

# Commentary on MCEP Draft Principles and Certification Criteria

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## Introductory remarks

The task that the Working Group has set itself is very challenging. Most certification schemes address only some aspects of organisational performance, whereas this scheme aims to deal with performance across a broad range of areas. It is inherently difficult to define criteria that will have general applicability but which, at the same time, can take account of the diverse circumstance of individual sites. The need to fit these criteria within the ICMM Sustainable Development framework has further complicated the task.

The scheme outlined in the Discussion Paper goes a considerable way towards meeting these challenges. While further refinement and clarification is required in some areas, the proposed framework, taken as a whole, ought to provide a sound foundation for developing a workable and effective certification process.

In the following discussion we make a number of suggestions about how elements of the scheme might be modified and, hopefully, improved. Some of these observations are of a more general nature; others relate to the wording and scope of particular criteria. Given that there are compelling pragmatic reasons for using the ICMM framework, we do not intend to comment on the appropriateness or wording of the core principles around which the scheme is organised.

## GENERAL COMMENTS

### *Threshold vs. non-mandatory criteria*

The document does not clearly indicate which criteria are intended to be mandatory thresholds (i.e. a 'fail' renders the mine ineligible for certification) and which are non-mandatory (a 'fail' will not, of itself, prevent certification, although failures across a number of criteria might). The 'request for feedback' asks for comment on proposed thresholds, but only one - 'no riverine tailings disposal' - is explicitly identified. Some other criteria, such as 'no forced labour', would clearly also fall into this category, but others are harder to categorise (e.g. is it intended to be mandatory that a site has a process for monitoring the effectiveness of new ideas and concepts?). The lack of clarity on this point makes it difficult to comment on the appropriateness of particular criteria. More generally, the intermingling of threshold and non-mandatory criteria

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<sup>1</sup> This commentary has been prepared by David Brereton, with input from Robin Evans and Ruth Beach. The views expressed in the document do not necessarily reflect the opinions of other individuals associated with the Centre for Social Responsibility in Mining or the Sustainable Minerals Institute.

adds considerably to the complexity of the scheme and is likely to be confusing to auditors, MSOs and stakeholders.

In our view, it would be preferable if only criteria that were intended to be mandatory were included in the scheme. In other words, the test for inclusion should be: would people feel comfortable about withholding certification from a mine that failed to meet this criterion, but satisfied all other relevant criteria? This approach would simplify the scheme considerably, and also send a clear signal about what was required for a site to obtain certification.

There are two possible justifications for including non-mandatory criteria, but neither of these arguments is particularly persuasive in this instance.

First, inclusion of non-mandatory criteria could be warranted if the intention was to establish a rating system which provided for different levels of certification (such as ‘gold’, ‘silver’ and ‘bronze’), rather than awarding certification on a simple pass/fail basis. The MSO’s rating would then be based on how well it did against the non-mandatory criteria. However, such a system would be extremely complex to implement, would be at odds with how most certification schemes operate, and would run the risk of duplicating existing auditing systems.

Second, inclusion of non-mandatory criteria could be justified if the intention was to base certification on an MSO achieving an overall score (e.g. 75%+ of criteria met) rather than on satisfying specific requirements. However, this assumes that each criterion is roughly equivalent, such that a fail on one could be compensated with a pass on another. This is clearly not the case here.

We recognise that substantial re-working of the document may be required to express all criteria in terms of mandatory thresholds and that it may not be practical to embark on such an exercise at this late stage. There would, however, be benefit in at least making it clearer within the document when a criterion is intended to be mandatory, and when it is not.

### *Setting the ‘bar’*

A critical issue for any scheme of this kind is determining how high to set the ‘bar’ for granting certification. No doubt the Working Group has considered this issue at length, so the comments below probably contain nothing new. Nonetheless, it may be useful to spell out our views on this issue, especially as they underpin a number of the comments that we have made about specific criteria.

Clearly, a major objective of any certification scheme should be to contribute to the raising of standards in the industry. However, setting a very high bar is not necessarily the best way of advancing this objective.

Certification schemes aim to contribute to improved performance by creating incentives for sites to improve their performance so as to obtain certification and, conversely, by imposing additional costs on uncertified sites. Potential benefits in this context can include enhanced reputation, improved relationships with stakeholders and regulators, easier access to capital, reduced insurance costs, the ability to charge a

market premium, improved access to markets, and greater demand for one's product. The potential costs of non-certification are essentially the inverse of these benefits.

Whether there are, in fact, significant benefits to be derived from certification will depend, in large part, on the willingness of external parties (customers, financiers, insurers, regulators, NGOs, etc) to use this as a basis for differentiating between sites and the products that they produce. If you create a system in which only the very best performers are motivated to strive for certification, the capacity of the scheme to differentiate will actually be quite low, since almost all sites – the good, mediocre and bad alike - will remain in the uncertified category. In these circumstances, there may be little for a site to gain from certification, other than a possible reputational benefit. For example, if the bar is set very high, financial institutions will continue to use other criteria to determine which sites present a reasonable investment risk, and most customers will continue to purchase from uncertified suppliers (especially in circumstances where certified operations can only meet a small part of total demand).

Another consequence of setting the bar 'too high' is that it increases the likelihood that sites will conclude that certification is 'out of reach', or not worth the effort. If this happens, there will be little incentive for these sites to improve their practices. Good performers may be motivated to do better, but middle range performers and those at the lower end of the spectrum will not be. In other words, the ceiling may be raised, but the floor will be left where it is.

It is difficult at present to determine what would be the effect of the MCEP's proposed framework in this regard, given that it is unclear which criteria are intended to be mandatory and which simply define 'best practice'. However, there is certainly a risk that many sites and companies could perceive the criteria as a whole too restrictive, especially in the absence of further guidance about what criteria are intended to be mandatory. Indeed, it is doubtful whether any site in Australia would be able to satisfy all of the listed criteria, as they are currently worded.

To some extent this issue can be addressed by being more specific about which criteria are mandatory and which are not, but we also consider that there is a case for revising the wording of some criteria and defining a less ambitious standard (see specific comments, below).

#### *How prescriptive should the criteria be?*

Some criteria are quite prescriptive about the particular controls and systems that an MSO needs to have in place, whereas other criteria are couched quite broadly. For example, criterion 3d)ii simply states that: 'the MSO demonstrates that its public and/or private security arrangements protect human rights and are consistent with international standards', without attempting to be more specific. An example of a criterion at the other extreme is 5(b)(ii), which not only specifies that an MSO should have a fitness for duty program, but is quite specific about what should be in this program.

The risk with being highly prescriptive is that sites that use different strategies to arrive at the same outcomes may fail to be certified. This is a particular problem with small-scale operations, which are likely to have less elaborate management systems in

place. Another concern is that the emphasis of the audit process ends up being on procedural, rather than substantive, compliance

One approach to this issue would be to keep the criteria fairly general, and then provide ‘guidance notes’ which describe current ‘best practice’ in the area and identify the range of factors which auditors should take into account in determining whether an appropriate system is in place. This approach would also substantially reduce the number of core criteria and make it easier to express the remaining ones in terms of thresholds and clear standards.

#### *Process vs. Outcome Measures*

The current criteria mostly relate to processes, rather than outcomes. This emphasis is understandable (up to a point) given that the MCEP is seeking to define standards for a well managed mine, not sustainable mining. As a matter of practicality, it is also generally easier to audit sites in terms of procedural rather than substantive performance standards. However, there are some areas where it would be practical to include some additional outcome-based criteria (such as environmental and biodiversity management). Including explicit outcome measures would send a clear message that results matter, as well as avoiding the possibility, however remote, of a site with ostensibly good processes, but poor outcomes, being certified.

It can also be argued that external parties are primarily interested in outcomes and would like some direct answers to how mines are performing in key areas. (For example: is the mine causing significant environmental damage? How good is the health and safety record? Have there been any human rights infringements?).

#### *Readability*

There is a large number of criteria and considerable overlap between some of them. In addition, general and specific criteria are mixed together in a way that can some times make it difficult to identify the key issues. This is no doubt due, at least in part, to the constraints imposed by the decision to follow the ICMM framework. Hopefully, there will be an opportunity, in preparing the next version of the Principles and Criteria, to revise the structure and sequencing of some sections without violating the ‘spirit’ of the ICMM principles.

## COMMENTS ON SPECIFIC CRITERIA

Note: to assist with readability, we have reproduced the criteria in full using underlined text and interspersed comments at the relevant points.

### **1. Implement and maintain ethical business practices and sound systems of corporate governance.**

**a) Develop and implement company statements of ethical business principles and practice that management is committed to enforcing:**

- i. The MSO's corporate entity has ethical business and corporate governance policies endorsed and reviewed by the Board of Directors.
- ii. The MSO implements and monitors these policies on site so that they are communicated and understood by all employees and change management procedures are in place.

The requirement that all employees understand these policies (particularly if they include corporate governance policies, as the wording suggests) is unrealistic. If this requirement is taken literally, it is doubtful that any MSO would attain certification. The reference to 'change management procedures' also appears out of place in this context.

A suggested alternative formulation is: *The MSO has taken reasonable steps to ensure that these policies are complied with on site.* (The guidance notes could include as examples of 'reasonable steps', such as: making plain English copies of relevant policies readily available to employees, informing all employees of these policies when they are inducted, disciplinary processes for sanctioning employees who deliberately breach the policies, systems controls to minimize the risk of people acting unethically, etc.)

**b) Implement policies and practices that seek to prevent bribery and corruption:**

- i. The MSO does not offer, pay or accept bribes.
- ii. The MSO minimises facilitation payments and clearly documents and accurately accounts for these where made.

The use of the word 'minimise' is too open-ended. We suggest a strengthening of this criterion, along the lines of the following:

*The MSO does not use facilitation payments, except where it can be shown that this is a necessary condition for doing business in the area where the MSO is located. Where payments are made, they are clearly documented and accounted for.*

The guidance notes should indicate that the onus should be on the MSO to show why it is necessary to make such payments.

iii. The MSO publicly discloses payments made to or received from any government, government-linked entities or private security forces.

c) Comply with or exceed the requirements of host country laws and regulations;

i. The MSO complies with or exceeds all national, state and local laws and regulations.

Perhaps a better formulation is:

*The MSO makes every reasonable endeavour to comply with or exceed all national, state and local laws and regulations.*

As the other criteria in this section recognise, even the best managed MSOs may sometimes breach specific legal requirements because of system failures, the actions of individual employees, etc. Also, different laws and regulations can sometimes be in conflict with each other, making full compliance impossible. (Again, the guidance notes can be used to put the onus on the MSO to justify/explain any breaches that have occurred.)

ii. Where legal non-compliance has occurred, the MSO responds, monitors the issue and verifies that it is, or is being, resolved expeditiously. The response includes provisions to prevent the noncompliance recurring.

iii. Conflicts between laws, regulations and MCEP Principles and Criteria will be evaluated on a case-by-case basis with the involvement of affected parties.

This seems more like a guidance note than a criterion. However, we agree that it is important to have such a procedure in place, because there is a good chance that some MCEP criteria may conflict with legal and regulatory requirements in some parts of the world.

## **2. Integrate sustainable development considerations within the corporate decisionmaking process.**

a) Integrate sustainable development principles into company policies and practices;

i. The MSO's corporate entity has sustainable development policies addressing the Working Principles and Criteria endorsed and reviewed by the Board of Directors.

It is possible to imagine a situation where a site has a very good SD framework in place, but for some reason the corporate entity does not. Does it follow that the site would then be ineligible for certification? This seems inconsistent with the idea of a site-based certification scheme.

ii. The MSO implements and monitors these policies through integrated business planning and practices on site.

This may be a case of setting the bar too high, at least at this point in time, given the difficulty of achieving genuine integration. A slightly less stringent formulation would be:

*The MSO's business planning processes explicitly address corporate SD policy requirements.*

Alternatively, the criterion could be dropped altogether, given that 2b)i adequately captures the key points.

**b) Plan, design, operate and close operations in a manner that enhances sustainable development;**

- i. The MSO implements systems and practices and sets targets that seek to continually improve the environmental and social outcomes for all phases of the mine site's lifecycle including construction, production and closure.

A commitment to continuous improvement is certainly to be encouraged, but this may be another case of setting the bar too high for a workable certification scheme. A suggested re-formulation is as follows:

*The MSO implements systems and practices and sets targets that seek to deliver positive environmental and social outcomes for all phases of the mine site's lifecycle including construction, production and closure, and regularly reviews progress against these targets.*

**c) Implement good practice and innovate to improve social, environmental and economic performance while enhancing shareholder value;**

- i. The MSO has a process for reviewing and incorporating new ideas and concepts that are consistent with sustainable development into its business plan.
- ii. The MSO has processes for monitoring the effectiveness of new ideas and concepts.

These two criteria might be better treated as guidance notes to auditors on what to look for in determining whether the MSO has appropriate management systems in place, rather than as criteria in their own right. The question arises as to whether a site would not be certified if it lacked a formal process for monitoring the effectiveness of new ideas – this again seems a high bar far removed from the original certification concept.

**d) Encourage customers, business partners, and suppliers of goods and services on site to adopt principles and practices that are comparable to those that the MSO implements;**

- i. Using a risk-based approach, the MSO evaluates contractors and other suppliers of services on sustainable development criteria based, where

relevant, on the MCEP Principles and Criteria prior to services being provided on site and regularly reviews performance.

This criterion is awkwardly worded. It is unclear why a 'risk-based' approach, in particular, must be used to evaluate contractors.

The intent of this provision is presumably to ensure both that suppliers and contractors comply with the MCEP while doing work for the MSO and, more generally, that the MSO gives preference to suppliers and contractors who run their businesses in accordance with SD principles. The difficulty with the latter objective is that suppliers vary widely in terms of their sophistication, resources, etc. Is it really intended, for example, that a small, local, firm that supplies laundry services should be assessed on whether it has integrated management systems in place to promote SD principles? Arguably, what is critical here is to ensure that MSOs avoid doing business with companies that treat their workers badly, flout human rights, follow bad environmental practices, have poor health and safety records, and so on. In other words, the focus should be on ensuring an acceptable level of compliance with core SD criteria (whatever these might prove to be) rather than the full range of suggested criteria.

A suggested approach to addressing these issues is to split this criterion into two parts, as follows:

*i. Systems are in place to ensure that contractors and other suppliers comply with relevant MCEP Principles and Criteria in any work that they undertake for the MSO.*

*ii Unless there are exceptional circumstances, the MSO does not use the services of contractors and other suppliers whose business practices are in clear breach of 'core' MCEP criteria.*

The most obvious exceptional circumstance would be where there are no other suppliers. Where this is the case, the MSO should have to show that it has processes in place to find alternative sources of supply and/or to pressure/assist the supplier to improve their standards.

ii. The MSO encourages business partners, contractors, suppliers and customers to adopt similar sustainable development principles.

It is doubtful whether this criterion adds anything, especially if 2d)i is re-drafted along the lines proposed.

e) Provide sustainable development training to ensure adequate competency at all levels among the MSO's own employees and those of contractors;

i. The MSO identifies the required training needs to meet MCEP Principles and Criteria.

ii. Employees and contractors are provided with adequate training consistent with their work responsibilities.

This criterion seems very broad. It could be merged with 2e)i by inserting the words "identifies *and delivers* the required training needs...".

**3. Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by MSO activities.**

**a) Ensure fair remuneration and work conditions for all employees and do not use forced, compulsory or child labour;**

- i. The MSO does not use forced labour.
- ii. The MSO does not exploit child labour.
- iii. The MSO provides wages and benefits at least commensurate with similar operations in the same country.

General comments on 3a) criteria

No doubt it is intended that these standards should also apply to contractors and other suppliers to the mine site. We suggest that this be made explicit in the criteria.

Is security of employment an issue that should also be addressed here? We are aware of some operations overseas which operate on a seasonal basis where employees have to re-apply for their jobs at the start of each new season (rather than there being any presumption of re-hiring). This creates a very uneven power relationship and leads to considerable uncertainty for employees and their families. People cannot be guaranteed employment in perpetuity, but perhaps something along the following lines could be included:

*Having regard to the nature of the operation, the MSO provides a reasonable degree of employment security to employees.*

(Issues to consider in determining what is reasonable in a particular situation could include the life span of the mine, whether it operates on a seasonal or continuing basis, etc.)

**b) Provide for the constructive engagement of employees on matters of mutual concern;**

- i. The MSO respects employees' right to choose whether or not they wish to be represented collectively. The MSO may offer other employment arrangements, consistent with its respect of employees' rights.
- ii. The MSO has training systems in place that, within reasonable limits, enable employees to upgrade their skills and seek advancement within the MSO.

This criterion seems out of place in this section, which deals with issues of employer-employee relations. Could it be moved to 3a), which is concerned with remuneration and work conditions?

iii. The MSO implements fair treatment and dispute resolution systems to enable complaints to be raised, either collectively or individually, and dealt with fairly, and that protect employees from arbitrary termination.

c) Implement policies and practices designed to eliminate harassment and unfair discrimination in all aspects of the MSO's activities;

- i. The MSO provides equal remuneration (pay and benefits) for men and women for work of equal value; and
- ii. The MSO provides for equality of opportunity and non-discriminatory treatment of all employees in respect to employment and occupation.

d) Ensure that all relevant staff, including security personnel, are provided with appropriate cultural and human rights training and guidance;

- i. The MSO provides employees and contractors, especially those involved in decision making, with relevant cultural awareness and human rights training and guidance. Affected communities, traditional owners and custodians are invited to develop, deliver and/or participate in cultural awareness training.

It is certainly desirable that affected communities, traditional owners and custodians are involved in cultural awareness training, where practicable, but is this a sufficiently important issue for this to be a condition of certification? Arguably, it would be better to include this by way of a guidance note, as a factor for auditors to consider in determining whether appropriate training is being provided.

ii. The MSO demonstrates that its public and/or private security arrangements protect human rights and are consistent with international standards.

e) Avoid or minimise involuntary resettlement, and compensate fairly for adverse effects on the community where they cannot be avoided;

- i. The MSO shall avoid or minimise resettlement of communities from their land. If resettlement cannot be avoided, it shall only take place with the free, prior and informed consent of the affected communities and with the effective participation of both men and women in the development of resettlement plans.

The concept of 'their land' can be quite problematic. For example, we have recently done some work with a company that is considering developing a mine in the Philippines. The location of the proposed mine is a minerals reserve and notionally public land. However, a squatter settlement (of non-Indigenous people) was established nearby several years ago and the inhabitants make a living from wood gathering in the area around the proposed mine site. Is the land 'theirs' or not? These definitional complexities could be avoided simply by removing the reference to 'their land'. Arguably, the company's obligations towards existing communities should be the same regardless of whether they have a legal or customary claim to the land.

The reference to ‘the effective participation of both men and women in the development of resettlement plans’ would fit better in the suggested re-draft of 3e)ii (see below).

We address issues relating to ‘free, prior and informed consent’ in the discussion on criterion 9a)ii.

- ii. Involuntary resettlement of individuals shall only take place after a resettlement plan has been prepared in accordance with international standards.

Why does this refer only to situations where people have been involuntarily resettled? Arguably, a plan should be required in all circumstances where resettlement is required. A suggested re-formulation is:

*Where it has been necessary to undertake resettlement a resettlement plan has been prepared in accordance with international standards and with the effective participation of both men and women in the development of the plan.*

- iii. Resettlement plans provide for sustainable livelihoods for men and women post-resettlement that are at least equivalent to those pre-resettlement. Resettlement of Indigenous people should, wherever possible, offer the option to return to the land.

The obligation to provide for sustainable livelihoods post-mining should apply whenever people lose their livelihood as a result of a development, regardless of whether resettlement has been required. (For example, a village may not need to be moved, but the villagers may no longer be able to access a forest area to undertake commercial woodcutting, water supplies may be disrupted, and so on). This issue is partly addressed in criterion 9b)v, but the reference there is only to ‘compensation’.

**f) Respect the human rights, culture and heritage of affected communities, including Indigenous people;**

- i. The MSO respects human rights, as outlined under the Universal Declaration of Human Rights (UDHR). In interpreting the UDHR, rights should be recognised as complementary, indivisible and interdependent.

This criterion is couched in extremely broad terms. Auditors, sites, and stakeholders will need to be provided with more guidance on what is meant by the phrase ‘rights should be recognised as complementary, indivisible and independent’.

- ii. The MSO respects the political and cultural identity of Indigenous people as distinct people, their rights and connections to ancestral lands and resources, their culture and heritage, and their decision making and dispute resolution processes.

Auditors will need some guidance on how to make this assessment. Presumably it would be necessary not only to look at the content of plans and policy documents, but also at how the MSO interacts with Indigenous communities on a day-to-day basis.

- iii. The MSO and Indigenous people develop a mutually agreed plan for the protection of sites of cultural, ecological, economic, or religious significance to Indigenous people, of traditional laws and customs, and of cultural and intellectual property and knowledge.
- iv. The MSO develops with the effective participation of affected communities, and Indigenous people, a code of conduct to apply to all employees and contractors, covering areas such as cross-cultural relations, responsible use of alcohol, and relationships with local people.

This is a very specific requirement. Development of a code of conduct would certainly be good practice, but we question whether it should be a stand-alone criterion for certification.

#### **4. Implement risk management strategies based on valid data and sound science.**

**a) Consult with interested and affected parties in the identification, assessment and management of all significant social, cultural, health, safety, environmental and economic impacts associated with the MSO's activities;**

- i. The MSO engages with stakeholders, including those who may be exposed to potential risks, in identifying, assessing and managing significant risks through all phases of the operation.

**b) Ensure regular review and updating of risk management systems;**

- i. The MSO has a risk management system that takes account of social, cultural, health, safety, environmental, and economic risks throughout the mine life cycle, that is regularly reviewed and updated.

To our knowledge, few sites currently have systems in place for monitoring social and cultural risks. This requirement will have to be interpreted fairly liberally, at least in the initial stages, or it may result in the bar being set too high. Some explanation of what is meant by the term 'cultural risk' would also be useful.

One of the limitations of traditional risk-based approaches is that they focus on the avoidance of negative consequences, rather than the identification and development of opportunities. Perhaps the phrase 'both threats and opportunities' could be added in parentheses after 'risks'.

**c) Inform potentially affected parties of significant risks from mining, minerals and metals operations and the measures that will be taken to manage the potential risks effectively;**

- i. The MSO provides stakeholders, including affected parties, with reliable access to risk information and expertise in an appropriate manner and language.

Would this sit better under 4a)?

ii. The MSO informs regulators and affected parties as soon as practicable of significant incidents, associated risks and the steps taken to remedy their impacts.

**d) Develop, maintain and test effective emergency response procedures in collaboration with potentially affected parties;**

i. The MSO works with stakeholders to identify emergency scenarios and develop emergency response strategies and capabilities designed to protect communities, workers and the environment.

### **5. Seek continual improvement of health and safety performance.**

**a) Implement a management system focused on continual improvement of all aspects of operations that could have a significant impact on the health and safety of employees, contractors and the communities where the MSO operates; and**

**b) Take all practical measures to eliminate workplace fatalities, injuries and diseases among employees and contractors;**

i. The MSO has a management system to protect the safety and health of its employees, contractors, their families, communities and visitors to the site.

Should this be an effective/appropriate management system?

The criteria that follow all refer to specific elements of an effective management system. If an MSO passes all the specific criteria, does it automatically pass this criterion as well? Conversely, could a site pass this criterion, but fail one or more of the others? Some re-structuring to show how general and specific criteria are related would be helpful here and in other parts of the document.

ii. The MSO has an active Fitness for Work program, or equivalent, that addresses substance abuse, fatigue and risks to work fitness arising from work design and work systems. This program also encourages physical fitness and stress management and enables employees to balance their work and family commitments.

This is very prescriptive. An alternative, simpler, formulation is:

*The MSO has appropriate systems in place for ensuring that employees are fit for work.*

The detailed description of what should be in a Fitness for Work program is more in the nature of guidance to auditors on what constitutes good/best practice in the area.

iii. Community health hazards associated with the MSO are identified and assessed and appropriate control measures are implemented.

- iv. The MSO has identified major hazard aspects of its operations and implemented appropriate controls.
- v. Employees and contractors have access to adequate medical and first aid services, appropriate to the location and nature of the MSO.
- vi. The MSO ensures that employees and contractors are provided with effective supervision and training.

Does this refer to training about safety, or training in general? If the former is the case, the criterion should be merged with 5c)i. If the latter applies, this criterion is arguably out of place here. Provision of proper training and supervision is important in its own right (development of human capital, etc.) not just because it contributes to a safer workplace.

- vii. The MSO sets targets with timelines for key health and safety issues that demonstrate a commitment to reduce workplace incidents.

Again, this is a very specific requirement. This might be better treated as one of the indicators that there is an effective management system in place, rather than as a criterion in its own right.

**c) Provide all employees with health and safety training, and require employees of contractors to have undergone such training;**

- i. Employees and contractors only undertake work for which they have the training, skills, knowledge and experience to undertake safely.

This criterion relates to workforce management, rather than training as such. Arguably the more logical place to list it is under 5a/b).

- ii. Health and safety training is certified under local or national vocational education and training networks, where they exist.

Neither this criterion, nor 5c)i, actually states that all employees and contractors should be provided with H&S training. A suggested reformulation to address this is omission is:

*A comprehensive health and safety training system is in place that provides training to all employees and contractors at induction and at regular intervals thereafter. Training is certified under local or national vocational education and training networks, where they exist.*

**d) Implement regular health surveillance and risk based monitoring of employees;**

- i. Health surveillance and monitoring are used for the purpose of providing early warning of health problems, identifying risks and assisting in the development of controls to reduce health and safety risks.

- ii. The MSO has adopted recognised standards for occupational health and exposure to workplace agents, and monitors and reports against those standards.
- iii. The MSO workforce is advised of the results of occupational health monitoring.
- iv. Employees who have been exposed to significant occupational health risk are monitored, with their consent, beyond the term of their employment or the life of the mine.
- v. Individual medical records are kept confidential with the employee having full access.

#### General comment on 5d

These are very specific criteria. Could they be made a subset of a general criterion along the lines of: *The MSO has an appropriate system in place for monitoring and controlling occupational health risks?*

There is no reference here to the monitoring of health affects on nearby communities. This will be an issue at some sites (e.g. where there is a smelter in operation, or people living nearby are exposed to dust).

**e) Rehabilitate and reintegrate employees into operations following illness or injury, where feasible.**

- i. The MSO has procedures for the treatment of, and compensation for, people who suffer injuries and illness that result from workplace incidents, exposures or conditions. The procedure shall include documentation and records of the treatment provided, compensation and rehabilitation programs.

This criterion does not directly address the issue of rehabilitation and reintegration. It only refers to treatment and compensation.

#### **6. Seek continual improvement of environmental performance.**

##### General comments on principle 6

As discussed above, in our introductory comments, there is scope here to include some more explicit outcome-based criteria, even if these are expressed in fairly minimalist terms. For example:

*No long-term damage is done to the environment in the vicinity of the mine.*

*There is no significant adverse impact on water quality in surrounding areas.*

*There is no significant adverse impact on the amenity of nearby communities.*

We are surprised that there is not an explicit focus in this section on water management issues. Many mines are located in low rainfall areas where it is imperative, from a SD perspective, that the mine uses water as efficiently as possible and minimizes its impact on overall water resources in the area.

There is also no criterion that explicitly addresses eco-efficiency/cleaner production considerations. Arguably, an MSO that makes no effort over time to improve energy efficiency at the mine (particularly if the energy is from fossil fuels or other non-renewable sources) should not be certified.

**a) Assess the positive and negative, the direct and indirect, and the cumulative environmental impacts of new projects - from exploration through closure;**

- i. Assessment of environmental impacts, including cumulative impacts, and collection of comprehensive and appropriate baseline data is completed before commencement of new site disturbing operations for the entire project life, including closure.
- ii. Monitoring, assessment and reporting is conducted appropriate to the activities and impacts of the MSO.

**b) Implement an environmental management system focused on continual improvement to review, prevent, mitigate or ameliorate adverse environmental impacts;**

- i. The MSO implements an environmental management system (EMS) consistent with an internationally recognised EMS standard.
- ii. The effectiveness of the EMS is regularly reviewed to demonstrate continual improvement.

Does the phrase ‘continual improvement’ refer only to the improvement of management processes, or does this mean improved environmental outcomes?

**c) Rehabilitate land disturbed or occupied by operations in accordance with appropriate post-mining land uses;**

- i. The MSO has a rehabilitation and closure plan that has been developed with the participation of key stakeholders, including Indigenous people.

Should the reference to Indigenous people carry the rider ‘where relevant’? Some mines are in areas where traditional landowners have long since dispersed and it may not be possible, in a practical sense, to obtain their input. (Note that 6c)ii uses the phrase ‘where appropriate’.)

MSOs should be expected not just to have a plan, but also to comply with it. We suggest the inclusion of an additional criterion along the lines of:

*Rehabilitation of land disturbed by mining commences as soon as is reasonably practical after mining operations on that land have been*

*completed and is carried out in accordance with the rehabilitation and closure plan.*

- ii. The MSO integrates the knowledge and land management practices of Indigenous people into rehabilitation plans and activities where appropriate.

**d) Provide for safe storage and disposal of residual wastes and process residues;**

- i. Hazardous materials and wastes from MSO operations are managed according to the following hierarchy in order of most preferred to least preferred: eliminated, reduced, reused, recycled, treated or properly disposed.

*There is some ambiguity in the wording of this criterion. Does it apply to all wastes, or only those deemed to be 'hazardous'? If the latter is the case, how should non-hazardous materials be managed?*

- ii. Waste rock dumps and tailings dams are designed, constructed and maintained so as to ensure the long-term, secure containment of waste materials.

- iii. The MSO has measures in place to eliminate or minimize to acceptable levels the effects of acid mine drainage.

- iv. The MSO does not use riverine tailings disposal.

- v. The following technologies are only used if independently reviewed impact assessments and management plans can demonstrate that they are environmentally responsible and safe in the long term: Submarine tailings placement, in-situ leaching.

*Arguably, this test should be applied to all technologies, not just the ones listed.*

**e) Design and plan all operations so that adequate resources are available to meet the closure requirements of all operations;**

- i. The MSO makes provision to cover the full costs of rehabilitation and any monitoring or treatment that may be required after closure, and regularly reassesses the adequacy of plans and provisions.

- ii. The MSO's closure plan does not rely in principle on perpetual treatment of mine waste.

**7. Contribute to conservation of biodiversity and integrated approaches to land use planning.**

**a) Respect legally designated protected areas;**

- i. The MSO is not located in, or does not have significant impacts upon, UNESCO World Heritage sites or other legally designated protected areas where mining is prohibited.

b) Disseminate scientific data on and promote practices and experiences in biodiversity assessment and management;

i. The MSO promotes, shares practices and experiences and disseminates data on biodiversity and land use assessment and management.

c) Support the development and implementation of scientifically sound, inclusive and transparent procedures for integrated approaches to land use planning, biodiversity, conservation and mining;

i. The MSO identifies and manages so as to protect areas of high conservation value on site, such as areas with listed threatened species and their habitat, threatened ecological communities and habitats under-represented in the protected areas network.

ii. The MSO has a conservation and land management plan, developed through consultation with stakeholders, that identifies categories of land management and the management regimes.

This criterion is focused purely on process. It says nothing about the appropriateness or effectiveness of the plan in question. Consultation with stakeholders, while desirable, will not of itself ensure that the plan is of good quality. For example, in some areas adjoining landowners and the local community may give only a low priority to conservation issues.

iii. The MSO develops management plans that are consistent with the outcomes sought through regional planning processes.

Sometimes regional planning processes might promote outcomes that are at odds with biodiversity considerations. For example, a regional plan could be focused on increasing the supply of land for agriculture or industrial uses, rather than on protecting threatened ecological communities on that land. Also, regional planning processes in some jurisdictions may exclude certain groups of stakeholders, such as Indigenous people. More consideration needs to be given to the relationship between this criterion and others in this section.

iv. The MSO integrates the views, experiences and practices of Indigenous people in land-use planning and biodiversity management and develop targets that are consistent with these views and experiences whilst respecting their intellectual property rights.

Should the rider 'where appropriate' be included here, as was done in relation to 7b)iii (the incorporation of Indigenous knowledge and land management practices into rehabilitation plans)?

More guidance would need to be provided to auditors on what is encompassed by the phrase 'develop targets that are consistent with these views and experiences whilst respecting their intellectual property rights'.

## General comment on biodiversity principles

This is another area where there may be scope to make greater use of outcome-focused criteria. For example, a possible threshold criterion to be applied to existing mines might be:

*As far as can reasonably be ascertained, the activities of the mine have not caused, or contributed significantly to, any loss in biodiversity in surrounding areas.*

If a mine fails this test, arguably it should not be certified, no matter how elaborate the management systems that it has in place. On the other hand, passing the test would not be sufficient grounds for certification, as the mine might have achieved this result by good luck, or by virtue of being in an area with low biodiversity, rather than good management. So the auditor would also need to be satisfied that *systems are in place to minimize the likelihood of the mine having a negative impact on biodiversity in the future*. This would also be the key test for certifying new mines, where environmental impact data may not yet be available.

### **8. Facilitate and encourage responsible product design, use, re-use, recycling and disposal of mined products.**

b) Conduct or support research and innovation that promotes the use of products and technologies that are safe and efficient in their use of energy, natural resources and other materials;

i. Consistent with business needs and capabilities, the MSO contributes site-based scientific information to collaborative research and development in this area.

This seems more like a description of desirable practice than a criterion for certification.

This Principle deals with life-cycle issues and is the other possible place (apart from Principle 6) to deal with eco-efficiency approaches, although the wording of the ICMM Principle does not readily lend itself to this.

### **9. Contribute to the social, economic and institutional development of the communities in which mines operate.**

a) Engage at the earliest practical stage with likely affected parties to discuss and respond to issues and conflicts concerning the management of social impacts;

i. Assessment of the social, cultural, economic and institutional impacts of the operations and the collection of baseline data is completed with the participation of stakeholders before commencement of site-disturbing operations.

Is the correct term here ‘affected communities’ rather than stakeholders?

ii. On-ground exploration and mining activities shall only proceed with the free, prior and informed consent of Indigenous people and affected communities.

The wording of this criterion suggests that a project should only go ahead if all affected communities have given their consent. This seems unduly restrictive and could operate to the disadvantage of particular local communities in some circumstances. Consider, in this respect, the following ‘hypothetical’.

A proposed mine is located in a remote area covered by Native Title. After a lengthy and inclusive negotiation process, the traditional owners reach agreement with the Project proponents that the mine should go ahead. The Agreement provides for substantial economic and other benefits to be provided to Indigenous communities in the area.

The plan is to pump the concentrate from the mill at the minesite through a pipeline to a small port some distance away, where it will be dried and loaded on to ships. Exhaustive investigations have shown that this is the only economically viable way of moving the material.

The ‘affected community’ living near the port is comprised predominantly of non-Indigenous people who have moved there for the fishing and are not interested in the jobs or other economic opportunities that the mine might generate. Public hearings are held in the community and those present raise various objections relating to impacts on local fishing grounds, increased noise, local property prices, etc. The project proponent is able to show that some of these concerns are unfounded, and that suitable controls will be implemented to address the other issues raised. Despite these assurances, the locals remain opposed to the development proceeding.

On a strict interpretation of criterion 9a)ii, the proposed development should not proceed, as one of the affected communities has not granted its informed consent. This is despite the fact that other affected (and disadvantaged) communities in the area are supportive of the mine proceeding and stand to benefit from it. In our view, it would be a perverse outcome to allow a small group, acting out of a fairly narrow self-interest, to exercise a veto over development in these circumstances.

We appreciate that it is very difficult to draft criteria that adequately deal with this issue. We are not able to propose an alternative formulation at this stage, but would welcome the opportunity to make a further submission at some future point.

More generally, as the discussion paper recognises, it is inherently very difficult to come up with a workable operational definition of ‘free, prior and informed consent’.

Clearly, there has not been consent if a mine has been imposed on local communities over their objections, if they have been denied any input into the approval process, or if their apparent ‘consent’ has been obtained by threats or inducements, or as a result of disinformation. Where the problem arises is in trying to define what constitutes positive evidence of consent, as opposed to evidence of non-consent. Martha McIntyre’s paper on the MCEP website does an excellent job of drawing out these complexities.

If the discussion at p.26 – 27 is a guide, there is a risk that the standard for determining consent will be set so high that very few mine sites will be able to obtain certification, in which case the certification scheme will be of little practical value. For example, how many mine sites in Australia have formal agreements with affected communities (other than Indigenous communities?) The issue of how the model of community consent proposed in the paper fits with established planning and political processes in Australia and other countries also requires further consideration. Again, we would welcome the opportunity to address these issues in more detail at a later stage.

iii. The MSO provides independent training and technical advice for affected communities to ensure they are aware of their rights and the agreements they enter into.

In some jurisdictions, independent advice and training is provided through Government agencies or other bodies. The key point is that the training and advice is actually provided, not who provides it.

iv. The MSO develops strategies for managing social and economic impacts of construction, operation, and post-mining conditions with the participation of affected communities.

v. Community development plans or resettlement plans provide compensation in the case of loss of, or damage affecting, the legal or customary rights, property, resources, health or livelihoods of Indigenous people and affected communities.

See the comment in relation to 3e)iii concerning the provision of sustainable livelihoods.

**b) Ensure that appropriate systems and processes are in place to provide for ongoing interaction with affected parties, making sure that minorities and other marginalised groups have equitable and culturally appropriate means of engagement;**

i. See 10(c).

**c) Contribute to community development from project [mine] development through closure in collaboration with host communities and their representatives; and**

**d) Encourage partnerships with governments and non-government organisations to ensure that programmes (such as community health, education, local business development) are well designed and effectively delivered; and**

**e) Enhance social and economic development by seeking opportunities to address poverty;**

i. The MSO develops opportunities for employment, training, and capacity building with the participation of affected communities.

ii. The MSO respects Indigenous people's right to economic development benefits flowing from its operations.

This criterion would benefit from some clarification. What does ‘respecting a right’ mean in this context? We would argue that the crucial point is that the MSO actually takes concrete action to ensure, as far as is practical, that Indigenous people derive economic development benefits from the project.

- iii. The MSO supports local businesses and products, whenever feasible and consistent with sound business practice, and works with stakeholders to establish business and other opportunities that are designed to be sustained beyond the life of the mine.
- iv. The MSO participates in and/or encourages partnerships and programs (public and/or private sector) that seek to improve environmental and social outcomes in the surrounding region.
- v. The MSO works with communities affected by poverty, within their region of influence, such that they benefit from economic development arising from MSO activities.

This is the first time that the term ‘within their region of influence’ is introduced. Is this different – and broader – than the concept of affected communities? If so, an MSO might quite justifiably argue that this is defining its responsibilities too widely.

- vi. The MSO conducts regular reviews of its community agreements and development activities.

This is good practice, but it is doubtful whether it should be a condition of certification.

#### **10. Implement effective and transparent engagement, communication and independently verified reporting arrangements with mining stakeholders.**

**a) Report on the MSO’s economic, social and environmental performance and contribution to sustainable development;**

- i. The MSO’s corporate entity produces an annual public performance report, which includes information on performance across the MCEP Principles.

Given that this is a site-based certification scheme, it arguably should be an explicit requirement that the corporate report includes site-level data about compliance with MCEP principles.

**c) Engage with and respond to stakeholders through open consultation processes.**

- i. The MSO conducts a stakeholder analysis to identify stakeholders (including minorities and marginalised groups), their rights and interests, and regularly reviews this during its operations.
- ii. Stakeholder engagement, consultation and communication use two-way processes of dialogue that are open, just and transparent.

Auditors and sites will need to be provided with some guidance on what is encompassed by the phrase 'two-way processes of dialogue that are open, just and transparent'

- iii. Consultation processes undertaken by the MSO address the needs and protect the rights of marginalised groups, including women, Indigenous people and the economically marginalized.
- iv. Outcomes of consultation processes are considered and, where appropriate, integrated into management planning, systems and operations.
- v. The MSO has appropriate mechanisms in place for hearing and resolving stakeholder grievances.