NORTHERN TERRITORY GOVERNMENT

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Legal framework and seabed mining

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June 2017

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Executive summary

A moratorium on seabed mining activities in the coastal waters of the Northern Territory was established in 2012. The moratorium was introduced to enable the Territory Government to undertake a review of the potential impacts and methods for managing impacts associated with seabed mining.

The review of the existing legal framework identifies that while many elements of the existing framework are applicable to seabed mining, neither mining nor environmental legislation specifically accounts for seabed mining. Further, where legislation can be said to apply, in many cases additional measures and reforms will be required in order to effectively and appropriately manage the impacts associated with seabed mining activities.

Specific discussions within this document identify key areas that will require additional policy consideration and potentially regulatory reforms[1]. These can be summarised as:

- Amendments to the titling system under the *Mineral Titles Act* to tailor specific types of titles to the seabed mining process for different substance, to ensure that all relevant stakeholders are consulted during the titling process, and to limit requirements for the construction and operation of marine structures and facilities (e.g. ports) where existing facilities can be used.
- Clarification of the intended operation of the *Mining Management Act* and other legislation managing wastes and pollution (including the *Water Act* and *Waste Management and Pollution Control Act*) as both these latter Acts are only excluded where wastes are confined within mining sites – something which is impossible in the context of underwater pollution given the tidal movement of water.
- Clarification of the intended operation of the Mining Management Act and other legislation that may manage impacts in the marine environment, such as the *Fisheries Act* and *Territory Parks and Wildlife Conservation Act* to ensure that activities that may be an offence under other legislation may not be inadvertently authorised.
- Review of policy and processes associated with the management of mining activities, the majority of which have been developed in terrestrial environments (for example security calculations), to ensure that appropriate and effective controls are placed on seabed mining activities.

[1] The Territory Government is currently undertaking reforms to its environmental impact assessment and project approval system, and has identified that it will undertake reforms to the management of the environmental impacts of mining activities. While acknowledging that these reforms are likely to address some of the matters addressed in this review, little material is available about the extent and nature of these reforms at the time of writing this review.

1 Introduction

The Northern Territory Government (Territory Government) established a Moratorium on exploration and mining in coastal waters of the Northern Territory in 2012. The moratorium recognises the paucity of information available on impacts on the environment and other resource industries and methods for managing the impacts from seabed mining. The moratorium also acknowledges the need to develop a legal framework, should seabed mining be considered for the Territory, through the following:

- *The Northern Territory Government will, through appropriate Ministerial Councils, also pursue development of a nationally consistent approach to the assessment of seabed mining.*
- *The aim of the review will be to:*
  - *Identify the appropriate standards for acceptance by the Territory which will adequately address the needs of the community in respect of industry "best practice", protection of the environment, protection of social and cultural impacts, mitigation strategies and community involvement*
  - *Permit the development of regulations, guidelines, or both, for the assessment of applications (received but not assessed due to the moratorium and future applications) to ensure consistency of assessment procedures and appropriate determinations, taking into account the relevant factors.*

The Northern Territory Environmental Protection Authority (NT EPA) and the Aboriginal Areas Protection Authority (AAPA) were asked to review elements of seabed mining to inform the Territory Government's review.

This document has been prepared to support the NT EPA's review of seabed mining. It provides an overview of the existing mining and environmental legislation that is, or may be, relevant to managing seabed mining activities.

It also contains information regarding international and national legislation and regulatory approaches that should be considered as part of any improvements to the regulatory framework.

2 Key context for seabed mining legislation

2.1 Key features of seabed mining legislation

From the review of the legal framework set out in this document, a number of key features of mining legislation (and dedicated seabed mining legislation) are identifiable. The key areas are:

- ownership of minerals in situ and upon recovery (if required), royalties for minerals recovered, fees in respect of applications, licensing and administrative cost recovery
- identification of the responsible authority for administering the regime (e.g. independent body, portfolio Minister, qualified appointee) and coordination or delegation between relevant decision makers
- assessment, mapping and planning of resources and adopting standard geographical data conventions, identifying maximum and minimum areas that may be the subject of mineral titles or other interests
- the meaning of key terms and concepts (e.g. minerals, mining, exploration, extraction, recovery, licence, permit and title)
- defining and delineating land and waters (e.g. territorial sea, coastal waters, tidal waters) as regulated by different laws and relevant to seabed mining
- identification of interests and values of land and waters that require particular processes and treatment (e.g. Aboriginal land, land subject to native title rights and interests, sacred sites, sensitive ecosystems, closed seas, areas or minerals which are reserved or cannot be mined)
- environmental assessment and approaches to protection of environmental values (e.g. the principles of ecologically sustainable development)
- types of mineral titles or other interests and processes for granting, accepting, registering, dealings, duration, expiry, varying, suspending and cancelling them
- methods for incentivising industry to actively explore and develop resources
- the standard techniques for exploration and mining of the seabed, approval of operational activities and their management
- public and stakeholder participation and consultation
- securities and assurances for compliance and environmental damage and apportionment of liability to title holders, operators or others in the chain of responsibility

- measures to ensure prevention, mitigation, offset and remediation of environmental damage and rehabilitation of affected environments
- approaches to information transparency and information gathering powers (e.g. publication of approvals, inspection, search and seizure)
- enforcement measures such as fines and penalties
- rights and processes to seek review of administrative decisions (e.g. whether affected persons or members of the public may appeal, whether the appeal is heard by a tribunal or panel).

2.2 Legislative power of the Northern Territory

Currently, the Northern Territory does not have any legislation aimed specifically at managing seabed mining rights and activities within its jurisdiction. Consequently, if undertaken, seabed mining would be managed in the same way as mining activities conducted on land.

Jurisdiction and regulation of areas and activities along and beyond the coastline is a complex matter affected by the intersection of international, constitutional, maritime, Aboriginal land rights and native title, minerals and petroleum and environmental laws. The likely location of seabed mining projects (e.g. whether they involve activities on land, in the intertidal zone or in subtidal coastal waters) and the Northern Territory's policy position on the key areas set out above will be relevant to evaluating the current regime and settling any dedicated regulatory regime for seabed mining. Relevantly in this regard:

- A 'baseline' for the Australian territorial sea is proclaimed under the *Seas and Submerged Lands Act 1973* (Cth) that generally follows the low water mark (normal baseline), but sometimes follows straight lines across bays or gulfs or around islands (straight baseline).
- The Australian territorial sea encompasses the waters from the baseline out to twelve nautical miles.[2]
- The 'geographical area constituting the Territory' or 'limits of the Territory' is generally accepted to end at the low water mark.[3] The 'original limit'[4] is the historical boundary of the Territory which extended to the low water mark but also included bays, gulfs and islands.

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[2] See section 13(2)(c) of the *Offshore Minerals Act 1994* (Cth).

[3] *New South Wales v Commonwealth* (1975) 135 CLR 337.

[4] This limit is particularly relevant to determining what is an 'onshore place' and an 'offshore place' under the *Native Title Act 1993* (Cth) (see section 3.2.4 below). The 'limit' of the Territory, sometimes also called the 'constitutional limit', is the limit set out in the Letters
Patent of Queen Victoria dated 6 July 1863 which was defined in the *Northern Territory Acceptance Act 1910* (Cth) (the 'original limit'), as:

> "The Northern Territory means that part of Australia which lies to the northward of the twenty-sixth parallel of South Latitude and between the one hundred and twenty-ninth and one hundred and thirty-eighth degrees of East Longitude, together with the bays and gulfs therein, and all and every the islands adjacent to any part of the mainland within such limits as aforesaid, with their rights, members, and appurtenances."

- The 'adjacent area in respect of the Territory'[5] is in broad terms, the area from the coastline of the Territory at the mean lower water mark to the outer limits of the continental shelf where there is one or otherwise out to 200 nautical miles.

- The expression 'coastal waters of the Territory' is defined in section 3 of the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth). While quite complex to identify in practice, in very broad terms this encompasses:

  - the waters from the baseline out to three nautical miles; and

  - the waters which are landward of the baseline but are not within the limits of the Territory (for example, where the baseline encloses an area of the sea that is beyond the low water mark).

- The baseline and other relevant defining lines or points may change by various means, such as natural tidal processes, proclamation or international agreements.

In the national context, arrangements in relation to responsibility for the Australian territorial sea were agreed between the Commonwealth and state and territory governments in 1979 (known as the Offshore Constitutional Settlement[6]).

In outlining the extent the Settlement relates to the exploring for, and exploiting minerals in the seabed, section 3(1) of the *Offshore Minerals Act 1994* (Cth) (OM Act) provides the following summary (noting a reference to a 'State' includes the Northern Territory):

> *(1) The Commonwealth and the States have agreed that:*
>
> *(a) Commonwealth offshore mining legislation should be limited to the area that is outside State coastal waters; and*
>
> *(b) the States should share, in the manner provided by this Act, in the administration of the Commonwealth offshore mining legislation; and*
>
> *(c) State offshore mining legislation should apply to State coastal waters beyond the baseline for the territorial sea (that is, the first 3 nautical miles of the territorial sea); and*

The original limit has not been identified with precision due to the limit being defined, at least in part, by principles of law that tie the limit to physical features which can change over time. However, it ended at the low water mark and included the bays, gulfs and islands, including ports and harbours. The original limit is less extensive than the baseline although the baseline does follow the low water mark in many places. The baseline can be much more extensive than the original limit as straight lines are drawn connecting offshore islands.

[5] The adjacent area in respect of the Territory was identified in the repealed *Petroleum Submerged Lands Act 1967* (Cth) and that definition is now reflected in the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) and the *Off-shore Waters (Application of Territory Laws) Act*.

[6] For useful background to the Offshore Constitutional Settlement, see Australian Government Attorney-Generals' Department, *Offshore constitutional settlement A milestone in co-operative federalism* (1980) and section 3(2) of the *Offshore Minerals Act 1994* (Cth).

> (d) *the Commonwealth and the States should try to maintain, as far as practicable, common principles, rules and practices in regulating and controlling offshore mining beyond the baseline of Australia's territorial sea.*
>
> *Note: So far as the agreement relates to petroleum, it is reflected in Commonwealth legislation by the Offshore Petroleum and Greenhouse Gas Storage Act 2006.*

The agreement to maintain commonality in principles, rules and practices with the Commonwealth and States suggests some level of consistency must be achieved with the Commonwealth regime. New South Wales, Queensland, South Australia and Western Australia have subsequently legislated specifically for mining of minerals offshore.

Scope for conferral of regulatory powers to the Commonwealth has been identified in relation to offshore petroleum exploration and production.[7] It is possible this approach could also be contemplated for offshore mineral resources.

In considering the existing and possible future legislation in relation to seabed mining, the general limits of the application of Territory laws and the legislative power of the Territory must also be borne in mind. Relevantly in this regard:

- The Territory's legislative power is limited by the *Northern Territory (Self Government) Act 1978* (Cth).
- Section 5 of the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) provides as follows:

  > *The legislative powers of the Legislative Assembly of the Territory conferred by section 6 of the Northern Territory (Self-Government) Act 1978 extend to the making of:*
  >
  > *(a) all such laws of the Territory as could be made by virtue of those powers if the coastal waters of the Territory, as extending from time to time, were within the limits of the Territory, including laws applying in or in relation to the* seabed *and subsoil beneath, and the airspace above, the coastal waters of the Territory;*
  >
  > *(b) laws of the Territory having effect in or in relation to waters within the adjacent area in respect of the Territory but beyond the outer limits of the coastal waters of the Territory, including laws applying in or in relation to the* seabed *and subsoil beneath, and the airspace above, the first-mentioned waters, being laws with respect to:*
  >
  > *(i) subterranean mining from land within the limits of the Territory; or*
  >
  > *(ii) ports, harbours and other shipping facilities, including installations, and dredging and other works, relating thereto, and other coastal works; and*

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[7] Australian Government Productivity Commission, *Mineral and Energy Resource Exploration Productivity Commission Inquiry Report No. 65*, (2013) 225.

(c) laws of the Territory with respect to fisheries in Australian waters beyond the outer limits of the coastal waters of the Territory, being laws applying to or in relation to those fisheries only to the extent to which those fisheries are, under an arrangement to which the Commonwealth and the Territory are parties, to be managed in accordance with the laws of the Territory.

- The *Off-shore Waters (Application of Territory Laws) Act* confirms that laws of the Territory apply[8] to areas consistent with the provisions of section 5 of the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) set out above.
- The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALR Act) extends power[9] to make laws in relation to sacred sites, Aboriginal land, land access arrangements, conservation of wildlife, and entry to and activities in waters adjacent to Aboriginal land.
- A Territory law may not be repugnant to a Commonwealth law on the same topic.[10]

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[8] Subject to some exceptions in relation to inconsistent Commonwealth laws, criminal laws, taxation laws and judicial powers. See section 3(3) of the *Off-shore Waters (Application of Territory Laws) Act* (NT) and the provisions of the OM Act discussed in section 5.2.1 of this report.

[9] See section 73 of the ALR Act.

[10] This principle is one of statutory interpretation, which was confirmed in the case of *Northern Territory v GPAO* (1999) 196 CLR 553 at 583 per Gleeson CJ and Gummow J. The Commonwealth has legislative power in respect of the territories under s122 of the Constitution of Australia. The Commonwealth has not legislated in a generally applicable way how an inconsistency between a Commonwealth law and Territory law will be resolved. Where there is such an inconsistency, it will be necessary to carry out the statutory interpretation process to resolve the issue. Whilst this must necessarily be a case by case exercise, in the event of repugnancy with a Commonwealth law which covers the field on a topic, the Commonwealth law will likely prevail.

3 Primary current legislation for seabed mining

There are numerous pieces of legislation contributing to the environmental assessment and operational management of mining activities, and granting of mineral titles in the Northern Territory. Those comprising the primary current framework for managing seabed mining are discussed in this section 3, other acts which may be relevant are discussed in section 4, and acts that provide broader context to seabed mining are discussed in section 5.

3.1 Ownership of minerals

As a general proposition, all minerals located in the Territory and its coastal waters, except those that are 'prescribed substances' under the *Atomic Energy Act 1953* (Cth),[11] belong to the Northern Territory.[12]

Also generally speaking, when minerals are recovered from land, the holder of the relevant mineral title takes ownership of the minerals, and is obliged to pay a royalty to government.[13]

3.2 Regulation of mineral titles and consents

The regulation of mining of minerals within the Territory primarily occurs under the *Mineral Titles Act* (MT Act) (which replaced the *Mining Act* and the *Mining Management Act* (MM Act).

3.2.1 Mineral Titles Act

The MT Act establishes the framework for granting and regulating mineral titles that confer rights to conduct exploration for, and extraction and processing of, minerals and extractive minerals.[14]

The MT Act applies to 'all land of the Territory' which includes 'water on the land' and 'coastal waters of the Territory as defined in section 3(1) of the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth)'.[15] It is expressed to have effect subject to other laws of the Territory and Commonwealth that affect rights, powers, obligations and functions given or imposed under the MT Act.[16]

A system for dividing the land of the Territory into 'blocks' is provided for.[17]

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[11] Prescribed substances are uranium, thorium and elements having an atomic number greater than 92 and any derivatives or compounds of these substances (section 5 of the *Atomic Energy Act 1953* (Cth)).
[12] See section 3 of the *Minerals (Acquisition) Act* (NT) and section 69 of the *Northern Territory (Self Government) Act 1978* (Cth).
[13] This is a common law principle: see the discussion of key cases in Michael Crommelin, 'The Legal Character of Resources Titles' (1998) 17(1) Australian Mining and Petroleum Law Journal 57, 63. The MT Act is consistent with the common law position, in that a mineral lease for example, grants rights to enter land and to recover minerals from land. Section 96 of the MT Act and the *Mineral Royalty Act* (NT) then impose requirements for payment of a royalty.
[14] See section 3(a) of the MT Act.
[15] Section 5 of the MT Act
[16] Section 4 of the MT Act. An example would be Commonwealth native title laws.
[17] Section 16 of the MT Act.

The MT Act also provides a system for reserving land from exploration or extraction of minerals and extractive minerals.[18] A reservation over an area can prevent or limit applications for mineral titles or prevent or limit certain activities in relation to certain minerals. Reservations may be made over land subject to a mineral title to take effect when the mineral title ceases to be in force. Reasons must be given in relation to reservations and any revocation thereof,[19] but may be made for any reason. For example, areas might be reserved due to social, cultural or environmental reasons.

The MT Act governs the granting of rights to explore or mine particular land, in the form of titles and other consents. There are a number of types of mineral titles and consents that can be obtained under the MT Act. Each has a different term and gives the holder the right to conduct certain activities on certain land, and in some cases to conduct ancillary activities.

Title or consent (section of the MT Act)	Authorised activities/rights[20]
Mineral exploration licence (EL) (26 and 31)	• the right to occupy the title area specified in the EL • the exclusive right to conduct exploration for minerals in the title area and in connection with exploration for minerals, including the following: – digging pits, trenches and holes, and sinking bores and tunnels, in the title area – activities for ascertaining the quality, quantity or extent of ore or other material in the title area by drilling or other methods – the extraction and removal of samples of ore and other substances from the title area in amounts reasonably necessary, and greater amounts if approved • the exclusive right to apply for a mineral lease for all or part of the title area.
Mineral exploration licence in retention (ELR) (34(3))	• the right to occupy the title area specified in the ELR • the exclusive right to continue conducting the authorised activities for an EL, in particular to carry out the studies and tests necessary to assess the development potential of ore bodies or anomalous zones in the title area for the evaluation of the commercial viability of mining and processing minerals in the area • the exclusive right to apply for a mineral lease for all or part of the title area.

[18] See Part 6 of the MT Act.
[19] See section 112(3)(c) and (5)(b)(ii) for example.
[20] See sections 11(3), 17(3) and (4), 84 and 135 of the MT Act.

Title or consent (section of the MT Act)	Authorised activities/rights[20]
Mineral lease (ML) (40 and 44)	• the right to occupy the title area specified in the ML; and • the exclusive right to: – conduct mining for minerals in the title area and the right to conduct other activities as follows: ▪ exploration for minerals in the title area ▪ the evaluation, processing or refining of minerals in the title area ▪ the treatment of tailings and other material in the title area ▪ the storage of waste and other material in the title area ▪ the removal of minerals from the title area ▪ other activities, as specified in the ML, in connection with the above ▪ mining extractive minerals in the title area ▪ other activities, as specified in the ML, in connection with the above; or – conduct tourist fossicking including using mechanical equipment in association with the fossicking; or – conduct activities in the title area that are ancillary to mining conducted under another ML granted to the title holder (for example, operating a treatment plant).
Extractive mineral exploration licence (EMEL) (46 and 48)	• the right to occupy the title area specified in the EMEL • the exclusive right to conduct exploration for extractive minerals in the title area and other activities as follows: – activities in connection with exploration for extractive minerals that are reasonably necessary for the exploration – other related activities as specified in the EMEL. • the exclusive right to apply for an extractive mineral permit or extractive mineral lease for all or part of the title area.
Extractive mineral permit (EMP) (50 and 53)	• the right to occupy the title area specified in the EMP • the exclusive right in the title area to extract, from the natural surface of the land only, extractive minerals and to conduct the following activities in connection with the extraction of extractive minerals from the natural surface of the land in the title area: – the temporary storage and temporary processing of the extractive minerals in the title area – the removal of the extractive minerals from the title area – other related activities as specified in the EMP • the exclusive right to apply for an extractive mineral lease for all or part of the title area
Extractive mineral lease (EML) (54 and 57)	• the right to occupy the title area specified in the EML • the exclusive right to conduct mining for extractive minerals in the title area and in connection with the mining of extractive minerals in the title area: – the processing of extractive minerals in the title area – the removal of extractive minerals from the title area – storage of waste and other material in the title area – other related activities as specified in the EML.
Mineral authority (MA) – which corresponds to	• the same rights as a holder of the corresponding title, including the right to conduct the authorised activities under

Title or consent (section of the MT Act)	Authorised activities/rights[20]
one of the mineral titles listed above (118 to 120)	the MA that may be conducted under the corresponding title; noting however • the Minister or a regulation may exclude provisions of the MT Act from applying to a MA.
Fossicking - Consent required from the landowner of certain classes of land (135)	• Detail provided in s135 of the MT Act.
Preliminary exploration - Consent required from the landowner of certain classes of land (Part 2)	• using only the following tools or equipment: – hand-held and non-mechanical tools, excluding metal detectors; – global positioning systems; – other tools or equipment prescribed by regulation, • preliminary exploration of land to assess its exploration potential may include any of the following activities: – examination of geological characteristics – with the Minister's approval – an airborne geoscientific survey – removal of small samples of minerals or extractive minerals for analysis – marking boundaries for a proposed application for a mineral title.
Access authority – where a person holds a mineral title (84)	• the right to enter land outside the title area (the relevant land) to construct, maintain and use infrastructure associated with conducting authorised activities under the mineral title if the title holder also holds an access authority for the relevant land.

The MT Act operates in conjunction with the MM Act (discussed further below) which provides for authorisation and management of the operational aspects of mining activities, including the extraction and processing of minerals, to ensure the protection of the environment.[21] However, it is noted that the principles of ecologically sustainable development is not incorporated into decision making under the MT Act.

In most cases, the rights and authorised activities under a mineral title or consent cannot lawfully be exercised unless the operator (which will be the title holder unless another operator has been appointed[22]) has obtained an Authorisation to carry out the relevant 'mining activities' on the 'mining site' under the MM Act.

It is noted preliminary exploration and fossicking can be conducted without a mineral title, subject to relevant controls.[23] A right to access land outside a

[21] See section 4(2) of the MT Act.
[22] See section 10 of the MM Act.
[23] See Part 2 and Part 8 of the MT Act.

mineral title area for construction, maintenance and use of infrastructure can be granted by the Minister.[24]

In applying for a mineral title, an applicant must submit a technical work program which includes a summary of the work and expenditure proposed, and the technical and financial resources available to the applicant.[25]

In granting a title, the Minister may generally include any conditions on the title instrument as considered appropriate.[26]

At any time the Minister may require a title holder or access authority holder to provide security to compensate relevant parties for damage to land and associated losses[27], or compensation under the *Native Title Act 1993* (Cth).[28]

Generally speaking:

- The MT Act differentiates[29] between 'extractive minerals' including soil, sand, gravel, rock and peat (and other substances prescribed by regulation) and 'minerals' such as coal, salt, and naturally occurring substances that can be obtained by mining inorganic elements or compounds or organic carbonate compounds.
- Titles for extractive minerals are designed to provide for three stages or activities: exploration; extraction from the surface of the land; and mining.
- Titles for minerals are designed to provide for three stages: exploration; feasibility assessment or retention until mining is commercially viable; and mining.
- The features of mineral titles under the Act (e.g. the material to be mined, staging, term, renewal provisions, size and conditions as to work programs and expenditure) directly respond to the industry requirements for mining of extractive minerals and minerals. Their design has sought to encourage active exploration and mining, while allowing for commercial factors.[30]

The seabed mining context likely involves technical and practical considerations that may not be appropriately reflected in the MT Act. For example, an extractive mineral permit allows extraction only from the natural surface of the land, but the natural surface of the sea floor may be subject to significant change due to tidal movements, and thus require special provision

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[24] See section 84 of the MT Act.
[25] See section 13 and for example, section 27(2)(b) in relation to an application for a mineral exploration licence (EL).
[26] Section 85(3) of the MT Act.
[27] Sections 106(1)(a), 107 and 108 of the MT Act.
[28] Section 106(1)(b) of the MT Act.
[29] See sections 8 to 10 of the MT Act for the definitions of mineral and extractive mineral.
[30] For example, an exploration licence in retention is only available if a mineral deposit with potential has been found but is not currently commercially viable (see section 33(2) of the MT Act). However, if the Minister is satisfied mining and processing is viable, the Minister may cancel the exploration licence in retention unless satisfactory reasons are given why a mineral lease is not being pursued (section 39 of the MT Act).

or limitation. To avoid uncertainty it may be appropriate to tailor specific types of titles to the seabed mining process for different substances.

Despite its application to land and waters, the MT Act also contains certain assumptions specific to land based mining. For example:

- Certain stakeholders are identified based on their occupation or ownership of land being explored and mined. Because of the different nature of ownership of and interest in the seas, identification of stakeholders for seabed mining may need to be focussed on other matters, for example persons owning land within a particular radius or persons affected by or interested in particular water pollution or seabed mining in general.

- Authorised activities include storage of waste on a title area. However, a stockpile of waste rock or dam of tailings on land is quite different from the disposal of waste into waters or onto the seabed, which may require specific provision.

- Mineral title holders have a right to access mineral title areas by the shortest practicable route from a council road or Territory road, a railway line, airstrip, the sea or a waterway, and to construct roads on other land for access.[31] It may be appropriate to limit this right where vessels for seabed mining could easily launch from existing facilities.

Application of the MT Act as currently drafted to seabed mining may therefore result in uncertainties or unintended authorisation of inappropriate activities.

Other matters of relevance in the MT Act include the following:

- There are provisions dealing with the variation, subdivision, amalgamation, cancellation and surrender of mineral titles.[32]

- Contravening conditions, carrying out activities without a mineral title, interference with authorised activities and giving misleading information among other things can lead to an offence under the MT Act.[33]

- The MT Act establishes a register of mineral titles where various information is recorded, and may be made available to the public.[34] Caveats may be lodged against a title[35] and a transfer of a title must be registered in order to have legal effect.[36]

- Certain information regarding titles and authorised activities can be made public, such as summary and statistical information from title holder reports[37] and geological samples.[38]

[31] See section 83 of the MT Act.
[32] See Part 5, Division 5 of the MT Act.
[33] See Part 9, Division 2 of the MT Act.
[34] Section 121 of the MT Act.
[35] Part 7, Division 2 of the MT Act.
[36] Section 123 of the MT Act.
[37] Regulation 125 of the *Mineral Titles Regulations*.
[38] Regulation 127 of the *Mineral Titles Regulations*.

3.2.2 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALR Act), traditional Aboriginal owners have proprietary rights in Aboriginal land which affect granting of interests in and activities on that land. There is a significant proportion of the coastline of the Territory which is Aboriginal land or under claim to become Aboriginal land.[39]

Grants of Aboriginal land abutting coastal and tidal waters are made down to the low water mark. This means that the grants include the intertidal zone between the mean high water and mean low water marks (i.e. where the tide comes and goes).

Exploration for minerals on Aboriginal land can be prevented by traditional Aboriginal owners pursuant to a veto power (unless the Governor-General declares the national interest requires the licence to be granted).[40] Part IV of the ALR Act sets out particular processes for the grant of an 'exploration licence' 'exploration retention licence' or 'mining interest' (as defined[41]) on Aboriginal land. These processes generally involve negotiation between the applicant and the relevant Land Council, consultation by the Land Council with traditional Aboriginal owners, agreement of terms and conditions, and determination where an agreed position cannot be reached.

When seeking an exploration licence or mining interest, a proponent may only commence negotiations with the Land Council with the consent of the Territory Minister responsible for administration of laws relating to mining for minerals.[42]

An interest or right granted in relation to the mining or development of 'extractive mineral deposits'[43] is not generally considered to be a mining interest,[44] but will be an estate or interest in land under section 19(11) of the ALR Act. This means that certain processes and consents are required in order to grant such an interest.[45]

Accordingly, where seabed mining involves Aboriginal land, the requirements of ALR Act will apply. This may be the case where a seabed mining operation involves activities above the low water mark, for example if a base of operations is established above the low water mark.

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[39] The Northern Land Council provides an illustrative explanation: "The coastline of the Northern Territory mainland is 5,100km long and offshore islands contribute a further 2,100km of coastline. Around 84% or 6,050km of this coastline is owned by Aboriginal Traditional Owner groups." Northern Land Council, *Sea Country Rights in the Northern Territory,* Northern Land Council <http://www.nlc.org.au/articles/info/sea-rights-in-the-northern-territory/>. There is also approximately another 8% of Northern Territory mainland coastline comprising the intertidal zone subject to claim under ALR Act.

[40] The Land Council can withhold consent under section 40 of the ALR Act.

[41] See section 3(1) of the ALR Act for these definitions. These definitions do not necessarily equate with the MT Act definitions and title types

[42] The requirement in section 41(1) of ALR Act is reflected in Part 5 of the MT Act, e.g. section 62(1)(b).

[43] See section 3(1) of the ALR Act for the definitions of 'extractive mineral' and 'extractive mineral deposits'.

[44] See section 3(2)(ba) of the ALR Act.

[45] See section 19 of the ALR Act, in particular subsections (4A), (5), (6) and (7).

To the extent a Territory law is capable of operating concurrently with the ALR Act, ALR Act does not affect the Territory law, but if it cannot operate concurrently the Territory law will be overridden.[46] This means that for clarity, any Territory legislative action in relation to seabed mining should be carefully drafted to avoid conflict with the ALR Act.

3.2.3 Aboriginal Land Act

The Territory has enacted legislation utilising the extended legislative powers provided by section 73 of the ALR Act, in particular for regulating or authorising entry of persons on Aboriginal land.

Relevantly to seabed mining, the *Aboriginal Land Act* (AL Act) makes provision for access to Aboriginal land and adjoining seas. The AL Act provides for the right of Aboriginals to enter and use the land and waters in accordance with Aboriginal tradition.

An access and permit system is established for entry onto Aboriginal land, meaning in most cases a permit must be obtained from the Land Council to enter the land.[47]

The AL Act also provides for control of entry to seas adjoining Aboriginal land. The Administrator may close the seas adjoining and within 2 kilometres of Aboriginal land to certain persons or purposes. If closed, in most cases a permit must be obtained from the Land Council to access or use the area.[48]

Entering or remaining on land or closed seas without a permit results in an offence.[49]

A permit holder obtains no right to exclude Aboriginals from entering the relevant land or from entering and using the resources of the relevant waters in accordance with Aboriginal tradition.[50]

The limitations in section 73 of the ALR Act must also be borne in mind in the event of legislative change.

3.2.4 Native Title Act 1993 (Cth)

The main objects of the *Native Title Act 1993* (Cth) (Native Title Act) include to provide for the recognition and protection of native title and to establish ways in which future acts affecting native title may proceed and to set standards for those dealings.[51]

Certain procedural rights must be afforded to native title holders or claimants before any action that might affect native title is taken, including legislative action or granting of a right to mine minerals. The procedures may involve notification, objections, negotiation and formal determination by a tribunal, or

[46] See section 74 of the ALR Act which indicates Commonwealth Parliament's intention as to the interaction of the ALR Act with a Territory law. See footnote 9 above in relation to repugnancy generally.
[47] See Part II of the AL Act.
[48] See Part III of the AL Act.
[49] See sections 4 and 14 of the AL Act.
[50] See sections 4(2) and (3) and 14(2) of the AL Act.
[51] See section 3(a) and (b) of the Native Title Act.

entering an 'Indigenous Land Use Agreement' with the relevant parties from a native title perspective.

The Native Title Act applies to the whole of Australia and external territories, the coastal sea of Australia and each external territory, and any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973* (Cth).[52] Native title rights and interests could exist in any of these areas, and where operations span the low water mark it is very likely both regimes will apply to an operation. It is highly likely that the Native Title Act will apply to the waters even if the project is not adjacent to Aboriginal land.

Particular processes apply to proposals affecting an 'offshore place', being a place that is not an 'onshore place'. An 'onshore place' means 'land' or 'waters' within the limits of a State or Territory to which the Native Title Act extends.[53] Section 253 of the Native Title Act provides as follows:

> ***land*** *includes the airspace over, or subsoil under, land, but does not include waters.*
>
> *Note 1: Because of the definition of waters, not only rivers and lakes etc., but also such things as the bed or subsoil under, and airspace over, rivers and lakes etc. will not be included in land.*
>
> *Note 2: Because of the definition of waters, the area between high water and low water will not be included in land.*
>
> ***waters*** *includes:*
>
> *(a) sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters; or*
>
> *(b) the bed or subsoil under, or airspace over, any waters (including waters mentioned in paragraph (a)); or*
>
> *(c) the shore, or subsoil under or airspace over the shore, between high water and low water.*

Acts affecting Aboriginal land are not subject to processes under the Native Title Act[54] (noting that Aboriginal land generally extends only to the low water mark).

Accordingly, where seabed mining or its regulation might affect native title rights and interests, the requirements of the Native Title Act will apply. This may be the case for example, where native title is found to exist over a relevant area of the seabed.

To the extent a Territory law is capable of operating concurrently with the Native Title Act, the Native Title Act does not affect the Territory law, but if it

[52] See section 6 of the Native Title Act.
[53] See the definitions in section 253 of the Native Title Act and footnote 3 above regarding the 'limits of the Territory'.
[54] An act that affects Aboriginal land, or causes land or waters to be held as Aboriginal land, is not a 'future act': see section 233(3) of the Native Title Act.

cannot operate concurrently the Territory law may be overridden.[55] This means that for clarity, any Territory legislative action in relation to seabed mining should be carefully drafted to avoid conflict with the Native Title Act.

3.2.5 The titling process

When an application for a mineral title is received, the relevant Minister under the MT Act must consider if certain preliminary criteria[56] are met, and if they have, publish details of the application and seek public comment on the application[57]. Objections and submissions received are put to the applicant who may respond, and that response is put to the objector or submitter.[58]

Carrying out of processes for compliance with ALR Act and the Native Title Act among others[59] are then provided for before the decision process proceeds.

After these processes, once the Minister has considered objections, submissions and details of the application, the decision may be made whether to grant the title, grant the title for part of the proposed title area, refuse to grant the title or refer the decision to the Northern Territory Civil and Administrative Tribunal for a hearing. The applicant and any objectors may be heard, and the Minister will make a decision after considering the Tribunal's recommendation (but is not obliged to follow it).[60]

A number of reviewable decisions, including a refusal of a mineral title application, may be the subject of an application by a person for review by the Northern Territory Civil and Administrative Tribunal. After any review, having regard to the Tribunal's recommendation and reasons, the Minister may reverse or confirm the relevant decision.[61]

3.3 Environmental assessment

3.3.1 Environmental Assessment Act

The *Environmental Assessment Act* (EA Act), and its supporting *Environmental Assessment Administrative Procedures* (EAAP), establish a framework to assess the potential impacts of a proposed action that may have a significant effect on the environment.[62]

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[55] See section 8 of the Native Title Act, which indicates Commonwealth Parliament's intention as to the interaction of the ALR Act with a Territory law. See footnote 9 above in relation to repugnancy generally.
[56] Under section 70 of the MT Act, the 'necessary criteria' as defined in section 58 must be considered as a prerequisite to public notification.
[57] Section 71 of the MT Act.
[58] Section 72(2) of the MT Act.
[59] For example, see section 73 of the MT Act.
[60] Section 78(3) and (4) of the MT Act.
[61] See section 162 of the MT Act and regulation 114 to 116 and Schedule 2 of the Mineral Titles Regulations.
[62] See section 4 of the EA Act.

Such proposed actions are referred to the NT EPA for consideration under the EA Act. The relevant 'responsible Minister' is obliged to refer a proposed action, or the NT EPA may call on a proponent to refer the proposed action.[63]

After consulting with advisory bodies and the responsible Minister, the NT EPA determines whether environmental assessment is required under the EA Act, determines the level of assessment (public environment report (PER) or environmental impact statement (EIS)) [64] and develops draft Terms of Reference (TOR) through a process of public notice and receiving submissions.[65]

Once prepared by the proponent, the draft PER or EIS is exhibited for public comment unless the NT EPA's permission to withhold parts thereof is obtained.[66] The proponent must address any comments received during the public comment period and may be requested by the NT EPA to provide further information.[67]

The NT EPA will examine the final PER or EIS and prepare an 'assessment report' which outlines, and makes recommendations about, the proposed action. The examination process can involve obtaining further information from the proponent or others such as experts and obtaining comments from the Minister. Upon finalisation of an assessment report for an EIS, public notice and inspection of the assessment report will occur.[68]

The assessment report is intended to assist relevant decision makers to make informed decisions about the proposed action and any conditions that may need to be applied to relevant consents and approvals. For this reason the responsible Minister is required to notify the NT EPA, provide reasons if their decisions are contrary to an assessment report and table the relevant notice in the Legislative Assembly.[69] If the Minister for the EA Act makes a comment in relation to an assessment report which is contrary to an assessment report, that Minister must also notify the NT EPA, provide reasons for the comments and table the relevant notice reasons in the Legislative Assembly.[70]

A proposed action may also be a 'controlled action' that requires an approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). These actions may be assessed separately by the relevant Australian Government Department, or by the NT EPA in accordance with the Bilateral agreement between the Northern Territory and Commonwealth[71] (Bilateral Agreement). Generally bilateral agreement assessments will be

[63] See section 6(1) and 7 of the EAAP.
[64] Section 8(1), (2) and (3) of the EAAP.
[65] Section 8(4) to (6) of the EAAP.
[66] Section 9 and 10 of the EAAP.
[67] See section 10A of the EAAP.
[68] See sections 7(2)(g), (ga) and (gb) of the EA Act and sections 11 and 14 of the EAAP.
[69] See section 8A of the EA Act.
[70] See section 8B of the EA Act.
[71] Australian Government Department of the Environment and Energy, *Bilateral agreement made under section 45 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) relating to environmental assessment* (11 December 2014) Australian Government Department of the Environment and Energy <https://www.environment.gov.au/system/files/pages/4aaf2c7e-3043-4b50-b0f9-9d7647ae51ca/files/nt-bliateral-agreement-assessment-2014.pdf>.

limited to actions that have effects wholly within the Territory and its coastal waters.[72] In that case, the NT EPA oversees the environmental assessment on behalf of both the Northern Territory and Commonwealth at the same time. After the NT EPA delivers its assessment report, the relevant Commonwealth Minister refers to that report in making decisions whether to approve a controlled action.[73]

3.3.2 Environment Protection and Biodiversity Conservation Act 1999 (Cth)

The EPBC Act provides for the protection and management of nationally and internationally important flora, fauna, ecological communities and heritage places. These are identified in the EPBC Act and known as matters of national environmental significance (NES). There are nine matters of NES specified in the EPBC Act and these are:[74]

- nationally threatened species and ecological communities
- Australia's World heritage properties
- national heritage places
- Ramsar wetlands of international importance
- migratory species listed under the EPBC Act (species protected under international agreements)
- Commonwealth marine areas
- nuclear actions, including uranium mining
- the Great Barrier Reef Marine Park
- water resources in relation to coal seam gas and large coal mining developments.

Proponents must refer any proposal that has a potential for a significant impact on a matter of NES to the relevant Australian Government Department (currently the Department of the Environment and Energy; Commonwealth, DOEE) for consideration under the EPBC Act.[75] The Territory may also refer a proposal it is aware of.[76] If the proposal will or is likely to have a significant impact on the relevant matter of NES, environmental assessment at one of the levels specified,[77] and an approval under Chapter 2, Part 9, will be required.

As noted above, the Northern Territory and Commonwealth have entered into an Assessment Bilateral Agreement in accordance with section 45 of the EPBC Act. That Agreement allows the Northern Territory to undertake environmental assessments on behalf of the Australian Government under the

[72] See clauses 4.1, 4.2 and 6.1(a) of the Bilateral Agreement.
[73] See section 3.3.2 below.
[74] See Chapter 2, Part 3, Division 1 of the EPBC Act.
[75] See section 68 of the EPBC Act.
[76] Section 69 of the EPBC Act.
[77] See Chapter 4, Part 6 and 7 of the EPBC Act.

EA Act process. Proponents must still individually refer their proposals to the Commonwealth DOEE for a determination as to whether assessment is required, and, after any assessment, obtain approval from the Commonwealth DOEE to conduct the activity[78].

Given the biodiversity of the Northern Territory, it is likely that the EPBC Act would apply to a seabed mining proposal.

3.4 Managing mining operations

3.4.1 Mining Management Act

The MM Act applies to "all mining sites and mining activities in the Territory" excluding fossicking, certain temporary borrow of fill for infrastructure purposes, and activities of the port operator[79] of the Port of Darwin.[80]

Land is defined as 'land within the jurisdictional limits of the Territory and includes waters within those limits'.[81] The expression 'land' is used in determining the scope of key concepts in the MM Act including 'environment', 'minerals' and 'mining site'.[82] It is clear that a mining site could be comprised of areas of the sea and seabed.

The MM Act is principally intended to provide for authorisation and management of 'mining activities', provision of benefits to affected communities, a security and levy for rehabilitation of mining sites, and the protection of the environment.[83]

The object of environmental protection is repeated throughout the MM Act. For example it provides that in exercising a power or performing a function under the MM Act the Minister and CEO must have regard to the desirability of protecting the environment and the outcomes of any assessment under the EA Act.[84] However, it is noted that the principles of ecologically sustainable development are not incorporated into decision making under the MM Act.

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[78] On 19 December 2013, the Commonwealth Minister for the Environment gave notice of his intention to develop a draft bilateral agreement with the Northern Territory relating to environmental approvals. Consistent with section 46 of the EPBC Act, finalisation of that agreement will depend on the Northern Territory having a 'bilaterally accredited management arrangement' in respect of controlled actions. If entered, the Commonwealth Minister would likely declare that certain classes of actions do not require an approval under Part 9 of the EPBC Act if assessed according to the accredited arrangement. There are currently no proposals for the Commonwealth Minister to continue to pursue entry into approval bilateral agreements with relevant jurisdictions.

[79] As defined in section 3 of the *Ports Management Act*.

[80] Section 5 of the MM Act.

[81] The jurisdictional limits could arguably extend to all those areas contemplated by section 5 of the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) set out in section of this report, which for example allows some laws to have …*effect in or in relation to waters within the adjacent area in respect of the Territory but beyond the outer limits of the coastal waters*... The MM Act operates in conjunction with the MT Act which in turn applies to coastal waters of the Territory, which might indicate the MM Act also applies to the coastal waters. Given the lack of a definition there seems to be some uncertainty in this regard. If this becomes an issue in practice, specific legal advice may be required to determine what areas are within the jurisdictional limits of the Territory for the purposes of the MM Act.

[82] See section 4 of the MM Act.

[83] For example, see section 3 of the MM Act.

[84] See section 82 of the MM Act

The MM Act prohibits an operator from carrying out mining activities on a mining site without an Authorisation.[85] The exception is that in relation to exploration for minerals, an Authorisation is required only if the exploration will involve substantial disturbance of the mining site.[86] An Authorisation must be consistent with an associated mining interest.[87]

An Authorisation is complemented by a mining management plan that also must be approved,[88] regularly reviewed,[89] and complied with by the operator.[90] The mining management plan is intended to detail the relevant mining interests, mining activities, organisation structure for operations, management systems, plans, closure plans and other details.[91]

The operator must pay a security in the form, and on the terms, specified in the Authorisation[92] and a levy to the mining remediation fund (established to rehabilitate environmental damage caused by unsecured mining activities).[93]

The security is calculated by reference to the level of disturbance likely to be caused by the mining activities to be carried out under the Authorisation, [94] and the purpose is to ensure the operator's compliance with the MM Act,[95] and enable the Minister to prevent, minimise or rectify environmental damage and remediate the mining site where the operator fails to do so.[96] There is provision for regulations to be made detailing any minimum amount, procedures for calculation, or criteria for calculation of a security.[97] No such regulations have been made to date.

The title holder is not liable for the security, and has only limited responsibilities to ensure the operator's compliance with the MM Act.[98]

Conditions appropriate for the relevant mining activities and the period of an Authorisation may be determined by the Minister.[99] The power to impose conditions is not expressed in a limiting manner, but relevantly section 37(3) of the MM Act lists a number of matters that can be the subject of a condition in an Authorisation, including:

1. the protection of the environment
2. the outcomes of an environmental assessment of mining activities undertaken under the *Environmental Assessment Act*

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[85] See sections 33, 35(1) and (4) and 39 of the MM Act.
[86] Section 35(2) and (3) of the MM Act.
[87] Section 34(1) and (2) of the MM Act.
[88] Section 36(2), (4) and (5) of the MM Act.
[89] Section 41 of the MM Act.
[90] Section 37(2)(a) of the MM Act.
[91] See sections 36, 40 and 41 of the MM Act.
[92] Section 37(2)(b)(i) of the MM Act.
[93] See section 37(2)(b)(ii) and Part 4A of the MM Act.
[94] Section 43A(1) of the MM Act.
[95] Section 43(2)(a) of the MM Act.
[96] Section 43(2)(b) and (c) of the MM Act.
[97] Section 43A(2) of the MM Act
[98] See section 10 of the MM Act.
[99] Section 37(1) of the MM Act.

3. the provision of social and economic benefits to communities outside the mining site that will be directly affected by the mining activities to be carried out on the site.

Authorisations can be varied or revoked on the application of the operator or the initiative of the Minister, if the management system is considered appropriate for the mining activities and is expected to operate effectively in protecting the environment.[100]

Although the MM Act does not provide for the Authorisation or mining management plan to be made publicly available, section 37(3)(d) to (f) of the MM Act provides that, as a condition of the Authorisation, operators may be required to make an environmental mining report or other reports publicly available. Publication of approval documents may be an avenue to increase transparency.

Powers to require information[101] and monitor and investigate compliance[102] are provided in the MM Act.

The MM Act can likely regulate seabed mining without excessive uncertainty. For example, an Authorisation and mining management plan can be tailored to the particular mining activities and their effects on the underwater environment.

On the other hand, an example of some uncertainty can be found in the interplay between the MM Act and the *Water Act* (Water Act), which refers to waste and polluted water being confined within a mining site[103] (and is discussed further below). Such confinement is impossible in the context of underwater pollution (caused by dredging for example) due to the tidal movement of water. So, the intended operation of the relevant provisions should be clarified for the seabed mining context.

Given the scarcity of seabed mining in the Territory, policies, data and experience dealing with mining in the marine environment are lacking. For example, the Department of Primary Industry and Resources advises that its MM Act security calculation tool uses assumptions based on land rehabilitation strategies such as whether a pit will be backfilled and the associated costs. A methodology for identifying risks and costs in relation to seabed mining will need to be developed.[104]

This means data and training on seabed mining issues will be required, and government's implementation of the MM Act[105] would likely require significant

[100] Section 38(1) to (3) of the MM Act.
[101] See section 45 and sections 61 and 62 of the MM Act.
[102] See sections 61 and 62 of the MM Act.
[103] See section 7(2) of the Water Act.
[104] This could involve making regulations under section 43A(2) to detail relevant matters for calculation of a security.
[105] In this regard it is noted that the Territory Government's environmental regulatory reform commitments include incorporating the environmental regulation of mining activities into proposed new environment protection legislation and away from the MM Act. At the time of preparing this document no further information on these proposals and the extent to which it may influence provisions to manage seabed mining activities is available.

review if effective regulation of seabed mining activities is to be achieved. As discussed below, other jurisdictions have seen fit to specifically provide a framework for offshore mining.

In relation to implementation, it should be noted that an Authorisation under the MM Act in conjunction with a mineral title or other consent under the MT Act may approve wide-ranging aspects of an exploration and mining project. If conduct is authorised that would be an offence under another Territory law (for example, polluting water under the Water Act may be effectively authorised as a result of systems for water storage and release), then prosecution of the offence under that law would likely be unsuccessful.[106] However, to the extent no other approval for such conduct has been obtained, the other law would be capable of enforcement. Thus Authorisations (and conditions of mineral titles where relevant) need to be carefully drafted to ensure conduct that should be regulated under another Territory law is not inadvertently authorised.

[106] This is due to the effect of either sections 23-24 of the *Criminal Code Act* or section 43BE of the *Criminal Code Act* (the latter if Part IIAA of that Act applies to the offence).

4 Legislation that may apply to seabed mining

Seabed mining activities may be affected by other Northern Territory legislation, for example if legislation applies to a specific area or activity.

4.1.1 Water Act

Generally speaking, the Water Act provides for the investigation, allocation, use, control, protection, management and administration of water resources.[107] The Minister and the Controller of Water Resources (Controller) have responsibilities under the Act, and each of them can delegate to any person.[108]

Water Act applies to tidal water

The Water Act applies in respect of pollution and water quality standards[109] to 'tidal water' which is defined as follows:[110]

> ***tidal water*** *means:*
>
> *(a) water within the geographical area constituting the Territory that is directly affected by the tide;*
>
> *(b) water within the geographical area constituting the Territory seaward of water referred to in paragraph (a) that is not coastal waters of the Territory within the meaning of the Coastal Waters (Northern Territory Powers) Act 1980 of the Commonwealth; and*
>
> *(c) coastal waters of the Territory within the meaning of the Coastal Waters (Northern Territory Powers) Act 1980 of the Commonwealth, declared under section 5(6) to be tidal waters.*

This means there are some areas of the coastal waters of the Territory that are not automatically tidal waters and consequently the Water Act does not apply to those waters.

Water Act contains offences and prevents actions

Section 16 of the Water Act provides that unless authorised to do so by or under this or any other law in force in the Territory and in accordance with that authorisation, it is an offence to wilfully cause, either directly or indirectly:

(a) waste to come into contact with water; or

(b) water to be polluted.[111]

However, if the pollution is in the course of a mining and petroleum activity, where the waste or polluted water is confined within the mining site or

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[107] Long title of the Water Act.
[108] Section 19 of the Water Act.
[109] See sections 16(1) and 72 of the Water Act respectively.
[110] See sections 4 and 5(6) of the Water Act.
[111] See section 16(2F) of the Water Act for the basic example this offence. It is noted that environmental offences in accordance with the *Environmental Offences (Penalties and Enforcement) Act* of varying degrees are also provided in section 16 depending on an environmental harm that is caused.

petroleum site on which the activity is being carried out, section 7(2) of the Water Act provides that section 16 does not apply. This is ostensibly because measures under the MM Act can regulate water within a mining site.

Section 73 of the Water Act gives the Administrator power to make a declaration of a beneficial use, quality standard, criterion or objective for or in relation to any waste, water or class thereof.[112] It then automatically becomes a condition of any licence, permit or consent under the Water Act that a person must not contravene the declared matter.[113] A person that was polluting water or allowing waste to come into contact with water before a relevant declaration has 3 months (unless a longer period is approved) to cease the relevant activity or apply for a WDL.[114]

Waste discharge licences protect from offences and prevented actions

A waste discharge licence (WDL) may be issued by the Controller under the Water Act.[115] WDLs can authorise a person *to carry out an action that would otherwise be an offence against this Act whether by virtue of section 73 or because the action is not and cannot be (but for this section) authorised by or under this Act.*[116] Holding a WDL therefore protects a licence holder from being prosecuted for an offence against section 16 or 73 of the Water Act.

If a person tries to exercise a right under another law to restrict, prevent or to obtain damages in relation to a licence holder polluting water, the licence holder may be able to resist if the pollution was authorised by a WDL.[117]

Discussion

Government likely needs to develop a policy position as to what if any aspects of seabed mining should be subject to the Water Act. In this regard:

- For the purposes of sections 16 and 7(2) of the Water Act there are obvious practical difficulties identifying whether wastes and pollutants disposed of in the marine environment are ‘confined’ to a mining site due to the tidal movement of water.
- For the purposes of section 73 of the Water Act, there may be a need to consider different water quality beneficial uses, quality standards, criteria or objectives to deal with tidal water or the coastal waters of the Territory generally, and ensure these matters are reflected appropriately under the MM Act, for example in an Authorisation, if there is no applicable WDL giving effect to the relevant conditions.
- The effects in terms of pollution of water and water quality will be significantly different for exploration and mining in the marine environment than the effects on land. This calls into question whether the Water Act provides appropriately for seabed mining, even though it

[112] Section 73(1) of the Water Act.
[113] Section 73(2) of the Water Act.
[114] Section 73(3) and (4) of the Water Act.
[115] Section 74(1) of the Water Act.
[116] Section 74(1) of the Water Act.
[117] Section 17 of the Water Act.

ostensibly applies to tidal waters. For example, it may not be intended that an operator requires a WDL for allowing sediment affected water released during dredging the seabed to travel beyond the mining site, where the act of dredging itself and associated environmental impacts can be addressed under the MM Act.

4.1.2 Fisheries Act

The *Fisheries Act* is intended to regulate the aquatic resources of the Territory in accordance with the principles of ecologically sustainable development.[118]

Of likely relevance to seabed mining, the *Fisheries Act* establishes offences for (amongst other things):

- Intentionally causing or permitting a shock, sound, or other vibration, whether by percussion, the use of an explosive, or otherwise, where an effect of the shock, sound, or vibration is, or may be, that fish or aquatic life is stunned, injured, killed or detrimentally affected'.119
- Intentionally introducing (including casting, placing, discharging, or allowing 'to fall, flow, or percolate or be carried by wind, tide, or current) a dangerous substance (being poisonous, toxic, narcotic, noxious, or other substance (where 'substance' includes heavy metal or solid debris)) into waters of the Territory recklessly where the result is, or may be, that fish or aquatic life are stunned, injured, killed, or detrimentally affected, or the habitats, food, or spawning grounds of fish or aquatic life are detrimentally affected'.120

A person may apply to the Director of Fisheries (Director Fisheries) for a permit to authorise the person to carry out activities that would otherwise be an offence, such as the above.[121] Activities that may require a permit in relation to seabed mining include:

- dredging and spoil (tailings) disposal
- dispersal of chemicals
- operations that may require the discharge of explosives.

The Director Fisheries may grant a permit if satisfied of the following:[122]

- the sustainability of the fisheries would not be jeopardised by the grant
- any requirements or matters prescribed by regulation as being relevant to an application for the type of licence or permit to which the application relates have been satisfied[123]

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[118] See long title and section 2A of the Fisheries Act.
[119] Section 11(4) of the Fisheries Act.
[120] Section 11(6) of the Fisheries Act.
[121] Section 11(1) of the Fisheries Act.
[122] Section 13(2) of the Fisheries Act.
[123] There does not appear to be any regulations in this respect.

- it is otherwise appropriate to do so, taking into consideration any Ministerial guidelines[124] and any other matters the Director Fisheries considers relevant.

Within the above categories, any other approvals or environmental assessments relating to a particular proposal, and the principles of ecologically sustainable development may well be considered relevant by the Director Fisheries.

The Director Fisheries has powers to impose conditions on a permit about various matters, but the conditions on all permittees must be substantially the same throughout the relevant fishery or species unless there are specified grounds on which the Director considers different conditions to be reasonable. From time to time, the conditions may be varied or revoked and new conditions may be imposed.[125]

The Director Fisheries is able to delegate their powers to any person.[126]

It is possible that without appropriate coordination, opportunities to effectively manage the effects of seabed mining on aquatic life in relevant approvals may be missed. There is scope to clarify the requirements as to coordination between decision makers under the Fisheries Act and those responsible for the primary regulation of seabed mining. For example, guidelines or regulations could be made under the Fisheries Act or MM Act to clarify coordination processes, conditions relating to ecologically sustainable development of fisheries could be required to be imposed in a primary approval such as an Authorisation under the MM Act rather than in a separate permit from the Director Fisheries, or delegation of certain powers could be considered.

4.1.3 Territory Parks and Wildlife Conservation Act

The *Territory Parks and Wildlife Conservation Act* (TPWC Act) establishes parks and reserves over land and provides for the study, protection, conservation and sustainable use of wildlife.

'Land' as defined in the TPWC Act includes *the sea above any part of the sea bed of the Territory*.[127] A reference to the seabed includes a reference to the surface of any coral formation, and a reference to the subsoil includes a reference to the coral beneath the surface of any such formation.[128] Declarations of parks and reserves also relate to the following unless the declaration notice expressly excludes them:[129]

- the subsoil beneath any land within the area
- the bed of any stream, lake, inlet or other water within the area

[124] There does not appear to be any guidelines in this respect, but they may be made under section 20D of the Fisheries Act.
[125] See section 14 of the Fisheries Act.
[126] Section 6(2) of the Fisheries Act.
[127] See the definition in section 9(1) of the TPWC Act.
[128] Section 9(2) of the TPWC Act.
[129] Section 12(6) of the TPWC Act.

- the subsoil beneath any such bed.

Generally speaking, prohibitions on works in parks and reserves do not apply to the exploration for, or recovery or processing of, minerals under and in accordance with the conditions of a mining interest or the carrying out of an activity permitted, or the exercising of a right or power in relation to the mining interest, and plans of management of parks and reserves do not need to address works relating to mining interests.[130]

Grant of new mining interests

The Minister for the TPWC Act may declare land, with the agreement of the Minister for the MT Act, to be a park or reserve for the purposes of section 73 of the MT Act.[131] If such a declaration is in place, this means that the Minister for the MT Act must take into account the opinion of the Minister for the TPWC Act in granting certain mineral titles for the land and must impose on those titles the conditions the Minister for the TPWC Act specifies.[132]

The TPWC Act makes provision for ‘joint management parks and reserves’ for which a Territory nominee and the traditional Aboriginal owners of the area are ‘joint management partners’.[133]

If a mining interest is proposed to be granted in a joint management park, the joint management partners must be given the opportunity to provide an opinion and specify conditions that should be imposed on the mining interest. The Minister that grants a mining interest must impose the specified conditions where the Minister has the power to do so and considers the conditions are appropriate for the protection of the environment.[134]

Activities requiring a permit

There are various restrictions on activities within parks and reserves and affecting relevant wildlife. [135] The most relevant example is, under section 66 of the TPWC Act it is an offence to take or interfere with protected wildlife unless authorised under the TPWC Act.

To ‘take’ protected wildlife means: [136]

- in relation to animals: to hunt, catch, restrain, kill an animal and includes attempts to perform any of those actions

[130] See sections 17 and 18 of the TPWC Act.
[131] Section 9(4) and (5) of the TPWC Act.
[132] Section 73 of the MT Act.
[133] Section 22(1) of the TPWC Act.
[134] Section 25AM of the TPWC Act.
[135] ‘Wildlife’ includes animals and plants indigenous to the Australian coastal sea or seabed and subsoil beneath that sea and migratory animals that periodically or occasionally visit Australia or the Australian coastal sea (section 9(1) of the TPWC Act). The seabed includes the surface of coral formations while subsoil includes the coral beneath the surface of such formations (section 9(2) of the TPWC Act).
[136] Section 9(1) of the TPWC Act

- in relation to plants: to sever, remove, damage or destroy the plant or assist to perform any of those actions.

To ‘interfere with’ protected wildlife includes harming, disturbing, altering the behaviour or otherwise affecting the capacity of an animal or plant to perform its natural processes and includes damaging or destroying the habitat of an animal or plant.[137]

The Director of Parks and Wildlife (Director Parks) may issue a permit to carry out relevant activities, including to take or interfere with protected wildlife.[138]

In assessing an application for a permit, the Director Parks must consider a range of matters specified in section 56 of the TWPC Act. These include:[139]

- the classification of the wildlife to which the permit application relates (which would include whether the wildlife was threatened)
- any principles of management and management programs specified for the wildlife
- the likely effect, and in particular any detrimental impact, on the continued survival of wildlife, habitats, vegetation and ecosystems and on the landscape and environment generally’
- the welfare of the animal or animals to which the permit relates
- the protection of the safety and welfare of the public
- any prescribed matters.

A permit cannot authorise an activity that is inconsistent with the objectives of a management program established under the TPWC Act or (unless the Minister gives written approval) taking or interfering with threatened wildlife.[140]

Under section 7 of the *Parks and Wildlife Commission Act*, the Director Parks may delegate powers and functions under the TPWC Act.

Discussion

Currently the Limmen Bight Marine Park and Garig Gunak Barlu National Park[141] cover areas of the coastal waters of the Territory. In relation to Garig Gunak Barlu, the *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act* is discussed below.

Given the likelihood environmental impact assessment would occur where mining activities were proposed in a park or reserve, and the subordination of parks and reserves to mining interests in certain ways, appropriate provision for wildlife should be made in the mining interest under the MT Act and any Authorisation and mining management plan under the MM Act. Coordination

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[137] Section 9(1) of the TPWC Act
[138] Section 55(1) of the TPWC Act.
[139] Section 56(1) of the TPWC Act
[140] Section 56 (2) of the TPWC Act
[141] Previously known as Gurig National Park and Cobourg Marine Park.

between the Ministers for the TPWC Act and MT Act is already provided for in both Acts. Whilst certain protection of the environment would require an operator or mining interest holder to implement appropriate measures in relation to wildlife, to require them to obtain a permit under the TPWC Act where the issues are already dealt with under mining interests and approvals, may be a duplication of 'red tape'.

4.1.4 Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act

The *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act* (Cobourg Park Act) was enacted to vest certain land at the Cobourg Peninsula in a Cobourg Peninsula Sanctuary Land Trust and to establish that land, and adjacent marine areas, as a national park. The sanctuary (comprising areas above the low water mark) and marine park (comprising an area below the low water mark surrounding the peninsula)[142] are now collectively known as Garig Gunak Barlu National Park.

Under section 33 of the Cobourg Park Act, in the sanctuary, mining is not allowed and 'mining interests' (which, as defined in section 3, could include a mineral title or consent under the MT Act or Authorisation under the MM Act) cannot be granted without the approval of the Board established under the Cobourg Park Act. Section 34 provides for fees or amounts to be agreed by the Board and the applicant for the right to carry out operations for exploration, recovery or processing of minerals.

The marine park is declared as a park under the TPWC Act. Further, under section 34A of the Cobourg Park Act, the Board may provide advice to the Minister for the Cobourg Parks Act about exploration and mining activities in the marine park and related matters. The Minister is obliged to provide this advice to the Minister for the MT Act who is obliged to consider it.

4.1.5 Heritage Act

The *Heritage Act* is intended to provide for the conservation of the cultural and natural heritage of the Northern Territory.[143]

Places that may be protected may comprise land (including land that is at any time covered by 'Territory waters' and 'Territory waters'),[144] buildings and other items on or historically associated with the place, (e.g. furniture, equipment and fittings).[145] A place could include maritime heritage such as shipwrecks and submerged plane wrecks.[146]

The *Heritage Act* automatically protects all Aboriginal and Macassan archaeological places and objects.[147]. Other places and objects, and classes

[142] See Figure 2, Cobourg Peninsula Sanctuary and Marine Park Board and Parks and Wildlife Service of the Northern Territory, Department of Natural Resources, Environment, The Arts and Sport, *Cobourg Marine Park Plan of Management* (2011), 33.
[143] Section 3(1) of the *Heritage Act*.
[144] See the definition of land in section 4 of the *Heritage Act*. Territory waters is not defined.
[145] See sections 5 and 6 of the *Heritage Act*.
[146] See section 5 of the *Heritage Act*, including example 9.
[147] See Chapter 2, Part 2.1 of the *Heritage Act*.

thereof, can become protected through declarations made under the Act,[148] or by agreement with the owner (which includes a person that holds particular kinds of mineral titles under the MT Act).[149]

There is a process for obtaining approval of work or other actions that may affect a relevant place or object,[150] exempting particular work,[151] and stop work[152] or repair orders[153] may be issued in certain circumstances.

Offences are established for damaging and removing heritage places and objects among other things.[154] Powers are given to enter and search places (including vessels) generally or if an offence under the Act has been committed. Seizure of things and other powers such as requiring information from a person are also provided for.

Shipwrecks or related places may be protected under the *Heritage Act*. The Australian National Shipwreck Database records the location of all shipwrecks in Australian waters, as well as sunken aircraft and other maritime heritage. The database lists approximately 400 different shipwrecks, aircraft and other maritime heritage objects in Northern Territory waters. In many cases the exact location of the object is not known.

The richness of the Northern Territory's maritime history, in conjunction with the relatively limited knowledge as to the location of many World War II shipwrecks and submerged plane wrecks, makes it likely that most seabed mining activities will be required to undertake appropriate detailed archaeological surveys as part of relevant assessment and approval processes.

4.1.6 Northern Territory Aboriginal Sacred Sites Act

The *Northern Territory Aboriginal Sacred Sites Act* (NTASS Act) establishes a system for the protection and registration of sacred sites, establishing a procedure for the avoidance of sacred sites in the development and use of land, and providing for entry onto sacred sites subject to conditions.[155]

The NTASS Act defines a 'sacred site' as a 'site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition'.[156] Sacred sites may be large or small; obvious or unremarkable. In coastal and sea areas, they may include features that lie above and below the water.

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[148] See Chapter 2, Part 2.2 of the *Heritage Act* in relation to places and objects and Part 2.3 in relation to classes of places and objects of heritage significance.
[149] See the definition of 'resources interest' in section 4 and Chapter 3, Part 3.1 of the *Heritage Act* regarding heritage agreements.
[150] See Chapter 3, Part 3.2 of the *Heritage Act*.
[151] See Chapter 3, Part 3.3 of the *Heritage Act*.
[152] See Chapter 3, Part 3.4 of the *Heritage Act*.
[153] See Chapter 3, Part 3.5 of the *Heritage Act*.
[154] See Chapter 5, Part 5.5 and 5.6 of the *Heritage Act*.
[155] See the long title of the NTASS Act.
[156] See section 3 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and section 3 of the *Northern Territory Aboriginal Sacred Sites Act*.

The NTASS Act protects sacred sites by creating offences if a person works on, uses, enters or remains on, or desecrates a sacred site.[157] Proponents intending to undertake work on land or use of land in the Territory (which includes land covered by water (including such land in the Territorial sea) and the water covering land[158]) can seek an Authority Certificate from the Aboriginal Areas Protection Authority (AAPA). The Certificate sets out the areas where the work or use may occur and conditions for the work or use that occur with the custodians' wishes or that have been agreed between the applicant and custodians.[159] If aggrieved by a decision of the AAPA or delay in considering an application for an Authority Certificate, there is a review process which may result in the Minister issuing a similar certificate (Minister's Certificate).[160]

If a person can prove they carried out work on or used a sacred site with, and in accordance with the conditions of, an Authority Certificate or a Minister's Certificate permitting the person to do so, that will be a defence to prosecution for carrying out work on or using a sacred site.[161]

If a person can prove they had no reasonable grounds for suspecting that the sacred site was a sacred site that will, subject to the following in relation to Aboriginal land, be a defence to prosecution where the person has worked on, used, entered or remained on, or desecrated a sacred site.[162] If the relevant sacred site is on Aboriginal land, the defence will not be available unless the person also proves they were lawfully present on the land and had taken reasonable steps to ascertain the details of sacred sites in the areas likely to be visited by the person.[163]

The Act establishes an Authority comprised of 12 members, including 10 custodians of sacred sites.[164] Most powers and functions under the NTASS Act are conferred on the Authority, which may delegate to the Chairperson, Chief Executive Officer or an employee of the Authority.[165]

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[157] Sections 33, 34 and 35 of the NTASS Act.
[158] See the definition of land in section 3 of the NTASS Act.
[159] Section 22 of the NTASS Act.
[160] Part III, Division 3 of the NTASS Act.
[161] Section 34(2) of the NTASS Act.
[162] Section 36(1) of the NTASS Act.
[163] Section 36(2) of the NTASS Act.
[164] See section 6 of the NTASS Act.
[165] Section 19 of the NTASS Act.

5 Legislation that provides broader context

This section provides an overview of legislation with broader relevance to seabed mining (e.g. the maritime aspects) or that provides context or alternative regulatory approaches for consideration.

5.1 National and international commitments

5.1.1 United Nations Convention on the Law of the Sea

The *United Nations Convention on the Law of the Sea*[166] (UNCLOS 1982) establishes a general obligation and legal framework for the management of marine resources and their conservation for future generations and is given effect through various Commonwealth acts and regulations.[167] It covers such matters as territorial seas, the continental shelf, rights of passage, marine pollution and navigation of ships.

UNCLOS 1982 also establishes the International Seabed Authority (ISA) which is responsible for the organisation and control or activities in the international seabed area.[168] The ISA develops and administers rules to regulate prospecting, exploration and exploitation of minerals in international waters.[169]

UNCLOS 1982 includes requirements for coastal states to adopt laws to manage seabed activities within their jurisdictions.[170] At a minimum, these laws must be as effective as the international rules, standards, recommended practices and procedures developed and administered by the ISA.[171]

In pursuance of article 145 of the UNCLOS 1982, the ISA has developed rules require operators undertaking seabed mining activities in international waters, both exploration and exploitation, to take necessary measures to:[172]

- prevent, reduce and control pollution and other hazards to the marine environment, applying a precautionary approach and best environmental practices
- gather environmental baseline data against which to assess the likely effects of their activities on the marine environment
- establish and implement programs for monitoring and evaluating the impacts of seabed mining on the marine environment

[166] *United Nations Convention on the Law of the Sea,* opened for signature 10 December 1982 33 UNTS 98 (entered into force 16 November 1994).
[167] See for example the *Seas and Submerged Lands Act 1973* (Cth) and the *Sea Installations Act 1987* (Cth). For a full list refer to the Australian Treaties Database available at http://www.dfat.gov.au/international-relations/treaties/Pages/treaties.aspx
[168] Article 157 of the UNCLOS 1982.
[169] Annex III of the UNCLOS 1982.
[170] See Part XII of the UNCLOS 1982.
[171] Article 208.3 of the UNCLOS 1982.
[172] For example (noting other regulations deal with polymetallic nodules and ferromanganese crusts), see regulation 33 and 34 of International Seabed Authority, *Regulations on prospecting and exploration for polymetallic sulphides in the Area* (7 May 2010) International Seabed Authority Assembly <https://www.isa.org.jm/sites/default/files/files/documents/isba-16a-12rev1_0.pdf>.

- include proposals, as may be appropriate, for "impact reference zones" (areas which are to be used for assessing the effect of activities on the marine environment that are representative of the environmental characteristics of the area being impacted)
- include proposals, as may be appropriate, for "preservation reference zones" (areas in which no mining shall occur to ensure representative and stable biota of the seabed in order to assess any changes in marine biodiversity)

Further information on UNCLOS 1982, the ISA's rules and industry codes of practice applicable to seabed mining activities is available in the Seabed Mining Interim Report.

5.1.2 Intergovernmental Agreement on the Environment

In May 1992 the Commonwealth, States and Territories entered into the Intergovernmental Agreement on the Environment (the IGAE). The IGAE is designed to provide a mechanism for a cooperative national approach to the protection and management of the environment among other things.[173]

In a separate but related initiative, in December 1992 the Council of Australian Governments (COAG) endorsed the *National Strategy for Ecologically Sustainable Development* (the ESD Strategy) which sets out the broad strategic and policy framework under which Commonwealth, State and Territory governments have agreed to make decisions and take actions to try to ensure that Australia's future development is ecologically sustainable.

The ESD Strategy has three core objectives:

1. to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations
2. to provide for equity within and between generations
3. to protect biological diversity and maintain essential ecological processes and life-support systems

The seven guiding principles of the strategy are:

1. decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations
2. where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation ('the precautionary principle')
3. the global dimension of environmental impacts of actions and policies should be recognised and considered

[173] See the preamble to the IGAE.

4. the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised
5. the need to maintain and enhance international competitiveness in an environmentally sound manner should be recognised
6. cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms
7. decisions and actions should provide for broad community involvement on issues which affect them

The Northern Territory's commitment to the IGAE and the ESD Strategy are primarily given effect through policy. Relevant to seabed mining, the *Fisheries Act*[174], the *Northern Territory Environment Protection Authority Act* (NT EPA Act)[175] and the *Waste Management and Pollution Control Act* (WMPC Act)[176] are among the few acts to give legislative effect to ESD. However, the recent *Petroleum (Environment) Regulations* also centralise the principles.

None of the primary Territory statutes relevant to seabed mining (being the EA Act, MT Act and the MM Act) give specific reference to decision making based on the principles of ESD. While each piece of legislation has scope to be applied consistent with the principles in the ESD Strategy, this is not mandated and thus the principles may not be applied fully.

5.2 Primary Commonwealth offshore minerals legislation

This is the key Australian seabed mining legislation coming out of the Constitutional Settlement. The intention is that the Commonwealth and Northern Territory will try to maintain as far as practicable common rules, practices and principles in regulating offshore mining beyond the baseline.

5.2.1 Offshore Minerals Act 1994 (Cth)

The *Offshore Minerals Act 1994* (Cth) (OM Act) regulates the exploration and production of minerals (but not petroleum) in the 'Commonwealth-State offshore area', which generally speaking is the area seaward of the outer edge of the coastal waters of the Territory to the boundary of the adjacent area in respect of the Territory. The adjacent area generally speaking extends to the outer limits of the continental shelf where there is one or otherwise out to 200 nautical miles.[177]

The OM Act confirms that exploration and production of minerals within the coastal waters of the Territory is to be regulated by the Northern Territory (references to a State in the OM Act include the Northern Territory[178]).

[174] See section 2A of the *Fisheries Act* (NT).
[175] See section 7 of the NT EPA Act.
[176] See section 5 of the WMPC Act.
[177] See section 13 of the OM Act and the description of the 'adjacent area in respect of the Territory' in section above.
[178] Section 5 of the OM Act.

Consistent with the Offshore Constitutional Settlement agreement that common principles, rules etc for regulating the territorial sea will be maintained,[179] a regime of joint management by the Commonwealth and Northern Territory is established in relation to the Commonwealth-State offshore area. In this respect, a Northern Territory Minister is the 'Designated Authority' responsible for most administration of the OM Act but some decisions and functions are reserved for the 'Joint Authority' comprising a Commonwealth Minister and Northern Territory Minister.[180] The Designated Authority may delegate relevant functions and powers to a person.[181]

Given the responsibility the Territory already has under the OM Act, there is a question whether, in respect of the coastal waters of the Territory, it might be efficient to adopt some similar provisions as are set out in the OM Act for the Commonwealth-State offshore area.

By comparison with the MT Act, the OM Act does not delineate between minerals generally and 'extractive' minerals.[182]

A methodology of dividing areas of seabed and subsoil into blocks using a grid is provided for.[183] Different restrictions are then applied to different types of blocks:

- A standard block which is vacant and is not 'excluded' is available for an applicant initiate an application for a licence.[184]
- Whilst the Designated Authority may allow an application for excluded blocks in a particular circumstance,[185] generally a block will be excluded for certain time periods after it becomes newly vacant[186] or for a particular applicant that recently held a licence for the block.[187] This provides an opportunity for other interested parties to apply for a licence over the block.[188]
- Certain blocks may be declared by the Joint Authority to be 'reserved blocks'.[189] The initiative then lies with the Joint Authority to invite applications through a 'tender block licence notice' for either exploration licences or mining licences over those 'tender blocks' within a particular timeframe and according to a specified process.[190]

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179 See discussion in section of this report in this respect.
180 A good summary is provided in the Reader's Guides on page ii of the OM Act.
181 See section 419 of the OM Act.
182 See the broad definition of mineral in section 22 of the OM Act.
183 Section 17 of the OM Act.
184 See section 50 of the OM Act and Explanatory memorandum, *Offshore Minerals Bill 1993* (Cth), 36, 73.
185 Section 52 of the OM Act.
186 See section 51(1)(b) of the OM Act for example.
187 See section 51(3) and (4).
188 Explanatory memorandum, *Offshore Minerals Bill 1993* (Cth), 25-26, 51.
189 Section 18 of the OM Act.
190 See sections 20, 74, 75 and 218 of the OM Act and Explanatory memorandum, *Offshore Minerals Bill 1993* (Cth), 36, 74.

- Provision is made for minimum and maximum licence areas, such that an exploration licence may encompass up to 500 blocks[191] and a retention licence and mining licence may encompass up to 20 blocks.[192]
- Provision is made for and areas subject to licences to be discrete areas.[193]

Information provided to the Designated Authority is generally confidential depending upon the blocks to which the information relates and type of information.[194] Cores, cuttings or samples from a licence area and provided to the Designated Authority are also confidential in nature.[195]

Exploration and recovery of minerals in an offshore area is prohibited without a licence or special purpose consent under the OM Act.[196] A person (e.g. a licence holder or their associate) is not authorised to conduct activities under the licence or consent which interfere with other activities such as navigation, exercise of native title rights and interests, fishing etc to a greater degree than is necessary for the reasonable exercise of the person's rights and the performance of the person's duties under the licence or consent.[197]

Each of the licences and consents provided for under the OM Act has a different term and gives the holder the right to conduct certain activities on certain blocks. Generally the licences and consents reflect the fact that usually mining projects will start with exploration, may involve retention to assess commercial viability, and progress to recovery. In summary:

Licence or consent (section of OM Act)	**Authorised activities/rights[198]**
Exploration licence (46(1) and (2))	• subject to a restriction in the licence as to the kind of minerals covered by the licence: – explore for minerals in the licence area – take samples of minerals in the licence area.
Retention licence (133(1) to (3))	• a retention licence does not authorise the recovery of minerals as part of a commercial mining operation • subject to a restriction in the licence as to the kind of minerals covered by the licence: – explore for minerals in the licence area – recover minerals in the licence area.

[191] See section 50(3)(b) of the OM Act.
[192] See sections 137(2)(b) and 197(3) of the OM Act.
[193] For example, section 50 of the OM Act provides that a person may apply for an exploration licence over a group of no more than 500 blocks, where they form a discrete area, unless up to t3 discrete areas is allowed in certain circumstances under section 53. Section 99 requires any voluntary surrender application to maintain a single discrete area.
[194] Section 27 of the OM Act.
[195] Section 28 of the OM Act.
[196] Section 38 of the OM Act.
[197] Section 44 of the OM Act.
[198] See sections 11(3), 17(3) and (4), 84 and 135 of the MT Act.

Licence or consent (section of OM Act)	Authorised activities/rights[198]
Mining licence (193)	• subject to a restriction in the licence as to the kind of minerals covered by the licence: – recover minerals in the licence area – explore for minerals in the licence area.
Works licence (267(2))	• a works licence can only authorise activities that: – are directly connected with activities that are carried out, or are to be carried out, under an exploration, retention or mining licence; and – are necessary or desirable for the exploration, retention or mining licence holder to: ▪ effectively exercise the licence rights; or ▪ effectively perform the licence obligations.
Special purpose consent (315(4) and (5), 316)	• a special purpose consent can only be granted for: – a scientific investigation; or – a reconnaissance survey; or – the collection of only small amounts of minerals • the exploration of an area is a reconnaissance survey if the exploration is carried out to work out whether the area explored is sufficiently promising to justify more detailed exploration under an exploration licence • a special purpose consent holder may: – explore for minerals; and – take samples of or recover minerals in the consent area for the purposes specified in the consent • the grant of a consent does not give the consent holder: – any exclusive or proprietary rights over the blocks covered by the consent; or – any option or preference when it comes to the grant of a licence over blocks covered by the consent.

Grant or renewal of a licence or consent, and in some cases refusal to renew, can only occur if the relevant processes in the OM Act are followed.[199]

Processes to deal with applications over standard and tender blocks, as well as multiple applications for the same block are provided. By way of example, the application process for an exploration licence over standard blocks includes advertisement, discussions between the applicant and Designated Authority, and processes for further information to be obtained from the applicant. A provisional grant is followed by an opportunity for the applicant to respond regarding conditions, pay the security, fees and accept the grant before the licence becomes effective.

For exploration licences for tender blocks, the Joint Authority specifies in the tender block licence notice if it will select the successful applicant on the basis of the exploration proposal or the amount of money offered for the licence.[200]

The power to impose conditions on a licence or permit is broad. In relation to an exploration licence for example, the joint authority may grant or renew the

[199] E.g. for referral of an application to
[200] Sections 75(1)(c), 77(2) and (3)

licence subject to whatever conditions the Joint Authority thinks appropriate.[201]

The Joint Authority must suspend the operation of a licence or consent if it in the national interest to do so.[202] If this occurs and results in an acquisition of property, processes to agree or determine compensation are provided for.[203]

If renewal does not occur, or a licence or consent is cancelled (eg for breach of its conditions[204]) there is no compensation payable to the licence of consent holder.

Minerals recovered by a licence holder or special purpose consent holder (but not a works licence holder) become the property of the holder when they are recovered.[205]

The grant of a licence of special purpose consent does not extinguish native title in the licence or consent area, but native title is subject to the rights conferred by the licence or consent.[206]

A review of the detail of the OM Act in relation to matters of a more administrative nature is not addressed in detail, except to say that in many respects there is a different approach than in the MT Act and MM Act. A more detailed comparison is likely warranted. Briefly, the scope of these administrative matters includes:

- various details of matters to be entered in a register of licences and consents, inspection and processes for updating the register, registration fees, correction of errors/appeals
- requirements about dealings in licences, eg that certain dealings require approval, that dealings must be registered to be effective
- power is given to the Designated Authority to require a person to appear personally to provide information or answer questions, examine a person on oath or affirmation, require production of documents
- provisions about confidentiality of information and admissibility of information in court proceedings
- powers of inspection and giving of directions, establishment of safety zones around structures and equipment
- administrative processes for the Joint Authority and Designated Authority[207] and review processes for their decisions under the OM Act[208]

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[201] Section 118(1) of the OM Act.
[202] See for example in relation to exploration licences, section 48 of the OM Act.
[203] See for example in relation to exploration licences, section 49 of the OM Act.
[204] See for example section 130 of the OM Act in relation to exploration licences.
[205] Section 42 of the OM Act.
[206] Section 43 of the OM Act.
[207] Part 4.4 of the OM Act.
[208] Part 4.3 of the OM Act.

- dealing with financial aspects of the regime, eg fees collected and funding[209]
- offences and enforcement.

The OM Act does not incorporate the principles of ESD. Provisions concerning the environment include the following:

- The Joint Authority is empowered to impose conditions on licences, and their renewal, requiring the holder to take steps to protect the environment of the licence area, including conditions relating to:[210]
  - protecting wildlife
  - minimising the effect on the environment of the licence area and the area surrounding the licence area of activities carried out in the licence area
  - a condition requiring the holder to repair any damage to the environment caused by activities in the licence area
  - a condition requiring the holder to pay a specified penalty to the Commonwealth if the holder does not comply with a licence condition.
- For special purpose consents, environmental matters may also be the subject of a condition.[211]
- Compliance directions may be given by the Designated Authority as necessary or convenient, and in particular in relation to remedying damage to the seabed or subsoil or due to the escape of substances in the course of exploration and mining activities, and in relation to the protection of the environment.[212]
- Details about restoration of the environment are left to be determined under regulations, given knowledge and technology continually advances and regulations are easier to amend.[213] The scope of those regulations may extend to the following:[214]
  - The removal, disposal by the Designated Authority and recovery of costs of removal and disposal of property (including structures and equipment) from the offshore area that is no longer in use. The recovery of costs may be by way of deduction from the proceeds of the disposal.[215]

[209] Part 4.6 of the OM Act.
[210] See sections 118, 177, 254 and 304 of the OM Act in relation to conditions on each kind of licence.
[211] Section 327(2)(b) of the OM Act.
[212] Section 386(2)(c) and (d) of the OM Act.
[213] See Chapter 4, Part 4.2, Division 4 of the OM Act and Explanatory memorandum, *Offshore Minerals Bill 1993* (Cth), Division 4, 126.
[214] It does not appear there are any regulations presently enacted to deal with these matters.
[215] Section 401 of the OM Act.

- The rehabilitation of an area in an offshore area that has been damaged or affected by exploration or mining activities of a licence holder and recovery of costs and expenses incurred by the Designated Authority of such rehabilitation. The recovery of costs and expenses may be by way of deduction from the licence holder's security.[216]

In this respect, it is worth considering the nature of rehabilitation of marine environments, and if particular kinds of damage are capable of rectification by a licence holder, perhaps another form of contribution should be sought from proponents, such as an environmental offset or social and community benefits (It is noted that provision of social and community benefits may be the subject of a condition of an Authorisation under the MM Act).

Provision for determining a royalty specific to minerals and kinds of minerals recovered from offshore areas is made in the *Offshore Minerals (Royalty) Act 1981* (Cth).[217] 60% of royalties obtained in relation to a particular Commonwealth-State offshore area will be paid to the relevant State.[218] Money received by the Designated Authority under the OM Act and certain Acts associated with the OM Act which generate revenue, is also paid to the States.[219]

Generally speaking, the relevant State and Territory's laws apply in their offshore area.[220] However, the OM Act imposes some limitations. For example, each of the following cannot be made for that area: substantive criminal laws, or laws of criminal investigation, procedure and evidence,[221] laws inconsistent with a Commonwealth law,[222] laws imposing a tax,[223] and laws that seek to confer certain judicial powers.[224]

5.3 Commonwealth legislation regarding marine and pollution issues

5.3.1 Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (Cth)

The *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) (National Law) replaces eight federal, state and territory laws with a single national regulatory framework for the certification, construction, equipment, design and operation of domestic commercial vessels inside Australia's exclusive economic zone (EEZ), including coastal waters of the Northern Territory.

[216] Section 402 of the OM Act.
[217] Section 5 of the *Offshore Minerals (Royalty) Act 1981* (Cth).
[218] Section 425 of the OM Act.
[219] Section 426 of the OM Act.
[220] See section 428(1) of the OM Act and the *Off-shore Waters (Application of Territory Laws) Act* .
[221] Section 429 of the OM Act.
[222] Section 430 of the OM Act.
[223] Section 431 of the OM Act.
[224] Section 432 and 433 of the OM Act.

The Australian Maritime Safety Authority (AMSA) promotes the safety and protection of the marine environment, combats ship sourced pollution and provides navigation infrastructure and national search and rescue service.

5.3.2 Environment Protection (Sea Dumping) Act 1981 (Cth)

The *Environment Protection (Sea Dumping) Act 1981* (Cth) (Sea Dumping Act) was enacted to fulfil Australia's obligations under international law.[225]

The Sea Dumping Act provides for the protection of the environment by assessing and regulating dumping into the sea, incineration at sea and artificial reef placements in 'Australian waters'.[226]

Sea dumping permits are most commonly issued for dredging operations and the creation of artificial reefs. There are a number of issues relevant to the NT with regard to disposal of seabed material, these are:

- The Sea Dumping Act does not apply in relation to the disposal or storage of wastes and other matter directly arising from, or related to, the exploration, exploitation and associated off-shore processing, of seabed mineral resources.[227]
- The Sea Dumping Act applies to the loading and disposal at sea of dredged material. Side casting techniques constitute a 'hit' on the vessel and therefore would require a permit; however, the disposal of dredged material via pipeline or through stripping overburden external to the vessel and discharging to another location (without a 'hit' on the vessel) does not require a permit.
- The dumping of dredged material in internal waters does not require a permit. Internal waters include the coastal waters of the NT within the straight territorial sea baseline.
- Dumping of dredged material in coastal waters seaward of the straight territorial sea baseline will require a permit.

5.3.3 Historic Shipwrecks Act 1976 (Cth)

The *Historic Shipwrecks Act 1976* (Cth) protects shipwrecks and relics of historic significance.

The *Historic Shipwrecks Act 1976* (Cth) generally applies to shipwrecks and relics 75 or more years of age (or otherwise declared) in or from Australian

[225] *Convention on the Prevention of Maritime Pollution and Dumping of Wastes and Other Matter,* opened for signature 13 November 1972 (entered into force 30 August 1975) and 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 29 December 1972, opened for signature 7 November 1996 [2006] ATS 11 (entered into force 24 March 2006).

[226] Section 4 of the Sea Dumping Act; "any sea that is on the landward side of the territorial sea of Australia, except any part of the sea that is within the limits of a State or of the Northern Territory." In the NT the coastal waters within the straight territorial sea baseline are considered within the limits of the NT.

[227] Section 5 of the Sea Dumping Act.

waters seawards from the low water mark and waters above the continental shelf in the adjacent area in respect of the Territory.[228]

There are offences in the *Historic Shipwrecks Act 1976* (Cth) for failing to comply with a direction of the relevant Minister,[229] and interfering with, damaging or destroying historic shipwrecks or relics.[230] A permit may be obtained to carry out an action that is otherwise an offence.[231]

Discovery of wrecks and relics must be notified to the relevant Minister.[232]

Approximately 120 shipwrecks in waters relevant to the Territory are currently protected under the *Historic Shipwrecks Act 1976* (Cth). Within the next five years approximately another 25 shipwrecks will become protected as vessels lost during the World War II bombing of the Northern Territory reach 75 years of age.

A protected zone may be established around a shipwreck in special circumstances.[233] In accordance with any relevant regulations, a permit is required to enter or carry out other activities in a protected zone.[234] There are two protected zones in the Northern Territory around:

- Japanese submarine I-124, lost off Bathurst Island in 1942
- The Florence D, sunk by Japanese aircraft off Bathurst Island in 1942

As with the *Heritage Act*, the richness of the Northern Territory's maritime history, in conjunction with the relatively limited knowledge as to the location of many World War II shipwrecks makes it likely that most seabed mining activities will be required to undertake appropriate, detailed, archaeological surveys as part of relevant assessment and approval processes.

5.4 Territory legislation regarding marine and pollution issues

5.4.1 Marine Safety (Domestic Commercial Vessel) (National Uniform Legislation) Act

The *Marine Safety (Domestic Commercial Vessel) (National Uniform Legislation) Act* (Marine Safety Act) applies the corresponding National Law) regulating marine safety for 'domestic commercial vessels'[235] and certain other vessels as laws of the Territory (and thus in the coastal waters of the Territory).

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[228] See section 4A(1), (3) to (6) and (8) to (12), sections 5 and 6 of the *Historic Shipwrecks Act 1976* (Cth).
[229] See section 11(4) of the *Historic Shipwrecks Act 1976* (Cth).
[230] See section 13 of the *Historic Shipwrecks Act 1976* (Cth).
[231] See section 15 of the *Historic Shipwrecks Act 1976* (Cth).
[232] See section 17 of the *Historic Shipwrecks Act 1976* (Cth).
[233] See section 7 of the *Historic Shipwrecks Act 1976* (Cth).
[234] See section 14(1) to (3) of the *Historic Shipwrecks Act 1976* (Cth).
[235] See the definition in section 7 of the National Law. A vessel associated with seabed mining is likely to be a domestic commercial vessel.

Subject to certain exceptions (e.g. management of ports, harbours and moorings), to the extent a law of the Territory relates to marine safety for domestic commercial vessels, the Marine Safety Act/National Law applies to the exclusion of the Territory law.[236] It is noted the *Marine Act* (Marine Act) applies in some respects to domestic commercial vessels, but is unlikely to encroach on marine safety issues.

5.4.2 Marine Act

The Marine Act regulates shipping[237] within the coastal waters of the Territory and waters internal to the Territory.[238]

In the absence of a contrary intention, the Marine Act does not apply to a defence force vessel of Australia or another country.[239] A similar exclusion is not made in relation to vessels engaged in resources exploration and mining.

The Marine Act supplements the requirements of the Marine Safety Act/National Law in relation to domestic commercial vessels, and concerns matters relevant to vessels generally[240] which may include vessels associated with seabed mining. Relevant matters include safety practices, wrecks, marine incidents, passengers, navigational aids, detention of vessels, erection of structures and closure of waters. Largely such matters are regulated by establishing offences for conducting prohibited activities or failing to report incidents.[241]

'Commercial operations' are also regulated through a licensing regime.[242] Particular operations or locations may be declared such that a licence is required.[243]

It is possible that another approval relating to seabed mining, e.g. Authorisation under the MM Act, could authorise or deal with activities that are regulated by the Marine Safety Act, or that would otherwise be an offence or require a licence under the Marine Act.

However, given the use of Territory waters by many users, and the existing specialised regulation of shipping, it would be appropriate to avoid encroaching on the Marine Safety Act's and Marine Act's functions. This would be consistent with the regime applicable in Commonwealth waters (where for example, the *Offshore Petroleum and Greenhouse Gas Storage*

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[236] Section 6 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth).
[237] See the long title of the Marine Act.
[238] See the definition of 'Northern Territory waters' in section 7 of the Marine Act.
[239] Section 6 of the Marine Act.
[240] Under section 7(3)(d) of the Marine Act, a vessel that is an 'off-shore industry vessel' (excluding an 'off-shore industry mobile unit') which has been got under way for the purpose of undertaking 'off-shore operations' is a vessel which has been taken or sent to sea or gone or proceeded to sea or is proceeding on a voyage (each being concepts used throughout the Marine Act). See the relevant definitions in section 7(1) of the Marine Act.
[241] See for example section 188A of the Marine Act, under which it is an offence to erect a structure below the high water mark without approval of the Chief Executive Officer of the agency with administrative responsibility for the Marine Act.
[242] Part 5 of the Marine Act. It is likely seabed mining operations would be a 'commercial operation' that requires a licence, as the definition in section 130 of the Marine Act is broad.
[243] See sections 130 and 131 of the Marine Act.

Act 2006 (Cth) applies to petroleum exploration and exploration activities but marine safety and navigation are regulated by the National Law and the *Navigation Act 2012* (Cth)).

Further consideration should be given as to the interaction of the Marine Safety Act and Marine Act with other relevant legislation such as the MM Act, and the appropriate coordination of relevant decision makers to avoid inadvertently encroaching on the Marine Safety Act's and Marine Act's functions.

5.4.3 Marine Pollution Act

The *Marine Pollution Act* aims to protect the marine and coastal environment by minimising intentional and negligent discharges of ship-sourced pollutants into the coastal waters of the Territory. It gives effect to certain international law in relation to pollution from ships.[244]

Relevantly, the *Marine Pollution Act* prohibits the owner or master of a ship intentionally causing or permitting the discharge or jettisoning of the following from a ship into coastal waters: oil, noxious liquid substances in bulk, harmful substances in packaged form and garbage. Environmental offences may result from causing or permitting relevant pollution, discharges or jettisoning of goods.[245] Various other requirements specific to particular risks are also imposed.[246]

There are various defences provided for,[247] and it is possible for regulations to identify certain discharges to which the offence provisions do not apply.[248]

Most functions and powers in relation to compliance with and enforcement of the *Marine Pollution Act* are conferred on appointed Authorised Officers,[249] and other functions and powers are conferred on the Chief Executive of the relevant department. Authorised officers are subject to the direction of the Chief Executive.[250] Only the Chief Executive may delegate their functions and powers.[251]

5.4.4 Waste Management and Pollution Control Act

The *Waste Management and Pollution Control Act* (WMPC Act) is intended to provide for the protection of the environment through encouragement of waste management and pollution prevention and control practices,[252] encourage

[244] See section 5 of the *Marine Pollution Act* and the definition of the 'MARPOL' convention as amended in section 7 of the *Marine Pollution Act*.
[245] See for example section 14 of the *Marine Pollution Act* in relation to discharge of oil into coastal waters.
[246] For example, certain ships must have an approved shipboard oil pollution emergency plan (section 17) and transfer of a pollutant must not be carried out at night without approval (section 45).
[247] See for example section 15 of the *Marine Pollution Act* in relation to discharge of oil into coastal waters.
[248] See for example section 16 of the *Marine Pollution Act* in relation to discharge of oil into coastal waters.
[249] See Part 10 of the *Marine Pollution Act* for example.
[250] Section 54 of the *Marine Pollution Act*.
[251] Section 10 of the *Marine Pollution Act*.
[252] Long title of the WMPC Act.

ecologically sustainable development and facilitate the implementation of national environment protection measures.[253]

Generally the WMPC Act is concerned with conduct resulting in waste and pollution causing environmental harm. Relevantly to this approach, the WMPC Act defines:

- 'environment' as including both land and water;
- 'land' as including water and air on, above or under land, and water as including the coastal waters of the Territory; and
- 'premises' includes equipment, plant and structures, whether stationary or portable, and the land on which premises are situated.[254]

The WMPC Act does not apply to a contaminant or waste that results from a mining activity where the contaminant or waste is confined within the land on which the activity is being carried out.[255] However, if the contaminant or waste is not confined to the relevant area, the WMPC Act applies to the whole of the contaminant or waste,[256]

The WMPC Act also does not apply to a circumstance if the *Marine Pollution Act* applies to the circumstance.[257]

The WMPC Act imposes a general duty on persons who conduct an activity, or perform an action, that causes or is likely to cause pollution resulting in environmental harm, or that generates or is likely to generate waste[258] and establishes environmental offences for a person causing pollution resulting in harm to the environment[259] and for a person failing to notify the NT EPA in relation to incidents in the course of their activities involving environmental harm or a risk thereof.[260]

Most functions and powers in relation to compliance with and enforcement of the WMPC Act are conferred on appointed Authorised Officers,[261] and other functions and powers are conferred on the relevant Minister and the NT EPA. The Minister may delegate their functions and powers to an agency, body or person.[262] The NT EPA may delegate its functions and powers to a member, a public sector employee or a Chief Executive Officer.[263]

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[253] Section 5 of the WMPC Act.
[254] See the definitions in section 4 of the WMPC Act.
[255] Section 6 of the WMPC Act.
[256] Section 6(5) of the WMPC Act
[257] Section 6(8) of the WMPC Act. The *Marine Pollution Act* aims to protect the marine and coastal environment by minimising intentional and negligent discharges of ship-sourced pollutants into coastal waters, giving effect to International Convention for the Prevention of Pollution from Ships 1973.
[258] See section 12 of the WMPC Act.
[259] See section 83 of the WMPC Act
[260] See section 14 of the WMPC Act.
[261] See Part 10 of the WMPC Act for example.
[262] See section 8 of the WMPC Act.
[263] See section 36 of the NT EPA Act.

Government likely needs to develop a policy position as to what if any aspects of seabed mining should be subject to the WMPC Act. In this regard:

- For the purposes of regulating contaminants and wastes from mining activities, there are obvious practical difficulties identifying whether wastes and contaminants disposed of in the marine environment are ‘confined’ to an area due to the very nature of marine environments and tidal movements.
- The effects of seabed mining activities in terms of pollution of water and will be significantly different in the marine environment than the effects of mining on land. This calls into question whether the WMPC Act provides appropriately for seabed mining, even though ostensibly it applies to coastal waters. For example, it may not be intended that an operator is prohibited from allowing sediment affected water released during dredging to travel beyond the mining site, where the act of dredging itself and associated environmental impacts are addressed under the MM Act.
- The WMPC Act may contain assumptions based on land based activities. For example, having regard to the ordinary usage of the term and the definition given in the WMPC Act,[264] it is not clear how to delineate ‘premises’ in an area of ocean.

[264] See the definition in section 4 of the WMPC Act.