CMSI Consultation Response

Respondent Details

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COUNTRY
Australia

PERMISSION
Yes, CMSI can disclose my feedback, name, and organisation.

STAKEHOLDER
Other: Legal

ORGANISATION
Storey & ward Lawyers

Comments & Questions by Document

Document:
Governance

General comment

COMMENT:

The first occasion the NNTC had to be aware of the CMSI draft Standard was a briefing conducted by officers of the MCA with senior officers of the NNTC on 5 November 2024. The draft documents on which comment is sought amount to slightly under 200 pages. CMSI has provided no resources to assist organisations in preparing responses. The public consultation on the draft Standard closes on 16 December 2024.

As the NNTC understands the process, the draft Standard was completed and made publicly available for comment some weeks prior to this. From the briefing, the NNTC understands that the reference group the CMSI formed as part of the process of preparing the draft Standard involved Mr Aaron Thomas of the Kokatha Aboriginal Corporation. Mr Thomas is a respected leader of his people. However, there was no broad consultation with Australian Traditional Owner organisations or the NNTC in particular as the national peak body regarding this appointment. There has not been, during the process of the development of the draft standard, any broader consultation on it. The Standard has been developed in isolation from the Peoples most affected by it.

Without wanting to belabour the point, the process of development of the Standard would not satisfy even the foundational practice requirements of the Standard itself. Clearly, the process of (lack of) engagement of key national Indigenous Peoples' organisations in preparation of the standard is unsatisfactory, the timeframes provided for comment are unsatisfactory, the lack of provision of resources to key organisation to provide feedback is unsatisfactory.

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6. What will the composition of the Board look like?

COMMENT:

This lack of credibility is reflected in the proposed governance structure. The proposal is for the Standard to be administered by for a 16-person board with four representatives coming from each of four key sectors:

producers, producers' stakeholders, value chain companies and value chain stakeholders. An "independent" chair cannot have served as a resources company executive for several years beforehand. The Stakeholder Advisory Group and Industry Advisory Group that are stated to have a role in the initial and ongoing selection process are appointed by the CMSI "partner" organisations. Indigenous peoples, globally, are identified as holding one of the sixteen directorships. Although it is not made clear in the document, it would appear the owners of the proposed legal entity that will administer the Standard are the four CMSI partner organisations. These organisations are essentially producer or producers linked organisations.

The proposed governance structure has no real independence. It would have no credibility with either Indigenous Peoples or civil society generally. The ownership of the legal entity that administers the Standard should be vested in key stake (rights) holder organisations and not be under control of producer organisations. A real question emerges as to whether a producer (or value chain company) should have even equal status with rights and stakeholders. The Standard is designed to regulate the activities of corporations, not rights and stakeholders. To give producers and their customers (supply chain companies) equal standing in the process is to misconstrue the regulatory role of the Standard.

Document:
Standard

General comment on Performance Area

SECTION: NA

COMMENT:

"Foundational practice" is clearly described as being in "conformance with (minimum) industry standards".

It is understood that the Standard is intended to have a broad application, including with a number of firms, particularly small corporations, that may not be currently ascribed to any of the standards that are promulgated by the CMSI partners. It is also understood that it is difficult to encourage such firms to enrol in a standard that will determine their performance to be "sub-standard".

One presumes the objective of the "foundational practice" level is to encourage participation in the Standard and subsequently to encourage an improvement from "Foundational Practice" to "Good Practice" over time. No doubt this is worthwhile aspiration.

COMMENT:

While the NNTC understands and appreciates the objective of extending the scope of participants in the Consolidated Standard process, this objective cannot be allowed to undermine the fundamental purpose of the Standard. In the submission of the NNTC the current approach does just that.

COMMENT:

The current approach seeks to consolidate Standards such as the ICMM Position Statement, The TSM and the Copper Standard. All these Standards in most respects exceed those contained at the Foundational Practice level of the CMSI. In addition, many of the elements of the Foundational Practice level are below the current domestic legislative requirements in Australia. The NNTC does appreciate that in several national jurisdictions legislative requirements may not match those in Australia. Be that as it may, the necessary implication -that the Foundational Practice level should somehow mirror the lowest national legislative standards is clearly unacceptable.

This point illustrates the essential challenges faced in developing the Foundational Practice level of the Consolidated Standard. The NNTC would submit that developing a "Foundational Practice level" that is below the

existing Standards of the CMSI partners and identifying this Foundational Practice level as being in "conformance with… industry standards" will inevitably lead to a situation where the result of the introduction of the Consolidated Standard is a reduction in industry standards and should not be pursued. The price of obtaining broader coverage of the Standard is to destroy the credibility of the Standard.

COMMENT:

It will be apparent from this submission that the NNTC has considerable reservation about the process of developing and the content of the draft Standard. Further because of the procedural shortcomings in developing the draft Standard there has only been the opportunity to provide comment on the two most directly relevant

Performance Areas. This is unfortunate.

Traditional Owners and proponents are increasingly coming to recognise they work (or should work) in a collaborative partnership. Thus, the NNTC would have welcomed the opportunity to provide feedback on additional Performance Areas. The Standards going to going to environmental management, mine closure, human rights, supply chains and project expansion are of clear relevance. The flawed consultation process has meant this opportunity has been denied.

From the Performance Areas that the NNTC has had the opportunity review, significant concerns have arisen. Primarily these concerns go to an apparent process whereby a desire to seek a broad uptake of the Standard has led to a proposed diminution of existing industry standards, often to a level below applicable international or domestic legal standards. This dilution is unacceptable.

The NNTC appreciates, and indeed supports, the concept of developing a single, broadly applicable, industry standard. This standard must conform with relevant law. It must be developed in genuine partnership with affected rights and stakeholders. The NNTC would urge the CMSI partners to reflect on the processes to date and move forward in genuine partnership.

The NNTC would welcome the opportunity to work with the CMSI partners in this endeavour.

Performance Area 14: Indigenous Peoples

SECTION: 14.1 Managing Engagement, Impacts and Opportunities with Indigenous Peoples, Foundational Practice

COMMENT:

The four substantive elements at this level amount to a non-binding commitment to respect (but not necessarily uphold) UNDRIP rights and create a forum for "meaningful participation" in decision making. The vagueness around the term "meaningful participation" has been discussed previously. The consequence is that the requirements of the Standard at this level are meaningless.

SECTION: 14.1 Managing Engagement, Impacts and Opportunities with Indigenous Peoples, Good Practice

COMMENT:

The key provisions at this level are "14.1. Good 6" and "14.1 Good 7" ("G6" and "G7" respectively). The first of these require an agreement "in accordance with the Principles of FPIC". The second provision (G7) however provides that if there is no agreement the facility will "develop, implement and publicly disclose appropriate steps" to "manage anticipated impacts to Indigenous Peoples land… ". That is to say in the absence of an agreement "the facility" (proponent) will decide how to proceed.

That is, in effect, "if the proponent does not reach agreement with Indigenous Peoples (per G6) then the proponent decides "appropriate steps". The conjunction of the two provisions undermines the first and makes it effectively voluntary.

The inclusion in the "Glossary and Interpretive Guidance" Note for this Performance Area of some possible courses of action in "Where Agreement is not Obtained" does nothing to alter the fundamental lack of obligation arising from the combined operation of G6 and G7.

By contrast the issue is dealt with in the August 2024 ICMM Position Statement on Indigenous Peoples at Commitment Statement 5 and its associated Explanatory Note. Without necessarily endorsing the ICMM position, it does attempt to give effect to UNDRIP Art 46.2. The UNDRIP provision provides that consent component of FPIC is not absolute but must be subject to a process of impartial balancing and adjustment of competing human rights where necessary.

The ICMM Commitment Statement attempts to give effect to this principle by ensuring that a proponent must engage in genuine and express steps to overcome a failure of agreement. The relevant provision in the Standard makes no such attempt

The approach to this process in G6 and G7 results in the use of G6 as essentially optional and undermines its inclusion. In undermining G6, the inclusion of reference to FPIC in the Standard at the Good Practice Level is made meaningless.

As noted, G6 and G7 have been identified as the "key provisions' of the Good Practice Level. This is not to dimmish the importance or relevance of the other matters addressed at this level. However, these additional matters can only provide guidance around the subject matter of "the agreement" that is at the core of the relationship between the proponent and the relevant Traditional Owners.

The process of reaching this agreement has been undermined by the combined operation of G6 and G7.

SECTION: 14.1 Managing Engagement, Impacts and Opportunities with Indigenous Peoples, Leading Practice, 1

COMMENT:

The provision appears to go some way to attempting to give effect to the ICMM Commitment 5 approach to UNDRIP Art 46.2 discussed above. That is commendable. However, the idea that this is occurring only at the "Leading Practice" level is disturbing.

Finally, the proposition in the first dot point that it is only at "Leading Practice" level that the parties are determining how they will seek agreement appears non-sensical. Despite its shortcomings, G6 was an exhortation to attempt an agreement -but without an agreed process for doing so apparently.

COMMENT:

At a less existential level, a significant shortcoming of the Standard across all Performance area is the lack of definition of some of the terms contained in it. Relevant examples can be seen in Performance Area 14. This uses terms such as "meaningful participation of Indigenous Peoples in decisions..." (PA14.1 Foundation 3). This is used in apparent distinction to a term such as "Indigenous Peoples' meaningful engagement" (PA14.1 Good 1). However, only the latter term is defined in the Standard. Without specific definition, the meaningful participation in PA14.1. Foundation 3 is left as a vague notion something lesser (presumably) than meaningful engagement (14.1 Good 1). "Meaningful engagement" is defined (in substance" as "the Facility has an obligation to consult and listen to affected stakeholders' perspectives and integrate those perspectives into their business decisions".

Thus, meaningful participation is left as something less than "integrating perspectives into business decisions". This would seem pointless. It is certainly below the legislative requirements for agreement making with Traditional Owners regarding the granting of a mining tenement in Australia.

This specific matter is raised as an example of the broader need to provide comprehensive definitions of currently undefined terms and to ensure a consistency across defined terms

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Performance Area 15: Cultural Heritage

SECTION: 15.1 Cultural Heritage Identification and Management, Foundational Practice, 1

COMMENT:

The obligation at this level is to "publicly commit to identify, protect and respect cultural heritage." Given the specification of procedures to manage harm to cultural heritage at the later "Good Practice Level", one presumes the commitment to protect cultural heritage at the foundational level is aspirational at best. If this is so, then a

slightly more forthright statement of the commitment would lead to greater credibility. However, the bare terms of the commitment are to be applauded.

The commitment is given effect the later provisions of the foundational level that describe a process of identification and establishing accountability structures that is also commendable. Assuming the "foundational level" commitments are accompanied by a similar commitment to respect legal protection of (definitionally critical) cultural heritage, the steps set out under this level are in excess of legal obligation and to be commended.

SECTION: 15.1 Cultural Heritage Identification and Management, Good Practice

COMMENT:

The differing requirements regarding (legally protected) critical cultural heritage and the broader (non-legally protected) cultural heritage requires separate consideration.

In relation to cultural heritage at Good Practice 1 ((G1) and Good Practice 4 (G4) a process in respect of cultural heritage is established whereby the facility (proponent) will: "conduct an analysis of alternatives that prioritise avoidance of adverse cultural heritage" and "[w]here cultural heritage impacts are unavoidable, develop and implement in collaboration with affected traditional owners and users, mitigation measures that aim to maintain the cultural heritage's value and functionality".

Again, in the context of cultural heritage not otherwise subject to legal protection these measures are of significant merit. Later provisions include. references to developing procedures to manage chance finds of cultural heritage. This is similarly to be welcomed.

In relation to critical cultural heritage at Good Practice 3 (G3) the relevant statement is:

Where there are potential adverse impacts to Indigenous Peoples' critical cultural heritage, work through decision-making processes as outlined in Performance Area: 14 Indigenous Peoples.

There is no specification of which level of operation of Performance Area 14 is applicable to this provision. Thus, a proponent could apply Performance Area 14 Foundational Level decision making to management of critical cultural heritage at a Good Practice Level. Not only does this undermine the integrity of the "level" process, it would also be generally unlawful in all Australian jurisdictions.

The shortcomings of decision-making processes at Performance Area 14 Good Practice Level have also been explored above. In conjunction then, the commitment here is to attempt to reach agreement on management of critical cultural heritage with Traditional Owners - but if no agreement is achieved the proponent should decide what to do with legally protected cultural heritage. This is not only offensive, but it would also be unlawful in Australia.

Given this shortcoming, the references to undertaking other actions "in collaboration with affected Traditional Owners" in other provisions of the Good Practice level lose any real operational meaning.

SECTION: 15.1 Cultural Heritage Identification and Management, Leading Practice

COMMENT:

The additional commitments at the Leading Practice level are, of themselves, worthwhile. The question that arises is whether these actions should only be taken at a "Leading Practice level". To cite two examples:

1. Monitor the effectiveness of measures taken to avoid adverse impacts on cultural heritage in collaboration with traditional owners and users.

…

4. Support traditional owners and/or users to undertake ongoing monitoring of cultural heritage protection measures in line with the values to be protected.

To the NNTC, it would seem that the process of "monitoring the effectiveness" of operational measures should be a necessary part of any extractive (or other) industry activity. It is surprising to see it identified as "Leading Practice." By contrast, the obverse of 4 above is to suggest it is acceptable, potentially good practice, but not leading practice, to not support Traditional Owners monitoring protection measures of their cultural heritage. The NNTC would submit that, surely, this is an element of Good Practice.

SECTION: Glossary and Interpretive Guidance

COMMENT:

The Performance Area "Glossary and Interpretive Guide" has two definitions of particular importance: "cultural heritage" and "critical cultural heritage". The definition of cultural heritage is as follows:

Customs, practices, places, objects, artistic expressions and values. Cultural heritage is often expressed as either intangible or tangible cultural heritage.

The definition of critical cultural heritage is more complex and is as follows:

Includes cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual impacts of affected Indigenous Peoples' lives. It includes natural areas with significant cultural and/or spiritual value such as sacred groves, sacred bodies of water and waterways, sacred trees and sacred rocks. It is defined as: Either (i) the internationally recognised heritage of communities who use or have used within living memory the cultural heritage for long-standing cultural purposes; or (ii) legally protected cultural heritage areas, including those proposed by host governments for such designation.

A first point to note is that the distinction between "cultural heritage" and "critical cultural heritage" resting upon an essentiality of cultural identity would be rejected by many Indigenous Peoples. If this definition was applied to western culture, what institution or artefact taken in isolation would survive? The qualification that criticality is determined by settler state legal recognition is arguably simply compounding the insult.

A further, more technical, point to note is that the definition of "critical cultural heritage" would extend only to cultural heritage that is subject to a protective legal regime under national (or sub-national) law. The inclusion of international recognition adds little as; to be included on the (UNESCO) world heritage register a place must be recognised by the relevant nominating country.

By contrast however, the definition of "critical cultural heritage" to include "cultural heritage that is subject to a protective legal regime under national (or sub-national) law" necessarily means that the definition of (non-critical) cultural heritage extends to cultural heritage without formal legal protection. This recognition is to be applauded. Presumably "critical cultural heritage" is a subset of the broader class of cultural heritage.

With these definitions in mind, it is appropriate to consider the requirements of each level.
