



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 55

Statements in disclosure documents and PDSs: Consent to quote

November 2011

About this guide

This regulatory guide is for issuers and others who prepare disclosure documents. It explains how ASIC administers the requirement under s716(2) and 1013K(1) of the *Corporations Act 2001* (Corporations Act) for an issuer to obtain consent before citing a person in a disclosure document or Product Disclosure Statement (PDS) (the consent requirement).

Note: Disclosure documents include prospectuses, profile statements and offer information statements: s9.

This guide is also relevant for persons preparing takeover documents, as it explains the relief we give from the consent requirement and from the requirement in s636(3) and 638(5) for a bidder or target to obtain consent to cite this information in a bidder's or target's statement.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This version was issued in November 2011 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 55 *Disclosure documents and PDS: Consent to quote*, issued 5 July 2007, updated 23 April 2010
- Superseded Practice Note 55 *Prospectuses citing experts and statement of interests*, issued 23 January 1995, updated 17 June 1996 and rebadged as a regulatory guide 5 July 2007

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

The Corporations Act allows issuers of a disclosure document or PDS to include statements made by another person (e.g. an expert). However, such statements may only be included if the issuer complies with certain obligations under the Corporations Act in relation to the statement.

The consent requirement allows the maker of the statement to control the effect of their statement in the disclosure document or PDS, and to control their liability: see RG 55.1–RG 55.5.

Where a disclosure document or PDS cites a statement made by a person, the issuer must obtain consent to include the statement in the disclosure document or PDS unless exempted: see RG 55.6–RG 55.7.

The issuer must obtain consent to include the statement in the form and context that it is included, and must state in the disclosure document or PDS that the person has given this consent: see RG 55.8–RG 55.9.

ASIC has provided class order relief to allow an issuer to make a statement which cites (or is based on) certain statements made by particular people without consent. ASIC may also provide case-by-case relief from the consent requirement: see RG 55.10–RG 55.12.

What is the purpose of the consent requirement?

- RG 55.1 A disclosure document may include a statement made by another person if certain consent requirements are met.
- RG 55.2 Under s716(2) and 1013K(1) of the *Corporations Act 2001* (Corporations Act), persons that an issuer wants to cite can:
- (a) control the effect of a statement in the context of a disclosure document or Product Disclosure Statement (PDS) as a whole; and
 - (b) control their liability.
- RG 55.3 Sections 716(2) and 1013K(1) are also evidentiary provisions supporting other provisions:
- (a) A person cited in a disclosure document or PDS with their consent is liable for loss or damage caused by the relevant statement: item 5 of s729(1), 1022B(2) and 1022B(3)(c). The Explanatory Memorandum to the *Corporate Law Economic Reform Program Act 1999*, para 8.31, states:

A person will need to have consented to being named in the disclosure document in relation to a statement...before any liability may arise.

- (b) A person cited in a PDS with their consent commits an offence if the statement is misleading or deceptive and is materially adverse from the point of view of a reasonable person considering whether to acquire the financial product: s1021L(1).
- (c) Issuers have a defence for a defective disclosure document if they prove that they reasonably relied on information provided by the cited person: s733(1). Issuers also have a defence for including a defective statement in a PDS if they took reasonable steps to ensure that it would not be defective: s1022B(7).

RG 55.4 The consent requirement is not concerned with, or designed to protect, any intellectual property or rights to confidentiality that any party may have in cited statements or information. Nor does the relief we give from the consent requirement abrogate any rights any person may have in cited statements, including rights to restrain the use of that statement or information.

RG 55.5 The consent requirement is independent of the prohibitions on making misleading and deceptive statements in a disclosure document or PDS: s728(1) and 1041E(1). ASIC relief from the consent requirement does not affect issuers' liability for misleading or deceptive statements. In any event, there is no statutory liability for a maker of a statement included in a disclosure document without consent under item 5 of s729(1).

When is consent required?

- RG 55.6 The consent requirement applies:
- (a) if the cited statement is:
 - (i) in the body of the text of the disclosure document or PDS;
 - (ii) in a document included in the disclosure document or PDS; or
 - (iii) in a document incorporated by reference into the disclosure document;
 - (b) irrespective of the expertise of the person to whom the statement is attributed (the person does not have to be an 'expert');
 - (c) if a statement contains a view attributed to a person but they are not named; and
 - (d) even where the citation of a person is only apparent when different parts of the disclosure document or PDS are read together.
- RG 55.7 The consent requirement does not apply where the issuer or directors make a statement without any kind of attribution: see Section B.

What must an issuer do to comply with the consent requirement?

- RG 55.8 In complying with the consent requirement, an issuer must:
- (a) obtain consent from the person attributed to making the statement for it to be included in the disclosure document or PDS in the form and context in which it is included;
 - (b) state in the disclosure document or PDS that the person has given this consent; and
 - (c) ensure that the person has not withdrawn this consent before the date of the disclosure document or PDS.
- RG 55.9 A person who gives ongoing or general consent to use a statement does not meet the consent requirement under the Corporations Act: see Section C.

What relief is available?

- RG 55.10 Relief from the consent requirement is available for citing:
- (a) statements by government officials;
 - (b) statements already published in books, journals or comparable publications;
 - (c) certain statements taken from geological reports available from government departments, authorities and agencies, or ASX; and
 - (d) trading data from prescribed financial markets or approved foreign exchanges.
- RG 55.11 We also give class order relief from the requirement in s636(3) and 638(5) for a bidder or target to obtain consent to cite this information in a bidder's or target's statement.
- RG 55.12 We may give case-by-case relief from the consent requirement and the requirement in s636(3) and 638(5) in other circumstances: see Section D.

B When is consent required?

Key points

This section sets out our guidance to help issuers determine whether they need to obtain consent when including a statement in a disclosure document or PDS.

The consent requirement applies if:

- a statement is included in a disclosure document or a PDS; and
- the issuer holds out that the statement has the authority of a person because it is:
 - made by the person (i.e. a quote); or
 - based on a statement made by the person (see RG 55.14–RG 55.36).

Consent is not required where the statement is used without any kind of attribution; however, consent is required where a statement is attributed to an unnamed person: see RG 55.20–RG 55.25.

Consent is also required for a summary of a statement; however, it may not be required for a deduction from a statement for which consent is obtained: see RG 55.31–RG 55.36.

Consent is required even if a statement attributed to a person is not material or new: see RG 55.37–RG 55.38.

What is a statement?

- RG 55.13 A ‘statement’ is not limited to text. For a PDS, a ‘statement’ is expressly defined to include a ‘matter that is not written but conveys a message’: s9. This includes diagrams, graphs, charts and maps. A ‘statement’ includes a statement of fact as well as a statement of opinion. Neither the language nor the underlying policy of s716(2) or 1013K(1) limit those provisions to statements of expert opinion.

Statement is included in a disclosure document or PDS

- RG 55.14 The consent requirement applies to a statement in a document that forms part of a disclosure document or a PDS. The statement can be included in the disclosure document or PDS, or incorporated by reference: see s712 and reg 7.9.15DA of the Corporations Regulations 2001 (Corporations Regulations). For example, an issuer may include parts of its annual report in a disclosure document, or incorporate these parts by reference. However, auditors’ reports, valuations and other material in an annual report should not be used in a disclosure document without the consent of their authors.

RG 55.15 For margin loans, some superannuation products and simple managed investment schemes, the Corporations Regulations impose additional requirements when incorporating by reference: see regs 7.9.11E, 7.9.11P and 7.9.11X.

Note: These products are subject to a shorter PDS regime: see Corporations Amendment Regulations 2010 (No. 5). For more information on the shorter PDS regime that applies to these products, see Information Sheet 133 *Shorter and simpler PDSs: Superannuation, managed investment schemes and margin lending* (INFO 133). Modified disclosure regimes also apply to general insurance products and first home saver accounts: see Pt 7.9 of the Corporations Regulations.

RG 55.16 Statements incorporated by reference are taken to be included in the disclosure document or PDS.

RG 55.17 The issuer must obtain consent for the form and context of the statement in which it is included. For example, consent for the statement to be included in an annual report will not be sufficient consent for including the statement being incorporated by reference in a disclosure document or PDS.

Statement is ‘made by’ a person

RG 55.18 A person’s consent is needed only if a disclosure document or PDS holds out that a statement was ‘by’ or ‘made by’ a person (i.e. the statement is a quote that has the authority of that person). For example, s716(2) and 1013K(1) do not apply in any of the following situations:

- (a) A person is mentioned in a disclosure document or a PDS as having assisted with the preparation of these documents, but is not mentioned as the authority for any particular statement.
- (b) A person’s views are used without express or implied attribution. The Corporations Act does not require each statement in a disclosure document or PDS to be attributed to someone authoritative on that matter. The issuer is responsible for everything in a disclosure document or PDS, subject to the defences in s731, 733 and 1022B(7).
- (c) A document is listed in the bibliography of a disclosure document or PDS but is not cited for any particular proposition. It will be necessary to obtain the consent of the author of the document only if it is apparent that the document is listed as authority for a statement in the disclosure document or PDS.

RG 55.19 The consent requirement applies irrespective of the profession, reputation, qualifications, skills or expertise of the person to whom the statement is attributed. The consent requirement does not use the language ‘expert’. If the disclosure document or PDS holds someone out to be a person making a statement, we will require that person’s consent without inquiring if the person in fact has the expertise to make the statement.

Unnamed attribution

RG 55.20 The consent requirement also applies where a statement contains a view attributed to a person, but the person is not named. For example, it applies to statements like:

- (a) ‘our legal advisers assure us we have a strong case’;
- (b) ‘our audited profit is \$X’;
- (c) ‘the building has been valued at \$Y’; and
- (d) ‘our geologist’s tests show that the tenement has significant gold mineralisation’.

Note: Relief may be available from the consent requirement for citing previous geological reports: see RG 55.60–RG 55.62.

RG 55.21 The consent requirement applies because these statements are held out as having the authority of the type of person making the statement. This is not changed by the fact that the person is only described as a member of a profession or referred to by implication. The issuer clearly intends that potential investors will rely on the views of these persons.

RG 55.22 We note the practice of including averaged anonymous broker valuations without the consent of the brokers concerned. If averaged anonymous broker valuations are used, the issuer of the document will need to ensure that their use is not misleading.

Note: Where averaged anonymous broker valuations are used in a takeover document and there is a risk of shareholders being misled, the bidder or target may risk an application to the Takeovers Panel for a declaration of unacceptable circumstances. For more information, see Takeovers Panel Guidance Note 18 *Takeovers documents*.

No attribution

RG 55.23 The consent requirement does not apply where the issuer or directors use a statement without any kind of attribution. For example, directors cannot attribute a statement to an expert in pharmaceuticals without the expert’s consent. But the directors may include a detailed analysis of the properties of a pharmaceutical product in a disclosure document or PDS without attribution, even though they have no technical expertise in pharmaceuticals themselves.

RG 55.24 Directors can use a statement without attribution (and so without consent) even if it may be apparent to some readers of the disclosure document or PDS that none of the directors have the expertise to make the statement. Such an assessment by a reader does not mean that there is an implied attribution to an unidentified person: contrast this with the examples in RG 55.20. In such cases, the issuer and directors will be liable for the statement (subject to defences), not the maker of the statement.

RG 55.25 However, if the disclosure document or PDS mentions the name of a person (e.g. a biochemist) and elsewhere in the disclosure document or PDS the directors make a statement about a matter that is within the person's area of expertise (e.g. the properties of a drug), we may conclude that there is an implied attribution to that person and that the consent requirement applies.

Implied and split mentions

RG 55.26 If several passages in a disclosure document or PDS can fairly be read together and clearly attribute a view to a person, the consent requirement applies to those passages.

RG 55.27 The test is always how potential investors will understand the relevant passages. The principle applies when:

- (a) one passage in a disclosure document or PDS refers to another or cannot be fully understood in isolation from the other; and
- (b) when read together by potential investors, those passages appear to attribute a view to a person.

RG 55.28 An example is a disclosure document that:

- (a) on one page says what a company's profit was for a particular year; and
- (b) on another page states that the company's accounts for that year have been audited.

RG 55.29 A potential investor would be entitled to assume that the profit figure was from the audited accounts and that the auditors have not qualified those accounts. This is because, to a person reading the disclosure document, the unqualified reference to the profit figure plainly implies that the auditors approved that profit figure.

Based on a statement by a person

RG 55.30 The issuer must obtain a person's consent where a disclosure document or PDS includes a statement said in the document to be based on a statement by the person. This ensures that the consent requirement cannot be avoided by giving a person's views in indirect speech. A distinction needs to be drawn between the following types of statements.

Summary of a statement

RG 55.31 The first type of statement is based on the views of a person in the sense that it represents or summarises those views. Consent is required to include a statement of this type. The person should have the opportunity to control the effect of a statement or veto its inclusion.

RG 55.32 This applies even if the person's statement is set out fully in another part of the disclosure document or PDS with the person's consent (e.g. a disclosure document or PDS that includes an investigating accountant's report with consent and elsewhere states that 'in the investigating accountant's report at page 7, the company's assets are valued at...').

Deduction from a statement

RG 55.33 The second type of statement is a deduction made by a person (e.g. the directors of the issuer) from another person's statement. The other person's consent is not required for every deduction drawn from what that person has said. Consent is only required if:

- (a) the directors cite the original statement; or
- (b) the directors attribute the deduction itself to the person.

RG 55.34 Where a disclosure document or a PDS includes a statement by a person and elsewhere makes inferences based on that statement, the inferences are part of the context in which the person's statement appears. The person may withhold consent to include their statement in this context.

RG 55.35 We will not require a person to consent to a statement (e.g. by the directors) containing a deduction based on the views of that person if:

- (a) it is made clear that the deduction represents the opinion of the directors rather than the person;
- (b) there is no suggestion that the person is vouching for the directors' deduction; and
- (c) the directors take responsibility for the deduction.

But the other person's consent will be required to include the views on which the directors' deduction is based.

RG 55.36 For example, a disclosure document to raise capital for an on-site sewage works construction company contains an independent expert's report. The report concludes that 'ecotourism is going to boom in Australia in the current climate' and is included with the expert's consent. Elsewhere in the disclosure document, the directors of the company state that 'given the expected boom in ecotourism, we anticipate the demand for our company's services in the coming years will grow exponentially'. Section 716(2) does not require the expert to consent to this statement by the directors.

Materiality and novelty

- RG 55.37 The consent requirement applies even if a statement attributed to a person is not material or new. We will not overlook non-compliance with, or give exemptions from, s716(2) or 1013K(1) merely because a statement seems unimportant or standard.
- RG 55.38 Directors who feel that a statement is not important enough to seek consent can use it without any type of attribution to another person: see RG 55.18(b) and RG 55.24.

C What must an issuer do to comply with the consent requirement?

Key points

This section provides guidance on what we expect issuers to do in order to comply with the consent requirement.

The issuer must obtain consent to the use of the statement in the form and context in which the issuer includes it (e.g. ongoing or general consent will not meet the consent requirement): see RG 55.39–RG 55.42.

The issuer must also keep a record of the consent in a form that complies with the Corporations Act. The consent must be in writing and name the person giving it: see RG 55.43.

The disclosure document or PDS must state that the person has given, and has not withdrawn, consent. The disclosure of the consent should identify the person's statement specifically, follow the language of the provisions and must state that the person has given, and has not withdrawn, consent: see RG 55.44–RG 55.47.

Obtaining consent

- RG 55.39 In satisfying the consent requirement, the issuer must obtain consent to its inclusion of the statement in the disclosure document or PDS in the form and context in which it is included: s716(2)(a) and 1013K(1)(a).
- RG 55.40 For example, if an issuer includes an extract of a geologist's report in a prospectus, the issuer must obtain consent for the inclusion of the extract in the section in which it is included in the prospectus. It is not sufficient for the issuer to only obtain consent to cite the geologist's report in its entirety, or to cite the extract in a different section of the prospectus. The person must not have withdrawn the consent before the date of the disclosure document or PDS: s716(2)(c) and 1013K(1)(c).
- RG 55.41 The consent of a company or firm should be given on its behalf by an authorised officer of the company or by a member of the firm.

Ongoing or general consent

- RG 55.42 Where a person gives ongoing or general consent or licence to use a statement (e.g. to all customers), this does not meet the consent requirement. This is so even if the consent is for limited purposes and subject to conditions (e.g. that issuers attribute the information to the author). The person has not consented to the use of the statement in the form and context in which the issuer includes it: s716(2)(a).

Form of consent

- RG 55.43 The issuer must keep a record of the consent. The consent must be in writing and name the person giving it. The consent must be kept in its physical form or an electronic form capable of being reproduced in physical form: s735, 1013K(2) and reg 7.9.76.

Disclosing consent

- RG 55.44 The statement in the disclosure document or PDS for which the person has given consent should identify the person's statement specifically and follow the language of the provisions. For example, s716(2) and 1013K(1) draw attention to 'the form and context in which' a statement 'is included' because these may colour the way it is read.
- RG 55.45 The disclosure document or PDS must state that the person has given, and has not withdrawn, consent.
- RG 55.46 For example, a disclosure document can include statements under s716(2), such as:
- (a) 'Consultant Pty Ltd has consented to the valuation of Blackacre on page 10 being included in the form and context in which it is included, and has not withdrawn this consent as at the date this disclosure document is lodged with ASIC'; or
 - (b) 'Consultant Pty Ltd has given its written consent to all statements by it or said to be based on statements by it in the form and context in which they are included, and has not withdrawn this consent as at the date this prospectus is lodged with ASIC. The statements are in sections 4.1, 4.2...of this prospectus'.
- RG 55.47 We may take regulatory action where a person places artificial limitations on the context in which a statement may be read. For example, we may impose an interim stop order on the disclosure document or PDS: s739(3) or 1020E(5). This is because people are already protected by the power to withhold consent to anything in the disclosure document or PDS that gives a misleading colour to their statements. By consenting to the inclusion of the statement in the form or context in which it appears, a person is not assuming liability for the disclosure document or PDS as a whole: see RG 55.3(a).

D What relief is available?

Key points

This section sets out the relief that is available to issuers to cite a statement without the requirement to obtain consent from the maker of the statement. This section also provides some guidance on what we look at in deciding whether to grant case-by-case relief.

Class order relief from the consent requirement is available for citing:

- government officials (see RG 55.49–RG 55.55);
- books and journals (see RG 55.56–RG 55.59);
- geological reports (see RG 55.60–RG 55.62); and
- trading data (see RG 55.63–RG 55.67).

We have provided class order relief from the requirement in s636(3) and 638(5) for a bidder or target to obtain consent to cite this information in a bidder's or target's statement: see RG 55.68.

Class order relief is also available where the bidder's or target statement fairly represents the statement and certain conditions are complied with: see RG 55.69.

We may give case-by-case relief from the consent requirement and the requirement in s636(3) and 638(5) in other circumstances: see RG 55.71–RG 55.74.

RG 55.48 A list of the relief available from the consent requirement is set out in Table 1. Where appropriate, we may also grant case-by-case relief from the consent requirement in other circumstances. In general, we will look at the circumstances of the statement and the maker of the statement in determining whether or not to grant relief.

Table 1: Consent relief available

Category of statement for which relief is available	Relevant class order(s)
Statements made by government officials	Class Orders [CO 00/193] and [CO 02/141]
Statements already published in books, journals or comparable publications	Class Orders [CO 00/193] and [CO 02/141]
Statements taken from certain geological reports	Class Order [CO 07/428]
Trading data from prescribed financial markets or approved foreign exchanges	Class Order [CO 07/428]
Certain information in a bidder's or target's statements	Class Orders [CO 07/429], [CO 03/635] and [CO 01/1543]

Government officials

- RG 55.49 A disclosure document may include a statement by an official person or a statement in a public official document without consent: see Class Order [CO 00/193] *Experts: Citing in disclosure documents*. There is an equivalent exemption from s1013K(1) for offers under a PDS: see Class Order [CO 02/141] *Experts: Citing in product disclosure statements*.
- RG 55.50 These class orders do not apply where the original statement was made in connection with the issuer, the offer or any business, property or person that is the subject of the disclosure document or PDS.
- RG 55.51 We may give case-by-case relief where a statement by an official person or in a public official document was made in connection with the issuer or the offer. However, we will not give the relief where:
- (a) national interests are involved (e.g. in the context of a privatisation); or
 - (b) the statement was made for the purpose of being included in the disclosure document or PDS.
- RG 55.52 Without our relief, issuers would need to obtain consent to refer to statements of government officials and government publications (e.g. the Australian Bureau of Statistics and the Bureau of Meteorology). To obtain the consent of a government official or body may be onerous for an issuer. There is also a low risk of civil liability in this case.
- Note: In any event, there would be no statutory liability for a government official or body under, for example, item 5 of s729(1) if it did not consent.
- RG 55.53 Guidance on the meaning of ‘public official document’ used in RG 55.49 can be found in cases on evidence that have considered the term ‘public document’. A public document is one made by a public official as a result of a public inquiry and available to the public: Lord Blackburn in *Sturla v Freccia* [1874–80] All ER Rep 657. Documents do not become public official documents merely because they have been lodged with a government department or statutory authority and are maintained for public access on a registry by the department or authority.
- RG 55.54 Our relief applies to statements made by a foreign ‘official person’ or contained in a foreign ‘public official document’. An issuer should be prepared to satisfy us that a foreign person is a foreign ‘official person’ or a foreign document is a document made by a foreign ‘official person’. However, [CO 00/193] and [CO 02/141] only cover statements by government officials made in their capacity as government officials.
- RG 55.55 We note that disclosure documents have occasionally contained information based on summaries of resource exploration reports lodged by holders of exploration permits. These summaries have been prepared by staff of government departments, authorities or agencies. We do not regard these

summaries as statements by official persons or contained in public official documents. They do not state the views of the government department, authority or agency. However, other relief may be available for the use of these summaries or the underlying exploration reports: see RG 55.60.

Books and journals

RG 55.56 Class Orders [CO 00/193] and [CO 02/141] also exempt statements by authors used in disclosure documents or PDSs from the consent requirement. The class orders apply to a correct and fair copy of (or an extract from) a book, journal or comparable publication.

RG 55.57 The class orders do not apply where the original statement was made in connection with the issuer, the offer or any business, property or person that is the subject of the disclosure document or PDS.

RG 55.58 It is generally impractical for an issuer to obtain the consent of the author of a statement in a book, journal or other comparable publication where the statement is not specific to the issuer or its business. There is also a low risk of civil liability for the author in this case.

Note: In any event, there would be no statutory liability for the author under, for example, item 5 of s729(1) if they did not consent.

RG 55.59 The phrase ‘book, journal or comparable publication’ includes statements in a form and of a standard similar to those normally contained in a book or journal, but made available through the internet or other electronic means. It excludes, for example, references to statements made in internet chat rooms, news groups and home pages with unaccountable content (i.e. with anonymous participants or without editorial control).

Geological reports

RG 55.60 Class Order [CO 07/428] *Consent to quote: Citing trading data and geological reports in disclosure documents and PDS* gives relief from the consent requirement for a geologist’s report dealing with the estimation, assessment or evaluation of minerals in a disclosure document or PDS to cite a previous geological report where:

- (a) the current geologist is either (or both) a Member or Fellow of the Australasian Institute of Mining and Metallurgy (AusIMM) or the Australian Institute of Geoscientists (AIG) with a minimum of five years experience relevant to estimating, assessing and evaluating the resources the subject of the report;

- (b) the statement is made in, or based on, a statement made in the previous geological report and publicly available (with or without payment of a fee) from:
 - (i) a government department, authority or agency of an Australian state or territory; or
 - (ii) ASX;
- (c) the previous geological report was not prepared in connection with the offer of products under the disclosure document or PDS;
- (d) the previous geological report was not prepared or commissioned by a person with or from whom the issuer (or any associate of the issuer):
 - (i) has a shared interest in the tenement that is the subject of the disclosure document or PDS; or
 - (ii) has purchased the tenement that is the subject of the disclosure document or PDS; and
- (e) the current geological report states, close to the first occurring reference to the previous geological report, that the author of the previous report has not consented to its use in the current report.

RG 55.61 A disclosure document or PDS relating to the acquisition or exploitation of mining tenements will often contain an independent technical assessment or valuation of the mining tenements. This is generally prepared in accordance with the Valmin Code or JORC Code by a member of the AusIMM or the AIG. AusIMM and AIG have adopted the Valmin Code for independent experts' reports concerning mineral and petroleum assets and securities.

Note: The JORC Code is incorporated in the listing rules of ASX: see ASX Listing Rule 5.6 and ASX Listing Rules Appendix 5A. The JORC Code applies when reporting certain matters to ASX (e.g. mining exploration results).

RG 55.62 Inherent in the preparation of the reports is the need to refer to previous results and assessments on the mining tenements (historical results). In many cases, the historical results are obtained from an open file register or website of a government department, authority or agency, or an open register or website of ASX. The historical results are often obtained from geologists' reports commissioned by previous holders of the tenements.

Trading data

RG 55.63 Class Order [CO 07/428] gives relief from the consent requirement for issuers to include in a disclosure document or a PDS trading data relating to trading on a prescribed financial market (e.g. ASX) or an approved foreign exchange (e.g. the New York Stock Exchange) without the consent of the relevant market operator or of any other party who provided the trading data (e.g. Bloomberg, Reuters or IRESS). The disclosure document or PDS must also

include a statement close to the first occurring trading data reference that the person who prepared the trading data has not consented to the use of the trading data.

Note: 'Prescribed financial market' is defined under reg 7.1.01. For a list of approved foreign exchanges, see [CO 07/428].

- RG 55.64 The class order applies where the information is quantitative data on financial product trading prices and volumes quoted on a prescribed financial market or an approved foreign exchange.
- RG 55.65 Trading data is purely factual information. If the issuer adds commentary, analysis or deduction, the attribution to the market data provider should be clearly limited to the underlying trading data. Our relief extends to a citation where the market data provider:
- (a) presents trading data in pictorial form (e.g. graphs, charts and diagrams); and
 - (b) applies simpler, objective formulas to trading data (e.g. volume-weighted average price (VWAP)).
- RG 55.66 For our relief to apply, the information must not amount to subjective analysis or financial modelling and must retain its purely factual character.
- RG 55.67 The consent requirement applies to raw trading information and other purely factual information just as it applies to professional opinion and analysis. We give relief because the risk of trading data being misleading or inaccurate is limited. It is also unlikely that the market data provider would be liable.

Note: In any event, there would be no statutory liability for the market data provider under, for example, item 5 of s729(1) if it did not consent.

Takeovers

- RG 55.68 Class Orders [CO 07/429] *Consent to quote: Citing trading data and geological reports in takeovers* and [CO 03/635] *Takeovers: Consent to quote officials and publications* give relief from the requirement under s636(3) and 638(5A) so that a bidder or target may cite the following kinds of statements in a bidder's or target's statements without consent:
- (a) statements from government officials or in public official documents;
 - (b) statements in books, journals or similar publications;
 - (c) geological reports; and
 - (d) trading data.

Note: See also Regulatory Guide 159 *Takeovers, compulsory acquisitions and substantial holding notices* (RG 159), Regulatory Guide 171 *Anomalies and issues in the takeover provisions* (RG 171) and Class Order [CO 01/1543] *Takeover bids*.

- RG 55.69 We have also provided relief from the consent requirement under [CO 01/1543] where a statement is made in a document lodged with ASIC (or the operator of prescribed financial markets), the bidder's or target's statement fairly represents the statement and:
- (a) the bidder's or target's statement includes, or is accompanied by, a correct and fair copy of the document or the part of the document that contains the statement; or
 - (b) if the bidder's or target's statement is not accompanied by a copy of the document or the part of the document that contains the statement:
 - (i) the bidder or target gives a copy of the document or the part of the document that contains the statement to a holder who asks for it during the bid period free of charge; and
 - (ii) the bidder's or target's statement identifies the document or the part of the document that contains the statement and informs holders of their right to obtain a copy of the document (or part) free of charge.
- RG 55.70 We may give case-by-case relief from the requirement in s636(3) and 638(5) in other circumstances. Applicants for this relief should use the criteria in RG 55.71 as a guide.

Other relief

- RG 55.71 We may give case-by-case relief from the consent requirement in other circumstances. Generally, relief will be limited to circumstances where consent to use a statement is wholly impracticable or impossible to obtain. The following considerations will generally be relevant to our decision:
- (a) Will the statement assist potential investors to make better-informed decisions (e.g. because it provides a context in which other material can be better judged)?
 - (b) Was the statement made in connection with a matter other than the issuer, the offer or any business, property or person that is the subject of the disclosure document or PDS?
 - (c) Is it wholly impractical or impossible to obtain the statement maker's consent (e.g. the person is dead, or in the case of a corporation, does not exist as an entity anymore or is in liquidation)?
 - (d) Is there any practical alternative to citing the statement for the information it contains (e.g. would it be too expensive to replicate the information contained in the statement)?
 - (e) Will the use of the statement in the disclosure document or PDS without the person's consent expose them to civil liability?

Note: In any event, there would be no statutory liability under, for example, item 5 of s729(1) if the person did not consent.

- (f) Is the information widely available to the public or is it available to professional investors (see s9) but not other investors?
- (g) Is the maker of the statement credible or authoritative on the subject matter?
- (h) Are the statements contained in unpublished material comparable to published books and journals?

RG 55.72 In considering granting relief, we will consider the policy tension between the disclosure obligations of s710 and 1013E and the consent requirements. Without relief, material information has to be omitted from the disclosure document or PDS because consents are not available.

RG 55.73 Case law indicates that, in general, the author of a statement will not be civilly liable for the inclusion in a disclosure document of that statement (or a statement based on it) if the original statement was not made for the purpose of being included in the disclosure document or PDS: see *Morgan Crucible Co plc v Hill Samuel Bank Ltd* [1991] 1 All ER 148, *Bride as Trustees for the Pinwernying Family Trust v KMG Hungerfords* (1991) 109 FLR 256 and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 188 CLR 241.

RG 55.74 We will not normally give relief on the grounds of expense for reports recently obtained by an issuer, such as valuations and auditors' reports provided to (or issued by) the issuer for internal use or publication in their annual report and notices of meeting. We would want to know why an expert from whom a report had recently been obtained had not consented to the report being used in a disclosure document or a PDS. An exception would be made if, for example, an auditor died after signing the audit report but before consenting to its use in the disclosure document or PDS.

Applying for relief

RG 55.75 Applications for relief must address all of the criteria in RG 55.71 where relevant to the particular circumstances of that application and supply all relevant information.

Note: For more information on applying for relief, see Regulatory Guide 51 *Applications for relief* (RG 51).

Key terms

Term	Meaning in this document
AIG	Australian Institute of Geoscientists
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited (ACN 008 624 691) or the exchange market operated by ASX Limited
AusIMM	Australasian Institute of Mining and Metallurgy
bidder's statement	Has the meaning given in s9
[CO 00/193] (for example)	An ASIC class order (in this example, numbered 00/193)
consent requirement	The requirement for an issuer to obtain the consent of a person to include in a disclosure document or PDS a statement by the person, or a statement said in the disclosure document or PDS to be based on a statement by the person, under s716(2) or 1013K(1)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
disclosure document	For an offer of securities, this includes a prospectus, a profile statement and an offer information statement
JORC Code	Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (prepared by the Joint Ore Resources Committee)
prescribed financial market	Has the meaning given in s9
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
reg 7.9.76 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.9.76)
RG 159 (for example)	An ASIC regulatory guide (in this example numbered 159)
s716 (for example)	A section of the Corporations Act (in this example numbered 716)
shorter PDS	A PDS that is required to comply with the shorter PDS regime

Term	Meaning in this document
shorter PDS regime	The requirements set out in Div 3A of Pt 7.9 of the Corporations Act as modified by Subdivs 4.2 to 4.2C and Schs 10B, C, D and E of the Corporations Regulations, which prescribe the content and length of the PDS for first home saver accounts, margin loans, superannuation products and simple managed investment schemes
target's statement	Has the meaning given in s9
Valmin Code	Code for the Technical Assessment and Valuation of Mineral and Petroleum Assets and Securities for Independent Expert Reports (prepared by the Valmin Committee)

Related information

Headnotes

adviser, auditor, biochemist, brokers, consent, consent requirement, consultant, director, disclosure document, expert, geological report, geologist, government official, independent expert, issuer, market data providers, misleading statement, PDS, Product Disclosure Statement, publication, public official document, statement, valuer

Class orders

[CO 00/193] *Experts: Citing in disclosure documents*

[CO 01/1543] *Takeover bids*

[CO 02/141] *Experts: Citing in product disclosure statements*

[CO 03/635] *Takeovers: Consent to quote officials and publications*

[CO 07/428] *Consent to quote: Citing trading data and geological reports in disclosure documents and PDS*

[CO 07/429] *Consent to quote: Citing trading data and geological reports in takeovers*

Regulatory guides

RG 51 *Applications for relief*

RG 159 *Takeovers, compulsory acquisitions and substantial holding notices*

RG 171 *Anomalies and issues in the takeover provisions*

Information sheet

INFO 133 *Shorter and simpler PDSs: Superannuation, managed investment schemes and margin lending*

Legislation

Corporations Act, s9, 636(3), 638(5), 638(5A), 707, 710, 712, 716(2), 728(1), 729(1), 731, 733, 735, 739(3), 1013E, 1013K(1), 1020E(5), 1021L(1), 1022B(2), 1022B(3), 1022B(7) and 1041E(1)

Corporations Regulations, regs 7.1.01, 7.9.15DA, 7.9.11E, 7.9.11P, 7.9.11X and 7.9.76

Corporate Law Economic Reform Program Act 1999 (Explanatory Memorandum)

Cases

Sturla v Freccia [1874–80] All ER Rep 657

Morgan Crucible Co plc v Hill Samuel Bank Ltd [1991] 1 All ER 148

Bride as Trustees for the Pinwernying Family Trust v KMG Hungerfords (1991) 109 FLR 256

Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg) (1997) 188 CLR 241

Guidance notes

Takeovers Panel Guidance Note 18 *Takeovers documents*