



Government of Australia's comments on the International Seabed Authority's report on the draft framework for the regulation of exploitation activities in the Area

May 2015

Introduction

Australia welcomes the opportunity to provide feedback on the Report to Members of the Authority and all stakeholders on Developing a Regulatory Framework for Mineral Exploitation in the Area.

Australia strongly supports the exploitation regulations being developed in accordance with sound commercial principles and best-practice environmental standards. Australia also welcomes the broad stakeholder consultation undertaken by the ISA in developing the draft Regulatory Framework.

We look forward to continuing to work closely with the ISA as it moves towards developing regulations for exploitation activities in the Area.

Comments on the Report

1. Environmental impact assessment (EIA), environmental impact statement (EIS) and environmental management plan (EMP)

Australia supports the early consideration of environmental issues, and would support the compulsory establishment by the Authority of an EMP as a requirement for granting contracts for exploitation in a designated area. Australia would also support the obligation for the contractor to carry out a prior EIA and an EIA.

We suggest that the regulatory framework could benefit from a specific section on EIAs, which captures the standards, processes or expectations associated with conducting an EIA. It is from the EIA that the EIS and the EMP are developed, subsequent approvals and conditions can be made and the benchmark of "acceptable impact" is investigated. As indicated by the Stakeholder Survey, there are existing standards and resources for EIAs. In our view, establishing regulations or expectations around EIAs is the most critical element of fulfilling the ISA's mandate to *give special emphasis to ensuring that the marine environment is protected from any harmful effects which may arise from mining activities including exploration and exploitation.*

We recommend that the EIA process should detail the principles, consultation processes and definitions of acceptable impact.

More generally, Australia supports an approach to environmental management which is objectives-based. That is, it should set out control measures that will be used to reduce the impacts and risks of the activity to as low as reasonably practicable, and should set out performance standards and measurement criteria applicable to the control measures. Environmental management should include plans for potential emergency conditions. Any inspection regime should not only be contingent on the passage of time, but should also include powers to inspect if breaches of or deviations from the plan of work are suspected of having occurred. Inspectors should have broad yet reasonable powers to do anything that is necessary and reasonable to complete their inspection. This includes but is not limited to the power to take samples (including documents), enter vehicle or structure, test equipment, take photographs and examine that which is deemed necessary.

2. Consideration of area for assessment

Part II of the report proposes that the principles for determining the size and location of the exploitation area could include "The proximity of exploitation area(s) to marine protected areas (including Areas of Particular Environmental Interest) and vulnerable marine ecosystems" (see p.16). We would support this inclusion, noting also that exploitation in the future could be conducted close to, and have impacts on, waters within national jurisdiction which may include marine protected areas.

In addition, we would support the proposal that the proximity of exploitation area(s) to marine protected areas should be a consideration of both the Environmental impact statement (p.12) and Environmental management plan (p.13) components of the proposed framework. As well as proximity the biological, ecological, and physical connectivity between exploitation area(s) and marine protected areas should be considered. This could help ensure that proponents consider how the activity might impact the values of neighbouring marine protected areas.

We would be grateful for clarification as to whether the EMP would also consider impacts on the sea surface. For example, the Clarion Clipperton Zone is also an important aggregation area for threatened species of sea bird for foraging.

3. Data and information management

Australia would support data, especially environmental baseline and monitoring data, being held in an open access system (at the minimum to the broader scientific community). This will assist in informing other activities and ensuring transparency. Open access would also help to minimise the potential for conflicts of interest between the proponents and regulator (both of whom will have a financial stake). Data is also a key requirement for an adaptive approach to managing exploitation.

We recommend that a data management strategy should encompass a broad range of data management issues including collection methods, storage and sharing of data. This data should underlay and be linked to the EIS, EMP and social impact assessment. Also, the sharing of information between different developers in the same general area should be enabled.

4. Effective protection of the marine environment

We note that effective protection for the marine environment from harmful effects (high level issue 9) has correctly been identified as a high level issue that should influence both the strategic approach to and operational development of a regulatory framework. This raises the complex question of what is meant by 'acceptable impact'. We note that conservation interests are very different from 'sustainable' development interests which in turn would differ from commercial interests; and acceptable impact is strongly linked to the establishment of 'social licence' to operate. This is an issue which requires careful consideration.

Agreeing the thresholds of serious harm is likely to be difficult. Whilst we support this approach in principle, we also acknowledge the difficulty of this task, particularly in the absence of robust baseline information. As such we would emphasise the importance of obtaining timely and accurate baseline data to inform decision making.

Whilst the framework generally supports the precautionary approach, we note that the text on page 18/19 (consideration by the LTC) suggests that the only way the ISA can disapprove an exploitation application is for Council to prove risk of serious harm. This is perhaps in contrast to the general approach for a precautionary approach. We propose that it would be preferable for the onus to be on a proponent to prove there is no risk of serious harm.

Specific comments by page numbers

Page 12. Environmental Impact statement

- The draft EIS template produced by the ISA is welcome, but we consider it would benefit from further development. For example, the 'commentary' for this draft regulation indicates that the EIS should be based on "sound engineering and economic principles", good mining industry practice and verified by an independent environmental consulting firm. We suggest there would be scope to include 'science-based impact assessment' and the concept of measurement of impact against a baseline. This would assist an objectives-based approach through Environment Management Plans.
- The document states that an EIS must: iii 'establish baseline of environmental conditions'. We suggest wording is broadened to 'environmental conditions and values'. In our view there would also be merit in considering any appropriate biodiversity values such as Environmentally and Biologically Significant Areas (EBSAs), Important Bird Areas, etc.
- We note that criteria for the selection of an environmental consulting firm are not detailed. Would the firm selected have to be international? Would it have to be of a certain size and provide expertise in specific technical subjects? We recommend that these and other factors should ideally be set out prior to consultant selection, to both assist choice of a firm and to allow firms to better understand their task.

Page 13. Environmental Management Plan (EMP)

- We note that offsets are mentioned. We suggest this issue needs careful consideration, including in relation to what and where offsets would apply. Would they be direct, or indirect, to offset environmental and/or social needs? Who would receive offsets? We suggest there is a need to ensure offsets are not seen as a way to proceed with environmentally unsuitable projects.

- We support the drafting of guidelines for the preparation and evaluation of an EMP by an expert, followed by consultation with stakeholders. We suggest this process might also seek to clearly define ‘independent’ in relation to the EMP being ‘verified by an independent environmental consulting firm’.
- We support further exploration of the use of Preservation Reference Zones and Impact Reference Zones.
- We note there are a number of models for EMPs, and consideration could be given to having multi-stakeholder workshops post-development of the EIS and EMP templates. This would provide the opportunity to ensure that the templates and processes decided are appropriate for the exploitation of minerals in the Area.

Page 14. Closure Plan

- We note that the document is silent with regard to whether or not the exploited area should be returned to its pre-exploitation state. We recommend consideration be given to the standard which the environmental state would need to meet post closure.
- The possible need for a bond to guarantee acceptable closure is identified. We believe this and other means of securing satisfactory decommissioning by leaseholders merit further attention, to ensure this responsibility can be adequately discharged.

Page 15. Note 20

- We note that the reference to the potential for using adaptive management to manage sequential development of plots highlights the need for collection and sharing of environmental information centrally for all proponents and regulators to use.

Page 15. Size and location of areas

- We suggest that high grading needs to be considered carefully. While reducing high grading may have long-term economic value if resources are limited, high grading may also reduce the environmental footprint of an operation.
- In relation to the section on the proximity of exploitation area(s) to marine protected areas (including APEIs) and vulnerable marine ecosystems, we would suggest that this could also include reference to EBSAs.

Page 18. Public review

- We support an open, inclusive and cost-effective decision-making process, and support further work to identify key stakeholders and review processes, including scientific bodies.
- We also note that public review can be supported through an open access data system, consistent with our comments above under “Data and Information Management”.

Page 19. Independent technical expert working group / sub-committees

- We suggest this could be formalised under the regulatory framework, in order to have prior agreement from interested parties that the review process is both independent and representative.

Page 20. Legal title to minerals

- We note that the ‘specific elements’ provide that legal title would logically pass to the titleholder on recovery, but asks whether there might be restrictions. We believe that it will be very important to have clarity on the point where legal title passes to the titleholder. For example, is it when the mineral leaves the seabed, or when the mineral leaves the sea and enters the atmosphere, or when the minerals are processed, or when the minerals are sold to a third party? A clearly articulated policy on this point

should be developed before any financial arrangements are decided. For the commercial entity, there is risk if the point of taxation or rent application is not clearly defined. For the ISA, there is a risk of quantification of mass or volume (wet versus dry, processed versus unprocessed) and the risk of transfer pricing. Consideration should also be given to whether sanctions should be placed on transfer of title should a breach occur. A range of possible sanctions could be considered.

Page 20-23. Contracting and renewal

- We note the interesting link between review of environmental costs and economic benefits and availability of high-grading. We suggest that renewal process and review should include a review of any mitigation or offsetting. Ideally offsetting should start prior to the impacts occurring so it is clear that the intervention is effectively offsetting impacts as they occur. We note that renewal, postponement or cessation would all have implications for environmental remediation and performance against environmental bonds.

Page 23. Performance requirements

- It will be important to have clarity on the point when commercial activity takes place, and we recommend that the ISA consider a plan of action to address a situation where no activity takes place. The report recognises that the US Deep Seabed Hard Minerals Act requires a cut-off point of ten-years (unless a contractor can show “just cause”). Commercial incentives for inactivity may be strong. The value of the title could increase through time, with substantial increase in title value, simply by maintaining tenure. At the same time, flexibility is required to allow commercial entities to respond to changes in market conditions. A case by case determination would be appropriate where “minor” changes are sought by an operator, however, the level at where a situation ceases being “minor” would need to be prescribed in order for the ISA to take action.

Page 24. Performance requirements

- Australia supports performance requirements including that production should take place in accordance with sound commercial principles, and that there is no subsidisation of activities or discrimination.

Page 25. Vessels operating in area

- We recommend consideration of the environmental impacts of increased risk of ship-strikes, impact of surface activities (e.g. lights) etc., in EIS, EIA and EMP. These impacts should be considered in relation to identified environmental values such as EBSAs, IBAs, PSSAs etc.

Page 25. Health and safety

- We propose that the establishment of an objective-based regulatory regime should be considered for health and safety. An objective-based approach would impose general duties on parties to the regime. Key to an objective-based regime is the unambiguous assigning to the creator of the risk (the duty holders) the responsibility for evaluating and managing the risk and reducing risk to ‘as low as reasonably practicable’. Additionally, the regulator should promote occupational health and safety.

Page 26. Termination of Sponsorship

- We suggest that the responsibilities of contractor need to include monitoring of EMP, offsets, mitigation etc, until the time that pre-agreed standards or criteria have been met.

Page 27. Protection and preservation of the marine environment

- While some prescriptive measures can be appropriate in some circumstances, our view is that objectives-based regulation can achieve better outcomes. Prescriptive regulations can become stagnant in the face of changing technologies, whereas objectives-based regulations allow for flexibility in how the regulations are adhered to over time. However, we note that for objectives-based regulations to succeed the regulator would need to have sufficient capacity, resources and expertise.

Page 28. Environmental management

- We support the intent of this section, particularly two-yearly audits, as this would contribute to an adaptive management approach as outlined on p31.

Page 29. Strategic Environmental Management Plan

- In our view, the difficulty (acknowledged in the report) in carrying this out with current knowledge reinforces the need for an adaptive management approach.
- We note this is a key point where cumulative impacts might be considered.

Page 31. Restoration and Rehabilitation

- We recommend consideration be given to the standard that the marine environment must be restored to under a general restoration obligation.

Page 31. Adaptive management

- This section further reinforces the need for information sharing.
- We recommend consideration be given to specifying EMP objectives with identified indicators that can be measured and monitored and are linked to the objectives so that the EMP can function additively.
- The development of new technology, together with a better understanding of environmental and other factors, can result in substantial improvements in exploitation efficiency. A situation could arise where prescribed conditions may obviate this. The ISA needs to have the flexibility to allow for changes to the EMP and other conditions on a case-by-case basis in consultation with the titleholder.

Page 32. Seabed Sustainability Fund

- We support further discussion of the merits of establishing a Seabed Sustainability Fund. If such a fund were to be established, contributions would need to be computed as a proportion of investment rather than removals so as to be able to support timely research. Consideration of such a fund would need to take into account the broader approach towards the establishment of funds, including the possibility of a separate Environmental Liability Trust Fund.

Page 32. Environmental Liability Trust Fund

- Consistent with our comments on the Seabed Sustainability Fund, we support further discussion of the merits of establishing such a fund, taking into account the broader approach towards trust funds.

Page 33. Confidentiality.

- We would recommend that the definition of confidential data needs to be limited/ defined clearly to avoid all data being withheld.
- It is crucial that this is not used to reduce exchange and availability of environmental information that can be used for monitoring and adaptive management.

Page 37. Annual Reports

- We note that the reporting of mineral inventories requires the development and use of standardized schemes. Jurisdictional mineral resource classification systems can be correlated on a broad basis with UNFC-2009 (United Nations Framework Classification for Fossil Energy and Mineral Reserves and Resources) with CRIRSCO (Committee for Mineral Reserves International Reporting Standards). The International Minerals Reporting Code Template provides general guidance that could be applied to deep seabed minerals. Specifics could include, sampling techniques, abundance estimation methods (for example, wet kilograms/square meter), recovery technology methods and probable recovery efficiencies, rate of recovery and duration of mining, potential monetary value and rate of return on investment. Individual contractors or commercial entities may not see a direct need to go beyond their existing processes, but we propose that the introduction of reporting through the consistent UNFC Mineral Resource Assessment Framework. This would provide a robust and consistent means of understanding and comparing the technical and economic potential of international seabed resources.

Release consent

Australia consents to the comments in this submission being made publicly available, but does not consent to the release of any personal details (email address below).

Future contact

Australia welcomes all future opportunities to engage in the development of regulations for exploitation of the Area. We will be particularly interested in the details and drafting of any Exploitation Regulations and look forward to being consulted.

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