



PARLIAMENT OF THE COOK ISLANDS

COMPETITION AND REGULATORY AUTHORITY BILL 2019

EXPLANATORY NOTE

This explanatory note relates to the Competition and Regulatory Authority Bill 2019 as presented to the Parliament of the Cook Islands. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and is intended to indicate its general effect.

General policy statement

Purpose

This Bill establishes the Competition and Regulatory Authority (the Authority) with responsibility for administering and enforcing laws for the regulation of certain industries and activities in Cook Islands.

Policy rationale — Telecommunications industry

This Bill is being introduced in concert with the Telecommunications Bill 2019 that will provide for the regulation of competitive markets for telecommunications services in the Cook Islands and the licensing of telecommunications and radiocommunications operators.

The Authority that will be established under this Bill will be responsible for regulating the telecommunications industry under the auspices of the Telecommunications Bill 2019. The policy rationale for the Authority's role in this regard is set out in the Explanatory Note to the Telecommunications Bill 2019.

Policy rationale — Electricity and water and sewerage industries

The Government's intention, endorsed in principle by Cabinet, is to extend the regulatory remit of the Authority from the telecommunications industry to the electricity and water and sewerage industries. This extension, which will establish the Authority as a multi-sector regulator, will require a separate policy and legislative process to specify the Authority's powers and functions for the additional sectors.

Natural monopoly is the classic case of a market failure. A natural monopoly can be defined as existing 'when the costs of production are such that it is less expensive for market demand to be met with one firm than with more than one'. It is more economically efficient to have only one business provide the service because the infrastructure required to produce and deliver a product such as electricity or water is very expensive to build and maintain.

Natural monopolies arise due to economies of scale or scope. The former, which is common in the utility services space, occurs when the average cost of production decreases as output expands – that is, the average cost curve slopes downwards up to and perhaps beyond the overall size of the market. Utility services in the electricity (Te Aponga Uira) and water (To Tatou Vai) sectors of the Rarotonga economy all have natural monopoly characteristics.

As monopolies, these service providers are not subject to normal competitive forces. In the absence of competition, there is the potential for abuse of market power in terms of either pricing or customer service levels. In practice, the objective of safeguarding against the abuse of monopoly powers means that the utility must be encouraged to conduct its business as efficiently as possible. This applies whether the service provider is a private company or a government-owned utility.

Independent regulatory oversight is a common way of ensuring that monopoly utility services are provided efficiently – that is at least cost and allocated efficiently between consumers. Independent multi-sectoral economic utility regulators are commonplace across the world, including other island jurisdictions. For example, the State of Hawaii Public Utilities Commission regulates public utility companies that provide electricity, gas, telecommunications, private water and sewage, and motor and water carrier transportation services in the State. The Utilities Regulation and Competition Authority regulates the telecommunications and electricity sectors in the Bahamas.

A second reason for the independent economic regulation of monopoly utilities is to provide a safeguard against the politicisation of pricing decisions. This applies to governments setting prices well below cost recovery, thereby encouraging inefficiently high levels of consumption and risking the deferral of necessary maintenance or capital investment, as well as to governments viewing utilities as an easy source of revenue and encouraging them to set prices above efficient levels. The existence of an independent regulator with price-setting powers, operating at arm's length from government, offers some protection against both of these undesirable outcomes.

While independent regulation does not preclude the provision of subsidies (for example to minimise price impacts on consumers when introducing prices for the first time), it will ensure that any subsidy is applied in a transparent manner. This leads to a third reason for independent regulatory oversight, which is transparency. Shining a light on the price-setting processes of monopoly utilities, and the provision of reasonable opportunities for public consultation and public input into the price determination process, is critical to ensuring public – and government – confidence in the efficiency of the service provider.

Consultation

In developing this Bill, the Government undertook a comprehensive public consultation process including:

- the publication of a draft policy and draft Bill along with a call for submissions;
- community meetings in Rarotonga and the Pa Enua; and
- individual meetings with a range of stakeholders.

More detail on the consultation on the Bill can be found in the **Cook Islands Telecommunications Market Competition Policy 2019** published on the Ministry of Finance and Economic Management website at <http://www.mfem.gov.ck/economic-planning/telecommunications-reform-2019>.

Contents of the Bill

Clause 1 Title
Provides that, once enacted, the Bill will be called the **Competition and Regulatory Authority Act 2019**.

Clause 2 Commencement
Stipulates that the Bill commences on the day on which it receives the assent of the Queen's representative.

Part 1 – Preliminary matters

Part 1 of the Bill sets out a number of preliminary matters.

Clause 3 Purpose
Specifies that the purpose of the Bill is to establish an authority with responsibility for administering and enforcing laws for the regulation of certain industries and activities in Cook Islands.

Clause 4 Interpretation
Sets out the definitions of certain terms used in the Bill.

Clause 5 Act binds the Crown
Specifies that the *Competition and Regulatory Authority Act 2019* binds the Crown. For instance, the Authority's powers and functions under the Act will apply in respect of Avaroa Cable Limited, as a telecommunications network operator, as they will apply in relation to a private operator such as Telecom Cook Islands Limited.

Part 2 – Establishment

Part 2 of the Bill sets out matters related to the establishment of the Authority.

Clause 6 Establishment of the Authority
Establishes the Authority as a statutory body with the powers of a body corporate.

Clause 7 Independence
Stipulates that the Authority is not subject to direction or control by the Minister or any other person in the performance of its functions, except as provided by this Act or a regulatory enactment or court direction.

- Clause 8 Government policy**
Obliges the Authority to have regard to published economic policies of the Government in carrying out its functions under this or any other enactment.
- Clause 9 Membership**
Requires the Authority to have a minimum of 1 and a maximum of 3 full or part time members, appointed by the Minister, with one member appointed as the Chair.
- Clause 10 Eligibility for appointment**
Sets out general eligibility requirements for members, including knowledge or experience in commerce, economics, law, public administration or management. It also sets out specific requirements for Chair. The requirements exclude any person with an interest any company or business which is regulated by the Authority, and Government employees.
- Clause 11 Evaluation**
Provides for an Evaluation Committee comprising the Financial Secretary, the Public Services Commissioner and the Solicitor-General, and sets out a process for the Committee to recommend suitably qualified candidates for membership of the Authority to the Minister. The Minister is prohibited from appointing a person as a member who has not been recommended by the Evaluation Committee. The Committee is also responsible for recommending terms and conditions of appointment, including in respect of remuneration, benefits, expenses, allowances and time required to be spent in the Cook Islands.
- Clause 12 Term**
Specifies that an Authority member can hold office for up to 3 years, and is eligible for re-appointment. A member's appointment is subject to the requirements set out in clause 10.
- Clause 13 Remuneration and expenses**
Sets out arrangements for Authority member entitlements in respect of remuneration and expenses, with any payments required to be sourced from Authority funds.
- Clause 14 Immunity**
Provides immunity for acts of good faith in the exercise of functions under this Act for the Government, a Minister and the Authority, its staff or agents, or persons acting under its authority.

Clause 15 Removal

Provides for the Minister to remove a member from office for a range of reasons, including failing to comply with an obligation to disclose a conflict of interest.

Clause 16 Vacancy

Sets out arrangements for the Minister to fill a vacancy should the office of a member become vacant if the member dies, completes a term and is not re-appointed, resigns from office or is removed from office.

Clause 17 Staff and consultants

Provides for the Authority to employ staff and contractors for any services that it considers necessary to perform its functions.

Clause 18 Delegation

Provides a broad power for the Authority to delegate its functions and powers.

Clause 19 Annual plan

Requires the Authority to prepare annual plan setting out its proposed activities for the next 3 years. A copy of the plan must be tabled in Parliament by the Minister.

Clause 20 Annual report

Requires the Authority to prepare an annual report on its activities in the preceding year. A copy of the report must be tabled in Parliament by the Minister.

Part 3 – Meetings

Part 3 of the Bill sets out matters related to Authority meetings.

Clause 21 Meetings of Authority

Sets out the requirements for convening, conducting and minuting Authority meetings if the Authority has more than 1 member.

Clause 22 Quorum for meetings

Sets out the quorum requirements for Authority meetings.

Clause 23 Voting at meetings

Sets out the voting requirements at Authority meetings.

Clause 24 Resolutions without meeting

Provides for an Authority resolution without a meeting.

Clause 25 Decisions not invalidated

Sets out a range of matters that will not invalidate an Authority decision, including a defect in the appointment of a member, a vacancy among members, the absence of a member or any irregularity in Authority procedures that does not affect the decision.

Clause 26 Disclosure of interests

Requires members to disclose interests that could conflict with the proper performance of the functions of the member's office. This clause also requires the Authority to take reasonable steps to ensure that Authority staff, persons engaged by the Authority, and other persons exercising or performing powers or functions of the Authority make proper and adequate disclosure of their interests.

Clause 27 Related parties' interests

Defines related party interests, which a member is required to disclose under clause 26.

Part 4 – Functions, powers and duties

Part 4 of the Bill sets out the general functions, powers and duties of the Authority.

Clause 28 Functions of Authority

Specifies the functions of the Authority, which include:

- enforcing compliance with this Act;
- promoting public understanding of the value of competition and role of regulation;
- promoting voluntary compliance with regulation;
- advising the Minister on matters of competition and regulation; and
- investigating possible infringements of the *Telecommunications Act 2019*.

Clause 29 General powers of Authority

Provides broad powers necessary for the Authority to function in relation to agreements and finances, and relationships with international regulatory international bodies.

Clause 30 Power to exchange information

Provides broad powers for the Authority to share information with overseas authorities that share similar functions, subject to confidentiality.

Clause 31 Power to assist overseas agencies

Provides broad powers for the Authority to cooperate with overseas agencies on request, including investigating matters related to the agency and providing information arising from the investigation, subject to confidentiality.

Clause 32 Power to enter cooperation arrangement

Provides for the Minister, or the Authority, with approval of the Minister, to enter into a cooperation arrangement with the government of an overseas agency, or with the governing body of an international agency.

Clause 33 Power to make confidentiality order

Provides for the Authority to make a confidentiality order that prohibits disclosure of information specified in the order except as specified in the order.

Clause 34 Duty to protect confidentiality

Requires Authority to establish and maintain reasonable procedural safeguards to prevent the unauthorised disclosure of confidential information.

Clause 35 Duty to act in good faith

Requires members of the Authority to act with integrity, honesty, impartiality, and diligence and requires employees of the Authority to comply with the Public Service's code of conduct.

Clause 36 Duty of transparency

Requires the Authority, in performing its functions under Parts 5 to 8, to observe reasonable standards of procedural fairness, act in a timely fashion, and observe the rules of natural justice. This includes, prior to making a significant substantive or procedural decision, giving notice of the decision and consulting with those likely to be affected by the decision. Following such a decision, the Authority is also required to provide a statement of its reasons for the decision and provide notice of the decision.

Part 5 – Complaints and investigations

Part 5 of the Bill deals with the receipt and investigation of complaints by the Authority of contraventions of relevant enactments — that is, acts and

regulations under which the Authority has functions or powers. This includes the *Telecommunications Act 2019*.

Complaints and investigations

Clause 37 Complaints

Provides for a person to make a complaint with the Authority regarding a contravention of a relevant enactment, and requires the Authority, if asked, to assist the person to make a complaint.

Clause 38 Investigations

Provides for the Authority, on its own initiative, or in response to a complaint made under clause 37, to carry out an investigation into conduct that contravenes a relevant act or regulation. The Authority may refuse to investigate a complaint if it is satisfied it is trivial, frivolous, or vexatious, the complaint is misconceived or lacking in substance, or the Authority has no jurisdiction.

Clause 39 Referral

Requires the Authority, if referred by the Minister, to investigate specified or alleged conduct to determine whether it occurred, and if it did, whether it contravenes a relevant act or regulation.

Investigators

Clause 40 Appointment of Investigators

Provides for the Authority to appoint an investigator, and requires the Authority to issue an identity card to the investigator. Clause 40 creates an offence for interfering with or impeding an investigator exercising a power or performing a function under this Act or any other relevant enactment.

Investigative powers

Clause 41 Warnings

Requires an investigator, before questioning a person about conduct that is an offence against this Act or any regulatory enactment, or that would make that person liable to a pecuniary penalty under this Act, to issue a warning to that person. The person must be warned that they do not have to answer a question, or do anything else in response to a question, about the conduct, but that anything that they say or do may be evidence.

Clause 42 Self-incrimination

States that a person is not excused from producing a document or thing, or answering a question under clause 41, on the ground that doing so might incriminate them or make them liable to a pecuniary penalty.

- Clause 43 Requirement to produce documents and things**
Creates an offence for not complying with an investigator's requirement to produce any document or thing relevant to an investigation.
- Clause 44 Requirement to answer or respond**
Creates an offence for not complying with an investigator's requirement to attend and answer questions or provide written responses to questions relevant to the investigation.
- Clause 45 Investigator may administer oath or affirmation**
Creates an offence for not complying with an investigator's requirement for a person to verify on oath or affirmation the accuracy and completeness of the answers the person gives to a question put by an investigator under clause 44.
- Clause 46 Authority may require statutory declaration**
Provides for the Authority to require a person to verify the truth of an explanation, particulars, answer or statement to the Authority under Part 5, by statutory declaration.
- Clause 47 False or misleading statements**
Creates an offence for making false or misleading statements to an investigator in relation to an investigation.
- Clause 48 Immunity Agreements**
Provides for the Authority, in exchange for a person's cooperation in an investigation, to provide the person with immunity from prosecution in respect of a possible contravention of this Act or a regulatory enactment.
- Searches*
- Clause 49 Search warrants**
Provides for an investigator to enter a place and search it for documents and things relevant to an investigation. A search is limited to circumstances where the occupier consents, it is authorised by a warrant under clause 49 or 50, or an urgent search is considered necessary to prevent the loss or destruction of a document or thing.
- Clause 50 Issue of warrants**
Provides, on application, for a Judge to issue a warrant for an investigator to enter or search a place and execute the warrant with any assistance that is necessary.

Clause 51 Remote access searches

Provides for a Judge to issue a warrant that authorises a remote access search in circumstances where there is no physical address, such as an internet data storage facility.

Clause 52 Remote access search of thing authorised by warrant

Provides for a person executing a remote search warrant to use reasonable means to gain access and to copy material that can be lawfully seized.

Clause 53 Period of warrants

Limits the validity of a search warrant to a maximum of 14 days.

Clause 54 Search powers

Provides broad powers for an investigator executing a search warrant. This includes powers to enter and search places and vehicles, request assistance from any person, seize things, copy documents and material and access computers.

Clause 55 Items of uncertain status may be seized

Provides for an item of uncertain status to be seized in the execution of a search warrant.

Clause 56 Powers of persons called to assist

Specifies that a person called on to assist an investigator executing a search warrant is subject to the control of the lead investigator. It also sets out the powers available to a person called on to assist, which include entering and searching places and vehicles, seizing things, copying documents and material and accessing computers.

Clause 57 Obstruction of search

Creates an offence for obstructing or interfering with any person exercising a power under a warrant issued under clause 50.

Clause 58 Destroying or falsifying documents

Creates an offence for the intentional or reckless destruction, disposal or concealment of documents that are required to be produced under clause 43 or a warrant issued under clause 50.

Part 6 – Inquiries

Part 6 of the Bill sets out the powers of the Authority in relation to conducting inquiries into issues affecting the industries which it regulates, on its own initiative or on request by the Minister or Parliament.

Clause 59 Inquiry by Authority

Provides for the Authority to conduct, on its own initiative, an inquiry necessary or desirable for the purpose of carrying out the Authority's functions. It also requires the Authority to conduct an inquiry on request by the Minister or Parliament, subject to a terms of reference and the availability of Authority funds.

Clause 60 Notice of inquiry

Requires the Authority to publish notice of an inquiry via the internet providing information as to its purpose, timeframe, submission period, public hearings and terms of reference.

Clause 61 Conduct of inquiry

Permits the Authority to conduct an inquiry in any many it considers appropriate, including the option of holding public hearings. This clause also allows the Authority to exercise its powers under Part 5 (complaints and investigations) in conducting an inquiry that relates to a matter referred to the Authority by the Minister or by Parliament.

Clause 62 Inquiry reports

Requires the Authority to provide a copy of its inquiry report to the Minister. The clause also requires the Minister to table the report in Parliament within 10 sitting days of receipt from the Authority and to make it available to the public via the internet — within 14 days after tabling if Parliament is sitting and 28 days if it is not.

Part 7 – Enforcement

Part 7 of the Bill sets out the powers of the Authority to enforce compliance with this Act or a regulatory enactment and prosecute infringements.

Clause 63 Authority may prosecute

Provides for the Authority, or a person authorised by the Authority, to prosecute contraventions of this Act or a regulatory enactment.

Clause 64 Administrative settlement

Provides for the Authority to settle proceedings with another party on agreed terms, if the Court has not yet determined those proceedings.

*Warnings***Clause 65 Warning notice**

Provides for the Authority to issue a warning notice to a person in relation to conduct that the Authority considers would contravene a regulatory enactment. It also sets out the mandatory content of the warning notice along with a range of remediation and compensatory options to be undertaken by the contravening party. Before issuing a warning notice, the Authority is required to give notice to the person that it is proposing to issue such a notice and consider any representations.

Clause 66 Effect of warning notice

Prohibits the Authority from bringing proceedings against a person if a warning notice in relation to that contravening conduct is in effect. This clause specifies that a person is not obliged to comply with a warning notice, but provides for the Authority bring proceedings against the person in circumstances where the Authority reasonably believes that the person has continued to engage in the contravening conduct or has not satisfied any requirement of the warning notice.

*Undertakings***Clause 67 Undertakings**

Provides for the Authority to accept an undertaking from a person as an alternative to taking action for a possible contravention.

Clause 68 Consequences of accepting undertaking

If the Authority has accepted an undertaking, clause 68 prohibits it from commencing or continuing an investigation or bringing court proceedings where they relate to matters addressed by the undertaking. Clause 68 also requires the Authority to notify a person in writing if it decides to accept an undertaking, and to register the undertaking on the register of undertakings.

Clause 69 Withdrawal of acceptance of undertaking

Sets out the circumstance in which the Authority may withdraw its acceptance of an undertaking, which include a material change in circumstances, failure to comply with the undertaking or the information on which it based its decision to accept the undertaking was incomplete, false or misleading.

Clause 70 Variation, substitution, and release of undertaking

Provides for the Authority to vary, substitute or release a person from an undertaking.

Clause 71 Enforcement of undertaking

Provides for the Authority to apply to the Court for an order in circumstances where there has been a failure to comply with an undertaking. It also provides for the Court make a range of orders if it is satisfied that person has failed to comply with an undertaking.

Clause 72 Register of undertakings

Requires the Authority establish and maintain a public register of undertakings.

Clause 73 Procedural requirements

Requires the Authority establish and maintain a public register of undertakings.

Part 8 – Reviews and appeals

Part 8 of the Bill sets out provisions related to the review and appeal of decisions by the Authority.

*Judicial review***Clause 74 Judicial review**

Specifies that nothing in Part 8 limits the rights to apply for a judicial review under the *Judicature Act 1980* of a decision made by the Authority or the Review Panel.

Clause 75 Decision remains in effect

Specifies that in the event of a judicial review of an Authority or Review Panel decision, that decision remains in effect until determined otherwise and the Court may not stay the effect of that decision or grant any other interim relief.

*Review Panel***Clause 76 Application for review**

Provides for, and sets out the process for a party to a reviewable decision by the Authority to apply for a review of that decision by the Review Panel.

Clause 77 Panel of experts

Provides for the appointment of a panel of experts to be drawn from to sit as a Review Panel, by Executive Order. Clause 77 specifies the skills and expertise required to be a panel member and sets out which persons are ineligible for appointment. This includes Authority and Cook Islands Government employees.

Clause 78 Review Panel

Requires the Minister, within 14 days of receiving an application for review of a reviewable decision, appoint a Review Panel comprising 3 members of the panel of experts to consider and determine the application.

Clause 79 Decision remains in effect unless stayed

Specifies that any decision of the Authority remains effective until determined otherwise by the Review Panel, or stayed by the Panel.

Clause 80 Review period

Specifies that a Review Panel must decide an application for review within 8 weeks of receiving the application, unless extended with the consent of the applicant or if the Review Panel considers extra time is required for proper consideration. The Authority's decision is deemed to be confirmed in the event any application is not determined before the review period expires.

Clause 81 Review procedure

Sets out the procedure to be followed by a Review Panel in conducting review. This clause obliges a Review Panel, after considering an application for review, to either confirm the Authority's decision or return the matter to the Authority to remake, along with any directions the Panel considers appropriate. In the latter event, the Authority is obliged to remake its decision in accordance with any directions.

This clause also specifies that the cost of the Review Panel must be borne by the Authority if the application is successful, and by the applicant if not, as determined by the Review Panel.

Part 9 – Financial

Part 9 of the Bill sets out matters related to the receipt, management and reporting on Authority finances.

Clause 82 Funds

Specifies that Authority funds comprise Government appropriations to the Authority and fees, levies and interest received by the Authority.

Clause 83 Fees and charges

Provides for the Authority to levy fees and charges for the provision of Authority services, including making an application to the Authority or the Review Panel. The amount of any fees and charge is required to be specified in regulations made under clause 99.

- Clause 84 Levies**
Requires a supplier or prescribed class of supplier of regulated goods or services to pay to the Authority a levy determined in accordance with regulations made under clause 99. This clause specifies that a levy is not limited by reference to administrative or other costs related to the application or service to which the levy relates.
- Clause 85 Expenses**
Specifies that expenses of the Authority must be paid out of Authority funds.
- Clause 86 Investment of funds**
Provides for funds not immediately required by the Authority to be invested in a manner approved by the Financial Secretary.
- Clause 87 Exemption from tax**
Specifies that the Authority is exempt from income and value-added tax.
- Clause 88 Accounts, audit, and estimates**
Requires the Authority to keep accurate accounts and prepare annual statement of accounts.
- Clause 89 Authority to appoint auditor**
Requires the Authority to appoint an auditor to audit its statement of accounts.
- Clause 90 Financial year**
Specifies that the financial year of the Authority is the period beginning on the day on which this Act comes into operation and ending on the next 30 June, and the period of 12 months ending on 30 June in each subsequent year.

Part 10 – General and miscellaneous provisions

Part 10 of the Bill sets out several general and miscellaneous provisions such as dealing with offences, legal and professional privilege and regulations.

Offences

- Clause 91 Ancillary contraventions**
Creates an offence for a range of ancillary contraventions of this Act or a regulatory enactment.

Clause 92 States of mind, etc, of bodies corporate

Deals with states of mind of persons and body corporates engaged in conduct relevant to proceedings under this Act or a regulatory enactment.

Clause 93 References to engaging in conduct

Broadens a reference in clause 91 to engaging in conduct to include failing or refusing to engage in conduct. This clause also broadens a reference to the state of mind of a person to include knowledge, intention, opinion and beliefs.

Clause 94 General penalty for offences, pecuniary penalties, and other orders

Specifies the general penalty that would apply on conviction for an offence committed under this Act or regulations made under this Act, for which no penalty is otherwise provided. This clause also provides for the Authority to apply to the Court for a pecuniary penalty for a contravention of this Act, regulations made under this Act or a telecommunications licence condition.

Clause 95 Injunctions

Provides a broad power for the Authority to apply to the Court for an injunction in relation to contraventions of this Act, regulations made under this Act or a telecommunications licence condition.

*Miscellaneous***Clause 96 Legal professional privilege**

Specifies that this Act does not affect the law relating to legal professional privilege.

Clause 97 Authority may participate in proceedings

Provides for the Authority, with the leave or invitation of the Court, to participate in legal proceedings involving any alleged contravention of a regulatory enactment.

Clause 98 Court may give advisory opinions

Provides for the Authority to apply to the Court an order as to the interpretation, operation or effect of a provision of this Act or a regulatory enactment.

Clause 99 Evidence of documents

Specifies that an Authority determination, decision, rule, regulation, order, or other document of the Authority has effect if it is in writing and is signed by at least one member of the Authority or an employee authorised for that purpose.

*Regulations***Clause 100 Regulations**

Confers a broad power to make regulations by Order in Executive Council necessary for the full administration of this Act. The making of regulations on the advice of the Minister must be in accordance with a recommendation of the Authority.
