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The Territory Law Firm

Our ref: 20211584:SNO

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The Hon. Eva Lawler MLA
Minister for Environment
c/- Department of Environment, Parks and Water Security
Level 1, Goyder Centre
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PALMERSTON NT 0830 **By Email: environment.policy@nt.gov.au**

Dear Minister Lawler

SUBMISSION ON PROPOSED DECLARATION TO PROHIBIT SUBSEA MINING

Introduction

We refer to the Northern Territory Government's media release made 5 February 2021 announcing 'a ban on seabed mining in the Territory' and your proposal to declare seabed mining as a 'prohibited action' pursuant to section 38 of the *Environmental Protection Act* (NT) (**EP Act**). We also refer to the draft Declaration of Prohibited Action: Subsea Mining (**draft Declaration**), and Statement of Reasons for the Draft Declaration of Prohibited Action: Subsea Mining dated 6 May 2021 (**Statement of Reasons**).

We understand in making your decision it has been considered and applied the principles of ecologically sustainable development (**ESD**) contained under section 17 of the EP Act with particular regard to the precautionary principle, together with the advice given by the Northern Territory Environment Protection Authority (**NTEPA**) and Aboriginal Areas Protection Authority (**AAPA**) (collectively the **Mining Reports**).

We have reviewed NTEPA's final report 'Review of Seabed Mining in the Northern Territory – Environmental Impacts and Management' but not reviewed AAPA's report 'Review of Seabed Mining in the Coastal Waters of the Northern Territory: Report of the Aboriginal Areas Protection Authority' (**AAPA Report**). All attempts were made to obtain the AAPA report without success.

Ward Keller is the Territory's oldest and largest legal firm with a long standing history of providing legal services to the mining and resource industry. As an interested person, Ward Keller welcomes the opportunity to provide comments on your draft Declaration and Statement of Reasons. We note the comments made by us in this submission belong to Ward Keller alone and do not purport to reflect any views held by industry.

Ward Keller respectfully opposes your proposed decision to prohibit subsea mining and rejects the reasoning for the declaration. This is because we are not satisfied that a prohibition on subsea mining is consistent with the principles of

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ESD and have formed the view that in making your decision you have misapplied the precautionary principle. We are of a further view that the advice provided in the Mining Reports have not been appropriately considered.

The precautionary principle is not absolute or extreme, neither does it prohibit an activity until the science is clear[1]. Prohibiting a particular activity should only occur where precautionary measures, such as an adaptive management approach, evidentially fails to reduce the threat of serious or irreversible environmental damage.[2] No such approach has been utilised in the Territory therefore there is no evidence of failures to reduce environmental threat to justify a permanent ban. Instead of declaring a prohibition, we instead recommend subsea mining to be declared as an activity-based referral trigger pursuant to section 30(1)(a) of the EP Act so that any proposal for seabed mining will automatically be the subject of an environmental impact assessment (**EIA**).

We understand the lack of data is a vital limitation to subsea mining in the Territory and declaring a prohibition on the activity denies industry the opportunity to acquire such data, and prevents the discharge of the burden of proof. In fact allowing industry the opportunity will result in the collection of baseline and monitoring data that may inform the EIA process and approval decisions, and be used for ongoing compliance monitoring, which is already taking place globally, for example, in Japan's exclusive economic zone near Okinawa, and the shared research ventures with the International Seabed Authority[3], signatory Nations[4], industry, universities and science organisations.

Therefore the objects under section 3 of the EP Act relating to EIA are and should be relevant to your decision given that the precautionary principle is axiomatic in dealing with environmental assessment.

Application of the Precautionary Principle

It is a misapplication of the precautionary principle to make an absolute or extreme decision to prohibit seabed mining when the science on its impact to the environment is unclear. It is without doubt that the application of the precautionary principle and the concomitant need to take precautionary measures have been triggered through the satisfaction of the two conditions precedent: a threat of serious or irreversible environmental damage; and scientific uncertainty as to the environmental damage.[5] However no precautionary measures, such as an adaptive management regime, have been implemented to reduce the threat of serious or irreversible harm to acceptable levels and until such precautionary measures have been implemented it is inappropriate to prohibit seabed mining.

Once the conditions precedents have been satisfied the precautionary principle will be activated and precautionary measures may be taken to prevent any anticipated threat to the environment however those measures must be proportionate to the threat. That is where the scientific uncertainty is epistemological and extremely significant, which is the case for seabed mining, then the degree of precaution should be strict.[6] Activation of the precautionary principle causes the decision maker to assume that the threat of serious or

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[1] The Hon Justice Paul L Stein AM, 'Are Decision-makers too Cautious with the Precautionary Principle' (2000) 17 *Environmental and Planning Law Journal* 3, 21.
[2] The Hon Brian J Preston CJ, 'The Judicial Development of the Precautionary Principle' (2018) *35 Environmental and Planning Law Journal* 123.
[3] The International Seabed Authority is an international authority established under the United Nations Convention on the Law of the Sea.
[4] Australia is a signatory nation ratifying the United Nations Convention on the Law of the Sea (UNCLOS) on the 29 July 1994.
[5] *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 269 [128].
[6] Applying precautionary principle book pg 38

irreversible environmental damage is certain and real however the burden of proof shifts onto industry to show that the threat does not exist or is not negligible.[7]

The courts have indicated what level of precaution should be applied when the precautionary principle has been activated. One precautionary measure that may be utilised is preventing (not prohibiting) an activity until further information is obtained in order to reduce scientific uncertainty. For example, in the seminal case of *Leatch v National Parks & Wildlife Service* (1993) 81 LGERA 270 the Environmental Court of NSW applied the precautionary principle and refused an application to grant a statutory licence to take and kill endangered fauna. The court however emphasised in this decision that the refusal of the licence was not the end of the proposal, and unless or until further information and advances on scientific knowledge are realised then a licence could be granted in the future.[8]

Another precautionary measure that could be implemented is retaining a margin for error until all consequences of the decision to proceed with the activity are known.[9] An example of retaining a margin for error is to implement an adaptive management approach which should not be viewed as a "suck it and see" trial and error but rather an 'iterative approach involving explicit testing of the achievement of defined goals'.[10] The following are core elements of the adaptive management approach[11]:

- monitoring impacts of management or decisions based on agreed indicators;
- promoting research to reduce key uncertainties;
- ensuring periodic evaluation of the outcomes of implementation, drawing of lessons, and review and adjustment, as necessary of the measures or decisions adopted; and
- establishing an efficient and effective compliance system.[12]

It seems to be common for decision makers to misapply the precautionary principle where the concept of ESD is recognised given that it has been the subject of a plethora of judicial considerations by courts throughout the world because of the difficulties of its application in determining when and what action is required. While the statement of the precautionary principle may be framed for the purpose of political aspiration, its implementation as a legal standard may have potential to create interminable forensic argument and taken literally it might prove to be unworkable[13].

However, for the precautionary principle to be more than aspirational it must have weight in the decision making calculus.[14] That said, each of the principles of ESD should not be viewed and applied in isolation of the other 'but rather as a package' as the courts have emphasised the need to consider all principles of ESD relevant to the decision.[15] In making your decision to prohibit seabed mining, we strongly hold the view that you have not applied all the relevant principles under Part 2 Division 1 of the EP Act being the principle of evidence-based decision making and principle of intergenerational and intragenerational equity.

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[7] Above n 4, 132.
[8] *Leatch v National Parks & Wildlife Service* (1993) 81 LGERA 270, 286-287.
[9] Above n 4 138.
[10] *Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Ltd* (2010) 210 LGERA 126, [184], [187].
[11] Above n 4, 139.
[12] *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 276 [164].
[13] *Nicholls v Director-General of National Parks and Wildlife* (1994) 84 LGERA 397.
[14] Above n 4, 136.
[15] Ibid 126.

Basis of the decision to prohibit seabed mining

As mentioned above, we reject the basis of your proposed decision to declare seabed mining a prohibited action under the EP Act. This is because we are of the view that the NTEPA Report has been improperly considered and other extrinsic information has not be considered at all.

Value of the coastal and marine environment

We acknowledge and agree with your statements that the Territory coastal waters "contain values that are of national and international significance" and "also provides important economic value from nature resource and marine-based industries such as fishing, aquaculture, pearling, and tourism".[16]

While we do not dispute these statements it does not mean seabed mining cannot coexist with these marine-based industries. In fact, to mitigate any potential impacts on marine-based industries government and industry should jointly establish an industry code of practice tailored to seabed mining which would, among other things, declare certain areas for mining and other areas for non-mining.

Although the NTEPA Report recommended development of an industry code of practice to mitigate potential conflicts between seabed mining and fishing industries, we believe a code of practice could be developed for all marine-based industries. Guidelines and standards for code of practice may be adapted from existing industries, and others might be wholly new.[17] If industry and government are able to cooperate, seabed mining could set a global benchmark because historically regulations on mining have lagged, such as with fracking where regulators were forced to catch up with industry.[18]

The paucity of information on potential impacts to the coast and marine environment

We acknowledge and agree with your statement that there is a "lack of adequate environmental information and knowledge about the existing condition of environmental values and the potential impacts from seabed mining".[19] We understand that the lack of information is a 'major constraint on management and mitigation of risks from subsea mining'[20] however it is the responsibility of industry to discharge the burden of proof to establish whether serious or irreversible environmental harm may or may not occur.

The lack of adequate information is the threshold test to satisfy the second conditions precedent triggering the application of the precautionary principle and the need to implement precautionary measures. Nevertheless, once each of the conditions is satisfied the burden of proof shifts onto industry to prove that there is no threat of serious or irreversible environmental damage which is achieved through collection of scientific evidence.[21]

Industry is currently working towards discharging the burden of proof through extensive scientific research taking place globally. For example, in September 2017 Japan Oil, Gas and Metals National Corporation conducted one of the first large commercial trails of seabed mining, gathering tons of zinc and other materials from deposits 1,600 meters deep inside

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[16] The Hon Eva Lawler, MLA, 'Statement of Reasons for the draft declaraiton of prohibition action: Subsea Mining' (Released 6 May 2021).
[17] Matthew Alford and Thomas Peacock, *Is Deep-Sea Mining Worth It?* (2018) 77.
[18] Ibid.
[19] Above n 16, 3 [27].
[20] Ibid.
[21] *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 274 [154].

Japan's exclusive economic zone.[22] Moreover, scientists around the world are currently working hard to identify potentially damaging effects and steps to mitigate these impacts.[23]

While there may be limited research to predict the impact of seabed mining in Australia, the NTEPA Report has identified that the Dredging Science Node of the Western Australia Marine Science Institution 'represents a coordinated research initiative to enhance capacity within government and private sector to predict and manage the environmental impacts of dredging in Western Australia'.[24] This type of research foreshadows the capability of industry to undertake scientific research to discharge the burden of proof triggered by the activation of the precautionary principle.

Potential impacts on sacred sites

We have not reviewed the AAPA Report so we are unable to comment in that regard however we do not deny the potential existence of sacred sites in the Territory's coastal waters. Sacred sites in the Territory are protected under the *Northern Territory Aboriginal Sacred Sites Act* (NT) (**Sacred Sites Act**) which creates offences for entry, works and destruction of a sacred site. One of the defences to a prosecution under the Sacred Sites Act is an authority certificate granted pursuant to section 22.

It is common practice for an exploration or mining project to obtain an authority certificate and we do not see why this process cannot be undertaken for any proposal to mine the seabed.

Uncertainty on how to effectively and appropriately manage impacts including rehabilitation

We agree with your statement that "there remains considerable uncertainty about the nature and extent of potential impacts" however we do not support your reasoning to prohibit seabed mining on this basis, or on the basis that significant investment is required by industry to satisfy the knowledge gaps. Respectfully, this is not your burden and we strongly believe industry should be afforded the opportunity to discharge it.

Furthermore, we do not believe you have considered the NTEPA Report in this regard. In fact the report makes no recommendation to prohibit seabed mining but instead supports our recommendation to instead declare the activity as a referral trigger. The NTEPA Report also provides detailed management approaches to mitigate potential environmental impacts of seabed mining.

Regulatory environment and complexities managing seabed mining in a highly dynamic environment

We agree that seabed mining activities would be managed under the existing legal frameworks. Currently, there is a proposal to move the environmental regulation of mining currently dealt with under the *Mining Management Act* (NT) to the EP Act and the NTEPA in their report recommends that the transfer of environmental management could be strengthened in its application to seabed mining.

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[22] Above n 18, 74.
[23] Ibid.
[24] Northern Territory Environmental Protection Authority, *Review of Seabed Mining in the Northern Territory – Environmental Impacts and Management* (2020) 75.

Seabed Mining vs Land Mining: is one better than the other?

Given the gaps in scientific knowledge as to the environmental impacts, it is hard to qualify or quantify whether seabed mining will be environmentally better or worse than land based mining. A potential benefit to seabed mining is that collectors and ships can leave an area of the sea and move to the other whereas with land based mining infrastructure it can be difficult to remove once constructed.

Global demand for metals is increasing exponentially and some of the higher grade land based mines are running low. Another benefit to pursuing seabed mining would be that it could be used to meet that demand.[25]

Conclusion

The Territory should be a jurisdiction that encourages responsible exploration and innovation. The use of the Territory's coastal waters to obtain minerals to support society should not be banned without the certainty that the costs outweigh the benefits.

The appropriate way to proceed in this matter is not to declare subsea mining a prohibited action but to make it a referral trigger that requires an appropriate level of environmental investigation before a decision is made on whether it can proceed.

If you have any queries, please contact me.

Yours faithfully
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[25] Above n 18, 74.