



## Kimberley Land Council

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ABN 96 724 252 047 ICN 21

18 May 2020

Code Administration Team  
Australian Carbon Industry Code of Conduct  
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Via email: [code.administrator@carbonmarketinstitute.org](mailto:code.administrator@carbonmarketinstitute.org)

### **Re: Submission in response to the findings of the Australian Industry Code of Conduct Independent Review**

The Kimberley Land Council (KLC) welcomes the opportunity to provide comments on the findings of the Independent Review of the Australian Carbon Industry Code of Conduct.

The KLC is the recognised Native Title Representative Body for the Kimberley region in WA, and facilitates the Kimberley Ranger Network as a regional network of Indigenous land managers. The KLC actively facilitates the registration and operation of Indigenous carbon projects on behalf of native title holders and other Kimberley Aboriginal people, including those holding pastoral leases.

While carbon projects under the ERF offer significant opportunities for native title holders, without proper checks and balances, underpinned by the principles of free, prior and informed consent, there is a risk of projects resulting in disempowerment of Traditional Owners. The Code of Conduct could play an important role in preventing such adverse outcomes and promoting true best practice in an indigenous context – as is its purpose and intent; in its current state it falls short of this.

These shortfalls in relation to free, prior and informed consent regarding project registrations in particular and Native Title holder and claimant engagement in general are the very reason KLC is not a current Signatory.

In that context, I am pleased to share the below comments on your Review and the Recommendations contained therein.

Sincerely,

**KRISTINA KOENIG**

Program Manager Carbon and Enterprise Development  
Land and Sea Management Unit  
Kimberley Land Council

Recommendation 2: *It is recommended that the Code clarify in section 2.3(3)(d) that best-practice requires EIH consent to be obtained prior to the registration of area-based ERF projects, consistent with the guidance of Indigenous Carbon Industry Network (ICIN) for “seeking free, prior and informed consent from indigenous communities for carbon projects” – a best practice guide for carbon project developers.*

- As only the timing of application but not that of subsequent registration (project declaration) is within the control of the proponent / developer rather than the Regulator, the following addition is proposed to the recommendation: “It is recommended that the Code clarify in section 2.3(3)(d) that best-practice requires EIH consent to be obtained prior to the **application for** registration of area-based ERF projects.”

Consent rights, including Recommendation 3 *The Review recommends the above best-practice standard on an ‘if not, why not’ basis. It is recommended that Signatories be obliged to report against the best-practice standard on the ‘if not, why not’ basis in their ‘Annual Report (Self-Audit Checklist)’.*)

- The recommendation on effectively ‘best efforts’ for free, prior and informed consent (FPIC) in relation to EIH consents does not go far enough if the Code aims to embed and enforce true best practice – which should preclude conditional registrations.
- Legislation which creates incentives for third parties to use and benefit from activities on areas of traditional country must be accompanied by positive protections for native title: Activities under the ERF have a clear capacity to interfere with Indigenous peoples’ rights and interests in areas of their traditional country and therefore trigger the need for this protection through provisions to ensure (not just aspire to) FPIC.
- As a result, the “if not, why not” approach may be appropriate for EIHs such as banks; up-front consent (pre-application) from Native Title holders whose land a project takes place on should be non-negotiable, as there will always be excuses for why what can indeed be a difficult process could not be undertaken.
  - In light of this, there is a possibility to make an explicit distinction between native title consent and that of banks and other interest holders whose rights are not impacted by carbon projects and who therefore should not be able to delay project registrations; i.e. the ability to conditionally register projects could be retained where EIH consent for example from banks (as opposed to native title holders) is concerned.
- Relatedly and as an alternative to “if not, why not” provisions, it is the KLC’s suggestion that the Code Administrator (and Review Panel) support a proposal to the Department and the Regulator to start allowing for baselines to be backdated once again (as used to be the case until 2014). A (limited) transition period between baseline end and project commencement would eliminate the need for conditional declarations which preclude proper consultation and FPIC but are often used to lock in baselines.
- Due to the possibility of a carbon maintenance obligation being imposed, it is the Land Council’s advice that the registration of a Sequestration project in particular is considered under the *Native Title Act 1993* (NTA) to be a Future Act, and, as such, proponents must be required to implement ILUAs prior to project registration (as per Part 2, Division 3 of the NTA). This requirement should be included in the Code.

- The requirement for ILUAs for sequestration projects would bring the carbon industry in line with common practice of other industries operating on native title land, including pastoralism and mining. It would also ensure compliance with the United Nations Declaration on the Rights of Indigenous People.
- In the spirit of the Code embedding best practice, Native Title claimants should be treated and consulted in the same way Native Title holders are – even though the CFI Act currently does not identify registered claimants as EIHS.
  - Given that a native title determination does not create new native rights, but confirms the existence (subject to extinguishment) of existing native title rights, registered native title claimants should be afforded the same rights as native title holders who have received a determination, especially as CFI projects can operate for 25-100 years.
  - This approach would be consistent with the approach taken in the *Native Title Act 1993* (Cth), and improve project integrity, as it would ensure future rights holders have given permission (legal right) for and consented to the future potential impact on their land, for example through the application of a carbon maintenance obligation (for a given permanence period).
- Lastly, on this area of the Code, “reasonable efforts (to enter into binding agreements with Native Title holders prior to project registration)” is a vague, undefined and insufficient requirement, and the Review should recommend it be better defined (in terms of time, language, access, etc) for the benefit of Signatories and clients / customers.

Recommendation 4: *It is recommended that Signatories consider the financial and cultural advantages of taking into account the ‘active dissent’ of EIHS in relation to area-based ERF projects.*

- In regards to ‘active dissent’, there would be a third and important implication of such an approach in addition to an unviable project either not being registered in the first place or voluntarily revoked upon active dissent: unilateral revocation by the Regulator, in order to free up that land for other potential proponents to consider developing a project. This would avoid a delay in delivery of abatement and any associated co-benefits, as well as preserve the baseline. This should be included in the Review.

Recommendation 5: *It is recommended that the Code provide guidance aimed at ensuring fair and transparent benefit-sharing arrangements between clients (the originators of the co-benefit) and Signatories for projects generating co-benefits*

- This Recommendation should explicitly suggest reference to free, prior and informed consent, including the right to withhold consent if proposed benefit-sharing arrangements are perceived as inappropriate and cannot be negotiated to all parties’ satisfaction.

Recommendation 6: *It is recommended that the Code modify the requirement to provide the information outlined in section 2 in ‘plain English’, and instead require that a Signatory use the medium of communication that is linguistically and culturally appropriate for the audience and their level of maturity in the carbon market.*

- To ensure that complex information is not withheld even if decision-making timelines may be impacted, the following addition is proposed to the recommendation: “It is recommended that the Code modify the requirement to provide the information outlined in section 2 in ‘plain English’, and instead require that a Signatory use the medium of communication that is linguistically and culturally appropriate for the audience and their level of maturity in the carbon market, ***whilst ensuring that all relevant information is duly covered and negotiations are based on FPIC.***”

Recommendation 8: *It is recommended that the Code Administrator provide guidance on the options for selling carbon credits.*

- This should be done in general terms only, whilst avoiding any bias, and with clear mention of possibly emerging new opportunities that may need to be explored.

Recommendation 12: *It is recommended that the Code Administrator provide legal guidance for written agreements via model contracts for each of the various types of arrangements entered into by Signatories and clients.*

- In addition to potential inclusions mentioned in the draft Review, any guidance for agreements should include and provide proposed clauses in regards to:
  - Confidentiality
  - Marketing of the ‘story’ related to a project (e.g. co-benefits etc)
  - Any secret and sacred material that becomes known to a Signatory as part of a project
  - Intellectual Property

Recommendation 20: *It is recommended that the Code Administrator should focus its compliance monitoring activities on any residual Code requirements that are not already covered by the CFI Act and subordinate legislation in order to reduce administrative burden for both the Code Administrator and the relevant Signatory.*

- In order to ensure the Code *can* go further than the CFI Act, this recommendation should only apply where the CFI Act sets at least the same standard as demanded by a commitment to best practice – e.g. refer Recommendation 3 re conditional consents and FPIC.

Recommendation 22: *It is recommended that the development of model contract provisions and/or model agreements for Australian Carbon Credit Units (ACCUs) be informed by the legal standards and procurement policies of its government and major corporate stakeholders.*

- It should be clarified that this Recommendation is specifically relevant to the Queensland Land Restoration Fund.
- Additionally, indigenous stakeholders should also be informing the requirements and model agreements, rather than only government and major Corporates.

Recommendation 25: *It is recommended that Section 2.5(1)(a) of the Code be amended to add: “If the Signatory takes on the role of ERF project proponent, the written agreement between the Signatory and customer must provide for orderly succession of the project proponent, consistent with the environmental and social integrity of the Scheme and with the relevant laws.”*

- In addition to the customer, EIHS should be addressed. When eligible interest holders provide consent to a project, they do so on the basis of a defined ownership and governance structure for the project – including a project proponent who is explicitly named – as well as an outline of operational arrangements. These are required to be disclosed as part of the project proposal, application and/or declaration documents that should accompany an EIHS consent form.
- Material changes to these details (based on which consent is given) – such as a change of proponent – should entail renewed EIHS engagement and consent as best practice. As above, legislation which creates incentives for third parties to use and benefit from activities, such as required for carbon projects, on areas of traditional country must provide positive protections for native title, given that activities under the ERF have a clear capacity to interfere with Aboriginal peoples’ rights and interests in areas of their traditional country and therefore trigger the need for this renewed informed consent.

Recommendation 30: *It is recommended that the Code Administrator provide further guidance for Signatories on developing feasibility advice, risk assessment plans and conducting stakeholder consultations.*

- The following addition is proposed in order to further embed principles of FPIC: “It is recommended that the Code Administrator provide further guidance for Signatories on developing feasibility advice, risk assessment plans and conducting stakeholder consultations, **and do so in consultation with indigenous representatives of the industry in particular.**”

Recommendation 34: *It is recommended that the Panel member selection process have regard to the skills and experience needed by the Panel as a whole. In addition, the nomination, screening and appointment of Code Panel Members should be undertaken by a Nominations Committee whose members are drawn from key Code supporters.*

- The Nominations Committee should represent a cross-section of industry participants (including producers, aggregators, buyers), and at least one independent member, rather than any combination of ‘key Code supporters’.

Recommendation 38: *It is recommended that a conflicts of interest framework be implemented if the CMI is appointed to administer the Code.*

- This is a crucial recommendation and, given the many linkages within the industry, needs to be reasonably explicit on what is considered a conflict and what levels of professional affiliations and commitments are permissible.

Recommendation 43: *It is recommended that more than one entity can become a Signatory to the Code under the one Signatory fee, subject to those entities being companies within the same corporate group.*

- This creates a significant imbalance between large corporates being advantaged versus small organisations – where a situation may arise in which a corporate with 5 subsidiaries pays the same fee as a 5-person company.
- At the very least, it needs to be clear that the membership fee would be based on the number of projects that all subsidiaries combined are involved in (rather than just the one paying the fee).

Recommendation 45: *It is recommended that the Code Administrator inform the Australian Financial Markets Association and the Clean Energy Regulator of the contractual needs of demand-side participants, to facilitate the modification of contracts for the trading of co-benefit branded ACCUs.*

- There is currently no co-benefits branding, and the indigenous savanna carbon industry has engaged with the Clean Energy Regulator to avoid unintended consequences of such an approach.
- Any changes / developments in this area should only be made in collaboration with the indigenous carbon industry.

#### Transparency – various Recommendations

- The KLC supports Recommendations 1, 6, 9, 10, 11, 12, 13, 17, 18, 32, all of which reflect a commitment to increase transparency and a shared understanding of the Code and related matters.