

Competency Processes – How we undermine our own self-regulation

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The purpose of this article is to share findings from recent research into the development of competency for generating estimates in accordance with the JORC Code. Whilst the focus of the PhD research is on the learning experiences and requirements to achieve a confident level of competence, significant weaknesses in Australia's competency review and sanctioning process have emerged. This article seeks to share these to encourage industry discussion.

The JORC Code itself is a reporting code: it sets out a set of standard definitions, identifies roles and associated responsibilities and, most significantly, relies on the judicious application of Competent Persons expertise in the generation of estimates which are then communicated publically by the board of the listed company.

The complexities and uniqueness of the resources and reserves estimation processes mean the JORC Code cannot be prescriptive. Instead the Competent Person takes responsibility for applying their judgement and for applying due assessment across the mine value chain. This spirit of judicious expertise is included in the embodied principles of Transparency, Materiality and Competence and in the requirement for Public Reports to be based on "work which is the responsibility of a suitability qualified and experienced person who is subject to an enforceable code of ethics" (JORC, 2004, p. 3)

Throughout the code's evolution JORC has fiercely safeguarded any attempts to introduce prescriptive reporting by keeping "the definitions and operational requirements relatively non-specific and non-prescriptive, thus allowing Competent Persons considerable freedom to exercise their professional judgement, but ensuring they can be held to account for their actions" (Stephenson & Miskelly, 2001, p. 625). Carmichael (2009, p. 2) highlights that "any claim for greater prescriptiveness in regulating the content of public reports made pursuant to a code such as JORC is counter to the instincts, pragmatism and good regulation which invested competent persons and their professional bodies with authority and responsibility in defined regulatory space."

To qualify as a Competent Person¹ a geologist, engineer, metallurgist or other mining industry specialist must be a member of the Australasian Institute of Mining and Metallurgy (AusIMM), the Australian Institute of Geoscientists (AIG) or an acceptable foreign institute, as specified by the Registered Overseas Professional Organisation committee (ROPO), and have a minimum of five years relevant experience. The JORC Code guidelines offer further advice regarding the types of

¹ Competent Person is the expression used in the JORC Code. Other codes refer to this person as the Qualified Person or QP.

experience, as well as suggest the Competent Person should be confident to defend their estimate in the presence of their peers (Vaughan & Felderhof, 2005).

The JORC Code does not prescribe how resources and reserves are estimated, so the broader responsibility for the quality of those estimates rests on a self-regulating system of peer review and complaint. This means a Competent Person's peers are effectively the only means of policing or sanctioning resource and reserve estimates. Whilst many organisations do establish both internal and external peer-review systems to validate their estimates, often poor quality estimates are released to the market with the only stopgap being the peers in industry. The improved transparency measure in the 2012 JORC Code update are likely, to some degree, to enable improved review by industry peers and it is hoped that this too will encourage improved discipline and quality in the processes and technical considerations that support the estimates.

Complaints regarding how exploration result statements and resource and reserve estimates are communicated publicly by companies are handled by the Australian Securities Exchange (ASX) and, ultimately by the Australian Securities and Investment Commission (ASIC). Complaints regarding a Competent Person are handled by the Ethics and Complaints Committees of the Competent Person's professional institute (AusIMM, AIG or ROPO organisation). Anyone may lodge a formal complaint against a Competent Person's conduct. Once the complaint has been lodged, it is the institute who takes responsibility for self-regulation and reprimand.

The current research highlights four areas of weakness in this process:

1. Institute switching by poor performing or reprimanded Competent Persons.
2. Legal vulnerability undermining reprimands in the complaints process.
3. Current confidentiality requirement limits the firepower of the sanctioning processes.
4. The long turnaround time between complaints and action due to the volunteer structure of the committees limits the powers of sanction.

Firstly, instances have been revealed where reprimanded (or threats of reprimand) by one institute has resulted in persons claiming to be Competent Persons switching institutes. The current confidentiality requirements limit the cross-institutional discussion of these perpetrators. As a body of professionals we need to find way to limit the degradation of our professional standard. Some measures worthy of discussion include:

1. a single register of Competent Persons – regardless of professional institute membership
2. a single JORC Ethics and Complaints committee with representation from the relevant bodies
3. an annual Fitness to Practice declaration similar to the requirement by the Queensland Board of Professional Engineers (Figure 1)

Secondly, the current review and reprimand process leaves the volunteers on our complaints and ethics committees legally vulnerable. This limits the force of pursuit and thus undermines the reprimands in the complaints process. As a body of professionals we need to have the conversation about how important it is to us to uphold the profession. Taking the step to lodge a complaint is

brave. In many instances it the person lodging the complaint has only done so after grappling with negative feelings of “dobbing” or dealing with potential conflicts with their confidentiality agreements – either documented or by virtue of the relationships. It is therefore a sad indictment of the process that when these complaints do reach discussion, review and require significant reprimand, that the process is undermined by potential legal action against the volunteer committee. We need to agree on the standard we want to uphold and then find a way to support the process that seeks to uphold that standard – regardless of legal threats.

Thirdly, the confidentiality surrounding the Competent Persons being investigated is imperative to ensure unfair damage to reputations. In many instances the cases are quite rightly treated as an educative process that benefits both the individual and the industry. However, there are instances where a Competent Person’s deliberate misrepresentation of resources and reserves are only dealt with internal to the ethics and complaints committees. There is argument from the research to include some degree of communication with the ASX. Here again, we need to have the conversation about how public we want to make the process. In particular, we need to discuss what outcomes we hope to achieve. Current research suggests we do not learn enough about what is going on, what form the reprimands take and what consequences are experienced. On the one hand there is potential to use the complaints process for broader education and on the other the responsibility to notify the ASX of repeat offenders.

The final observation regarding weaknesses in the sanctioning system regards the turnaround time between public release and Competent Persons review/reprimand. Since the ethics and complaints committees are volunteers, the review process will essentially take second fiddle to their personal work commitments. Moreover, it is difficult to implement a restriction on the response time. There are thus unmonitored delays between public report, complaint, reprimand and potential adjustment to an estimate or classification. In reality the connection between public estimate and estimator is non-existent in the process. So, whilst a Competent Person may be reprimanded, there is minimal exposure to the corporation enlisting the Competent Person, unless the reprimand reaches the highest level of name, shame and blame.

Given the recent civil action against a Qualified Person in Canada, we can no longer just talk about potential liability: there is quite clearly a connection between what is estimated and reported and how investors value shares. What we do as a body of professionals affects how investors make decisions. We cannot take either our responsibility or our credibility lightly. By deferring to our institutes we defer to ourselves. We need to talk. We need to talk about what this standard means to us. We need to talk about the implications of that standard for Competent Persons. We need to talk about the practical process and vulnerabilities around our standard – including what needs to be changed or introduced and, importantly, how we protect those who stand up for our standard.

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FITNESS TO PRACTISE	
<p>Answers to the following questions must be provided pursuant to sections 11 & 20(3) of the Professional Engineers Act 2002. If your answer to any of the following questions is "Yes", please provide details on separate but attached page/s. The following information is for the purposes of the Board only.</p>	
<p>Do you have a conviction, other than a *spent conviction for any of the following:</p> <p>(i) an indictable offence; or</p> <p>(ii) an offence against the <i>Professional Engineers Act 2002</i> or the repealed <i>Professional Engineers Act 1988</i>; or</p> <p>(iii) any other offence relating to the practice of engineering, against a law applying, or which applied, in Queensland, or the Commonwealth or any other State or Territory of Australia or a foreign country?</p> <p>(iv) Has there been a cancellation, suspension or order made against your registration to practise as a professional engineer on disciplinary grounds under a law applying, or that applied, in the Commonwealth, another State or a foreign country, or your membership of an association of professional engineers, whether in Australia or a foreign country.</p> <p>* Spent conviction means a conviction for which the rehabilitation period under the Criminal Law (Rehabilitation of Offenders) Act 1986 has expired and not revived under that Act.</p>	<p>Yes / No</p> <p>Yes / No</p> <p>Yes / No</p> <p>Yes / No</p>
<p>Has any application by you for registration as a registered professional engineer been refused by any registration board?</p>	<p>Yes / No</p>
<p>Since 1 January 2003</p> <p>(i) have you been made bankrupt;</p> <p>(ii) have you compounded with your creditors; or</p> <p>(iii) have you as a debtor, otherwise taken, or applied to take, advantage of any law about bankruptcy?</p>	<p>Yes / No</p> <p>Yes / No</p> <p>Yes / No</p>
<p>Have you been an executive officer of a corporation which, since 1 January 2003:</p> <p>(i) has executed a deed of company arrangement under the <i>Corporations Act</i>; or</p> <p>(ii) has been the subject of a winding-up, whether voluntarily or under a court order, under the <i>Corporations Act</i>; or</p> <p>(iii) has been the subject of an appointment of an administrator, liquidator, receiver or receiver and manager under the <i>Corporations Act</i>?</p>	<p>Yes / No</p> <p>Yes / No</p> <p>Yes / No</p>
<p>Is there any other issue which could affect your ability to competently practise as a professional engineer, including for example the current state of your mental or physical health?</p>	<p>Yes / No</p>
<p>CPD – have you maintained competency in the practice of engineering in the area/s of engineering for which you are registered?</p> <p>As a guide the profession's continuing professional development (CPD) policy is 150 hours of structured CPD within a three year period.</p> <p>Are you currently registered under an approved CPD Assessment Scheme (see guideline for list)?</p> <p>NAME OF SCHEME: (approved scheme must be identified here in order to satisfy 'yes', otherwise your application will be recorded as a 'no')</p>	<p>Yes / No</p> <p>Yes / No</p>
<p>Applicant's Declaration:</p> <p>I, the above applicant for renewal of registration with the Board of Professional Engineers of Queensland, do hereby make application for my registration to be renewed for the period ending 30 June 2013 and by virtue of the particulars contained in this application sincerely declare that the particulars shown in this application, both in this and the preceding pages, and also in any other documents provided with this application are true and correct in every particular.</p> <p>Applicant's Signature: _____ Date: _____</p>	

Figure 1 Fitness to Practice Declaration

(extracted from **Form 4: Application for Restoration of Registration**, www.bpeq.qld.gov.au/IMIS15/BPEQ)