

# Company-commissioned independent inquiries in the mining sector: A preliminary paper and a case for applied research



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<sup>1</sup> QS World University Rankings and Performance Ranking of Scientific Papers for World Universities, 2018.

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## 1. Introduction

The past decade has seen the advent of a rare and under researched phenomenon: the company-commissioned ‘independent’ inquiry (CCII) into aspects of mining industry social performance.<sup>3</sup> Initiated by global mining companies – generally as a result of pressure exerted by external events and stakeholders – CCII have largely been conducted in situations where community grievances about operational impacts are longstanding and acute. These situations are often characterised by weak state institutions with gross imbalances in economic and political power.

The global community is demanding greater transparency from the private sector and the advent of CCII suggest a corporate willingness to pursue unconventional forms of inquiry to understand complex issues where companies carry (or are seen to carry) responsibilities. Findings of CCII may not always be what participants in the process expect, but the potential for identifying new pathways to remedy and reconciliation appears to be greater than if such processes were not attempted in the first place. On this basis alone, CCII deserve greater attention.

CCII are a vehicle for responding to – even pre-empting – complex stakeholder issues in the context of resource extraction. A cursory review shows that CCII are usually sparked by underlying grievances. These are typically high-stakes environments: there is a need to make good decisions in a complex situation, where the available facts are contested, and where human rights risks are present. Whether CCII are appropriate in these circumstances needs careful consideration. Companies are expected, through instruments such as the United Nations Guiding Principles on Business and Human Rights (UNGPs), to establish a comprehensive understanding of how their activities impact individuals and communities, and how those impacts intersect with internationally recognised human rights.<sup>4</sup> CCII are one means through which companies can demonstrate these efforts.

Large-scale mining developments are complex: they straddle national boundaries, economies and cultures, and intersect with the rights, interests and worldviews of different groups, in unique and often problematic ways. These circumstances are bound to raise issues that are difficult to resolve, and if left unchecked over the course of the mine lifecycle, can become intractable. Ensuring principles can be applied across different contexts, across a range of dimensions, and from a variety of stakeholder perspectives is pivotal to these processes being activated with integrity.

## 2. About this paper

In determining whether CCII are an appropriate tool for investigating complex issues and incidents in the mining industry, it is important to first establish a basic understanding about their use. This paper considers seven international CCII commissioned over the past ten years, and

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<sup>3</sup> One of the few studies in this area pre-dates most of the CCII considered in this paper. See: [https://sites.hks.harvard.edu/m-rbcg/CSRI/publications/studentpaper\\_3\\_lombardo\\_santiago.pdf](https://sites.hks.harvard.edu/m-rbcg/CSRI/publications/studentpaper_3_lombardo_santiago.pdf).

<sup>4</sup> See: [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

describes them – both in terms of the methodologies used, and so far as can be readily determined, the outputs and outcomes which resulted. While these processes have advantages over the industry’s more internal and “closed” approach to addressing and investigating issues, this brief review has established that there is potential to increase the effectiveness of CCIs. For this reason, the paper compares CCIs with approaches taken by seven, resource sector-related, government-commissioned independent inquiries (GCIs).<sup>5</sup> GCIs tend to carry an authority that is not available to CCIs (e.g. legislative powers of investigation), nevertheless there is much that can be learned from this established state-sanctioned practice.

We maintain that CCIs cannot offset the need for companies to implement careful, comprehensive approaches to social performance and human rights due diligence from the outset of mining activities. Rather, this paper highlights further work that could enhance the acceptance, and the effectiveness, of CCIs commissioned in the future. Such work needs to proceed on the premise that these processes are appropriate for investigating complex cases, and that companies accept and act on their prior responsibilities to avoid and mitigate harms arising from their activities.

This paper provides a preliminary desktop review of CCIs as they have been used in the mining sector. It does not purport to offer a comprehensive evaluation of the inquiries considered. Nor does the paper seek to provide definitive advice about whether, when, and how, CCIs should be undertaken. Rather, the paper identifies topics that could be further explored by researchers, with input from mining companies, communities, civil society, researchers and other stakeholders. One outcome of further research could be a “model” for companies to voluntarily and proactively engage complex problems, and discover solutions, through a robust CCI approach. This could include a set of principles or recommendations for responsible inquiry conduct.

### 3. Background context

The CCIs considered for this paper were initiated during a decade in which business responsibility for human rights enjoyment, and for responding to allegations of corporate human rights abuse, was being defined. The 2008 UN “Protect, Respect, Remedy” Framework, and the 2011 UNGPs, clarified business’ responsibility to “respect” human rights, and to ensure that victims of abuse have access to “remedy”.<sup>6</sup> These pillars are underpinned by a core process: human rights due diligence. The UNGPs require companies to exercise due diligence to ensure that their activities do not cause harm to people, and, if they do cause harm, that remedies can be obtained.

The CCIs considered in this paper represent occasions where companies have recognised a need to establish clarity over allegations made about human rights harms caused, or that may have been caused, by their mining operations. They also reflect circumstances where the project-level grievance mechanisms envisaged in the UNGPs were insufficient to the task. The CCIs examined

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<sup>5</sup> These government-commissioned independent inquiries are sourced from the Australian context given the authors’ familiarity with this jurisdiction. Similarly, comparisons could be made with commissions of inquiry from other countries.

<sup>6</sup> See: [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).



were generally initiated in situations where complex, highly publicised, issues had escalated to the point where the company deemed that some other, novel, process was necessary.

CCIIs are not the only non-judicial form of form of inquiry to have emerged during this same period. Several other types of inquiry processes have attempted to create an independent process for investigating community grievances. The International Finance Corporation's (IFC) Compliance Adviser Ombudsman (CAO), is a well-recognised example.<sup>7</sup> Such processes, however, are initiated by project-affected people. When this occurs, companies face pressure to participate and, under these circumstances, can tend to be defensive.<sup>8</sup> The focus in these situations can easily shift from an investigative mindset to companies looking to protect their interests and reputation. Nonetheless, as with CCIIs, the IFC CAO represents an attempt to ensure that local communities affected by mining have legitimate mechanisms through which to have their grievances considered, and to find pathways to remedy.

The pressures that led companies to initiate CCIIs are not likely to abate, and may intensify, in the near future. Our review of mining companies' risk screening and assessment processes elsewhere suggests that social incident investigation models and methods are not well established. Operational-level personnel are not routinely trained in identifying the human rights dimensions of issues, and can be reluctant to elevate issues and incidents to senior company management based on their analysis. Likewise, the industry's willingness and capacity to conduct retrospective reviews of social incidents is limited compared with workplace safety and environmental incidents. In these circumstances, opportunities for early and effective responses to allegations of indefensible social impacts and human rights abuse can easily be lost.

At the same time, external scrutiny of company approaches to human rights and social performance continues to strengthen. It is therefore prudent to further consider both the past, and potential future, appropriateness, and utility of CCIIs. Where disputes have accelerated beyond the reach of project-level grievance mechanisms, CCIIs may be one means for companies to demonstrate due diligence under the UNGPs, and to avoid more punitive processes, which can become resource and time intensive for all parties. The recent release of the Zero Draft of a *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, serves as a reminder of the potential consequences for mining companies of failing to adequately address social performance issues and incidents.<sup>9</sup>

## 4. Scope and structure of the paper

The CCIIs examined in this paper are operationally-specific. In each case, the commissioning entity took deliberate steps to formally separate itself from the oversight, management, and daily conduct of the investigation or assessment. In each case, a new, time-limited, body with the

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<sup>7</sup> The CAO is the independent recourse mechanism for the IFC and the Multilateral Investment Guarantee Agency (MIGA). The CAO responds to complaints from project-affected communities with the goal of enhancing social and environmental outcomes on the ground. See: <http://www.cao-ombudsman.org/>

<sup>8</sup> An IFC CAO process can be initiated for IFC-financed projects, or where the IFC has an equity stake. Companies can decide whether they participate or not.

<sup>9</sup> See: <https://www.business-humanrights.org/en/about-us/blog/debate-the-treaty>; <https://www.business-humanrights.org/en/binding-treaty>; <https://www.somo.nl/topic/business-human-rights/>.

specific stated responsibility of obtaining and evaluating information ‘independently’ was established. These bodies sought to engender stakeholder confidence that the inquiry process was transparent, credible, and fair, and, at least by implication, fundamentally different from alternative approaches such as direct consultancies.<sup>10</sup>

In contrast, the seven GCIIIs are not operationally-specific and, in all but one case, were focused on a resource sector issue or set of issues in more general terms. Each GCII was contending with elevated levels of stakeholder anxiety, discordant perceptions of the facts surrounding the inquiry subject matter, considerable media interest, and high, often conflicting, expectations of stakeholder groups. In these respects, the Australian GCIIIs assessed for this paper have much in common with the CCIIIs considered.

Each inquiry considered for this paper has been analysed in terms of its:

- aims and purpose
- structure and scope
- approach to independence
- treatment of evidence and information
- openness and transparency
- engagement with stakeholders
- outputs and outcomes.

While the authors’ understanding of the internal workings of several inquiries has contributed to this paper, in the main, information has been collected from public sources. It has not been possible to incorporate the views of local communities or other stakeholder groups on CCII processes, or to observe outcomes. As a result, our analysis is preliminary. A deeper, richer, analysis of CCIIIs, and their consequences, will require direct engagement with those involved.

The paper is structured to provide:

- brief summaries of each CCII
- an assessment of the issues and implications arising
- brief summaries of each GCII
- an initial analysis of the potential learnings for CCIIIs from GCIIIs
- suggestions for further research.

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<sup>10</sup> The Mining, Minerals and Sustainable Development (MMSD) project was a multi-company inquiry commissioned in 2002 that examined how the mining and metals sector could contribute to sustainable development.<sup>10</sup> The MMSD has not been examined in this report. Convened by the International Institute of Environment and Development (IIED) as the independent third party, the MMSD was global in scope, with approximately 175 individual studies commissioned during the course of the project, across multiple issues and operations. While notable, the drivers, scope and coverage of the MMSD differ from the operationally-specific CCIIIs included in this report.



## 5. Company-commissioned independent inquiries

The seven CCIs considered in this paper are listed in Table 1.<sup>11</sup>

*Table 1: CCIs considered in this paper*

Date	Inquiry title
2007 – 2008	Review of Cerrejón Coal and Social Responsibility – Impacts and Intent
2007 – 2009	Newmont Mining Corporation Community Relationships Review
2008 – 2010	Human Rights Assessment of Goldcorp’s Marlin Mine in Guatemala
2015 – 2016	Independent Assessment of the Porgera Remedy Framework
2015 – 2016	Yanacocha Independent Fact Finding Mission on Tragadero Grande
2016 – 2017	Review of Free, Prior and Informed Consent (FPIC) within a Human Rights Framework: Lessons from a Suriname case study
2017 – 2020	Amulsar Independent Advisory Panel: First Annual Report

Brief summaries of each of these CCIs follow. In keeping with the source restrictions outlined earlier, the summaries provided below are, of necessity, limited.

### 5.1 Review of Cerrejón Coal and Social Responsibility: Impacts and Intent

The Cerrejón Review was commissioned by Cerrejón Coal and its owners, Anglo American, BHP Billiton and Glencore, in August 2007 as part of negotiated response to a complaint filed with the Australian National Contact Point (ANCP) for the OECD Guidelines for Multinational Enterprises.<sup>12</sup> The Cerrejón mine, in Colombia, had been strongly criticised over the past forcible removal of indigenous communities. The complaint alleged that attempted depopulation of one township in 2001 had caused suffering and hardship; and sought an appropriate process to manage future relocation of other communities.

The Review was described as an independent assessment of the company’s past and current social engagement. Internally, it seems that the Review was viewed as an opportunity to ‘reset’ Cerrejón Coal’s relationships with local communities, and to assure interested non-government

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<sup>11</sup> Other similar exercises preceded the seven CCIs reviewed in this paper. For example, we are aware that in 2004 Freeport McMoRan initiated a Social and Human Rights Audit of the Grasberg mine in West Papua, following a process not dissimilar to that which is described in this report. This report is no longer available in the public domain.

<sup>12</sup> See: [https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Cerrejon\\_Panel.pdf](https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Cerrejon_Panel.pdf).

organisations (NGOs) of the company's intention to shift its social performance to align with international best practice.

Cerrejón Coal appointed a four person Panel selected on the basis of expertise, and acceptability to international stakeholders (two of the four panellists worked for international NGOs), to oversee the review. The criteria used to select the Panel do not appear to have been publicised. Panellists have since suggested that prior engagement with Cerrejón led to their names being put forward.<sup>13</sup> The Panel appointed social issues consultancy, Social Capital Group, to conduct field work.<sup>14</sup>

Both the panellists and the consultants were paid directly by Cerrejón Coal. It is not known what arrangements, financial or otherwise, were made to reinforce the independence of the Panel's work.

The Panel conducted stakeholder meetings in Colombia, and the consultants carried out what were described as 'extensive' in-field interviews and observations, (SCG's report on this field-work has not been published). Documents, both company, and public, were reviewed. The approach taken by the Panel to the testing, and weighing, of the information provided has not been publicly described.

At the outset, Cerrejón Coal undertook to release an executive summary of the Review report. In the event, the full report was provided on both the company's and the shareholders' websites. Cerrejón also placed a detailed response to the Review on its site. The company continues to provide annual progress reports on its social commitments in response to the Review Report. It is unclear what other steps were taken to engage with community members on the Report.

The Cerrejón Review provided the impetus for a number of changes to social policy and practice at the mine. The Review also spurred completion of a financial agreement between the company and two communities. The company, and its shareholders, were praised by some NGOs for their commitment to public accountability. Nevertheless, a subsequent study found that some local community members had questioned both the independence and transparency of the Review process.<sup>15</sup>

## 5.2 Newmont Mining Corporation Community Relationships Review

This Review was triggered by a shareholder resolution following continued, sometimes severe, conflict between communities and the company at several locations worldwide. The Review sought to evaluate the effectiveness of Newmont's approach to 'management of community risks associated with company activities' by focusing on five (later expanded to six) mine sites in differing operating environments.<sup>16</sup>

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<sup>13</sup> See: [https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/studentpaper\\_3\\_lombardo\\_santiago.pdf](https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/studentpaper_3_lombardo_santiago.pdf).

<sup>14</sup> See: [www.s-c-g.net/en](http://www.s-c-g.net/en).

<sup>15</sup> See: [https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/studentpaper\\_3\\_lombardo\\_santiago.pdf](https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/studentpaper_3_lombardo_santiago.pdf).

<sup>16</sup> See: [https://s1.q4cdn.com/259923520/files/doc\\_downloads/crr/CRR-Global-Summary-Report-and-Appendices-English.pdf](https://s1.q4cdn.com/259923520/files/doc_downloads/crr/CRR-Global-Summary-Report-and-Appendices-English.pdf).

The Review structure was relatively complex, with an eight member Advisory Panel, Study Directors responsible for preparation of the final summary report, and Site Study Teams for each jurisdiction. The Panel Chair was recruited directly by Newmont. The Chair then worked with Newmont to identify potential panellists. Again, the criteria used to select these panellists do not appear to have been made publicly available. Ultimately the Panel included a community representative, an 'ethical investor' representative, and individuals from NGOs. The Study Directors were also appointed directly by Newmont. Study Teams, who were a mix of researchers and consultants, were chosen through consultation between Newmont, the (initial) Study Director, and the Advisory Panel.

Several steps were taken to bolster the independence of the Review process. The Advisory Panel were empowered to provide their own, unedited, public report on the Review. Study Directors and Site Teams were required to formally document their independence from the company. Nevertheless, while panellists felt strongly that the Review was independent from the company, some Study Teams indicated that Newmont had influenced the structure, content and tone of their final site reports, when commenting on draft versions.<sup>17</sup> Both the Study Directors and Study Teams were paid directly by Newmont. Panel members were offered the option of no compensation if they so chose.

The Study Teams reviewed corporate documents, and conducted brief (several days to a week) site visits, interviewing both company and external stakeholders.<sup>18</sup> The process by which the information gathered was tested, or weighed, is not described in the consolidated Global Summary Report.

At the commencement of the Review, Newmont committed to making the findings public. The Global Summary Report, inclusive of five site reports and the Advisory Panel's separate report, were ultimately published on Newmont's website in English, Spanish and Bahasa. Newmont's response, and annual progress reports are also available on the site.

There was some stakeholder criticism about the level of engagement and transparency during the Review. Other authors highlighted concerns expressed about the year-long gap between the conduct of interviews, and feedback being provided to interviewees; and about a perceived inability for community members to contact the Panel whilst the Review was in progress.<sup>19</sup>

The Community Relationships Review provided Newmont with lessons and guidance which the company explains as subsequently incorporated into policy and practice changes at corporate level, and at sites.

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<sup>17</sup> See: [https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/studentpaper\\_3\\_lombardo\\_santiago.pdf](https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/studentpaper_3_lombardo_santiago.pdf).

<sup>18</sup> Noting that some Study Teams had previously visited these sites for other assessment work, and were otherwise familiar with the site context.

<sup>19</sup> See: [https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/studentpaper\\_3\\_lombardo\\_santiago.pdf](https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/studentpaper_3_lombardo_santiago.pdf).

### 5.3 Human Rights Assessment of Goldcorp's Marlin Mine in Guatemala

In early 2008, following a series of protests, and public pressure from an ethical investors shareholder group, Goldcorp agreed to commission an independent assessment of potential human rights impacts at its Marlin Mine in Guatemala. The assessment was aimed at evaluating the company's past performance, informing Goldcorp's future policies and practices, and, according to the ethical investors, 'setting a benchmark for mining companies operating in high risk countries'.<sup>20</sup>

The Assessment was overseen by a three person Steering Committee directly appointed by Goldcorp. The Committee was representative in nature, encompassing one appointee from Goldcorp, one from the ethical investors' group, and one from a Guatemalan NGO. The Committee issued a call for proposals to conduct the Assessment, ultimately choosing social performance consultancy, On Common Ground (OCG).

OCG have indicated that they worked independently from the company, (they reported to the Steering Committee); had complete control over the determination of which groups to meet with; and that Goldcorp had no say in regard to the form, content, or findings of the final report. Nevertheless the process was strongly criticised by NGOs on the basis that inclusion of a Goldcorp senior executive on the Committee had given the company undue influence over the results. OCG was paid directly by Goldcorp.

The assessors spent more than 180 days in Guatemala and conducted interviews, informal discussions, and focus groups on a relatively large scale. Extensive documentary material from company, public, and stakeholder group sources was reviewed, and two expert reports were commissioned. The final report describes the process used to test, and weigh the evidence gathered through these different mechanisms. The report indicates OCG utilised United States Government Auditing Office 'standards for guidance on determining the reasonableness of evidence', with 'particular attention being given to not overstepping available information'.<sup>21</sup>

At the outset, an Assessment website was established, which displayed the Assessment objectives, and the agreement between the ethical investors and Goldcorp, and, subsequently, minutes of Assessment Steering Committee meetings. During the initial months of the Assessment, community updates were also provided on the website. The final report was published on the Assessment website, (in both English and Spanish), and on the Goldcorp website. Goldcorp's formal response was also published on their website, as were progress reports on implementation of the Assessment recommendations. Goldcorp's implementation of

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<sup>20</sup> See: <https://www.business-humanrights.org/en/investors-spur-goldcorp-to-address-human-rights-in-guatemala>.

<sup>21</sup> See: [http://q4dev.s11.clientfiles.s3-website-us-west-2.amazonaws.com/653477107/files/doc\\_downloads/portfolio\\_docs/marlin/OCG\\_HRA\\_Marlin\\_Mine\\_May\\_17\\_linked.pdf](http://q4dev.s11.clientfiles.s3-website-us-west-2.amazonaws.com/653477107/files/doc_downloads/portfolio_docs/marlin/OCG_HRA_Marlin_Mine_May_17_linked.pdf).

Assessment findings has since been independently reviewed, with that review also being made available on the company website.

The Assessment provided Goldcorp with specific opportunities for improvement, which have been reportedly actioned by the company. Conduct of the process also seems to have provided reassurance to the Guatemalan Government about Goldcorp's approach to human rights. Nonetheless, some NGOs remain convinced that the Assessment was fundamentally flawed from the outset, given the composition of the Steering Committee.

## **5.4 Independent Assessment of the Porgera Remedy Framework**

Barrick Gold commissioned the Assessment following a recommendation from the Office of the High Commissioner for Human Rights that there be an independent review of the implementation of the Porgera Remedy Framework. The Framework was established by the company to provide remedies for survivors of sexual violence perpetrated by individuals associated with the Porgera Mine in Papua New Guinea. The Framework had been criticised by both local and international NGOs.

The Assessment sought to establish the degree to which the Framework had been implemented as it had been designed; and how well or otherwise the Framework aligned with the UNGPs. The company indicated that it also hoped to provide durable lessons for other businesses with respect to operational level grievance mechanisms.

The Assessment was overseen by a three person External Committee which included two NGO representatives, and one individual with legal expertise. The basis for selection of the Committee was not publicised. The Assessment itself was conducted by Enodo Rights, a firm offering both legal and stakeholder engagement skills. Enodo Rights were chosen after invitations were issued to a number of organisations to submit proposals. The criteria used to select Enodo Rights were not made public.

In an effort to ensure, and to be seen to ensure, independence, Barrick Gold provided all funding to Enodo Rights prior to research findings being shared with the company. The External Committee worked on a voluntary basis. The Assessors reported to the External Committee. The Assessors emphasised that they had been provided with full control over the conduct of the Assessment. The company (but no other stakeholders) were provided with the opportunity to comment on draft conclusions.

The Assessors conducted a twenty-two day site visit, and consulted with local and international stakeholders over a fourteen week period. Enodo Rights also reviewed an extensive range of company, and public, documentary material. The final report describes the processes used to test and weigh evidence, and the standard of proof applied. The Assessors sought to consider all

actions from the perspective of the 'reasonable observer', and all decisions in the context of 'reasonable alternatives'.<sup>22</sup>

Enodo Rights have indicated that they shared the Assessment Terms of Reference (TOR), an overview of the scope and methodology, and a summary of engagement expectations with all stakeholders on request. Prior to the start of the Assessment, Barrick Gold committed to making the Report publicly available. The final report, and the company's formal response to it, were subsequently published on the Barrick Gold website.

Given that the Assessment was largely supportive of the company's efforts to design and implement the Framework, the process provided the company with some verification of its approach. NGOs have strongly criticised the Assessment on the basis that it was not sufficiently independent from the company.

## 5.5 Yanacocha Independent Fact Finding Mission on Tragadero Grande

The Yanacocha Independent Fact Finding Mission (YIFFM) was initiated by Newmont following persistent allegations by local and international stakeholders that the Minera Yanacocha operation in Peru had perpetrated human rights violations as part of a land dispute with a local family.

The YIFFM was asked to consider three questions about Minera Yanacocha's past practices, and to advise on the facts relevant to the human rights allegations. Subsequent comments from Newmont indicate that the company may have hoped that the YIFFM would dispel the allegations, and would 'open pathways' to resolve the ongoing land dispute.<sup>23</sup>

Newmont commissioned RESOLVE, a non-profit organisation, to provide a concept for a fully independent process. RESOLVE appointed the YIFFM Director, who consulted with stakeholders, including NGOs, before appointing both Mission team members, and a four person Advisory Group who were charged with oversight of the YIFFM methodology and implementation.

A number of arrangements were made to assure the independence of the process. Newmont provided funds to RESOLVE in scheduled instalments. There was no direct payment arrangement between Newmont and the Mission Team or Advisory Group. A Board member of RESOLVE, who was a former Newmont executive, took a leave of absence from the Board for the duration of the YIFFM. The Mission Director has indicated he was afforded complete independence in the conduct of the assessment.

The YIFFM conducted interviews, held discussions, and analysed a wide variety of both company and public documents. The Mission also sought some specific documents from stakeholders.

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<sup>22</sup> See: <http://q4live.s22.clientfiles.s3-website-us-east-1.amazonaws.com/788666289/files/porgera/Enodo-Rights-Porgera-Remedy-Framework-Independent-Assessment.pdf>.

<sup>23</sup> Elaine Dorward-King, 'Newmont responds to Independent Report on Land Dispute in Peru', *Corporate Social Responsibility Newswire*, 2016. See: [www.csrwire.com/press\\_releases](http://www.csrwire.com/press_releases).



Interestingly, unlike the Porgera and Marlin cases, there is no substantive, publicly available explanation of how the material discovered during the YIFFM was tested and weighed. The final report only emphasises that information used in the report “does not meet a judicial standard of evidence”.

From the outset, the YIFFM maintained a website on which a description of the Mission approach, a Fact Sheet, and frequently asked questions were provided, as was the opportunity to contact the Mission Team. Updates were provided to the local family’s attorney during the YIFFM. The family, and the company had the opportunity to comment on the draft report. The final report was published on the YIFFM website in English and Spanish. Newmont’s response to the YIFFM was also published on the company’s website.

Following the completion of the YIFFM there was some increased engagement with the impacted family, however the underlying issues have not been unresolved. While the Mission provided observations, and suggestions for the future, it does not appear to have provided the level of clarity on the human rights allegations which had been hoped for by Newmont, particularly in terms of responding to the use of violence by other parties.

## **5.6 Review of FPIC within a Human Rights Framework: Lessons from a Suriname case study**

By contrast with other CCIIIs considered, there was no immediate external trigger for Newmont’s commissioning of the Review of FPIC at its Merian mine in Suriname. Instead, Newmont indicated that it saw the Review as an opportunity for the company, and others including members of the FPIC Solutions Dialogue group, to gain insights and improve understanding of implementation of FPIC in the context of large-scale mining.

Newmont commissioned RESOLVE to appoint an Advisory Panel, chaired by RESOLVE’s President. The three other panel members were appointed on an expertise basis (one did work for an NGO). Efforts to identify a panellist from Suriname were unsuccessful.

Funding for the Review was provided to RESOLVE. Panel members were offered an honorarium for their participation in the project. The Panel indicated it had full independence over the findings of the Review.

The Panel conducted a four day visit to Suriname during which it held discussions with a ‘limited sample’ of stakeholders. The Panel also conducted a ‘rapid review of available documentation’.<sup>24</sup> The Panel did not publicly articulate the methodology used to test and weigh the information it received.

Engagement with stakeholders (other than the company), was limited to the short in-field visit. In keeping with the aims of the Review, the final report was published on RESOLVE’s website in

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<sup>24</sup> See: <http://solutions-network.org/site-fpic/merian-report2017/>.

English and Dutch and provided to FPIC Solutions Dialogue members. Newmont subsequently publicly committed to utilising lessons from the Review to further align its practices with FPIC.

Newmont has since indicated that those lessons were applied to another development in Suriname where it was 'honored to secure free, prior and informed consent'.<sup>25</sup>

## 5.7 Amulsar Independent Advisory Panel: First Annual Report

Lydian International established the time-limited Amulsar Independent Advisory Panel following community and international NGO opposition to the development of their Amulsar mine in Armenia; and the filing of complaints to the IFC CAO requesting a stop to project funding. The Panel's mandate commenced in 2017 and runs until 2020. In this sense, the Panel is still active, unlike the other inquiry processes reviewed above.

The Panel is charged with providing an independent source of advice on, and scrutiny of, the Amulsar project. Although the Panel's TOR state that its 'role will be authoritative but advisory', the Panel has since indicated that it sees itself as having a pseudo-regulatory role in holding Lydian to account on social and environmental performance.<sup>26</sup> This is a unique feature.

The Panel Chair was chosen directly by Lydian. Panellists were appointed by the company in consultation with the Chair, and subject to the Chair's approval. The panellists were selected on the basis of their expertise, with care being taken to recruit both international and Armenian experts. The specific criteria utilised in the selection process were not made publicly available. The Panel itself has the formal authority to revoke the membership of any panellist if it is felt an individual member is not contributing sufficiently.

The Panel has a wide brief to consider all aspects of the social, environmental and human rights impacts of the Amulsar project. The Panel develops its own agenda, programme of work and research plan. Panellists are not allowed to have business links with Lydian or its shareholders. Lydian provides a per diem payment directly to the Chair, and to panellists who choose to receive it.

Thus far, the Panel has reviewed a wide range of documentation, and engaged with stakeholders in Armenia, and elsewhere. There is no public information about the processes used by the Panel to test, or weigh, the information provided to it.

The Panel maintains its own website, and publishes regular updates on its work in both English and Armenian. The Panel presented its first Annual Report on its website, and in a press conference in Armenia.

The Panel has provided Lydian with both formal and informal advice on how to improve its approach to social and environmental issues. Lydian shareholders and the Armenian Government

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<sup>25</sup> See: <https://sustainabilityreport.newmont.com/2017/>.

<sup>26</sup> See: <http://www.amulsarpanel.com/wp-content/uploads/2017/09/Amulsar-Independent-Advisory-Panel-Annual-Report-2017-2018.pdf>.

have expressed confidence in the Panel processes. Some NGOs remain vehemently opposed to mining at Amulsar, (and elsewhere in Armenia). The extent to which the Panel is prompting improved practice by the company, or to which community interests are being addressed, remains unclear.

## 6. CCIs: issues and implications

Given that most CCIs have been initiated in an endeavour to provide a credible basis for recalibrating company interactions with stakeholders on social performance and human rights issues, our preliminary review of CCIs has raised questions for further consideration.

Our position is that the credibility of any CCI will be directly related to the extent to which it can be demonstrated that the inquiry is:

- independent
- fair and balanced
- engaged with stakeholders
- transparent
- impactful.

### 6.1 Independent

None of the CCIs studied had a fully transparent process for appointing Chairs, panellists, or study teams. Our view is that the absence of transparency in the appointment process leaves CCIs vulnerable, to varying degrees, to claims of undue influence from the company commissioning it. Beyond this, both the formal arrangements, and the degree of independence actually achieved throughout the inquiries, varies considerably.

Circumstances where commissioning organisations were able to release funds at their discretion, and where companies unilaterally selected inquiry personnel, are more likely to give rise to scepticism about the independence of CCI processes. Those CCIs that afforded one stakeholder (i.e. the commissioning company) the opportunity to comment on draft reports, without offering similar access to other stakeholders, can be perceived as being less than independent. These decisions represent opportunities for company control over the conduct of CCIs.

The inclusion of panel members who represented, or were seen to represent, particular stakeholder interests raises the question of whether those panels can be viewed as 'independent' or 'representative' of stakeholder interests. Whether the process is representative or independent should be clear from the outset. Problems arise when some stakeholders commit to supporting a representative process, whereas others expect independence. Notably, in the seven cases examined, independence seems to have been delineated solely in terms of separation from the company, rather than the community. Clarity about criteria for independence is another important consideration for establishing credibility.

## 6.2 Fair and balanced

Given the intention of the CCIs to provide a sound platform for addressing social performance issues, there was a notable absence of clarity in how evidentiary material collected by, or provided to, inquiries was tested and weighed. Only the reports of the Marlin Mine's Human Rights Assessment, and the Assessment of the Porgera Remedy Framework, contain substantive description of the criteria and methodology used. In the case of the Yanacocha Independent Fact Finding Mission, the Mission Director discussed the weighing and testing of evidentiary material with the Advisory Group and several other stakeholder groups at some length, but the outcomes of these discussions were not made available in the public domain.

This is not to suggest that other CCIs treated the information gathered in an unbalanced way, and indeed in some instances we are directly aware that this was not the case, but to highlight that without transparency about how information is treated, there is considerable scope for doubt as to the fairness of the process used. Where CCIs are seeking to establish a credible factual base, the need to explain the treatment of evidentiary material is more acute. Decisions to leave certain detail or information out of inquiry reports to protect identities, or alleged victims, is a relevant factor in terms of completeness.

Whether it occurs in substance or not, an absence of clarity on how evidence is assessed leaves open the prospect that material provided by some stakeholders may have been given more weight than information provided by others, or that the CCI panellists and consultants may have chosen to privilege the opinions of those who they were already biased towards. Where the validity of the CCI is under scrutiny it is not sufficient to rely, as several CCIs have done, on the notion that the 'experts' assessed the information provided 'expertly'.

## 6.3 Engaged with stakeholders

All of the CCIs considered in this paper met directly with stakeholders, and sought their views on issues, often through a semi-structured interview process. Some CCIs involved substantial engagement, over an extended period, with a large number of stakeholders, whereas others were, as their reports emphasise, constrained by time limitations. A key question for further consideration in relation to future CCIs, is how to ensure that the scope of initial stakeholder engagement is adequate to the range, intensity, and complexity, of the issues or incidents under examination. Likewise, engagement need not be confined to the gathering of evidence. Even in an otherwise independent process, there will be opportunities to consult about different aspects of the inquiry, such as the TOR, or scope of work, and other criteria, before the commencement of fact finding or evidence gathering.

As far as we have been able to ascertain, none of the CCIs openly called for submissions from affected parties, though we are aware that some were provided, and specific documents were sought and obtained. A call for submissions may have provided another avenue for some groups to express their perspective in a more comprehensive, self-directed, manner than might be possible through interviews and focus groups alone. Interview processes are controlled by the interviewer; whereas submissions are not.

In most cases, CCII stakeholder engagement largely ceased after the initial field visits, and did not include a strategy for ongoing communication or engagement with stakeholder groups. This was a particular issue for some complainants and other project-affected people. Given the long timeframes which can elapse between field visits and the publication of reports, more regular engagement would be required if processes are to retain the confidence of alleged victims, and other parties.

## 6.4 Transparent

All of the seven CCIIs have in common the public release of the inquiry report, and the publication of a company response. The extent to which TOR, minutes of panel meetings, and updates on progress were published varied considerably. Several of the CCIIs had their own dedicated websites, and this afforded individuals the opportunity to contact panels directly, rather than via the company, or company website.

Available information suggests, however, that most CCIIs did not make regular efforts to provide information on the status of the inquiry directly to impacted communities during the course of the inquiry's work. We are aware that resources and timelines are ever present constraints, but suggest that creation of an ongoing, non-electronic, method of communication between inquiry panels and affected communities may have the potential to address some concerns about transparency. Additional time and resourcing would be required to enhance communication processes.

In light of increasing pressures for corporate transparency, further thought could be given to the documentation and evidence made available in 'raw' form during an inquiry process. On what basis would documents and other evidence be made public, alongside an inquiry report? This is a particularly challenging area because there are often important reasons for ensuring information is kept confidential to the inquiry team – such as protecting alleged victims or not breaching commitments to anonymity and confidentiality. A balance must be struck between ensuring that the process is open and transparent, and protecting people who are vulnerable or at risk. The approach to transparency of evidence must be made clear from the outset.

## 6.5 Impactful

The preliminary assessment of CCIIs indicates that all of the inquiries provided companies with useful improvement opportunities, and contributed to policy-level change. The issue, however, is that tracking what the companies agreed to do as an outcome of the inquiry process, and who is accountable, is often difficult. Even in cases where companies report progress against recommendations and commitments, the reporting approach becomes more focused on activities rather than outcomes, and somewhat removed from some of the issues raised during the inquiry process. Ensuring that follow up from the inquiry process is accessible and meaningful is a key aspect of credibility. The post-inquiry reporting and follow up process is an area where there are clear opportunities for improvement.

The extent to which CCIs fully achieved their original aims, led to improved relationships between the parties, or resulted in ongoing, substantial, changes to social performance at the operational level cannot be assessed without further study.

In this preliminary review, the role of the state in the CCI process was not considered. Given that most of the jurisdictions in which CCIs have been conducted have relatively undeveloped regulatory approaches to the social aspects of mining, some inquiries may have served to fill a regulatory gap – and in the Amulsar case the Panel seems to be overtly doing so. The extent to which CCIs are in a position to influence the state, or indeed should be doing so, is an outstanding question. Likewise, there is the question of whether states should be involved in the inquiry process itself. This will depend on the context, as the state apparatus has often contributed to longstanding grievances and legacy issues. This is another area that further research could usefully engage.

## 7. Government-commissioned independent inquiries

Many advanced democratic states use GCIs to examine complex and alarming social problems.<sup>27</sup> Australian states and territories typically commission independent inquiries when a particular issue is of strong community concern; where the facts of a situation are contested or unknown; and, commonly, where the government is contemplating policy or regulatory change. As such, the genesis of these GCIs is somewhat different to that of the CCIs considered for this paper.

However, in other, significant, ways both government and privately commissioned inquiries have similar aims. Just as CCIs do, the GCIs included in this study were constructed to provide an independent view, were expected to engage with key stakeholders, and were tasked with providing a credible basis for future action. The two types of inquiry may not be directly comparable, but there may be potential for some aspects of government processes to be successfully applied in the CCI context.

As indicated, the seven GCIs chosen for this paper all related to controversial issues with implications for the resources sector in Australian states (Table 2). Brief summaries of each of these GCIs follow.

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<sup>27</sup> The Kerner Commission on Civil Disorder established by United States President Lyndon Johnson in 1967 is one example. The Scarman report commissioned in 1981 by the Government of the United Kingdom following extensive rioting in London is another.



*Table 2: GCIIIs considered in this paper.*

Date	Inquiry title
2006 – 2008	Independent Inquiry into the Impacts of Underground Mining on Natural Features in the Southern Coalfield (New South Wales)
2014 – 2016	Hazelwood Mine Fire Board of Inquiry (Victoria)
2015 – 2016	South Australian Nuclear Fuel Cycle Royal Commission
2015 – 2016	Victorian Inquiry into the Labour Hire Industry and Insecure Work
2016 – 2018	Scientific Inquiry into Hydraulic Fracturing in the Northern Territory
2017 – 2018	Independent Scientific Panel Inquiry into Hydraulic Fracture Stimulation in Western Australia
2018 –	Independent Expert Panel for Mining in the Greater Sydney Water Catchment (New South Wales)

## 7.1 Independent Inquiry into the Impacts of Underground Mining on Natural Features in the Southern Coalfield

This Inquiry was initiated following continuing community concern about the perceived impacts of underground mining on water catchments in the Southern Coalfield of New South Wales.<sup>28</sup> The Inquiry was required to review existing impacts, to provide advice on future minimization and management of issues, and to establish a sound basis for assessments of subsequent mining applications.

The Inquiry was conducted by a five person expert Panel appointed by the New South Wales Government. There was no representation from mining companies, community groups, government or other stakeholders. While the selection criteria used to choose the Panel were not made available, the Government did publicly discuss panellists' expertise and suitability at the time of their appointment.

The Panel was provided with a set of instructions by the Government. Significantly, those instructions on the conduct of the Panel were publicised. The Panel were required to call for

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<sup>28</sup> See:

<http://www.georgesriver.org.au/IgnitionSuite/uploads/docs/Impacts%20of%20Underground%20Coal%20Mining%20on%20Natural%20Features%20in%20the%20Southern%20Coalfields%20-%20July%202008.pdf>.

submissions, and conduct hearings. Beyond this, the Panel had control over day-to-day process, and the contents of the final report. The Panel was paid directly by the Government.

The Panel received and considered 53 initial public submissions, more than half from community groups and individuals. All submissions were placed on a government website, and further comment invited. This resulted in 13 supplementary submissions. In addition to conducting public hearings, (where again, community members were well represented), the Panel reviewed documents, received initial 'briefings' from stakeholders including government, mining, and community groups, and conducted field visits.

The Panel's report was made available on a Government website and widely publicised. It does not describe the processes it used to test, or weigh, the information provided.

The Inquiry led to changes in government policy and practice. The information available suggests that while not all stakeholders agreed with Inquiry findings, the exercise was largely accepted as being an independent, credible, one.

## **7.2 Hazelwood Mine Fire Board of Inquiry (Victoria)**

This Inquiry was initiated in response to ongoing public concern about the physical, social, and mental health impacts of the 45 day Hazelwood Mine fire on the Victorian town of Morwell and surrounding areas.<sup>29</sup> The Inquiry was asked to examine the origins and control of the fire; and the adequacy of responses to it by the mine operator, and government agencies. The Inquiry was expected to provide recommendations for the future.

The Victorian Government appointed a three person expert panel to conduct the Inquiry. No parties with direct interests in the case were represented on the Panel. The Victorian Premier indicated that the Panel Chair, who was already well known in Victoria, had been chosen mindful of his previous experience in chairing an earlier bushfire Royal Commission. The Government publicised the Panel's expertise at the time of the appointment. The Panel's independence was protected in Victorian law. Panellists were paid directly by the Victorian Premier's Department.

The Panel was authorised to conduct the Inquiry 'as it considers appropriate [...] having regard to the desirability of adopting informal and flexible procedures that engage with the affected communities ... [and] ... ascertain the facts.'<sup>30</sup> The Panel publicised the approach that it intended to use to test and weigh evidence from the outset of the process.

The Panel called for public submissions (660 were ultimately received), engaged independent experts to provide reports on particular issues, held facilitated community discussions, (including one specifically for a local indigenous community), and held three weeks of public hearings. The Panel also considered a wide range of documents.

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<sup>29</sup> See: <http://report.hazelwoodinquiry.vic.gov.au/>.

<sup>30</sup> Victoria Government Gazette, 21 March 2014.

The Panel made considerable effort to encourage community engagement, delivering thousands of flyers to homes, and community centres, as well as utilising media appearances, newspaper advertisements, and social media. Throughout the course of the Inquiry, a wide range of other material was progressively provided on the Inquiry website. This included summaries of community consultations, written submissions, and transcripts of hearings.

The Inquiry Report was placed on the website, and press releases issued. The Government response to the Inquiry was widely publicised, and made available in full on line. The Victorian Government committed to implementing all of the Inquiry recommendations and to allocating substantial funding to do so. Community representatives and other stakeholders have since publicly praised the consultative, and transparent, approach taken by the Inquiry; and the Government response.

### 7.3 South Australian Nuclear Fuel Cycle Royal Commission

The Commission was established to inquire into the feasibility of any further expansion of the nuclear industry in South Australia, to identify the potential environmental, community, and economic impacts, and to advise on measures that might be taken to manage risks.<sup>31</sup>

As this was a Royal Commission, established under the *Royal Commissions Act 1917*, the process was overseen by an independent Commissioner, supported by expert advisory panels, and Commission staff. The Commissioner, a former Governor of South Australia, was already widely known, and well regarded, in the State. Following initial criticism from one NGO that the Commissioner had a 'pro-nuclear bias', the Commissioner conducted a range of media interviews to assert his own, and the Commission's independence. Some NGOs also accused the Commission of having a pro-business bias on the basis that one of the consultants who prepared an expert report had links to the nuclear industry. All those assisting the Commission were legally required to disclose whether they had any employment, consulting or research links that might be considered relevant to the Commission's work. The Commissioner, and Commission staff, were funded by the South Australian Government. The independence of the Commission process is protected under South Australian law.

The Commission adopted an 'evidence based' approach to the information provided to it. While the Commission did not seek to achieve a legal standard of proof, it did indicate from the outset that the basis for all claims made would be tested, and that information would be assessed for reliability.

At the commencement of the inquiry, the Commission held public information sessions on the TOR, and the process to be followed. The Commission then called for written public submissions (ultimately more than 250 were received), held 37 days of public hearings, had regular engagement with indigenous communities, and conducted field visits. Following concerns expressed by indigenous representatives, the Commission accepted oral submissions outside of

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<sup>31</sup> See: <http://nuclearrc.sa.gov.au/>.

the hearings process; and provided explanatory documents in indigenous languages prior to engaging in discussions with communities. The Commission released issues papers for comment.

The Commission progressively provided a wide range of information on its website, including submissions, descriptions of field visits, and transcripts of evidence. Hearings were streamed online. The Commission's tentative findings were published for consideration and comment. The Commission held community information sessions on the preliminary findings. The final report, and the Government response to it were placed on Commission and Government websites and widely publicised.

The South Australian Government ultimately chose to only partially support the Commission's findings, but did indicate that they saw the Commission as having provided a sound basis for consideration of issues associated with expansion of the nuclear industry.

## 7.4 Victorian Inquiry into the Labour Hire Industry and Insecure Work

This Inquiry was called in response to concerns expressed prior to the election of the Victorian Labor Government by trade unions opposed to increasing use of labour hire and short term contracting.<sup>32</sup> The Inquiry was conducted as a Formal Review under the *Victorian Inquiries Act* meaning that it was not bound by formal rules of evidence and could gain and assess information as it saw fit.

The Inquiry was conducted by an independent Commissioner, supported by an Inquiry Secretariat. The basis for selection of the Commissioner was not made public. The Commissioner was expected to call for submissions, to conduct hearings, and to consult extensively. Day-to-day independence of the Inquiry was protected under Victorian law.

The Commission ultimately received almost 700 initial submissions, conducted 17 days of both public and closed hearings, held policy forums with various subject matter experts, issued requests for information, and considered a wide range of other documentation.

The Inquiry website was progressively updated with information including the TOR, submissions, supplementary submissions, the Commissioner's comments at the opening of hearings, background papers and fact sheets. The final report, and the Government response to it, were made available online, and widely publicised.

The Victorian Government accepted, in full or in part, all of the Inquiry recommendations and made policy and other changes as a result. While some stakeholders continued to disagree with the Inquiry findings, and its original impetus, the conduct of the process was broadly supported.

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<sup>32</sup> See: <https://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry>.

## 7.5 Scientific Inquiry into Hydraulic Fracturing in the Northern Territory

This Inquiry was instituted by the Northern Territory Government to assess the environmental, cultural and social risks of hydraulic fracturing, to advise on whether and how these risks could be mitigated to an acceptable level, and to identify priority areas for 'no go zones'.<sup>33</sup> The Government aimed to use the Inquiry results as a basis for deciding whether to lift a moratorium on hydraulic fracturing.

The Inquiry was conducted by a nine person expert Panel, chaired by an interstate judge, and absent any representation from stakeholder groups. The reasons for panellists' selection were widely publicised. The appointment of the Chair was endorsed by a wide variety of stakeholders, however some NGOs did query whether the Panel had the right mix of skills.

The Inquiry was provided with a broad outline of the methodology it needed to use, including, for example, that it needed to develop and publicly release a stakeholder engagement plan, encompassing opportunities for written submissions, community meetings, and public hearings. The required Inquiry methodology was widely publicised. Beyond this, the day-to-day functioning of the Inquiry was left with the Panel. The independence of the process was protected under Northern Territory law.

The Panel called for public submissions, (1257 were ultimately received), held 52 community forums, mostly in regional and remote areas, conducted 151 public hearings, and held many informal discussions. The Panel also commissioned specific pieces of work. A wide range of other documents were also considered. The Panel's approach to assessing and weighing evidence is documented in its final report.

The Panel progressively published material on its website, including written submissions, community updates (generally several each month), transcribed versions of oral submissions, and live-streams of public hearings. Community members were able to register to receive updates on Panel activities sent to their email addresses. The draft final report was provided online, and submissions on the draft were sought. The final report, was provided on the Inquiry website, as was a summary version in English, and audio translations in nine indigenous languages. The Government response was provided on line and widely publicised.

The Northern Territory Government accepted all of the Inquiry recommendations, many of which involved regulatory or policy change, and lifted the moratorium on hydraulic fracturing. The Inquiry's conclusions continue to be criticised by some stakeholders, and there has been some ongoing criticism at the lack of a climate scientist on the Panel. There has also been praise for the consultative, and transparent nature of the process.

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<sup>33</sup> See: <https://frackinginquiry.nt.gov.au/>.

## 7.6 Independent Scientific Panel Inquiry into Hydraulic Fracture Stimulation in Western Australia

This Inquiry was charged with identifying the risks associated with hydraulic fracture stimulation in specific areas of onshore Western Australia, with considering what regulatory mechanisms could be used to limit and manage those risks, and with recommending a scientific approach. Fracking had already been banned in some on-shore areas of the state, and a moratorium was in place for the remainder.

The Inquiry was conducted by a five person expert Panel appointed by the Western Australian Government. Panellists' expertise was widely publicised. There was no representation from stakeholder groups on the Panel. While the Panel were open about the various types of information they would be considering in the Inquiry, there appears to have been no explicit explanation of how that evidence would be tested and weighed.

Government media releases emphasised that the Inquiry was required to hold three public meetings (one each in the Kimberley, the Midwest and Perth areas) and to call for public submissions. Beyond this, the Inquiry appears to have had control over its own day to day operations.

In practice, the Panel called for public submissions (ultimately more than 9,500 were received), 'invited submissions from more than two dozen organisations', held seven public meetings, and reviewed 'many hundreds' of technical and research reports.<sup>34</sup> The panel responded to requests from stakeholders for greater engagement with the Inquiry by expanding the number of public meetings originally planned, and supporting a four month extension to the public submission period. The Panel's final report was also subjected to technical peer review.

Over the course of the Inquiry, information, including summaries of public meetings, submissions (de-identified as necessary), and Panel-produced background papers, were provided on the Inquiry website. Notice of public meetings was given through local newspapers, as well as by email (to those who had previously indicated interest), and on social media. The final Panel report, and accompanying appendices was released on the Inquiry website, and widely publicised.

The Western Australian Government utilised the Panel Report, as the basis for its decisions to remove the moratorium in so far as it applied to fracking on existing petroleum titles, subject to new requirements for consent by traditional owners and farmers, and other additional regulatory restrictions.<sup>35</sup> The Government response drew both praise and criticism from stakeholders. The Inquiry itself has largely been seen as a credible process.

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<sup>34</sup> See: [https://frackinginquiry.wa.gov.au/sites/default/files/final\\_report.pdf](https://frackinginquiry.wa.gov.au/sites/default/files/final_report.pdf)

<sup>35</sup> See: <https://www.mediastatements.wa.gov.au/Pages/McGowan>



## 7.7 Independent Expert Panel for Mining in the Greater Sydney Water Catchment (New South Wales)

This current GCII has been instituted in response to community concerns about the cumulative impact of mining on water quantity in the Greater Sydney Water Catchment.<sup>36</sup> The Panel has been charged with reviewing existing approaches to predicting, monitoring, and managing mining impacts on water quantity, and with providing government with advice on how these approaches may be improved.

The five person Panel was appointed directly by the New South Wales Government. The basis for selection of panellists, and panellists' expertise, was publicised. There is no representation from any stakeholder group on the Panel.

The Panel has been asked to establish a process for receipt of public submissions, and to undertake site visits. Beyond this, the conduct of this GCII is a matter for the Panel. There is currently no information publicly available which indicates how the Panel proposes to test, and weigh, information provided to it.

Minutes of all Panel meetings are available on a Government website, as are the Panel TOR, submissions made to it, and a progress report. There is a stated intention to continue to provide regular public updates on the Panel's work. The New South Wales Government has committed to making the Panel report publicly available, and to broad dissemination of Panel findings once these are available.

## 8. Implications of GCII for CCII

As our exploration of GCII indicates, notwithstanding some criticisms, these inquiries have generally been seen as credible efforts to inquire into controversial issues.<sup>37</sup> Available information suggests that each commissioning government was acutely aware of the importance of establishing, and then maintaining, public and stakeholder confidence in GCII processes. Decisions to choose 'known' individuals to chair Panels; selection of individual panellists on the sole basis of their expertise; publication of the reasons for panellist selection; requiring, and announcing the requirement for, extensive stakeholder consultation; and setting expectations for regular communications between GCII Panels and stakeholders; can all be seen in this context.

The methods used to engage with stakeholders also seem to have contributed to support for GCII processes. The call for, and encouragement of, stakeholder generated submissions was welcomed by communities in the cases of the Hazelwood (Victoria) and the Hydraulic Fracturing (Northern

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<sup>36</sup> See <http://www.chiefscientist.nsw.gov.au/reports/independent-expert-panel-for-mining-in-the-catchment>.

<sup>37</sup> Australia's state-based commissions of inquiry have been the subject of scholarly critique. A prominent critique is that while government-led inquiries establish a documented record of the harms caused, and offer a foundation for future discussion, they do not necessarily lead to change. See: Cunneen, C., Goldson, B., and Russell, S. (2016). "Juvenile justice, young people and human rights in Australia". *Current Issues in Criminal Justice*, 28(2), 173-189.

Territory) inquiries. GCII willingness to devote considerable time, in communities, to listening to individuals and groups was praised in both of these instances. Provision of opportunities for stakeholders to comment on submissions made by others, and on draft reports, may similarly have played a part in generating community confidence.

Progressive reporting on GCII activities also meant that communities were not, as they were in the cases of several CCII, left to speculate on the status of inquiries. An interested stakeholder could consult the GCII website, or indeed the GCII itself. Any stakeholder could expect to hear about the GCII's progress through the media.

The level of transparency shown by most GCII was far greater than that exhibited by most CCII. Publication of submissions, meeting minutes, summaries of consultations, expert reports, community updates, and tentative findings, all served to provide a guide as to the range of issues being considered, and as an indication of developments in the GCII. GCII efforts to provide final reports in a variety of accessible formats are noteworthy. The approach taken in the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory's publication of audio translations of the summary report in indigenous languages warrants particular mention.

This study has not sought to compare the funding provided to CCII with that allocated to GCII. Nevertheless we are aware that it is very likely that the full range of independence, stakeholder engagement, and transparency measures implemented by some GCII were not of the level available to CCII. It is also the case that some GCII activities, such as public hearings, may not be appropriate to CCII circumstances.

We would not, on the basis of consideration thus far, advocate wholesale adoption of GCII methodology by CCII. However, our initial review of GCII does suggest that there would be value in giving further consideration to whether, and how, key aspects of GCII processes could be adapted for use by future CCII.

## 9. A case for applied research

As our preliminary review suggests, there is much to learn about the potential of CCII. Conducted well – with recognition that companies cannot, and should not, seek to control inquiry outcomes – CCII may provide an additional, credible, avenue for social performance questions to be examined and addressed. For this to occur, CCII need to be more fully understood, improvement opportunities need to be identified and adopted, and, leading practice inquiry procedures would need to be delineated, and utilised.

Against this backdrop, we suggest further work could usefully focus on four areas:

- understanding of past CCII from a company perspective
- perspectives from other stakeholder groups
- procedural dimensions
- guidance materials.

## 9.1 Understanding of past CCIs from a company perspective

In considering the potential future utility of CCIs, it would be useful to gain a deeper understanding of why global mining companies – in this case BHP, Glencore, Anglo American, Newmont, Goldcorp and Lydian – took a decision to commission an unconventional process of inquiry. Engagement with company personnel – at corporate and operational levels – to understand the drivers and incentives for engaging in CCIs would be a fruitful avenue for applied research. In doing so, it is imperative that researchers engage across functional domains within the corporate structure. This will ensure that a range of perspectives – from social performance to production – are actively incorporated into the research.

Engagement at the Executive and Board levels would provide insight into discussions that took place in the lead up to, and during the inquiry process, and provide a greater appreciation of the extent to which CCIs were seen as meeting company needs. Industry engagement could also explore the degree to which findings remained “on the radar” of senior executives and operational-level personnel at the completion of the formal process.

## 9.2 Perspectives from across the stakeholder spectrum

Engagement with other stakeholder groups is essential. Assessment of the appropriateness and utility of CCIs would be incomplete without engagement with groups that were involved in inquiry commissioning and operations – panellists, study teams and other support staff. Targeted interviews would augment our understanding of how well, or otherwise, CCIs worked in practice.

Likewise, if CCIs are to be comprehensively assessed, then interaction with stakeholder groups could provide a more meaningful basis for judging CCI impact. As we have indicated, CCIs may be one means for companies to demonstrate their credentials under the UNGPs. For this to occur, CCIs need to satisfy the process requirements stipulated in the Guiding Principles. It would be necessary to understand the extent to which this has been the case in each of the examples examined from the perspective of NGOs (national and international), other civil society groups, community members, project-affected people and, where appropriate, alleged victims.

## 9.3 Procedural dimensions

Looking to the future, this paper has identified opportunities for improvement in the inception and implementation of CCIs. Those opportunities need to be further assessed and delineated. In particular, the potential for CCIs to adopt and adapt some of the mechanisms used by GCIs requires far more substantial study in the context of an in-depth appreciation of the variations in context and circumstances which may apply.

Lessons are likely to be gleaned through an examination of other inquiry and investigative processes, beyond GCIs, such as human rights fact finding processes in non-industry domains (e.g. humanitarian issues and the development sector). Many of the considerations relating to independence, transparency, accountability and team configuration, are relevant to other types of inquiry processes, including for example the emerging arena of human rights impact assessment (HRIA).

## 9.4 Guidance materials

Further research could inform the development of guidance materials to ensure future CCIs are credible, and defensible, in both purpose and process. This could include a framework, or a base-level TOR, that defines standard elements across CCIs, and provides a rationale for ensuring that those elements are strong. Guidance could cover the appointment of panellists, protection of victims, handling evidence, resourcing, timing, communication and dealing with objections during the inquiry process itself.

## Concluding remark

There is a growing consensus on the need to better understand the mining, human rights and the company-community interface. In order to determine whether CCIs – or other such forms of engagement – hold value in understanding and remediating complex cases, there will need to be investment in targeted social research. Support for these studies could be organised directly with industry, including companies and financiers, or through collaborative arrangements that also include governments and foundations.



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