

ALIENATION OF CUSTOMARY LAND AMENDMENT BILL 2017

SAMOA

Explanatory Memorandum

1.0 Object and reasons:

- 1.1 This Bill provides for amendments to the Alienation of Customary Land Act 1965 (“the Act”) with the objectives of:
 - 1.1.1 Strengthening the provisions relating to leasing and licensing of customary land; and
 - 1.1.2 Facilitating the mortgaging of leases over customary land.
- 1.2 The key amendments to leases and licenses of customary land is to protect the interests of beneficial land owners and to provide them with certain rights that are often enjoyed by commercial lessors under a Lease or License Agreement.
- 1.3 The key amendments in relation to mortgages of leases over customary land is to facilitate the mortgaging process and put in place a number of legal prohibitions and requirements that will protect the ownership rights of the beneficial land owners whilst also providing for the interests of mortgagors and mortgagees.
- 1.4 Overall, the amendments aim to strengthen the legal framework to safeguard the Constitutional protection against the alienation of customary land whilst ensuring the authorised manners of alienation (i.e. lease, licence and mortgaging of leases over customary land) comply with the Constitution.
- 1.5 The outcome is to improve the people’s standard of living through promoting greater economic use of customary land via leasing, licensing and mortgaging of leases over customary land. All Samoans stand to benefit from these amendments.

Clauses:

- Clause 1:** - provides for the short title and commencement.
- Clause 2:** - This clause amends section 4 by inserting a new subsection (5) that provides a list of rights and powers for beneficial owners of customary land in relation to a lease or licence granted under section 4 of the Act.
- Clause 3:** - This clause inserts a new section 5A, after section 5, to empower beneficial owners to grant reasonable access to and use of their customary land that is subject to a licence. It requires licence to be for a term not exceeding one (1) year, the title of the customary land to which a licence is subject to has been determined by the Land and Titles Court, and that the beneficial owners must sign the licence.
- Clause 4:** - This clause amends section 6 of the Principal Act by inserting after the number 5, the words “or section 5A”.
- Clause 5:** - This clause amends:
- (a) section 8(1) by providing additional requirements for the publication of an application for a lease. That is, the application should also be published in any other newspaper or television or other forms of advertising as determined by the Chief Executive Officer. This requirement is in addition to the current requirement for the publication in the Savali. This amendment recognizes that the publication in the Savali alone is restrictive and allowing publication using a variety of media outlets will ensure a wider audience in Samoa and accessible by beneficial owners living overseas.

- (b) section 8(2) by increasing the period for publication from 3 to 6 months to allow more time for beneficial owners to lodge any objections. This will provide more time for the beneficial owners living overseas to lodge any objections.
- (c) section 8 by inserting a new subsection (2A) that empowers the Chief Executive Officer to extend the publication period if it is warranted.
- (d) section 8(3) by requiring the applicant of a lease to provide a copy of the determination by the Land and Titles Court to the Chief Executive Officer as proof of ownership of the customary land over which the lease is applied for. A further amendment to section 8(3)(b) substitutes the reference to "Savali" with "under this section" in light of the publication options provided under the amendments to section 8(1).

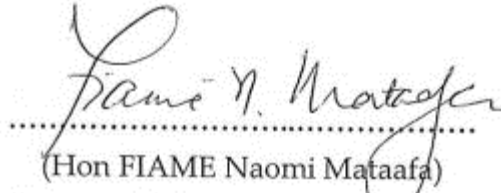
Clause 6: - This clause amends section 16 by substituting with a new section 16 that empowers either the Minister or the beneficial owners to take legal actions to recover outstanding unpaid rental payments under a lease or a licence. This new section also permits the beneficial owners to take legal action without the consent of the Minister.

- Clause 7:** - This clause inserts a new Part 3 entitled “**Provisions Applicable to Mortgages of Customary Land**” and inserts the following new sections:
- (a) Clause 19 provides for the mortgaging of leases over customary land and sub-section (1) sets out a number of protections to the interests of beneficial land owners, such as -
 - (i) A mortgage cannot be created without the prior written consent of the beneficial land owners, i.e. the consent of the beneficial land owners must be secure first and must be in writing to support a mortgage;
 - (ii) A mortgage of the lease over customary land must be registered under the Land Titles Registration Act 2008;
 - (iii) A registration under subsection (1)(b) does not in any way confer a right of ownership over the customary land.
 - (b) Clause 19(2) sets out some prohibitions that will protect the interests of beneficial land owners and ensure the lease over customary land is not mortgaged more than once. It further provides that such a second or subsequent mortgage must not be registered and is void if it has been created and registered;
 - (c) Clause 19(3) prohibits the mortgagee (bank or financial institution) from taking any action against the customary land that is being leased and mortgaged in the event of a default. This section also gives priority to rental payments over any outstanding payments in the event of a default of the mortgage. This amendment protects the interests of the beneficial land owners and ensures the rental payments are paid up first before the

mortgage or other repayments under a mortgage default;

- (d) Clause 20 prohibits the assignment of a lease unless the beneficial land owners have consented to in writing;
- (e) Clause 21 provides for regulation making powers relating to the process of mortgaging of leases over customary land. The Regulations will cover such matters as the rights of mortgagees arising from a default under a mortgage of a lease over customary land, and the processes and conditions applying to the exercise of those rights. The Regulations have been prepared for these and other matters necessary for the implementation of the mortgaging of a lease over customary land.
- (f) Clause 22 clearly states that two specific Acts do not apply to the mortgaging of leases over customary land. That is, the Land Titles Registration Act 2008, except for the process of registration and discharge of such mortgages applies; and the Property Law Act 1952 (NZ).
- (g) Clause 23 consequentially amends the Land and Titles Court Act 1981 by excluding from the jurisdiction of the Land and Titles Court any disputes relating to leases over customary land.

Clause 8: - Renumbers the current section 19 to section 24.



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(Hon FIAME Naomi Mataafa)

**DEPUTY PRIME MINISTER AND MINISTER
FOR NATURAL RESOURCES AND ENVIRONMENT**

**ALIENATION OF CUSTOMARY LAND
AMENDMENT BILL 2017**

SAMOA

Arrangement of Provisions

1. Short title and commencement
2. Section 4 amended
3. Insertion of new section 5A
4. Section 6 amended
5. Section 8 amended
6. Section 16 substituted
7. New Part 3 inserted
8. Section 19 renumbered

2017, No.

A BILL INTITULED

AN ACT to amend the Alienation of Customary Land Act 1965 (“Principal Act”).

BE IT ENACTED by the Legislative Assembly of Samoa in Parliament assembled as follows:

1. Short title and commencement:

- (1) This Act may be cited as the Alienation of Customary Land Amendment Act 2017.
- (2) This Act commences on the date of assent by the Head of State.

2. Section 4 amended:

Section 4 of the Principal Act is amended as follows:

- (a) insert after subsection (1) the following new subsection (1A):

“1A. Despite that the lease or licence is approved by the Minister as trustee for beneficial owners under subsection (1), the beneficial owners have the following rights in relation to such lease or licence granted:

- (a) the right to approve or disallow the use of the lease as security;
- (b) the right to approve or disallow the assignment of the lease or licence whether as a result of a default by mortgagor or not;
- (c) the right to receive payments in accordance with the terms of the lease or licence;
- (d) the right to approve or disallow a sub-lease;
- (e) the right to initiate and enforce a review of rents as provided for by the terms of the lease;
- (f) the right to enforce beneficial covenants under the terms of the lease or licence, including obligations of the lessee or licensee to -

- (i) provide employment, to assist in business development; or
- (ii) to provide community services or infrastructure; and
- (iii) the right to enforce environmental protection obligations applying to the lessee or licensee under the terms of the lease or licence.”; and

(b) substitute subsection (3) with the following:

“(3) The process of registration and discharge of such mortgages is set out in the Regulations made pursuant to this Act.”.

3. Insertion of new section 5A:

The Principal Act is amended by inserting after section 5 the following new section:

“5A. Access by licence:

- (1) For a license granted under section 5 on the following terms:
 - (a) the term does not exceed one (1) year;
 - (b) the customary ownership of the land has been determined by the Land and Titles Court; and
 - (c) the beneficial owners have signed the license, the beneficial land owners of that license, have the authority to grant reasonable access to and use of their customary land.”.

4. Section 6 amended:

Section 6(1) of the Principal Act is amended by inserting after the number 5, the words "or section 5A".

5. Section 8 amended:

Section 8 of the Principal Act is amended as follows:

- (a) for subsection (1) after the word "Savali" insert "or any newspaper or television and other forms of advertising determined by the Chief Executive Officer"; and
- (b) for subsection (2) -
 - (i) after the word "Savali" insert "or any newspaper or television and other forms of advertising determined by the Chief Executive Officer"; and
 - (ii) substitute "3 months" with "6 months"; and
- (c) after subsection (2) insert the following new subsection:

“(2A) The Chief Executive Officer may extend the period under subsection (2) if the Chief Executive Officer considers that further time is warranted for a particular application.”; and

- (d) in subsection (3)(a) insert after "the application is made"; the following proviso:

“**PROVIDED THAT** a copy of such determination by the Land and Titles Court is provided to the Chief Executive Officer”; and

- (e) in subsection (3)(b)(ii) substitute the word "Savali" with "under this section".

6. Section 16 substituted:

For section 16 of the Principal Act, substitute with the following:

“16. Powers to recover rents:

- (1) The right to recover rents and other sums due under a lease or licence in accordance with any law or legal process is exercisable by the Minister, acting on behalf of the beneficial customary landowners.
- (2) The beneficial customary landowners also have power to commence and undertake legal proceedings for the recovery of rents and other monies due under a lease or licence granted under this Act, even if the lease or licence has been made on their behalf by the Minister.
- (3) When taking action under subsection (2), the beneficial customary landowners (or their legal representative) have the right to commence and undertake the proceedings, and any proceedings to execute any order or judgment made in their favour, without the consent or involvement of the Minister.”.

7. Insertion of new Part 3:

The Principal Act is amended by inserting after section 18 the following new Part 3:

**“PART 3
PROVISIONS APPLICABLE TO MORTGAGES
OF LEASES OVER CUSTOMARY LAND**

19. Mortgages of leases of customary lands:

- (1) If a lease of customary land is to be mortgaged, the mortgage:
 - (a) must not be created, except with the prior written consent of the beneficial owners of the customary land; and

- (b) must be registered under the Land Titles Registration Act 2008; and
 - (c) registration under paragraph (b) does not confer a right of ownership over the customary land.
- (2) A second or subsequent mortgage on a lease of customary land:
- (a) is prohibited;
 - (b) must not be registered; and
 - (c) if created or registered, is void.
- (3) A mortgagee of a lease on customary land:
- (a) must not take an action over the mortgaged lease unless the action is permitted under this Act or Regulations made pursuant to this Act;
 - (b) must first pay any outstanding lease rental payments from any money recovered when exercising the default right under the mortgage.

20. Assignment of leases of customary land subject to mortgage:

The lessee of customary land that is subject to a mortgage, must not assign the lease except with the prior written consent of the beneficial owners of the customary land.

21. Regulations:

The Head of State may, acting on the advice of Cabinet, make regulations to give effect to this Part.

22. Acts not to apply:

None of the following Acts apply to mortgages of leases over customary land:

- (a) Land Titles Registration Act 2008 except the process of registration and discharge of such mortgages applies; and
- (b) Property Law Act 1952.

23. Consequential amendment:

Section 34 of the Land and Titles Act 1981 is amended by inserting after subsection (2) the following:

“(2A) Despite, subsection (2), any disputes relating to or arising from a lease agreement over customary land made under the Alienation of Customary Land Act 1965, must be determined by the Supreme Court.”.

8. Section 19 renumbered:

Section 19 of the Principal Act is renumbered as section 24.
