

SEABED MINERALS AUTHORITY OPERATIONAL POLICY

ASSESSMENT OF FIT AND PROPER PERSON



Seabed Minerals Authority
Runanga Takere Moana
COOK ISLANDS

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1. PURPOSE

This operational policy is issued as guidance by the Seabed Minerals Authority (the Authority) in connection with the fit and proper person test under section 65 of the Seabed Minerals Act 2019 (Act)

2. SCOPE

This operational policy applies to all applicants for the grant of a licence under the Act and including the applicant/(s) and their directors, affiliates and their directors¹ and any associate and their directors involved in the management of the applicant's business.²

The policy will apply to current licensees on a continuous basis throughout the term of a licence and on an application for renewal of a licence under section 86 of the Act and in respect of any proposed transferee under section 102.

3. OBJECTIVE AND PRINCIPLES

This policy sets out the criteria that will be considered by the Authority in assessing a licence applicant's status as a "fit and proper person" under section 65 of the Act.

The overall objectives are to:

- enable responsible and competent operators to generate investment, job and capacity-development opportunities in the Cook Islands through the grant of exclusive access to the seabed minerals of the Cook Islands exclusive economic zone (EEZ);
- provide assurance for the Cook Islands government and the Cook Islands community that operators will fulfil their regulatory obligations and social responsibilities to protect the marine environment throughout the exploration and mining life cycle;
- safeguard the health, safety, security and labour conditions of people engaged in exploration or mining operations in remote locations, including the Authority's and other Crown agency personnel engaged as inspectors or observers;
- protect the culture and heritage of the people of Cook Islands;

- provide upfront guidance to all licence applicants on how all applications will be assessed in a transparent, fair and consistent way; and
- ensure that the Cook Islands honours its obligations under international law.

Applicants for an exploration or mining licence must satisfy the Authority, among other matters, that they are a fit and proper person to hold a licence.

The licence application must be declined if the Authority is not satisfied the applicant is a fit and proper person to hold a licence.

The fit and proper person provisions must be met on a continuous basis for the duration of a licence. A licence may be cancelled if the licensee is no longer considered to be a fit and proper person under section 117(1)(b) of the Act. Similarly, an application to renew a licence may be refused if the licensee is no longer considered to be a fit and proper person.

The principles of procedural fairness will be applied in assessing a person's overall status as a fit and proper person to hold a licence.

4. FIT AND PROPER PERSONS

4.1 General Concepts

The concept of a fit and proper person is incorporated into the legislation of many countries, not least in connection with extractive industries. The intent is to ensure that only those persons with the appropriate expertise, professional integrity and high standards of personal behaviour are authorised to undertake regulated activities in the national interest.

Assessing a person's status as a fit and proper person involves considering their overall suitability to carry out a regulated activity and takes meaning from its context. This includes considering a range of relevant factors, such as the activities in which the person will be engaged, the nature of the activities and how the activities are regulated. However, the Authority should endeavour to strike a reasonable balance between the resources to be invested in each aspect of the assessment and the significance of the risk intended to be avoided or minimised.

¹ Means in relation to an applicant or a title holder, means any person, firm, body corporate, or entity that controls, is controlled by, or is under common control with, the applicant or title holder.

² Means a person who acts on behalf of, or enters into an agreement with, a title holder, or a title holder's associate, to carry out regulated activity.

A range of other factors is normally taken into consideration to assess a person's overall status as a fit and proper person to undertake an activity, including the seriousness of previous unacceptable behaviours (including any resultant damage or penalties), singular or repetitive patterns of unacceptable behaviours, reformed behaviours, mitigating circumstances and the time that has elapsed since the occurrence of any transgression.

The assessment of a fit and proper person may require detailed information being presented to the Authority depending on the complexity of the corporate or other structure, including how an applicant intends to carry out its operations. The behaviour of a person/(s) having greater decision-making or operational influence over an applicant may be given greater weight under the fit and proper person test.

The concept of a fit and proper person is not narrowly construed or confined, nor will it remain constant over time. The assessment of the factors listed above is made in a general or an overall sense, with all aggravating and mitigating circumstances considered.

4.2 Exploration and Mining Context

The Act and other legislation relevant to seabed mineral activities including the Environment Act 2003 and the Marae Moana Act 2017, establish, collectively, a legal framework to administer, manage and regulate activities which pose a risk to the marine environment, the health and safety of people and the cultural integrity of the Cook Islands and its community.

There is a high reliance on operator trustworthiness to work within the legal framework and comply with their legal obligations and social responsibilities, taking account of a range of contextual factors for seabed minerals sector including (but not limited to):

- operators may undertake a range of regulated activities that present potential risks of harm to the marine environment and health and safety of those engaged in the regulated activity, if not effectively managed;
- regulatory oversight of operations is to a degree constrained, particularly in remote locations;
- operators are expected to behave as good citizens throughout their operation lifecycles and in their engagement with the Cook Islands community;
- operators are required to provide true, accurate and timely reports on their operations; and
- authorised inspectors or observers may be vulnerable to anti-social behaviour by operators in remote EEZ locations where response times for emergency intervention can be limited.

4.3 The Act – Overview

Section 65 of the Act specifies the criteria that the Authority must be take into account in assessing whether an applicant is a fit and proper person under section 64(e). The list of matters is not exhaustive, and the Authority may prescribe for other criteria. The list does not limit the subject matters that the Authority may take into account.

Other factors that are relevant include the principles under section 7(2) of the Act, the principle of ecologically sustainable use in the Marae Moana Act 2017 and matters pertaining to the national interest can be considered in the assessment.

The relevant extracts of the Act provisions are listed in Appendix 2 to this operational policy.

4.4 The Act – Mandatory Criterion

An applicant is not a fit and proper person to hold a licence if they, an affiliate or an associate is currently insolvent or under administration, as prescribed under section 65(3) of the Act.

No other specific criterion automatically makes an applicant not a fit and proper person under the Act.

4.5 The Act – Specific Criteria

The Act provides that the Authority must take into account the following matters to be satisfied that an applicant is fit and proper to hold a licence, in accordance with section 65(1)(a) of the Act:

- whether the applicant has been found on reasonable evidence to have breached a term or condition of an approval to conduct seabed mineral activities or similar sea- or land-based activities relating to:
 - o protecting or rehabilitating the environment; or
 - o safeguarding the interests of the local community.
- whether the applicant has been convicted of an offence relating to the conduct of seabed mineral activities or other sea- or land-based exploration

or mining activities.

- whether an applicant has been convicted of a fraud or dishonesty offence.

The above criteria apply to breaches or offences in any jurisdiction and is not just limited to the Cook Islands. It will also include any breaches under contracts or licences held with international organisations such as the International Seabed Authority.

In connection with a breach of a term or condition of an approval this extends to the breach of any consent, licence or permission or any form of authorisation, including the cancellation of any authorisation and non-compliance with relevant Acts and associate regulations.

As to the safeguarding of the interests of the community, the Authority may consider breaches relating to:

- the health and safety of a local community;
- labour practices in respect of persons hired from the local community;
- interference with other users of the area/(s) adjacent to that of the relevant activities;
- the culture or heritage of a local community, including of objects of archaeological or historical nature.

4.6 The Act – Other Criteria

The Authority may consider any other relevant prescribed criteria for the purpose of being satisfied that an applicant is a fit and proper to hold a licence, in accordance with section 65(1)(b) of the Act. The following criteria will be considered:

- An applicant's professional history, including whether they:
 - have been banned or disqualified from being a company director;
 - have been in receivership or under administration;
 - have been or are non-compliant with the Act or other equivalent resource management, environmental or safety related legislation in any country, including companies that the applicant is/was a director or senior officer; or
 - has been convicted of a criminal offence.
- The applicant's professional reputation and character, including whether they have:

- failed to comply with legal obligations, regulatory requirements or professional standards;
- been obstructive, misleading or untruthful in dealing with regulatory bodies or courts;
- participated in negligent, deceitful, or otherwise discreditable business or professional practices;
- behaved unethically towards or failed to work cooperatively with relevant landholders and local communities;
- failed to cooperate or acted in a threatening way towards duly authorised inspectors or observers;
- acted unethically in the treatment of their employees and sub-contractors, such as failing to pay employee entitlements or contractors or failing to ensure their health and safety;
- any business associations with any person, body or association that is not of good repute having regard to character, honesty and integrity.

The Authority may consider any current investigations into an applicant or licensee's conduct in the application of section 65(1)(b), such as alleged breaches of existing approvals, consents, licence or permission or any form of authorisation or cancellation thereof. Generally, the Authority's assessment and determination of the fit and proper person test will not be concluded in such circumstances until the resolution of the investigation or charges is determined by a court or tribunal.

The Authority may also consider any other information collected about an applicant under section 65(1)(c) of the Act. The Authority will only consider such information where it is relevant for determining whether the applicant is a fit and proper person to hold a licence, and that such information is factual evidence, credible and capable of substantiation, and not simply hearsay.

4.7 Assessment of Identified Specific and Other Factors

Any identified criteria will be considered on their merit to inform the assessment of an applicant's status as fit and proper to hold a licence, taking account of the following elements (to the extent relevant):

- The circumstances for any identified specific or other factors, including (but not limited to):

- o the circumstances that led to action being taken;
- o when the circumstance arose;
- o the nature of the offence;
- o when the offence occurred; and
- o the penalty imposed, including whether the applicant's conduct resulted in a fine, term of imprisonment, infringement notice or prosecution.
- The seriousness of the applicant's conduct will also be considered, including (but not limited to):
 - o the impact of the applicant's conduct on any community, employee or the environment,
 - o any injury, loss, or damage resulting directly from the applicant's conduct,
 - o whether the applicant's conduct involved any fraud or dishonesty,
 - o whether the applicant's conduct involved violent or threatening behaviour, or
 - o whether the applicant committed a summary or indictable offence.

Consideration may be given to statements from the applicant, reports from regulatory bodies, police reports, police checks, court transcripts and sentencing remarks in assessing any identified factors. Information from other sources may also be considered, provided these are relevant and credible.

4.8 Mitigating Circumstances

Consideration may be given to any mitigating circumstances where a relevant criterion has been identified.

A mitigating circumstance will not automatically excuse the applicant's conduct, but it may lessen the significance of the conduct in the overall assessment of a person's status as a fit and proper person to hold a licence.

Examples of mitigating circumstances that may be considered, where known, include (but are not limited to):

- The applicant's intent:
 - o Did the applicant knowingly commit a breach or offence contemplated by section 65(a) of the Act?
 - o Was the offence (including criminal offences) committed by the applicant premeditated?

- The consequences of the offence:
 - o Was any part of the environment significantly damaged?
 - o Were employees, including contractors, or the community put at risk or injured?
- Any breach of trust:
 - o Did the applicant try to cover up a breach of any resource management, environmental or safety related legislation?
 - o Was the applicant truthful in their dealings with the relevant regulator, police or the courts or tribunals?

4.9 Time Elapsed

The Authority may consider the time that has elapsed since the occurrence of the relevant breach or offence. As a general rule, any conviction of or revocation or suspension of any authorisation under applicable legislation in any country may be disregarded by the Authority where it occurred more than 10 years before the date of lodging an application.

Nevertheless, the Authority may exercise its discretion in applying the general rule by assessing the significance of an identified criteria by taking account of:

- the seriousness of the matter under consideration;
- whether the matter is part of a sustained or repeated pattern of behaviour;
- whether the matter relates to dishonesty or violent and threatening conduct;
- whether the matter has been fully disclosed by the applicant at the first time of asking; and
- whether the circumstances that contributed to the matter have been removed or are no longer operative.

As a general principle, the fact that time has elapsed since a matter occurred is likely to be relevant where the misconduct is less serious, less sustained and does not relate to dishonesty, violence or threats.

The Authority has the sole discretion to determine whether to give greater or lesser weight to the time elapsed in each case and on the facts and circumstances presented to it.

4.10 Repeated Non-compliant Conduct

Consideration may be given to repeated non-compliance with any resource management, environment or safety related legislation.

As a general principle, repeated non-compliance conduct may carry significant weight in assessing the applicant's fitness and propriety to hold a licence.

4.11 Reformed Behaviours

Consideration may be given to any evidence of reformed behaviour or steps the applicant has taken to improve their conduct. Examples include:

- deliberate action to redress a circumstance;
- recent compliance with any resource management, environment or safety related legislation;
- remedial training;
- rehabilitation courses; or
- community service.

Consideration will also be given to whether the applicant has been forthcoming in declaring and acknowledging any relevant previous adverse behaviours, remorse and commitment to improved behaviours.

4.12 Assessment

All identified factors will be considered severally and collectively on their merit to inform the assessment of an applicant's overall status as being a fit and proper person to hold a licence.

The Authority will determine whether the applicant is a fit and proper person on the basis of the evidence before it. While the determination by another body relating to an applicant's status as a fit and proper person may be relevant evidence, it is not conclusive for the purposes of the Act, and the Authority will make its own independent assessment.

An application will be refused if an applicant is found not to be a fit and proper person to hold a licence.

A whole application may fail section 65(1) of the Act in circumstances where joint applicants apply for a licence and one of the applicants is determined not to be a fit and proper person to hold a licence.

An application will continue to be assessed against other qualification criteria in section 64 of the Act, if the applicant is determined to be a fit and proper person to hold a licence.

5. GENERAL PROCEDURES

5.1 Procedural fairness

Applicants will be informed in writing of any decision and the reasons for the decision with respect to their status as a fit and proper person to hold a licence.

Applicants will be given an opportunity to explain any relevant matter. Applicants will be provided 10 days to respond in writing and given opportunity to provide any supporting evidence.

5.2 Request for Information

Applicants are required to submit current and accurate information to the Authority to inform the assessment of their status as a fit and proper person, in accordance with regulations made under the Act. The Authority may request further information from a licence applicant under section 63(2)(b) of the Act. An applicant must provide such information within 10 days.

Licence holders may also be requested to submit updated information to the Authority to inform the assessment of their continuing status as a fit and proper person during the term of a licence.

6. OTHER SOURCES OF INFORMATION

The Authority will conduct any police checks, company searches, credit agencies or other bureaus and other relevant inquiries, and use its official record of previous dealings with the applicant to verify and inform the assessment of their status as a fit and proper person to hold a licence. The applicant's consent will be sought where necessary.

7. PROVIDING FALSE, MISLEADING OR FAILING TO DISCLOSE INFORMATION

An application (or application for the renewal of a licence) may be declined, or a licence suspended or cancelled under section 117 of the Act if an applicant fails to provide sufficient information to enable the assessment of whether they are a fit and proper person, despite requests for further information.

A negative inference will not be drawn from any failure to provide the further requested information. However, the assessment may result in an unfavourable determination in circumstances where the application is assessed on incomplete or

insufficient information.

The provision of false or misleading information will be relevant to the Authority's determination of whether the applicant is a fit and proper person.

8. CONFIDENTIALITY

All information, including personal data supplied with an application or obtained from a third party will be held by the Authority. It will be stored securely in electronic form in accordance with the Authority's information management procedures. The information will only be used in connection with the requirements of section 65 of the Act. The Authority will not keep personal information for longer than necessary.

9. SUBSEQUENT APPLICATIONS

A prior failure to meet the fit and proper person test will not prejudice subsequent applications.

10. NON-DISCRIMINATION

The Authority will apply the Act and this operational policy on a non-discriminatory basis, except that the Authority in its discretion, may apply this policy more stringently in the case of applicants for a mining licence.

Nothing in this policy will preclude the Authority from restricting any seabed mineral activities under a

licence by imposing or varying conditions related to the fit and proper person criteria where appropriate.

11. RELATIONSHIP WITH OTHER QUALIFICATION CRITERIA UNDER SECTION 64 OF THE ACT

If in the course of any assessment of the status of an applicant or current licensee as a fit and proper person, the Authority may, for example, become aware of evidence of on-going financial difficulties. This may be indicative that the applicant or current licensee does not have the financial capability under section 64(c) of the Act to meet its future or existing obligations under a licence.

A decision to decline the grant of a licence under section 67 of the Act or refusal to grant the renewal of a licence (section 86(3)) or to transfer a licence may be made on the basis of other qualification criteria under section 64 of the Act without the need for the Authority to form the view whether the applicant or transferee is a fit and proper person.

12. RECORDS MANAGEMENT

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APPENDIX 1 SAMPLE SUMMARY OF QUESTIONS

- Has the applicant ever breached the provisions of the Act or any other regulatory standards relating to resource management, environment, health and safety in any jurisdiction?
- Does the applicant, its beneficial owners, directors or other senior personnel involved in its management have past criminal charges or convictions, or unresolved investigations for serious wrongdoings?
- Has the applicant been found to have misled, or been untruthful to, regulatory authorities in any dealings?
- Has any member of the Board of the applicant been ever disqualified from being a company director in any jurisdiction?
- Has any member of the Board of the applicant or any of its senior management team been found to have breached any professional standards or been untruthful to professional bodies in any jurisdiction?
- Is the applicant under any investigations in any jurisdiction? Has it ever been under any investigations in the past and what was the outcome?
- Has the applicant been in a receivership or under administration?
- Has the applicant ever failed to cooperate with authorised inspectors or failed to comply with their lawful directives?
- What is the applicant's history of relationship with landowners and local communities affected by its operations?
- Has the applicant ever failed to act with utmost integrity towards its employees or subcontractors, such as improper dismissal of employees, failure to pay employee entitlements, preventing employees from unionising, or failure to pay their contractors?
- Does the applicant have a record of encouraging whistle-blowers to speak up? Or does it have a record of harassing whistle-blowers in any shape or form?
- Does the applicant have a record of discrimination, such as on grounds of gender, race, etc?
- Are there mitigating or aggravating circumstances that might excuse/minimise or escalate the seriousness of some conduct? For instance, is the conduct intentional, routine or accidental? Did the applicant attempt to cover up the conduct? When the conduct was discovered, did the applicant cooperate with investigators?

APPENDIX 2 RELEVANT SECTIONS OF THE SEABED MINERALS ACT 2019

Section 63 Review of licence applications by Authority

- (1) The Authority must be satisfied that an applicant for a licence meets the qualification criteria before it refers the application to the licensing panel.

Section 64 Qualification criteria for grant of licence

The qualification criteria for the grant of a licence are as follows:

- (e) the applicant is a fit and proper person to hold a licence;

Section 65 Fit and proper person test

- (1) For the purpose of determining whether the applicant is a **fit and proper person** under section 64(e) the Authority must take into account,—
- (a) whether the applicant (including each director, affiliate, and any associate involved in the management of the applicant's business) has previously, in any jurisdiction,—
 - (i) been found on reasonable evidence to have breached a term or condition of an approval (however described) to conduct seabed mineral activities or similar sea- or land-based activities, which related to—
 - (A) protecting or rehabilitating the environment; or
 - (B) safeguarding the interests of the local community; or
 - (ii) been convicted of an offence relating to the conduct of seabed mineral activities or other sea- or land-based exploration or mining activities; or
 - (iii) been convicted of an offence involving fraud or dishonesty; and
 - (b) any other prescribed criteria; and
 - (c) any information the Authority has collected about the applicant.
- (2) Subsection (1) does not limit the matters that the Authority may take into account when deciding if an applicant is a fit and proper person to hold a licence.
- (3) An applicant is not a fit and proper person for the purposes of section 64(e) if the applicant is currently insolvent or under administration.



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