Government of Australia's submission on the International Seabed Authority's first working draft of the Regulations and Standard Contract Terms on Exploitation for Mineral Resources in the Area

November 2016

Australia welcomes this opportunity to provide feedback on the International Seabed Authority's first working draft of the Regulations and Standard Contract Terms on Exploitation for Mineral Resources in the Area ('the draft regulations'), released in July 2016.

In our view, the Authority should aim to put in place a Mining Code which is underpinned by sound commercial principles which promote investment on a level playing field. It should incorporate the best possible environmental management frameworks, incorporating the precautionary approach and protection and preservation of the marine environment. While drawing on existing knowledge and best practice, the Mining Code must also be able to respond and adapt as activities in the Area change and as more information comes to light about ongoing activities.

Australia urges the ISA to proceed with caution, based on science, to ensure that in managing the mineral resources of the Area the marine environment is protected from any harmful effects which may arise from mining exploration and exploitation.

Australia provided views on the draft framework for the regulation of exploitation activities in the Area in May 2015, and we take this opportunity to reiterate those comments now. We encourage further iterative work on the draft regulations.

General comments on the development of the Mining Code

The LTC's approach

Australia notes the Mining Code will comprise both Exploitation Regulations and Environmental Regulations. One cannot proceed without the other. The draft regulations reflect this in cross-referencing environmental regulations. Further, the working draft refers to Seabed Mining Directorate Regulations to elaborate the administrative arrangements for the exploitation regime in the Area.

The LTC has taken a "building block" approach to developing these regulatory elements in tandem, while emphasising that "nothing is agreed until everything is agreed". Australia supports this approach and reiterates that development of the environmental regulations and directorate regulations is a prerequisite to finalisation of the Mining Code as a final integrated set of regulations. This will ensure genuine integration of environmental and operational considerations into the decision-making process.

As such, the Seabed Authority will need to devote considerable attention to developing the accompanying environmental regulations and directorate regulations in tandem with ongoing development of the draft exploitation regulations.

To promote the development of environmental regulations, Australia was pleased to host the workshop on environmental impact assessment in exploitation regulations, hosted by Griffith University in conjunction with the ISA on 23-26 May.

Australia notes that the next step in the development of the Mining Code is for the Legal and Technical Commission (LTC) to formulate a clear plan including timelines and stakeholder participation strategy. This process should also take into account any recommendations adopted by the Authority following the Article 154 review relating to the work of the Authority.

The process to finalise the Mining Code should allow for regular input and guidance from the state parties. We welcome this opportunity to provide comments, and urge the ISA to continue to provide opportunities to the states parties for regular input.

Specific comments on the draft regulations

Draft Preamble
Draft preamble: the objective of the regulations should explicitly reference protection of the marine environment. This is consistent with Article 145 of UNCLOS, which provides that measures with respect to activities in the Area shall be taken in accordance with UNCLOS to ensure effective protection of the marine environment from harmful effects which may arise from such activities.

Part II: Applications/ plan of work
UNCLOS sets out the process whereby applicants may put forward plans of work (UNCLOS Annex III article 4), for review by the LTC and approval by the Council (Art 165(2)(b), Annex III Art 4).

Draft regulation 1.5: the draft Exploitation Regulations appear to contemplate that Environmental Regulations will be in place concurrently, as a number of requirements are to be undertaken in accordance with the Environmental Regulations (see draft regulation 4.4(b), (e), (g), (h), and draft regulations 8.6, 10.3, 14.2(d), 18.2). We suggest that regulation 1.5 should state that these Regulations be read and applied together with the Environmental Regulations.

Draft regulation 2: suggest the application should contain the name, in addition to the information for determining nationality and residence, of the applicant. Also suggest the application should be in one of the languages of the ISA. Draft regulation 2 is currently consistent with (but not identical to) the Regulations o Prospecting and Exploration for sulphides and nodules. Our suggestion would more closely align these interrelated sets of regulations.

Draft Regulation 4: note that the application, in the form of the template set out in Annex I, must also be accompanied by a feasibility study, environmental and social impact statement (referring to the Environmental Regulations to be developed), a mining plan, financing plan, emergency response and contingency plan, training plan, environmental management and monitoring plan, and a closure plan. Support the inclusion of these important documents.

We note that the content requirements for these documents will be outlined in the environmental regulations, and we would welcome the opportunity to comment on the regulation 'package' as a whole once a working draft of the environmental regulations has been prepared.

Draft Regulation 4.5: can accept in principle permitting the delivery and submission of an Environmental Management and Monitoring Plan at a date later than the original application. However, clarity is required as to the timeline. We would anticipate that the requirement to prepare and submit an Environmental Management and Monitoring Plan (in accordance with draft regulation 4.4(g)) would be an express condition of the approval, and its later preparation and submission would be a prerequisite for commencement of the proposed activity.

Also suggest this can be further considered alongside the draft Environmental Regulations, so that parties can consider what information will be included in the Environmental Impact Statement (EIS) and Environmental Management and Monitoring Plan.

Note that the Commission will need documents listed in draft regulation 4.5 (such as the Closure Plan) in order to assess the financial capacity of the Applicant as required by draft regulation 8.2. Suggest considering how these draft regulations interact and whether at least drafts of these documents should be required at the time of the original application.

Draft Regulation 8: UNCLOS article 165(b) says the LTC shall review plans of work, in accordance with 153(3) and make recommendations to the Council. One possibility for providing additional guidance and certainty to both the Commission and applicants would be to include a template Program of Work form as an Annex to the Regulations. This could provide more detail of what is to be included.

Draft Regulation 8.3: recommend adding 8.3(e) "has submitted an EIA which conforms to the requirements set out in the Environmental Regulations" to ensure compliance with UNCLOS Art.206 and the *1994 Agreement*, Annex, Art1(7) and fulfilment of 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.*.

Draft Regulation 8.6: Separate to public consultation under the Environmental Regulations; suggest the Commission should also determine whether consultation with other users of marine resources has been undertaken. This is also reflected in section 5 of the standard clauses for exploitation contract.

Draft regulation 8.7: suggest that a reference to the Environmental Regulations should be included here. After 'comply with these Regulations', add 'or the Environmental Regulations'.

Part III: Exploitation contracts
Draft regulations 16 and 17: in relation to the use of an exploitation contract as security and transfer of rights, agree with Footnote 17 (page 24) which notes 'further consideration and discussion' is needed to understand the suitability of using

exploitation contracts as security, and how this relates to the transfer of rights/obligations. For example, what is envisaged in circumstances where a mortgagee is required to undertake exploitation activities upon foreclosure, and has a different nationality to the Contractor? Or where the contract transfers to a state which was not previously a sponsoring state?

We would welcome guidance from the LTC on whether these provisions are modelled on existing frameworks.

Part V: Financial terms
The ISA must provide for the "equitable sharing" of the benefits derived from the exploitation of seabed resources in the Area (UNCLOS Art.140). We note that further work on Part V is required to set out the financial terms for exploitation including annual fees, royalties, penalties and liabilities. *Discussion Paper No.4/ Enforcement and Liability Challenges for Environmental Regulation of Deep Seabed Mining* (ISA, 2016) outlines several issues for further consideration including an environmental liability trust fund, or similar.

Draft regulation 25: as noted in footnote 21, agree that further consideration needs to be given to draft regulation 25. In particular, it would be useful to clarify the legal status of an 'opinion', and how this regulation is intended to interact with: existing dispute settlement mechanisms provided for in UNCLOS; or the legal capacity of the Seabed Disputes Chamber of ITLOS to provide advisory opinions and opinions in contentious disputes. How does this interact with draft regulation 50?

Further, we suggest the Authority may give guidance from time to time on the method of calculation and liability for certain payments under Part V. Where guidance is not clear, a contractor may apply to the Secretary-General for clarification. Disputes may be settled according to draft regulation 58 and the Convention.

Part VI: Information management
Draft regulation 47: to support and enable the Secretary-General to discharge this duty, it may be necessary for the Authority to develop data confidentiality standards and systems.

Part VII: General provisions
Draft regulation 50: the process for making recommendations for the guidance of contractors is not entirely clear. Suggest clarifying the role that the Council should have in requesting and endorsing the Commission's recommendations, in accordance with UNCLOS Article 162 and 165(2).

Draft Regulation 52.2: suggest adding "*or under a Plan of Work*" after the words "by a contractor" to include all activities under Plans of Work under these regulations.

Draft Regulation 52.3: suggest adding "*or a threat of serious harm*" after the words that serious harm", to reflect the coastal state's belief in 52.2. There appears to be a need to elaborate [emergency orders] in this paragraph.

Draft Regulation 52.4: this paragraph should cross-reference the relevant Environmental Regulations, when available.

Part VIII: Inspection
We note the proposal for separate "Seabed Directorate Regulations" to establish an Inspectorate mechanism and function.

Draft Regulation 54: Many regional fisheries management organisations have observer schemes and inspection schemes, which could be drawn from for elaboration of this regulation. Noting a standing staff of inspectors might be costly, it might be helpful to set out a risk assessment process to provide guidance on how the authority would determine which activities are to be inspected. Suggest exploring whether sponsoring states might train and provide their own observers, or whether technologies might be equally effective and less costly.

The role of flag states is not explicitly addressed. It might be helpful for the regulation to spell out that flag state consent would be required for inspections of their vessels carrying out activities in the area (UNCLOS Article 110).

Suggest that reports should also be provided to the Authority, and not just the sponsoring state and flag state, to enable follow up and monitoring.

Part IX: Enforcement of Penalties
Regulation 55: suggest clarifying the particular roles of the sponsoring state and flag state in ensuring compliance by the Contractor.

Regulation 56: suggest this regulation requires clarification of the remedial works or measures that are available to the Authority. For example, could it enforce a contractual debt in a domestic court or an international court?

Part X: Settlement of Disputes
Regulation 57.3: suggest including a provision for circumstances where the disputing entities cannot mutually agree on an Appropriately Qualified Expert or panel of experts – drawing from language commonly used in dispute settlement provisions.

Part XI – Review of the Authority's Regulations
Draft Regulation 59: the draft text refers to both a formal review process and the ability to propose amendments or revisions to the regulations. Suggest restructuring so as to separate these provisions for clarity.

Draft Regulation 59.5: suggest that an expedited procedure for setting rates under the system of payments might be worthwhile to ensure that the rates remain relevant and can change as required.

Annex I-V: templates for application and related documents
Annex II: Feasibility Study: Section S: suggest including a reference to the Environmental Regulations here to avoid confusion and to elaborate how the Environmental Regulations requirements will fit with these Regulations.

Annex VII: Standard clauses for exploitation contract
Suggest there should be a reference to accepting and enabling inspections.

With respect to environmental management, monitoring and reporting (Section XX p.66), Australia supports an objectives-based regulatory regime, seeking to evaluate and manage environmental risk to 'as low as reasonably practicable and acceptable'. While some prescriptive measures can be appropriate and complementary, objectives-based regimes allow for flexibility in the face of changing technologies and practices over time. This would see the elaboration of standards of 'reasonably practical', taking into account logistical challenges; and 'acceptable', taking into account the uncertainty around features and processes in the area. We would welcome the opportunity to comment on these contract terms when drafted, and on the regulation 'package' as a whole when a working draft of the environmental regulations has been prepared.

With respect to safety, labour and health standards, Australia supports the inclusion of an objective-based general obligation, in addition to the specific obligations stated in section 16. Suggest including a general obligation for the contractor to evaluate and manage the health and safety risk to 'as low as reasonably practicable'.

As stated above, there will be a need to review the draft Mining Code in its entirety for any overlap and ambiguity, particularly as regards clarity in duties and obligations.

List of supporting documents

N/A

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).