of some information about an activity ('a sledgehammer to crack a nut' is the phrase that comes to mind).

- Part 2, Subpart 2 - Cook Islands Seabed Minerals Advisory Committee: The creation of a committee to provide advice to the Authority on its functions – other than the approval of individual applications – is a helpful approach in principle. I do note that some of these members may not be appointed for their expertise in relation to mining matters but simply for community perspectives, while they are expected to provide recommendations to the Authority on mining matters. In practice, I don't know how much expertise is available in the Cook Islands in relation to advice on mining matters. Such expertise will presumably be able to be developed over time, but consideration needs to be given to appointment on the basis of expertise, not only community representation. It may be preferable to provide this kind of guidance in the legislation, or at least regulations, so as to ensure effective Advisory Committee input.

- I also note the functional overlap between the Advisory Committee and the Marae Moana TAG and Marae Moana Council, in that it appears that these bodies are currently performing a similar function (although the latter two are operating within a wider role of marine spatial

³⁹ *Kiwis Against Seabed Mining Inc v Environmental Protection Authority* [2016] NzEnvC 217.

planning, not just in relation to minerals activities). I am surprised that this Bill does not provide for the Advisory Committee to expressly include a TAG member with expertise on the environmental effects of minerals activities, for example. Some thought should be given to this overlap and how best to accommodate it.

- Given the committee's representation of community perspectives, it would also be appropriate for every report or recommendation mentioned in s 24(3) to be provided not only to the Minister but also made publicly available.

- Clause 27, **Secretariat to Committee**, it is a helpful and necessary requirement: it requires the Authority to "subject to funding and resource constraints, provide Secretariat and administrative support (including technical advice) to the Committee to help the Committee carry out its functions". It must be ensured that, as a matter of implementation, sufficient funding and resourcing is provided so as not to constrain the ability of the Advisory Committee to carry out its functions appropriately.

- **s 29 Designation of areas for seabed minerals activities**: Given that the marine spatial planning process is designed to identify areas where mining is not able to be taken place, including buffer zones, it would make sense to explicitly refer to that in this Bill, such as in this section dealing with identification of appropriate areas for seabed mineral activities. I understand that this Bill is made explicitly subject to the Marae Moana Act, so it may not be technically or legally necessary to do so, but it does make it clearer for those making decisions under the Bill and for those reading and trying to understand the rules. This would assist with achieving transparency of law.

The main concern at the moment is the practical one that the marine spatial plan has not been agreed upon yet, so only a few areas would-be currently off-limits to minerals activities (e.g.

the marine protected areas up to 50 nautical miles from the coast of all islands of the Cook Islands that have already been established in the MMA). Therefore, any designations that are made before the plan is agreed on may effectively limit the marine zoning choices available, thus pre-empting some of the decisions on the marine spatial plan. Thought could be given to introducing at least some transitional provisions relating to the anticipated marine spatial plan, if not an explicit addition, such as in s 29(2), referring to inconsistency with a marine spatial plan and, e.g., the need for one to exist.

- **s 30 Inconsistent declarations:** S 30(4)(b) needs further explanation. The two sections have a lot of cross-references and appear to be designed to achieve a coherent overall goal; but its interaction with the anticipated marine spatial plan is unclear. The Declarations it is referring to are not currently limited by the marine spatial plan, as discussed above in relation to s 29, so may not be limited by the MMA (except to the extent of the marine protected areas identified above). I am not sure if the future marine zonings would count as a declaration that would be inconsistent and thus not void to the extent of the inconsistency if a block had been reserved under s 29(1)(b). Because it is unclear to me what kinds of declarations would be covered, I suggest further clarification on its coverage is sought.

- **s 38 Penalties:** In cases of some illegal marine activities, such as some illegal fishing, vessels may be seized as a penalty. I suggest that this is possible in relation to illegal seabed mineral activities at least within the EEZ, and possibly also within the Area, under international law.⁴⁰

⁴⁰ For example, in relation to offshore installations, “within a safety zone established pursuant to Article 60 of the LOSC, the coastal State has exclusive jurisdiction including for enforcement of its national laws”: Ted L McDorman, “The Continental Shelf”, in *The Oxford Handbook of the Law of the Sea*, Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott, Tim Stephens, eds. (OUP, 2015) (<http://opil.ouplaw.com>). At pp187-188.

It may be appropriate to suggest this as a penalty to be included in this legislation. This can be a practical matter where it is easier to hold a vessel, for example, as surety.

- **s 41 Timely prospecting permit decisions:** 60 days appears to be a short time to make a decision given that an environmental impact assessment must be conducted, with 30 days for public comment within that. It is accepted that prospecting by its nature will cause significantly less damage than exploration and mining activities. Yet, at the same time, the marine spatial planning process has not been completed yet so decision-makers and anyone commenting on the application will need to pay attention to a wider range of factors in an environmental assessment process than if the zoning had already taken place. The timeframe also might be easier to satisfy later, when there is more information known about the benthic and other marine ecosystems that might be affected.

- **ss 42-44 re prospecting permits and blocks:** These three sections are excellent in terms of substance. They meet the intentions of the MMA and marine spatial planning process.

- **Subpart 3 Licensing of seabed mineral activities:**

- **ss45-56** are generally excellent and consistent with the *SPC Framework*. **S 52, the ‘fit and proper person test’**, helps the Cook Islands avoid problems faced elsewhere by avoiding problematic applicants. **S 53 on public consultation** provides an excellent procedure. (I have already commented above on the lack of transparency that the Authority recommendation in section 55 maybe directed by the Minister; this remains a concern.)

- **s 57 Cabinet approval of licenses:** It is up to the government to decide who will be the final decision-maker on exploration and mining licenses. In this Bill, they have chosen that the Minister and Cabinet will make this final decision. In most developed democracies decisions on such licenses are made by an independent body such as through a Board of Inquiry, or an expert decision-making committee such as appointed for the purposes of such decisions in New Zealand under the EEZ Act. Parliament can always pass legislation providing a different result, but this is different from the Executive making this decision. This is an important decision to make and clearly the Cook Islands government wishes to keep that to itself; I am simply identifying that this is the case but also noting that consideration could be given to allocating this to a more independent, expert decision-making committee.

If licence approval powers are retained by the Executive, this also makes it even more important that the appropriate environmental and other safeguards are strong and are followed in order to provide the best advice to the Minister and Cabinet before they make such a decision. In that light, the ability of the Minister to direct the Authority what advice to receive is even less desirable than mentioned above for reasons of transparency.

- It is also noted that the criteria for decision are not provided for in this Bill but are in regulation; the Minister will therefore have this power to decide the criteria as well.

- **s 58 Licence decision-making reasons:** I assume that para (a) deals with decisions to grant and (b) deals with decisions to decline. If so, there is a typo in para (b): “decline grant” should simply read “decline”. (I think it is also drafted in an awkward manner, where the consequences are almost the same for both types of decision: the only difference is that the written statement of reasons is being provided by the Authority in (b) but there is no statement of who provides

those reasons in (a), and could presumably be the Minister. But this is not important substantively.)

- **s 59 Review of licence decision:** It might be more helpful if this Bill actually provided who and who does not have legal standing to challenge a decision on a licence application under this section. This doesn't limit a judicial review action, so it doesn't limit the ability to review; but it may limit the ability to access the alternative procedure in this section.

- **s 63 Rights of retention after exploration license:** This section does not deal with the zoning of blocks (i.e. areas on the seabed for mining activities) but does concern the retention of rights to use a block even after the end of an exploration license. Given that the marine spatial plan has not yet been created, and given that information on appropriate zoning could change over time, and certainly between the passage of this Bill and the end of a future exploration license, it would be sensible to consider including a reference to the ability to reject retention if it was inconsistent with a marine spatial plan or there was other (e.g. environmental) reason that had come to light to show that it was not appropriate to continue to explore that block.

- **s 65 Rights to minerals:** This provision is helpful as it ensures certainty.

- **s 70 License renewal:** It is helpful to provide for renewal of licenses in this manner, including the re-permitting under the Environment Act. As the permitting process enables there to be terms and conditions specified, this presumably means that a licence renewal could be subject to changed conditions, as a result of consideration under the Environment Act permit process. I wonder if it might be helpful to state this in s 70, to make it clear that a licence may be renewed

but that it may be subject to changed terms and conditions, depending on the Environment Act permit received.

- **Part 5 Duties on permit and licence holders:** The sections in this Part providing for various duties and responsibilities of permit and licence holders (and others) are excellent. They helpfully provide for the priority of the Environment Act and adherence to other rules and laws, specifying the MMA as well as other Cook Islands laws that protect Cook Islanders. This is relevant to avoiding some of the problems faced as a result of some mineral activities elsewhere in the Pacific (and indeed elsewhere in the world).

- The penalties for breach of certain clauses in the duties on prospectors and licensees in Schedule 2 are significant and welcome.

- **s 78:** I note that there are no penalties attached to any breaches of s 78, unlike s 79, for example. (As a drafting matter, I would also add the word “must” in the last clause of s 78(2), just for readability: “and must apply the relevant requirements under this Act”.)

- **Part 6 Financial arrangements:** The provisions on financial arrangements are helpful in that they provide for fees and royalties to be payable, that payment may be enforced, and that the government may take security for that. This follows *SPC Framework* guidelines and could enable the Cook Islands government to avoid some of the difficulties faced in respect of other Pacific mining projects in relation to finances. However, much of the difficulty elsewhere has also been due to fees being set at a level too low for full cost recovery, plus a lack of capacity for enforcement (which may be due to not having received enough fees to fund that enforcement). These practical matters are not the subject of this Bill but should be borne in mind in its implementation.

- s 85(1): a security is not mandatory but may be required under this subsection. Thought could be given to making this mandatory as a matter of course, in order to ensure financial security for the Cook Islands.

- 85(4): “a security must remain in place” could be interpreted in two ways: that a security must be held – i.e. that it is mandatory to have one – or it might simply be requiring that any security that happens to be required, has a mandatory time period for it to be in place. The intention of the section overall would suggest the latter; in order to make that clearer, I would suggest that “A security” be amended to “Any security”.

- **Part 7 Enforcement:** The sections in this Part are excellent and will likely assist the Cook Islands government in maintaining their interests. The key will be that sufficient financial and administrative resources are allocated to enable the government to undertake any enforcement measures necessary. Most of the enforcement action mentioned appears to be undertaken by the Authority, so enforcement needs will be able to be taken into account for cost recovery and thus factored into permitting fees, for example. If there are any other Crown agencies that might need administrative support for enforcement, this should also be factored into cost recovery fees in order to avoid the difficulties with enforcement that some other Pacific Island states have faced.

- s 93(b) typo: I note one significant typographical error: “unlawful” should read “lawful”.

- Part 8 Miscellaneous:

-There may be public interest in some matters such as archaeological or historical objects (s **108**), or changes in ownership (s **104**). The government could consider adding a provision about publicity of such information in the public interest.

- A lot of the matters that the public will be interested in are likely to be prescribed by regulations (s **113**). For example, the criteria to be prescribed for evaluating applications may be prescribed by regulation, as may be any requirements to consult with any specific persons or groups about an application. At least the criteria or rules for evaluating applications and granting titles will be key to the operation of this Bill, once enacted. This is therefore something for the public to monitor and provide input where appropriate. (E.g, it could be recommended that regulations require the input of Aronga Mana, in order to provide input as per indigenous human rights under international law).

- **s 110(4)**: There is an error in the cross-reference: s 94(5) is not relevant; perhaps this should refer to s 99(5).

- **s 113 (3)(a)**: Other sections (eg ss 39, 40) refer to “prospecting permits”; this paragraph refers only to “permits”. I suggest that this be amended to read “prospecting permits” in this paragraph.

- Schedule 1 Amendments to the Environment Act:

- **s 20 National Environment Council**: The membership of this National Environment Council is changed significantly from the existing s20. Whether the community representation function is appropriate for the Cook Islands is not for me to say. But I will note that the function of this Council is to oversee the environmental impact assessment process and approve a permit to

undertake an activity, including seabed minerals activities. Such bodies need not be technical experts in their own right, but they need to have access to technical experts who can provide independent evaluation and advice on any environmental impact assessment provided by an applicant. It is not obvious that this is provided for in this process or membership. If not, this would be one of the biggest drawbacks of the process: that environmental impact assessment is not undertaken on the basis of technical advice and ability. The *SPC Framework* says that the international law EIA requirement must be implemented through incorporation of provisions that applicant assessments be provided and submitted to “expert independent assessment” and that⁴¹

“The State’s Regulating Authority should verify the DSM [deep seabed mining] operator’s primary analysis of potential impact. Where there is doubt or uncertainty, a cautious approach should be adopted.”

Where the state seeks independent review and assessment, the *SPC Framework* suggests that “the legislation should make provision for this, and for related reasonable (e.g. capped) cost recovery, whose terms are set out in advance in the legislation or regulations”.⁴² (As this does not happen in the legislation, such cost recovery may still be provided for in regulations.)

- s 20(5) does list some requirements for knowledge and experience of members, yet these do not reflect the grounds for approval of a permit or not. One normally sees in such lists of expertise for an environmental assessment body, references to, for example, marine ecology and environmental science; the closest this s 20 list comes is reference to the administration of environmental and risk management frameworks. All of the matters listed here are important, but I suggest they are insufficient, unless it is clear that independent expert advice on these other matters are being sought.

⁴¹ *SPC Framework*, at 18.11.

⁴² *SPC Framework*, at 18.14.

- **s20(3)(a)** specifies that the Director of the Environment Service is chairperson of the Authority; I presume that “Authority” should instead refer to the Council”.

- **s 20(4)** is drafted incorrectly, where part of (b) it is also meant to be read as part of (a). On its own, as it is, paragraph (a) does not make sense – it does not say what they collectively need to have knowledge of. This needs to be redrafted; I would delete the paragraph labels (a) and (b) and simply make this one sentence (also deleting the “and” that appears between the paragraphs).

- I note also that the Director is not appointing members but Cabinet is appointing them, as specified in the previous subsection. This needs to be corrected in the legislation.

- **s 36 Environmental impact assessment:** This section is largely the same as the existing section in the Environment Act. Even though this is the case, I note that the threshold for needing an environmental impact assessment is higher than the international law requirements, and does it not accord with the *SPC Framework* wording. This higher threshold – “an activity which causes or is likely to cause significant environmental impacts” – means that fewer activities need to have an environmental impact assessment than if the threshold was lower. For example, the international law statement quoted above is of “a risk” of a significant impact;⁴³ this risk may be much less than 50% while “likely” refers to the balance of probabilities, meaning a more than 50% chance. Similarly, Art 206 UNCLOS refers to a reasonable belief that an activity “may” produce adverse effects, which is a significantly lower threshold than “likely”.⁴⁴ There will be a range of effects from seabed mineral activities, depending on the type of activity. From what is known about current mining activities they

⁴³ See [4.8] above.

⁴⁴ See [4.6] above.

would all meet the greater than 50% chance anyway, so this wording choice might not make much difference. However, given the lack of knowledge about the impact of prospecting procedures, as well as of the ecosystems of the deep seabed, it might be hard to say that that 50% threshold would be met. The Bill would better achieve compliance with international law requirements if it chose different wording, such as “a risk of significant environmental impacts”, or referred to “reasonable belief that it may cause” instead of “likely to cause”.

- **36(7)(b)**: I note that the ability for regulations to declare any seabed minerals activity to be one that is not likely to cause significant environmental impacts is provided for within the *SPC Framework*. This is one aspect of that *SPC Framework* that has been criticised, given the current lack of knowledge about the marine ecosystems, particularly on the deep sea floor, and then its impact on other aspects, such as on the marine food chain. The suggestion is the use of regulations to declare activities as not likely to cause significant harm is premature at the moment. In the case of the Cook Islands, it may be that once zoning via marine spatial planning has taken place, this will be easier to determine. Therefore the existence of this provision is not critical in itself, but it will again be a matter of how it is exercised, and how well the regulation-making process utilises a precautionary approach, for example.

In order to allay fears about how this will be implemented, the government may like to add a provision to reassure people that the process of making such determinations about the impacts of classes of activities will be subject to a thorough process in line with environmental impact assessment procedures.

- **s 36A Consultation**: The wording of subsection (1), referring to the issuing of the project permit, makes it read as though the permit will be issued. This is the same wording as the

existing section, but it could still be improved, such as by referring to the ‘project permitting process’ rather than the issuing of the permit.

- The public will have 30 days to comment on the environmental impact report prepared by the project developer, as it does now. There are two issues with this process. The first is that there is no independent assessment of project developer’s report available to the public. It will be very hard for interested parties to conduct their own evaluation of such a report, without expert advice, especially in the timeframe provided. It would be helpful if this could be provided for the public by the Service, through the employment of relevant experts (paid for by the permit application fee on a cost recovery basis).

- The second criticism is of the time limit itself. The 30-day limit is the same time limit as in the current Environment Act provision. Under normal rules of statutory interpretation this is 30 calendar days as it does not specify working days. This is to be contrasted with, for example, the equivalent time limit in the New Zealand EEZ Act, which specifically states that submissions must be made within 30 working days after public notification of the application.⁴⁵

In New Zealand there has been considerable criticism that even 30 working days is too short a time to meaningfully comment on for potential environmental effects of seabed mining proposals. There is partly because the ocean is a lot less studied than the land, and much less is known about how the marine environment will be affected by activities within it. For example, how far, how fast and in what concentration will seabed mining sediment plumes be disbursed, and what effect might they have on marine life within the water column and on the benthic floor on which the sediment might land. To date, this kind of information has been gathered by modelling and thus predictions and projections rather than by observation; it is thus necessary to engage experts familiar with assessing such models in order to assess whether the predictions

⁴⁵ EEZ Act 2012, s 48.

about possible effects are accurate. Thus communities and other interested parties who wish to comment on these kinds of activities need time to engage such experts, who need time to assess the science, and then the communities need time to absorb that assessment. It might be different if the Environmental Service commissioned independent assessments of an applicant's environmental impact assessment information, and then communities had 30 days to comment after having seen this. But this does not appear to be part of the process proposed by the legislation.

- **36A(2):** There does not appear to be any provision for compensation for those who are requested to comment under 36A(2); this would be relatively easy to provide for under cost recovery permitting fees via regulation. Such compensation and cost recovery should be considered.

- **s 38B Reconsideration and appeal:** This provision enables an applicant to request that the Minister for the Environment to review a permitting authority's decision on a project permit application. If the Minister for the Environment is also "the applicant for the permit, or is otherwise directly or indirectly interested in the permit application otherwise than as the reviewing authority", subsection (3) provides for the Minister to "convene an independent panel to review the permitting authority's decision and submit a recommendation to the Minister", and then "follow the panel's recommendation" in deciding the appeal, and "make those recommendations public".

The first point to note is that the duty to "convene an independent panel" should be worded more clearly. The word "independent" and intention of the section is clearly to remove this decision-making power from the Minister. Yet the verb "convene" makes it sound like the Minister is in charge of this panel. It would be better to use the word "appoint" rather than

“convene”, so as to remove even an appearance of involvement. It is contrary to the rule of law for any Minister to be making or even involved in a decision on a matter in which he or she has a substantive interest.

More generally, I query whether the Minister for the Environment is even the most appropriate person to be hearing such an appeal on a project permit resulting from the environmental impact assessment process. For example, in New Zealand an appeal of a permitting authority’s decision would normally go to a separate independent decision-maker, such as a Court or Tribunal. (Although in some situations there are some Ministerial call-in powers to make decisions in the national interest.) A decision has been made in this section that a Minister can decide an appeal on a refusal of a project permit even if it was refused on environmental impact grounds.

In the case of seabed mining activities, this could pose a significant possible conflict of interest. If the Minister for the Environment also happens to be the Minister responsible for the Cook Islands Seabed Minerals Authority, then this person will first be able to make the decision on the project permit on environmental grounds – i.e. determine the result of the environmental impact assessment. (For example, if a private company is the applicant, it is unclear whether the Minister responsible for the Seabed Minerals Authority will count as being directly or indirectly interested in the permit application, and thus be required to appoint an independent panel to review the decision.) They will then also decide on the seabed minerals activity licensing approvals, and will have the ability to direct the Seabed Minerals Authority on their recommendation on such applications. This means that there may be the ability for the same person, even carrying different ministerial portfolios, to influence every aspect of a minerals licensing decision, including the environmental assessment. Some would suggest that this is too much authority in a democracy based on the separation of powers and on such important environmental matters and that this should be reconsidered, for the appearance of political interference; I would agree with this concern and with reconsidering these provisions. This is

exacerbated when it is also the Minister convening/appointing an independent panel to review the decision of the environmental impact assessment where the Minister is interested in the permit application (36B(3)(a)).

- This makes it essential that the Minister for the Environment not be ‘convening’ the independent review panel, but must only be required to ‘appoint’ such a panel, at the most.

- Thought should be given to minimising the appearance of bias, as well as to upholding the purpose of an environmental impact assessment process, by separately providing for a situation where the Minister for the Environment is also the Minister responsible for the Seabed Minerals Authority. I suggest that the Act provides that the same person is not able to make final decisions on both matters.

- **s 36C Penalties:** The penalties in the Environment Act for undertaking an activity without a permit is lower than most of those in the Seabed Minerals Bill, including those for breaching the environmental duties in Schedule 2 cl 5. That under the Environment Act as \$100,000 or \$50,000, whereas that under the Seabed Minerals Bill is up to \$500,000; yet the threshold for both are similar: “likely to cause significant environmental impacts” and “likely to cause serious harm”. Consideration should be given to whether the penalties in the Environment Act should be greater for those who undertake risky activities without first obtaining an environmental permit.

- **36C(2):** There is a typographical error: 36(1) here should refer to 36C(1), as the latter is where the penalties are imposed, not the former.

- Schedule 2 General duties of titleholders:

Overall, this Schedule is excellent and provides for exactly the kinds of duties that the *SPC Framework* and international law suggests that legislation of this kind should impose on those undertaking seabed mineral activities. I have some suggestions for possible improvement:

- Requirement 4 has a threshold for users “likely to be adversely affected by the seabed mineral activities”. As discussed above, likely is a high threshold – greater than 50%, on the balance of probabilities – and that is difficult to meet in an area where there is a lack of knowledge and information to enable determination of likelihood. An alternative word such as “may be adversely affected” could provide too low threshold given the duty to obtain free, prior and informed consent, including by way of compensation. So I wonder if an alternative such as “appear likely” could be used, in order to get around the difficulties in making an assessment of such likelihood. Otherwise, the requirement of free, prior, and informed consent is an excellent adoption of the relevant standards in this area that have been criticised heavily in relation to other countries’ mineral activities.

- I note that this can be compared with the use of “likely” in requirement 5, because it refers to evidence that arises such that a determination of likelihood can be made.

- Requirement 6 Dumping: A titleholder may get permission to discharge sediment waste according to a permit. And it may get permission to discharge from a vessel that separates and sorts valuable minerals from unwanted sand, for example. This would therefore meet the definition of dumping and so it may be appropriate to include at the end of this, “or according to the titleholder’s permit” (or similar).

- Requirement 1 Environmental data: It is excellent that the titleholder is required to collect and analyse environmental data, as prescribed. In the interests of public participation and transparency, there should also be an obligation to share or publicise (or enable publicity of)

such data for the purposes of monitoring and management (including enforcement) as well as for simple transparency. Given the high public interest in seabed mineral activities, it would be well recommended to require at least the permission of publicity of information, if not for the titleholder to publicise it themselves. (I apologise if I have missed such a requirement elsewhere in the legislation, and note the short nature of my engagement to review this Bill.)

General Comments - Marae Moana Act 2017:

Given the stated importance of the MMA and the marine zoning process to the Cook Islands, it is surprising to not see more explicit references to that process and to the bodies constituted under the MMA, particularly the TAG, given its involvement and overlap with seabed minerals matters to date. This legislation is also of great importance to the community. While the MMA is clearly prioritised in the Bill, and there are references to it, consideration could be given to greater involvement, in this Cook Islands context.

6. Alternative approaches to include in the regime:

I have two additional comments to make on this Bill overall:

Ecosystem approach:

While the Cook Islands legislative regime in general is to be applauded for an integrated management approach, experience of integrated management approaches in other countries has found it insufficient. There is a move worldwide towards ecosystem-based management approaches. This is already quite well advanced in relation to fisheries, spearheaded by the FAO, for example, and countries worldwide are moving to adopt it in land-based environmental management regimes. Reason for this move is the recognition that we cannot study

environmental effects in isolation but we must look at interactions within and between ecosystems. Thought could be given to adopting more of an ecosystem approach, particularly in relation to environmental assessment such as in the Environment Act.

Indigenous rights:

The Cook Islands Constitution, in s 66A, recognises the importance of the “customs, traditions, usages, and values of the indigenous people of the Cook Islands”.⁴⁶ As mentioned above, the opinion of the Aronga Mana on the content of a particular custom, traditional value is conclusive for the purposes of the Constitution. Under international human rights law, indigenous people have various rights in respect of the traditional territories and customs. Some of this is reflected in the Bill, such as the reference to free, prior, and informed consent in the duties of operators, as discussed above. But there is little else and there could be more reflection of the international human rights or obligations. For example, direct notice of applications and specific consultation rights could be included as part of both the Seabed Minerals and Environment Act assessment processes.

Thought could be given to explicit recognition of Aronga Mana’s role as customary tiaki or guardians of the moana. The move to adopt guardianship models for environmental management in Aotearoa New Zealand has been as a result of the recognition of Crown duties

⁴⁶ S 66A in full provides:

- (1) In addition to its powers to make laws pursuant to Article 39, Parliament may make laws recognising or giving effect to custom and usage.
- (2) In exercising its powers pursuant to this Article, Parliament shall have particular regard to the customs, traditions, usages, and values of the indigenous people of the Cook Islands.
- (3) Until such time as an Act otherwise provides, custom and usage shall have effect as part of the law of the Cook Islands, provided that this subclause shall not apply in respect of any custom, tradition, usage or value that is, and to the extent that it is, inconsistent with a provision of this Constitution or of any other enactment.
- (4) For the purposes of this Constitution, the opinion of the Aronga Mana of the island or vaka to which a custom, tradition or value relates, as to matters relating to and concerning custom, tradition, usage or the existence, extent or application of custom, shall be final and conclusive and shall not be questioned in any court of law.

to iwi through the Treaty of Waitangi settlement process. This is relevant in the Cook Islands as a matter of human rights of indigenous Cook Islanders. In addition to the above consultation and notice right suggested, the law could go further to recognise the constitutional status of Aronga Mana such as through appointing guardians under the Environment Act to represent the interests of Tangaroa. The guardians could be comprised of a crown and a customary representative, chosen from within and by Aronga Mana. This could help give effect to and maintain Cook Islands custom within a modern environmental management regime. The absence of such recognition is noticeable in light of both the constitutional position of customary law and the need for traditional guardianship models that provide guidance even when modern science is uncertain. Legislative changes to a significant aspect of environmental management is a good opportunity to begin such discussions.

7. Conclusion

Overall, this Consultation Draft Bill is a significant improvement on the existing legislation and regime. It importantly provides for many of the recommendations for such a regime contained in the *SPC Framework* that were missing before. However, I suggest that there are some significant matters that need to be addressed, and I have made various recommendations for changes to the Bill. In summary, the more significant issues include:

- There are places where the Bill is inconsistent with Cook Islands international legal obligations and the guidelines contained in the *SPC Framework* (for example, the definition of the precautionary approach, the statement of the duty to conduct environmental impact assessments, the definition of “serious harm”, and the operation of the environmental impact assessment process, particularly in relation to the apparent lack of independent expert advice).
- There are places where the Bill is inconsistent with fundamental principles of law (such as the presumption of transparency of information and government, including where information

should be provided in the public interest; the transparency of decision-making under the rule of law; independence and sufficiency of advice to support license approval by the Executive; a significant concentration of policy, advice, rule-making, and decision-making power in the hands of the Minister responsible for the Seabed Minerals Authority; a potential conflict of interest exists where the Minister for the Environment is also responsible for the Seabed Minerals Authority).

- There is room for better integration with existing Cook Islands law and institutions, most particularly the marine spatial planning process and expert bodies under the Marae Moana Act 2017.

- There are practical issues (such as in relation to penalties, time limits for decision-making, advice in relation to environmental impact assessments, and the appropriate setting of fees to cover cost recovery of a possibly wider range of matters). Future practical issues of implementation will also need to be kept in mind, to ensure that the legal regime duly passed by Parliament is indeed implemented by the Executive.

I suggest that the Cook Islands is in an excellent position to learn from the mistakes of other small Pacific island states, and can improve the Bill to enable the Cook Islands to profit from of the natural environment while still protecting it for future generations and for the maintenance of the natural world upon which they depend.