



**ASIC**  
Australian Securities &  
Investments Commission

REGULATORY GUIDE 111

# Content of expert reports

October 2020

## About this guide

This is a guide for any person who commissions, issues or uses an expert report.

It provides guidance on the content of an expert report and how an expert can help security holders make informed decisions about transactions.

### 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 October 2020 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 111, issued October 2007, reissued March 2011

### 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

This guide gives ASIC's views on how an expert can help security holders make informed decisions about transactions.

It gives guidance to experts on how to draft an expert report that satisfies the requirements of the *Corporations Act 2001* (Corporations Act).

This guide outlines our views on:

- how experts should analyse a proposed transaction (see Section B);
- the different valuation methodologies used by experts and the treatment of assumptions (see Section C);
- general requirements for all expert reports (see Section D); and
- the regulatory action we might take against an expert (see Section E).

### Reports covered by this guide

- RG 111.1 This guide focuses on reports prepared for transactions under Chs 2E, 5, 6 and 6A of the Corporations Act, whether the reports are required by the Corporations Act or are commissioned voluntarily. The principles in this guide may also be relevant to independent expert reports commissioned for other purposes—for example, specialist reports like geologist reports or traffic forecast reports for inclusion in Ch 6D disclosure documents and Ch 7 product disclosure statements.
- RG 111.2 This guide does not apply to independent or investigating accountant reports.
- RG 111.3 Examples of transactions for which entities are required to commission an independent expert report or may do so voluntarily to assist security holders to make an informed choice are takeover bids, compulsory acquisitions and buy-outs, schemes of arrangement, related party transactions and capital reorganisations: see Table 1.
- RG 111.4 Where the Corporations Act or Australian Securities Exchange Limited (ASX) Listing Rules require an entity to commission an independent expert report, this is generally to ensure that shareholders receive an independent analysis of transactions involving related parties or other persons of influence. For example, s640 of the Corporations Act requires an independent expert report where the bidder has a 30% voting power in the target company or the bidder and target have common directors. It is important that an expert applies close scrutiny to a transaction involving a related party or other person of influence and critically analyses the information provided to it.

**Table 1: Examples of transactions for which entities commission an independent expert report**

Transaction	Circumstances
Takeover bids	<ul style="list-style-type: none"> <li>The target must commission an expert report when the bidder's voting power in the target is at least 30% of the target or when the bidder and the target have common directors: s640.</li> <li>The bidder must commission an expert report when the consideration paid by the bidder for acquiring a pre-bid stake includes unquoted securities: s636(1)(h)(iii) and 636(2).</li> <li>Targets often commission expert reports to assist security holders, even if there is no requirement to do so.</li> <li>In joint bids the bidders must use their best endeavours to have the target engage an independent expert to prepare a report on whether the joint bid is fair and reasonable to target shareholders who are not associates of the bidders: see Table 9 in <a href="#">Regulatory Guide 9 Takeover bids</a> (RG 9) and RG 9.649.</li> </ul>
Schemes of arrangement	<ul style="list-style-type: none"> <li>The scheme company must commission an expert report when the other party to the scheme holds at least 30% of the voting shares of the scheme company or when they have common directors: reg 5.1.01 and Sch 8, cls 8303 and 8306 of the Corporations Regulations 2001 (Corporations Regulations).</li> <li>Scheme companies often commission an expert report when transactions are complex or effect a takeover.</li> </ul>
Compulsory acquisitions or buy-outs	The bidder in a compulsory acquisition must commission an expert report under s663B, 664C, 665B and 667A.
Acquisitions approved by security holders under item 7 of s611	The company commissions an expert report (or, if it has the expertise, a director's report to the same standard) to discharge the requirement to disclose all material information on how to vote on the resolution: item 7(b) of s611.
Selective capital reductions	An expert report should usually accompany the explanatory memorandum to satisfy the information requirements of fairness under s256C(4).
Related party transactions	An expert report may be supplied to members as part of the material to accompany the notice of meeting: s218, 219, 220 and 221.
Transactions with persons in a position of influence	Notices of meeting for approvals under ASX Listing Rule 10.10 must be accompanied by an expert report: ASX Listing Rule 10.10.2.
Demutualisations of financial institutions	An expert report must accompany a notice of meeting for a demutualisation of a financial institution or friendly society: Sch 4, cl 29(4).
Buy-backs	If a company proposes to buy-back a significant percentage of securities or the holdings of a major shareholder, it should consider providing an independent expert report with a valuation of the shares: <a href="#">Regulatory Guide 110 Share buy-backs</a> (RG 110) at RG 110.18 and RG 110.20.

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Transaction	Circumstances
Share transfers under s444GA	Share transfers under s444GA that require relief from s606 will generally require an expert report to help: <ul style="list-style-type: none"><li data-bbox="628 376 1225 409">• ASIC in determining whether to grant relief from s606;</li><li data-bbox="628 416 1382 479">• members, creditors, interested persons and ASIC in their decision to oppose leave of the court; and</li><li data-bbox="628 486 1054 519">• the court in its decision to grant leave.</li></ul>

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## B Analysing a transaction

### Key points

An expert should focus on the issues facing the security holders for whom the report is being prepared: see RG 111.5–RG 111.7.

An expert should focus on the substance of the transaction rather than the legal mechanism used to achieve that purpose: see RG 111.8–RG 111.34.

Some transactions will require a different form of analysis, particularly:

- demergers and demutualisations (see RG 111.35–RG 111.40);
- approval of a sale of securities under item 7 of s611 (see RG 111.41–RG 111.46);
- compulsory acquisitions and buyouts (see RG 111.47–RG 111.51); and
- share transfers under s444GA (see RG 111.64–RG 111.80).

When assessing whether a related party transaction is ‘fair and reasonable’, an expert should consider the overall effect of the transaction: see RG 111.53–RG 111.63.

## A recommended approach

- RG 111.5 In deciding on the appropriate form of analysis for a report, an expert should bear in mind that the main purpose of the report is to adequately deal with the concerns that could reasonably be anticipated of those persons affected by the proposed transaction. An expert should focus on the purpose and outcome of the transaction, that is, the substance of the transaction, rather than the legal mechanism used to effect the transaction.
- RG 111.6 The Corporations Act requires an expert to express the opinion using particular language depending on the type of transaction. For example:
- (a) whether a takeover bid is ‘fair and reasonable’ under s640;
  - (b) whether a scheme of arrangement is in ‘the best interests of the members of the company’ under Sch 8, cl 8303 of the Corporations Regulations; and
  - (c) whether the proposed terms in the buy-out or acquisition notice give a ‘fair value’ for the securities under s667A(1).
- RG 111.7 Nevertheless, the form of analysis an expert uses to evaluate a transaction should address the issues faced by security holders. The rest of this section sets out our guidance on the form of analysis an expert should use for particular types of transactions.

## Control transactions

RG 111.8 A control transaction, when a person acquires, or increases, a controlling stake in a company, can be achieved by way of a number of different legal mechanisms, including, for example:

- (a) a takeover bid under Ch 6;
- (b) a scheme of arrangement under Pt 5.1;
- (c) approval of an issue of shares using item 7 of s611; and
- (d) a selective capital reduction or selective buy-back under Ch 2J.

Note 1: Ch 6 extends to listed managed investment schemes and listed bodies that are not companies. For the purposes of this regulatory guide, references to a 'company' in the context of Ch 6 takeovers can be read as references to these bodies or schemes, when appropriate.

Note 2: Not all transactions under item 7 of s611 involve the issue of shares. For those transactions that do not involve the issue of shares, see RG 111.41–RG 111.46.

RG 111.9 It is important for an expert to focus on the substance of a control transaction, rather than the legal mechanism used to effect it.

### Takeover bids

RG 111.10 It has long been accepted in Australian mergers and acquisitions practice that the words 'fair and reasonable' in s640 establish two distinct criteria for an expert analysing a control transaction:

- (a) is the offer 'fair'; and
- (b) is it 'reasonable'?

That is, 'fair and reasonable' is not regarded as a compound phrase.

RG 111.11 Under this convention, an offer is 'fair' if the value of the offer price or consideration is equal to or greater than the value of the securities the subject of the offer. This comparison should be made:

- (a) assuming a knowledgeable and willing, but not anxious, buyer and a knowledgeable and willing, but not anxious, seller acting at arm's length; and

Note: Any special value of the 'target' to a particular 'bidder' (e.g. synergies that are not available to other bidders) should not be taken into account under this comparison, but see RG 111.13(e).

- (b) assuming 100% ownership of the 'target' and irrespective of whether the consideration is scrip or cash. The expert should not consider the percentage holding of the 'bidder' or its associates in the target when making this comparison. For example, in valuing securities in the target entity, it is inappropriate to apply a discount on the basis that the shares being acquired represent a minority or 'portfolio' parcel of shares.

- RG 111.12 An offer is ‘reasonable’ if it is fair. It might also be ‘reasonable’ if, despite being ‘not fair’, the expert believes that there are sufficient reasons for security holders to accept the offer in the absence of any higher bid before the close of the offer.
- RG 111.13 When deciding whether an offer is reasonable, an expert might consider:
- (a) the bidder’s pre-existing voting power in securities in the target;
  - (b) other significant security holding blocks in the target;
  - (c) the liquidity of the market in the target’s securities;
  - (d) taxation losses, cash flow or other benefits through achieving 100% ownership of the target;
  - (e) any special value of the target to the bidder, such as particular technology, the potential to write off outstanding loans from the target, etc;
  - (f) the likely market price if the offer is unsuccessful; and
  - (g) the value to an alternative bidder and likelihood of an alternative offer being made
- RG 111.14 For example, a bidder who controls a target and makes a takeover bid may offer a price which is ‘not fair’ as it includes a minority discount. The offer price may, however, be greater than the price at which the securities were trading before the takeover bid was made. In such circumstances, it is appropriate for the expert to consider whether the market price may fall if the offer is unsuccessful: see RG 111.13(f). It would also be appropriate for the expert to consider the matters set out in RG 111.13(d) and RG 111.13(f) in assessing the likelihood that the bidder would increase its offer price, including to a price that an expert would assess as ‘fair’.
- RG 111.15 A bidder may also offer a price which is ‘not fair’ where the target is in financial distress. This is because the fair value of the target securities should be determined on the basis of a knowledgeable and willing, but not anxious, seller that is able to consider alternative options to the bid (e.g. an orderly realisation of the target’s assets). Such an offer may nonetheless be reasonable if the alternative methods of remedying the financial distress are likely to be less attractive to security holders than a successful offer.

Note: For the avoidance of doubt, funding requirements for a target that is not in financial distress (e.g. capital that is required to develop a project) should generally be taken into account when determining the fair value of target securities: see *Northern Energy Corporation Limited* [2011] ATP 2. Such funding requirements will generally be relevant to determining the value of the target securities assuming knowledgeable and willing, but not anxious, parties. These funding requirements will often be implicitly reflected in certain methodologies (e.g. the quoted price for listed securities). The expert may need to expressly determine to take funding requirements into account when using other methodologies (e.g. the discounted cash flow methodology).

- RG 111.16 An expert concluding that an offer is not fair, but reasonable, should clearly explain the meaning of this opinion, why the expert has reached this conclusion and the significance of the conclusion to the decision to be made by security holders (e.g. what it might mean for the security holder's decision making). Otherwise, depending on the circumstances, the report might be misleading or deceptive. In describing the factors that are relevant to a conclusion that an offer is reasonable, an expert should generally only include the factors that are material to this conclusion.
- RG 111.17 To the extent reasonably practicable, and where it can do so with sufficient precision to assist security holders, the expert should quantify the reasonableness factors it considers to be material. For example:
- (a) if the expert comments that the share price may fall if the bid is unsuccessful, the expert should consider providing quantitative information such as the pre-announcement share price (or volume weighted average price) and the liquidity profile of the target's shares; and
  - (b) if the bidder controls the target, the expert should consider quantifying the size of the minority discount.

### **Control transactions by way of a scheme of arrangement**

- RG 111.18 Schemes of arrangement can be used as an alternative to a Ch 6 takeover bid to achieve substantially the same outcome. In these circumstances, we expect the form of analysis to be substantially the same as for a takeover bid, even though the wording of the opinion will also be whether the proposed scheme is 'in the best interests of the members of the company'. This reflects that the legislative test for schemes of arrangement differs from that applicable to a Ch 6 takeover bid.
- RG 111.19 When an expert report is required in a scheme of arrangement involving a change of control, the expert is expected to apply the analysis and provide an opinion as to whether the proposal is 'fair and reasonable' as set out in RG 111.10–RG 111.17 as if:
- (a) the 'bidder' was the 'other party'; and
  - (b) the 'target' was the company that is the subject of the proposed scheme.
- RG 111.20 If an expert would conclude that a proposal was 'fair and reasonable' if it was in the form of a takeover bid, it will also be able to conclude that the scheme is in the best interests of the members of the company.
- RG 111.21 If an expert would conclude that the proposal was 'not fair but reasonable' if it was in the form of a takeover bid using the analysis described in RG 111.10–RG 111.17, it is still open to the expert to also conclude that the scheme is 'in the best interests of the members of the company'. The expert

should clearly say that the consideration is not equal to or greater than the value of the securities the subject of the scheme, but there are sufficient reasons for security holders to vote in favour of the scheme in the absence of a higher offer.

- RG 111.22 If an expert concludes that a scheme proposal is ‘not fair and not reasonable’, then the expert would conclude that the scheme is not in the best interests of the members of the company.
- RG 111.23 When a scheme of arrangement is used to acquire or increase a party’s control, the report should address the interests of members who are bound to give up rights under the scheme. The expert should separately consider the interests of each class of those members under the scheme.

### **Other control transactions**

- RG 111.24 An issue of shares by a company otherwise prohibited under s606 may be approved under item 7 of s611 and the effect on the company’s shareholding is comparable to a takeover bid. Examples of such issues approved under item 7 of s611 that are comparable to takeover bids under Ch 6 include:
- (a) a company issues securities to the vendor of another entity or to the vendor of a business and, as a consequence, the vendor acquires over 20% of the company incorporating the merged businesses. The vendor could have achieved the same or a similar outcome by launching a scrip takeover for the company; and
  - (b) a company issues securities in exchange for cash and, as a consequence, the allottee acquires over 20% of the company. The allottee could have achieved the same or a similar outcome by using a cash-rich entity to make a scrip takeover bid for the company.
- RG 111.25 If this is the case, an expert should apply the analysis outlined in RG 111.10–RG 111.17—that is, the transaction should be analysed as if it was a takeover bid under Ch 6. However, references to, for example, the ‘bidder’ and the ‘target’ should be taken to mean the ‘allottee’ and ‘company’ respectively.
- RG 111.26 An issue of shares for cash may have other benefits that should be considered in deciding whether the transaction is reasonable. These benefits may include:
- (a) the provision of new capital to exploit business opportunities;
  - (b) a reduction in debt and interest payments; or
  - (c) a needed injection of working capital.
- RG 111.27 There may be circumstances in which the allottee will acquire 20% or more of the voting power of the securities in the company following the allotment

or increase an existing holding of 20% or more, but does not obtain a practical measure of control or increase its practical control over that company. If the expert believes that the allottee has not obtained or increased its control over the company as a practical matter, then the expert could take this outcome into account in assessing whether the issue price is ‘reasonable’ if it has assessed the issue price as being ‘not fair’ applying the test in RG 111.11.

RG 111.28 A transaction otherwise prohibited under s606 for which approval is sought under item 7 of s611 will not always involve the issue of shares. For the analysis of other transactions under item 7 of s611, see RG 111.41–RG 111.46.

RG 111.29 Similar considerations apply in relation to control transactions by way of a selective capital reduction or selective buy-back under Ch 2J.

### **Assessing non-cash consideration in control transactions**

RG 111.30 If the bidder is offering non-cash consideration in a control transaction, the expert should examine the value of that consideration and compare it with the valuation of the target’s securities, whether the transaction is effected by a takeover bid, a scheme of arrangement or an issue of shares.

RG 111.31 The comparison should be made between the value of the securities being offered (allowing for a minority discount) and the value of the target entity’s securities, assuming 100% of the securities are available for sale. This comparison reflects the fact that:

- (a) the acquirer is obtaining or increasing control of the target; and
- (b) the security holders in the target will be receiving scrip constituting minority interests in the combined entity.

However, the expert may need to assess whether a scrip takeover is in effect a merger of entities of equivalent value when control of the merged entity will be shared equally between the ‘bidder’ and the ‘target’. In this case, the expert may be justified in using an equivalent approach to valuing the securities of the ‘bidder’ and the ‘target’.

RG 111.32 If the expert uses the market price of securities as a measure of the value of the offered consideration, the expert should consider and comment on:

- (a) the depth of the market for those securities;
- (b) the volatility of the market price; and
- (c) whether or not the market value is likely to represent the value if the takeover bid is successful.

- RG 111.33 For example, trading after a bid is announced may reflect some of the benefits of the combined entity, depending on whether the market has confidence that the transaction will proceed.
- RG 111.34 If, in a scrip bid, the target is likely to become a controlled entity of the bidder, the bidder's securities can also be valued assuming a notionally combined entity. However, the expert should still allow for the fact that accepting holders are likely to hold minority interests in that combined entity. The comparison should include the assets and liabilities of the target and the dilution effect of the acquisition on the target's earnings, asset backing and dividends. The expert should also discuss the bases for calculating the dilutions.

Note: Reverse takeovers (either by takeover bid or scheme of arrangement) can raise special issues: see [Regulatory Guide 60 Schemes of arrangement](#) (RG 60) at RG 60.35–RG 60.37.

## Demergers and demutualisations

- RG 111.35 Demergers and demutualisations might not involve:
- (a) a change in the underlying economic interests of security holders;
  - (b) a change of control; or
  - (c) selective treatment of different security holders.
- RG 111.36 In the absence of these factors, the issue of 'value' may be of secondary importance (particularly in demutualisations). The expert should provide an opinion as to whether the advantages of the transaction outweigh the disadvantages. In some cases, it might still be appropriate to carry out a valuation. In a demerger, the expert may still choose to value the demerged businesses to test whether the value of the sum of the parts (the demerged entities) is greater or less than the whole (the existing entity). If the expert does not undertake such a valuation, to the extent reasonably practicable, and where it can do so with sufficient precision to assist security holders, the expert should quantify the advantages and disadvantages that it considers to be material. For example, the expert may comment on the likelihood of a 'market re-rating' by analysing the post-transaction performance of other demergers.
- RG 111.37 If the demerger or demutualisation involves a scheme of arrangement and the expert concludes that the advantages of the transaction outweigh the disadvantages, the expert should say that the scheme is in the best interests of the members.
- RG 111.38 In a demerger, security holders will typically have to balance issues such as the benefits of a greater focus afforded to the demerged entities against increased costs and reduction in diversified earnings streams.

- RG 111.39 In a demutualisation, the advantages and disadvantages to be considered might include questions of unlocking value for members and greater management accountability as reasons to demutualise, as compared to the loss of the benefits of being a mutual organisation.
- RG 111.40 An expert might need to consider whether using the form of analysis described at RG 111.10–RG 111.17 is appropriate when demergers and demutualisations involve one or more of:
- (a) a change in the underlying economic interests of security holders;
  - (b) a change of control; or
  - (c) selective treatment of different security holders.

## Approval of a sale of securities under item 7 of s611

- RG 111.41 Approval for a sale of securities that would otherwise contravene s606 may be sought under item 7 of s611. Item 7 of s611 envisages that security holders not associated with such a transaction may approve it. In doing so, these security holders may be forgoing:
- (a) the opportunity of receiving a takeover bid; and
  - (b) sharing in any premium for control.
- RG 111.42 The expert should identify the advantages and disadvantages of the proposal to security holders not associated with the transaction. In contrast with the analysis for an issue of shares approved under item 7 of s611, the expert should provide an opinion either:
- (a) that the advantages of the proposal outweigh the disadvantages; or
  - (b) that the disadvantages of the proposal outweigh the advantages.
- RG 111.43 A specific issue the expert should determine is whether the vendor is to receive a premium for control.
- RG 111.44 The greater the control premium, the greater the advantages of the transaction to the non-associated holders would need to be to support a finding that the advantages of the proposal outweighed the disadvantages. These other advantages may come, for example, from a better long-term profit outlook as the incoming security holder offers superior management skills.
- RG 111.45 The expert should also inquire whether further transactions are planned between the entity, the vendor or any of their associates. If any are contemplated, the expert should determine whether those transactions would be on an arm's length basis. If not, an implication arises that they may compensate a vendor for a price that is too low.
- RG 111.46 An expert should also consider whether any proposed acquisition by way of sale, if approved, might deter the making of a takeover bid for the entity.

## Compulsory acquisitions and buy-outs

- RG 111.47 Chapter 6A prescribes the steps an expert must take in reaching an opinion for compulsory acquisitions and buy-outs. Section 667A(1) requires an expert to:
- (a) provide an opinion on whether the proposed terms in the buy-out or acquisition notice give a ‘fair value’ for the securities; and
  - (b) set out the reasons for its opinion.
- RG 111.48 To determine what is ‘fair value’, s667C requires that an expert:
- (a) first assess the value of the entity as a whole;
  - (b) then allocate that value among the classes of issued securities in the company (taking into account the relative financial risk and the voting and distribution rights of the classes); and
  - (c) then allocate the value of each class pro rata among the securities in that class (without allowing any premium or applying a discount for particular securities or interest in that class).
- RG 111.49 In determining the fair value for securities, an expert must also take into account the prices paid for securities in that class in the previous six months: s667C(2).
- RG 111.50 The weight of judicial authority is that an expert should not reflect ‘special value’ that might accrue to the acquirer (e.g. *Capricorn Diamonds Investments Pty Ltd v Catto* (2002) 41 ACSR 376 at 431; *Winpar Holdings Ltd v Austrim Nylex Ltd* [2005] VSCA 211 at [11]–[37]; *Teh v Ramsay Centauri* (2002) 42 ACSR 354 at 359). In practice, the issue of ‘special value’ might not be a critical issue. Special value might not be material once it has been allocated pro rata to each security in the class, including the securities of the party seeking to make the compulsory acquisition. An expert should not add any premium for forcible divestment: see *Capricorn* at 432.
- Note: Similar considerations apply as to whether consideration under a capital reduction ‘is fair and reasonable to the company’s shareholders as a whole’: see s256B(1)(a) and *Re Goldfields Kalgoorlie; Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd* (2000) 34 ACSR 737 at [69].
- RG 111.51 Our approach to nominating experts to provide valuations under Ch 6A is set out in [Regulatory Guide 10](#) *Compulsory acquisitions and buyouts* (RG 10) at RG 10.173–RG 10.178.

## Related party transactions

- RG 111.52 Experts who are asked to prepare a report for the following transactions should comply with RG 111.53–RG 111.63:
- (a) a transaction with a related party that requires member approval under Ch 2E (including as modified by Pt 5C.7 for registered managed investment schemes); or
  - (b) a transaction with a person in a position of influence that requires member approval under ASX Listing Rule 10.
- RG 111.53 When analysing related party transactions, it is important that an expert focuses on the substance of the related party transaction, rather than the legal mechanism. For example, where a related party transaction is made up of a number of separate components, the expert should consider the overall effect of the related party transaction.
- RG 111.54 Where the related party transaction is one component of a broader transaction or a series of transactions involving non-related parties (such as a control transaction), the expert should carefully consider what level of analysis of the related party aspect is required: see also RG 111.4. In this consideration, the expert should bear in mind whether the report has been sought to ensure that members are provided with sufficient information to decide whether to approve giving a financial benefit to the related party as well as the broader transaction.

### **‘Fair’ and ‘reasonable’ test**

- RG 111.55 Generally, ASIC expects an expert who is asked to analyse a related party transaction to express an opinion on whether the transaction is ‘fair and reasonable’ from the perspective of non-associated members. This analysis is specifically required where the report is also intended to accompany meeting materials for member approval of an asset acquisition or disposal under ASX Listing Rule 10.1.
- RG 111.56 Where an expert assesses whether a related party transaction is ‘fair and reasonable’ (whether for the purposes of Ch 2E or ASX Listing Rule 10.1), this should not be applied as a composite test—that is, there should be a separate assessment of whether the transaction is ‘fair’ and ‘reasonable’, as in a control transaction. An expert should not assess whether the transaction is ‘fair and reasonable’ based simply on a consideration of the advantages and disadvantages of the proposal, as we do not consider this provides members with sufficient valuation information. See [Regulatory Guide 76 \*Related party transactions\*](#) (RG 76) at RG 76.105–RG 76.112 for further details.

- RG 111.57 A proposed related party transaction is ‘fair’ if the value of the financial benefit to be provided by the entity to the related party is equal to or less than the value of the consideration being provided to the entity. This comparison should be made:
- (a) assuming a knowledgeable and willing, but not anxious, buyer and a knowledgeable and willing, but not anxious, seller acting at arm’s length; and
- Note: This is a separate test to the consideration of relevant factors and circumstances when determining whether the transaction is on ‘arm’s length’ terms for the purposes of s210: see Section C of RG 76.
- (b) for control transactions, on the basis referred to in RG 111.11.
- RG 111.58 Where the proposed transaction consists of an asset acquisition by the entity, it is ‘fair’ if the value of the financial benefit being offered by the entity to the related party is equal to or less than the value of the assets being acquired. Where the financial benefit given by the entity is securities in the entity and the consideration is securities in another entity held by a related party, the value of the entity’s securities should be compared to the value of the securities it is purchasing. If the expert uses the market price of either of the securities as a measure of their value, it should consider, among other things, the factors set out in RG 111.32(a)–RG 111.32(b).
- RG 111.59 In valuing the financial benefit given and the consideration received by the entity, an expert should take into account all material terms of the proposed transactions.
- RG 111.60 A proposed related party transaction is ‘reasonable’ if it is ‘fair’. It might also be ‘reasonable’ if, despite being ‘not fair’, the expert believes there are sufficient reasons for members to vote for the proposal.
- RG 111.61 If an expert concludes that a related party transaction is not fair, but reasonable, it should clearly explain the meaning of this opinion, why the expert has reached this conclusion, and the significance of the conclusion to the decision to be made by security holders (e.g. what it might mean for the security holders’ decision-making): see also RG 111.16–RG 111.17.
- RG 111.62 When deciding whether a proposed transaction is ‘reasonable’, factors that an expert might consider include:
- (a) the financial situation and solvency of the entity, including the factors set out in RG 111.26, if the consideration for the financial benefit is cash;
  - (b) opportunity costs;
  - (c) the alternative options available to the entity and the likelihood of those options occurring;
  - (d) the entity’s bargaining position;

- (e) whether there is selective treatment of any security holder, particularly the related party;
- (f) any special value of the transaction to the purchaser, such as particular technology or the potential to write off outstanding loans from the target; and
- (g) the liquidity of the market in the entity's securities.

RG 111.63 Generally an expert need only conduct one analysis of whether the transaction is 'fair and reasonable', even if the report has been prepared for a reason other than the transaction being a related party transaction (e.g. if item 7 of s611 approval is also required).

## Transfer of shares under s444GA

RG 111.64 Section 444GA allows shares of a company in administration to be transferred by an administrator as part of a deed of company arrangement (DOCA). The transfer may only occur if shareholders consent or when the court is satisfied that the transfer would not 'unfairly prejudice' the interests of shareholders.

RG 111.65 Where a transfer under s444GA will result in a person acquiring a relevant interest in voting shares in a company subject to Ch 6 above 20%, relief from s606 must be granted by ASIC.

RG 111.66 ASIC generally requires an expert's report to be prepared for s444GA transactions to assist in determining whether to grant relief from s606. The expert's report is also included as part of an explanatory statement to:

- (a) assist members, creditors, interested persons and ASIC in determining whether to oppose the application for leave of the court under s444GA; and
- (b) provide further evidence to assist the court in its assessment of granting leave under s444GA.

Note: [Regulatory Guide 6 Takeovers: Exceptions to the general prohibition](#) (RG 6) at RG 6.202(b) provides more information on the requirements for the explanatory statement.

RG 111.67 In exceptional circumstances, where a company clearly holds assets of negligible value and/or has no business, there may be limited benefit in providing an expert's report. In these circumstances, you should approach ASIC early in the process to discuss whether or not an expert's report is required.

RG 111.68 Provided the requirements in RG 6.202(b) are met, ASIC will generally grant relief from s606 where the expert's report concludes that shareholders' equity has no residual value. This aligns with the position of the courts when

considering whether unfair prejudice exists. The courts consider that the possibility of prejudice to a shareholder only arises if there is some residual equity in the company: see Martin CJ in *Weaver v Noble Resources Ltd* [2010] WASC 182 and White J in *Lewis, In the matter of Diverse Barrel Solutions Pty Ltd (subject to a Deed of Company Arrangement)* [2014] FCA 53.

RG 111.69 Experts who are asked to prepare a report for share transfers using s444GA should generally comply with RG 111.70–RG 111.80.

### Form and content of report

RG 111.70 An expert’s report should provide an independent opinion of the value, if any, of shareholders’ residual equity. The expert is not required to form a view on the ‘fairness’ or ‘reasonableness’ of the transaction.

RG 111.71 Shareholders’ residual equity should be derived by assessing the value of the company’s assets and/or business operations, less borrowings, other liabilities and creditors’ claims.

RG 111.72 The value of shareholders’ residual equity should be assessed on the basis that the company is in administration.

RG 111.73 Consistent with the approach of the courts, an expert should generally value shareholders’ residual equity in a company under administration on a ‘winding up’ or ‘liquidation’ basis where that is the likely or necessary consequence of the transfer of shares not being approved: see *Re Mirabela Nickel Ltd (subject to deed of company arrangement)* [2014] NSWSC 836 at [42]; *Re Nexus Energy Limited* (2014) 105 ACSR 246 at 254 [24].

RG 111.74 Experts should:

- (a) value any underlying assets, and where necessary business(es), using the guidance in Part C, including crosschecks;
- (b) consider valuation evidence provided by the sales process conducted by the administrator (if any) as well as the value (if any) of potential recoveries for voidable transactions; and
- (c) seek specialist technical assistance, where relevant, consistent with the requirements in Section E of [Regulatory Guide 112 Independence of experts](#) (RG 112).

RG 111.75 The selection of the appropriate approach and methods to value company assets and/or businesses will depend on the facts and circumstances involved, available data and the professional judgement of the expert. The rationale for the selection of the approach and method used should be fully disclosed in the report.

## Asset and business valuations

- RG 111.76 We expect in many cases that it will be clear from the administration process whether the company under administration holds a business (or businesses) capable of sale or, rather, a series of assets that, but for the proposed DOCA, would otherwise be sold on a piecemeal basis to realise value (if any).
- RG 111.77 Where a company under administration holds assets that form a business, the expert should generally base the assessment on the higher of;
- (a) the sum of liquidation value of the underlying business assets; and
  - (b) the value of the business as a whole.
- RG 111.78 A business will likely be subject to various constraints associated with the company being under administration. These may affect the expected performance of the business directly and/or perceptions of business risk to potential acquirers. These should be considered by the expert in deriving the expected sale value of the business and should be disclosed in the report.
- RG 111.79 Any assets that do not form part of the business may be valued assuming liquidation value. Liquidation value is defined by the International Valuation Standard 104: *Bases of Value* (effective 31 January 2020) at paragraph 80.1 as:
- the amount that would be realised when an asset or group of assets are sold on a piecemeal basis. Liquidation Value should take into account the costs of getting the assets into saleable condition as well as those of the disposal activity. Liquidation Value can be determined under two different premises of value:
    - (a) an orderly transaction with a typical marketing period, or
    - (b) a forced transaction with a shortened marketing period.
- RG 111.80 Valuations of residual company assets should generally be determined using the premise of, ‘... an orderly transaction with a typical marketing period’. The marketing period assumption should be disclosed by the expert.

## C Methodologies and assumptions

### Key points

An expert should:

- if possible use more than one valuation methodology and compare the values derived from using different methodologies to minimise the risk that the opinion is unreliable; and
- justify its choice of methodologies and describe the methods used: see RG 111.81–RG 111.90.

An expert's opinion should be based on reasonable assumptions and all material assumptions should be disclosed: see RG 111.91–RG 111.94.

An expert should usually give a range of values and that range should be as narrow as possible: see RG 111.95–RG 111.96.

An expert might need to value individual assets in certain circumstances: see RG 111.97–RG 111.100.

### Choice of methodology

RG 111.81 An expert should use its skill and judgment to select the most appropriate methodology or methodologies in its report. The expert must have a reasonable (or tenable) basis for choosing its valuation methodologies: *Re Matine* (1998) 28 ACSR 268 at 290–291. An inappropriate choice might be misleading: *Re EPHS Ltd* [2002] ATP 12. It might also lead to liability because the expert did not take sufficient care and skill in the preparation of the report: *Duke Group Ltd v Pilmer* (1999) 31 ACSR 213.

RG 111.82 We consider that an expert should, when possible, use more than one valuation methodology. We consider that this reduces the risk that the expert's opinion is distorted by its choice of methodology. We also consider that an expert should compare the figures derived from using the different methodologies and comment on any differences. Further, if the expert's valuation of a company's securities differs materially from the price of the company's securities in the period leading up to the announcement of the proposed transaction (together with a typical premium for control for such a transaction), the expert should comment on this difference and the factors underlying it. The expert should also comment if its valuation is less than the price of the company's securities in the period leading up to the announcement of the transaction.

Note: The expert should also consider whether the price of the company's securities is an appropriate valuation methodology: see RG 111.86(d).

- RG 111.83 However, we will not prescribe the valuation methodologies that an expert should use in preparing its report since an expert should exercise its own skill and judgment to choose methodologies that are appropriate in the circumstances of the entity or the asset being valued.
- RG 111.84 An expert should justify its choice of methodology or methodologies (including when the expert has used only one methodology, the basis for doing so) and describe the method or methods used in the report. We consider that an expert report that does this allows security holders to better understand the expert report and determine the weight to be attached to the report. It also allows another expert, professional adviser or institutional investor to replicate the expert's work and assess the valuation.
- RG 111.85 An expert should discuss how much weight is being placed on each methodology used in the valuation. For instance, one methodology may be identified as the primary methodology whereas another is used to provide a cross-check to the valuation.
- RG 111.86 It is generally appropriate for an expert to consider using the following methodologies:
- (a) the discounted cash flow method (see also RG 111.112–RG 111.118) and the estimated realisable value of any surplus assets;
  - (b) the application of earnings multiples (appropriate to the business or industry in which the entity operates) to the estimated future maintainable earnings or cash flows of the entity, added to the estimated realisable value of any surplus assets;
  - (c) the amount that would be available for distribution to security holders on an orderly realisation of assets;
  - (d) the quoted price for listed securities, when there is a liquid and active market and allowing for the fact that the quoted price may not reflect their value, should 100% of the securities be available for sale; and
  - (e) any recent genuine offers received by the target for the entire business, or any business units or assets as a basis for valuation of those business units or assets.
- Note: Some valuation methodologies include a premium for control while others do not. An expert needs to ensure that the choice of methodology or methodologies is appropriate for the circumstances of the transaction.
- RG 111.87 The amount an alternative bidder might be willing to offer if all the securities in the target were available for purchase may provide a useful framework for the application of methodologies (e.g. in selecting earnings multiples) and in underpinning any overall judgment as to value.

- RG 111.88 An expert should not take into account highly speculative alternative proposals which are so unformulated that no sensible value could be placed on them.
- RG 111.89 If an entity has recently conducted a sale process without success or has been ‘in play’ for some period without an alternative bid emerging, it may be possible to comment that no alternative acquirer appears likely to offer a higher price.

### Option valuations

- RG 111.90 The most commonly used methodologies for valuing unlisted or thinly traded options are the Binomial Model and the Black–Scholes Model. In selecting an approach, an expert should assess whether the assumptions used in the methodology are appropriate for the options being valued.

## Assumptions

- RG 111.91 An expert’s opinion should be based on reasonable assumptions. This reduces the risk that the report will be misleading: s670A(2); s12DA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act); *MGICA (1992) Ltd v Kenny & Good Pty Ltd* (1996) 140 ALR 313 at 356; *RAIA Insurance Brokers v FAI General Insurance Co Ltd* (1993) 112 ALR 511 at 522.
- RG 111.92 An expert should disclose all material assumptions on which its report is based. This allows security holders to assess the reasonableness of the report and its main uncertainties: *Re BNQ Sugar Pty Ltd and Others* (1994) 12 ACSR 695 at 702; *GIO Australia Holdings Pty Ltd v AMP Insurance Investment Holdings Pty Ltd* (1998) 29 ACSR 584 at 621–622.
- RG 111.93 The material assumptions disclosed should be specific and definite. All-embracing assumptions of no specific relevance to the entity being valued should not be included (e.g. the continued absence of war or the non-occurrence of natural disasters). However, assumptions concerning specific future economic conditions (such as assumed interest rates, exchange rates and commodity prices) and the assessment of their impact on the report should be disclosed.
- RG 111.94 If changes in material assumptions are likely to materially impact on a report’s valuation (e.g. changes in the exchange rate or interest rate assumptions), an expert should consider including a sensitivity analysis which sets out the impact of such changes.

Note: See [Regulatory Guide 170](#) *Prospective financial information* (RG 170) at RG 170.65–RG 170.66.

## Value ranges

- RG 111.95 An expert should usually give a range of values. The value of securities is typically subject to uncertainty and volatility. Placing a precise dollar value on them is likely to imply a misleading accuracy to a valuation.
- RG 111.96 Nevertheless, the range of values should be as narrow as possible. If an expert cannot give a narrow range because of uncertainty (e.g. start-up companies), the expert should prominently explain in its report what factors create this uncertainty and how the expert is able to justify its findings despite the uncertainty. In our view, a broad range of values undermines the usefulness of the report.

## Valuing assets

- RG 111.97 An expert might need to value individual assets in undertaking the analysis required to prepare its report, for example, if the assets are considered 'surplus' to other business activities being valued. In valuing individual assets, an expert may need to quantify and discuss any material differences between its valuation and the market value of the asset used for accounting purposes.
- RG 111.98 An expert may also need to assess the carrying value of an entity's assets if the primary valuation methodology it has employed results in a value that is less than the entity's reported net assets (after allowing for reasonable realisation costs).
- RG 111.99 In such circumstances, the expert should ensure that it has the expertise to value the assets (e.g. to value real property or exploration mining tenements) or retain a specialist to do so.
- RG 111.100 Real property assets that are planned or are in the process of development should be valued on the basis of their current market value rather than on an 'as complete' basis.

## D Other key requirements

### Key points

An expert report should help security holders make their decision by clearly disclosing key information: see RG 111.101–RG 111.106.

An expert's opinion should be based on reasonable grounds. These grounds should be discussed in the report: see RG 111.107–RG 111.118.

An expert might need to act on changes in circumstances after issuing its report: see RG 111.119–RG 111.121.

Particular considerations apply to the inclusion of certain information (e.g. disclaimers): see RG 111.122–RG 111.133.

An expert should have the relevant expertise to prepare the expert report: see RG 111.134–RG 111.139.

An expert should maintain adequate records of the work undertaken to prepare the expert report: see RG 111.140–RG 111.144.

### Clear, concise and effective communication

RG 111.101 An expert report should help security holders make their decision. The report should:

- (a) address the varying information needs of a report's audience;
- (b) clearly explain the meaning of the expert's opinion and the significance of that opinion to the decision to be made by security holders;
- (c) highlight key information;
- (d) be easy to navigate and understand (e.g. through including an up-front summary of the expert's opinion and the reasons for the opinion, the use of content tables, signposting, cross-references, numbered sections, sub-sections and the avoidance of jargon); and
- (e) be as brief as possible.

RG 111.102 An expert report should only contain information that relates directly to the decision to be made by security holders. Including extraneous information in an expert report undermines the effectiveness of that report. Santow J dealt with this issue in *Re Australian Co-operative Foods Ltd* (2001) 38 ACSR 71 at 77 in the following terms:

Experts are responsible for what they say in their reports. They must ensure that their reports deal adequately with the kind of concerns that could reasonably be anticipated from those affected by the scheme, in reporting

on whether the relevant scheme proposal is fair and reasonable from their viewpoint ... This is so those members can then make an informed decision with the benefit of a report that is as simple, clear and useful as possible. A plethora of peripheral information is more likely to distract than illuminate.

- RG 111.103 For example, an analysis of the industry in which the company (i.e. the subject of the opinion) operates might be useful. However, copying material out of an industry research database may merely add to the length of reports. An expert should include an analysis of the material and relate the material directly to its opinion.

### **Technical terms**

- RG 111.104 Technical terms should be avoided when possible. If the expert uses technical terms, it should use them consistently in a report and consistently with the way they are used in the relevant industry. When appropriate, the expert should provide a glossary, especially when the definition or interpretation of specific terms is central to its report.

### **Concise or short form expert report**

- RG 111.105 We encourage an expert to consider preparing a concise or short form expert report. The commissioning party would make a longer expert report containing additional, more technical or detailed information available on request free of charge or ensure it is accessible online. This reflects a developing market practice.

Note: See RG 60.84 for information about the use of concise expert reports in schemes of arrangement.

- RG 111.106 The concise report would still need to contain sufficient information to help security holders make their decision. The concise report should include the information that we emphasise in the rest of this guide and in RG 112 (e.g. material assumptions). If the longer report contained any 'surprises' for the security holder who only read the concise report, this would indicate the concise report was inadequate or misleading. Table 2 contains examples of types of information that an expert might consider including and leaving out of the concise report. Determining what information to include in the concise report and what to leave out is a matter for the expert's professional judgment in the particular circumstances of the report. However, we are happy to work with experts on these issues.

**Table 2: Examples of information that an expert might consider putting in and leaving out of a concise expert report**

<b>Include in the concise expert report</b>	<ul style="list-style-type: none"> <li>• Expert's conclusion</li> <li>• Meaning of conclusion and significance for the decision to be made</li> <li>• Summary of reasons for conclusion</li> <li>• Summary of valuation including:               <ul style="list-style-type: none"> <li>– methodologies used;</li> <li>– material assumptions; and</li> <li>– a justification of these</li> </ul> </li> <li>• Financial Services Guide</li> </ul>
<b>Leave out of the concise expert report</b>	<ul style="list-style-type: none"> <li>• Industry overview</li> <li>• Disclaimers</li> <li>• Detailed financial information</li> <li>• Detailed profile of parties to the transaction</li> <li>• Qualifications, declarations (e.g. indemnities) and consents</li> <li>• Detailed share price analysis</li> <li>• Details of capital structure (e.g. shareholder spread and directors' relevant interests if not linked to the expert's analysis)</li> <li>• List of previous ASX announcements</li> <li>• List of sources of information</li> </ul>

## Statements should be supportable

### Reasonable grounds

- RG 111.107 An expert's opinion should be based on reasonable grounds. These grounds should be set out in the report.
- RG 111.108 We consider that setting out the reasons for the opinion will assist security holders to understand the expert's opinion, to assess the weight to attach to that opinion and to evaluate the validity of the expert's conclusions: s636(2); 640(1); 667A(1)(c); Sch 8, cl 8303 of the Corporations Regulations and *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 729 and following. Further, security holders cannot make an informed decision without the benefit of 'sufficient supporting information': *Australian Co-operative Foods* at 77.

### Review of information

- RG 111.109 We expect an expert to:
- (a) critically evaluate the information provided to it; and
  - (b) take note of any grounds held for questioning the truth, accuracy and completeness of the information.

- RG 111.110 An expert should conduct such critical analysis of the information on which it relied to prepare the report as is reasonable in the circumstances and as the law requires: *Australian Co-operative Foods* at 77. The more material the information is to the conclusions reached by the expert, the greater the responsibility on the expert to be satisfied that the information is not materially inaccurate. If there are indications suggesting that the information in question may not be reasonably relied on, then the expert should make additional enquiries. We do not expect an expert to conduct an audit of the subject matter of the report.
- RG 111.111 For example, the expert must review directors' valuations and management accounts, partly to detect changes in the way those valuations and accounts have been prepared from period to period: see RG 111.113. If there are no indications of irregularities or omissions, an expert will ordinarily be entitled to take at face value valuations previously prepared by outside experts, audited financial statements and the accounting records of the company. An expert may also rely on management accounts if it has established reasonable grounds: see RG 111.113.

### **Forward-looking information and use of the discounted cash flow methodology**

- RG 111.112 An expert should not include prospective financial information (including forecasts and projections) or any other statements or assumptions about future matters (together, 'forward-looking information') in its report unless there are reasonable grounds for the forward-looking information. Otherwise the opinion will be misleading under s670A(2) of the Corporations Act or s12DA of the ASIC Act.
- RG 111.113 An expert should make sufficient inquiries to satisfy itself that forward-looking information on which it has relied was prepared on a reasonable basis. It is important that those producing such information to the expert have used methods of analysis and presentations previously used by the company (unless there is a sound reason to use a different approach), and have not used new systems or approaches which favour their objectives. If there are any material variations in method or presentation, the expert should adjust for or comment on them in the report.
- RG 111.114 RG 170 gives detailed guidance on what we consider is a reasonable basis for stating prospective financial information. While RG 170 is expressed to apply to fundraising documents under Chs 6D and 7, it provides useful guidance for inclusion of prospective financial information in expert reports. We also consider that RG 170 provides useful guidance for inclusion of forward-looking information that does not fall within the definition of 'prospective financial information'.

- RG 111.115 However, we recognise that using the discounted cash flow (DCF) methodology will involve the use of forward-looking information and assumptions over a longer period than the two-year period in RG 170: see RG 170.39–RG 170.41. As long as the focus of the disclosure in the expert report is on the valuation rather than forward-looking information that supports it, the expert does not need to commission an independent accountant report for the DCF methodology: see RG 170.41. However, the expert should undertake a critical analysis of the forward-looking information used in applying the DCF methodology to ensure it is based on reasonable grounds.
- RG 111.116 ASIC recognises that there may be a reasonable basis for the use of DCF methodologies before a project generates cash flows as long as, at the date of reporting, the expert has reasonable grounds for the forward-looking information. Where the expert does not have reasonable grounds, other valuation methodologies should be used.
- RG 111.117 When an expert includes forward-looking information in its report, the report should include all information that may be required for users of the report to assess the reasonableness of the methodology and assumptions used, including:
- (a) the nature of the information, its limitations and the reason for its inclusion in the report;
  - (b) the material inputs and assumptions used and the reason for using those assumptions;
  - (c) if applicable, the discount rate selected and rationale;
  - (d) the extent and nature of the adjustments made to the DCF (if any) to allow for the development stage risks attaching to these cash flows (whether through risk weighting cash flows, adjustments to discount rates or other methods);
  - (e) the extent of inquiries and research undertaken by the expert and the compiler of that information;
  - (f) the technical and financial qualifications of the expert and the compiler in relation to the relevant industry and asset; and
  - (g) the specific period to which the information relates and the reason for the use of that period.
- RG 111.118 Full disclosure of the types of matters raised in RG 111.117 and any other risk disclosure, warnings or cautionary language does not affect the requirement for forward-looking information to be based on reasonable grounds. It will also not prevent particular information from being misleading.

## Changes in circumstances

- RG 111.119 An expert who has delivered its report to the commissioning party should notify that party as soon as possible if the expert becomes aware of a significant change affecting the information in its report or if the expert believes that a material statement in the report is misleading or deceptive. The commissioning party should also notify the expert if that party becomes aware of a significant change affecting the information in the expert report prior to a meeting being held or during the offer period.
- RG 111.120 When a material change in circumstances has arisen since a report was prepared, a failure by the expert to provide a supplementary report to its client may constitute misleading or deceptive conduct. Security holders will rely on an expert report when making their decision, not when they first receive the report: *ASIC v Solution 6 Holdings Ltd* (1999) 30 ACSR 605 at 611. If an expert becomes aware of a material change in circumstances, then depending on the circumstances, it may be appropriate for a commissioning party to send a supplementary report, even if security holders would receive the report:
- (a) shortly before a meeting is held; or
  - (b) towards the end of an offer period.

See *Troy Resources NL v Taipan Resources NL* (2000) 36 ACSR 197.

Note: Commissioning parties should consider what period is appropriate for security holders to have to consider any supplementary information: see also RG 60.92–RG 60.93.

- RG 111.121 Changes affecting valuations in reports are more likely to trigger the supplementary report obligation than tactical events in the progress of transactions, for example, the level of acceptances in a bid.

## Inclusion of other information

### Confidential information

- RG 111.122 While an expert should not omit material information from its report merely because it is confidential, the expert may be able to adequately support an opinion by careful disclosure without revealing confidential information.

### Disclaimers

- RG 111.123 The purpose of an expert report is to give security holders an assessment on which they can rely. A disclaimer defeats this purpose.
- RG 111.124 An expert cannot limit its statutory liability for the report through disclaimers (e.g. that the expert will not be liable for any loss incurred through reliance on its report). An expert report that purports to exclude the expert from liability may be misleading.

- RG 111.125 An expert should consider refusing to give a report when it has not been given:
- (a) sufficient information or unimpeded access to an entity's records; or
  - (b) enough time to prepare the report.
- RG 111.126 When an expert decides that its report will assist security holders despite limitations that the expert cannot resolve (e.g. because the expert does not have time to investigate the reliability of certain information), the expert should prominently explain the nature of the uncertainties and the impact on its opinion so that security holders can assess what weight to attach to the opinion.
- RG 111.127 When an expert is retained to provide a report on a limited matter, the expert may disclaim responsibility for matters outside the scope of its retainer.

### **Indemnities**

- RG 111.128 An expert may take an indemnity from the commissioning party (or any other person) under which it is to be compensated for certain liability. An acceptable indemnity would cover liability that arises because:
- (a) the expert relied on information provided by the person; or
  - (b) the person did not provide the expert with material information.
- RG 111.129 Such an indemnity will not diminish the liability of an expert to security holders. Nor will it reduce the expert's responsibility to ensure that it has reasonable grounds for its opinion and that the report is not misleading or deceptive.
- RG 111.130 An expert report that implies that an indemnity relieves the expert from liability to security holders is potentially misleading. ASIC expects reports to explain the effect of any indemnity.

### **Additional disclosures**

- RG 111.131 Security holders will generally expect that an expert report will have been prepared on the following basis:
- (a) the expert has made all the inquiries that it believes are desirable and appropriate in order to prepare the report; and
  - (b) the report has not omitted any matter that the expert regards as material to security holders' assessment of the expert's conclusions.

Note: To the extent that there are any normally applicable standards and guidelines for valuing a particular class of assets (e.g. the Valmin Code for valuations involving mineral and hydrocarbon assets), security holders will generally expect that these have been complied with. The report should disclose if that is not the case as that will be a matter that is relevant to security holders' assessment of the expert's conclusions.

- RG 111.132 If an expert report has not been prepared on this basis, the report should prominently explain why this is the case and the impact of this on the report. If the report is unable to be prepared on such a basis, the expert may need to consider refusing to give the report: see RG 111.125–RG 111.126.
- RG 111.133 An expert should also disclose to security holders, to the extent necessary to help them assess what weight to give to reports:
- (a) the source of material used in the reports;
  - (b) the inquiries made by the expert;
  - (c) any unacceptable or unusual time constraints the expert worked under;
  - (d) whether the expert is dissatisfied with the quality of the information used for the report; and
  - (e) whether any concerned party to the relevant transaction has refused to provide adequate:
    - (i) access to information; or
    - (ii) explanations;

if the information or the explanations might have impacted on the report's conclusions.

## Expertise

- RG 111.134 ASIC expects an expert preparing an expert report to be, in fact, an expert in the relevant field. Section 9 defines an expert as 'a person whose profession or reputation gives authority to a statement made by him or her'. To this end, we expect an expert and the commissioning party to ensure that:
- (a) the expert's profession or reputation is relevant to the matters upon which the expert is to report;
  - (b) the expert holds the licences or authorities necessary for providing the type of advice sought; and
  - (c) the expert states in the report its qualifications and experience or, if the report is made by a corporation or firm, the qualifications and experience of the individuals responsible for preparing the report.
- RG 111.135 Gyles J observed in *Reiffel v ACN 075 839 266 Ltd* (2003) 45 ACSR 67 at 87:
- It is implicit ... that such an expert will exercise the care, skill and judgment appropriate to the relevant field of expertise in forming and expressing the opinion.
- RG 111.136 For technical matters beyond the expert's expertise, an expert should retain a specialist to advise them (e.g. a geologist to provide an opinion on recoverable ore the subject of mining tenements, or a traffic forecast report in relation to a toll road): see RG 112.67–RG 112.70.

- RG 111.137 An expert should ensure that staff preparing and supervising the preparation of the report have sufficient skill, knowledge and experience to perform the expert's role.
- RG 111.138 Expert reports typically constitute the giving of financial product advice so an expert must hold an Australian financial services (AFS) licence. An AFS licensee should have sufficient human and technological resources to provide the services specified in its licences and should ensure its staff are adequately trained and competent to provide those services: s912A(1).
- Note: ASIC has taken action against an expert when the expert lacked the expertise to complete the task, failed to comply with the law and did not meet standards of good practice.
- RG 111.139 Detailed guidance on how we consider these licence obligations can be met are contained in [Regulatory Guide 104](#) *AFS licensing: Meeting the general obligations* (RG 104), [Regulatory Guide 105](#) *AFS licensing: Organisational competence* (RG 105) and [Regulatory Guide 146](#) *Licensing: Training of financial product advisers* (RG 146).

## Working papers

- RG 111.140 In preparing an expert report, an expert should document its work and maintain adequate working papers that record the basis of the report. The expert should be able to readily draw on its working papers to demonstrate that its opinion is reasonably based.
- Note: Much of the expert's analysis will be described in the report. The requirement to document and maintain adequate working papers does not detract from the obligations of an expert with respect to the contents of an expert report.
- RG 111.141 Maintaining adequate working papers is an important aspect of an expert's quality control and review process. In our view, the duties imposed by the Corporations Act on AFS licensees require licensees to keep adequate records about their financial services business: see [Regulatory Guide 175](#) *Licensing: Financial product advisers—Conduct and disclosure* (RG 175) at RG 175.97 and RG 175.145.
- RG 111.142 Maintaining adequate working papers will also assist the expert in demonstrating compliance with its legal obligations (including the obligations described in this guide and RG 112 and its obligations as an AFS licensee) and its internal procedures and processes.
- RG 111.143 Working papers should be compiled so that someone with no prior involvement with the transaction can review them and understand the major issues. They should include, for example:
- (a) documents supporting the expert's choice of methodology;
  - (b) documents supporting significant assumptions underpinning the expert's opinion;

- (c) factual information relied on, or used by, the expert in preparing the report and material documenting the inquiries made by the expert in relation to that information;
- (d) analysis of any financial models that the expert has relied on. Where the expert has relied on a financial model, the expert should undertake a review of the model and document its analysis, including which aspects of the model have been reviewed by the expert and the extent of the review. We do not expect an expert to conduct an audit of the model; and
- (e) file notes of discussions and correspondence between the expert and the commissioning party: see RG 112.47.

RG 111.144 All records relevant to the preparation of an expert report may be subject to review by ASIC. Even where we do not have any particular concerns about an expert report, we may review the report, the working papers and the independence of the expert as part of our regular review of the independent expert sector.

## E Regulatory action

### Key points

We will consider regulatory action if we consider there are material issues with the content of an expert report or have concerns about the independence of an expert.

- RG 111.145 We will consider regulatory action if we consider that there are material issues with the content of the report (e.g. as to the adequacy and the completeness of the expert's analysis) or if we have concerns about the independence of an expert.
- RG 111.146 We might write to the expert or the commissioning party or both to raise concerns or request changes to an expert report. However, when delay might prejudice the interests of security holders or the market, we might take enforcement action without consulting the expert or the commissioning party.
- RG 111.147 The action we might take could be one or more of the following:
- (a) in a takeover bid, an application to the Takeovers Panel for a declaration of unacceptable circumstances;
  - (b) in a scheme of arrangement, opposition to the scheme at a court hearing;
  - (c) action for contravention of misleading or deceptive conduct provisions;
  - (d) action by us to revoke, suspend the expert's licence or add a condition after a hearing: s915C; or
  - (e) action by us to cease or suspend nominating the expert to prepare reports in compulsory acquisitions: s667AA and RG 10.173.

## Key terms

Term	Meaning in this document
administrator	Has the meaning given in s9 of the Corporations Act Note: The definition in s9 includes both deed administrators and voluntary administrators.
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASX	Australian Securities Exchange Limited
bidder	Has the meaning given in s9 of the Corporations Act
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
DOCA	A deed of company arrangement
DOCA proposal	A proposed DOCA or proposed variation of a DOCA
DOCA proponent	A person who advocates for the DOCA proposal
expert	Has the meaning given in s9 of the Corporations Act
prospective financial information	Financial information of a predictive character based on assumptions about events that may occur in the future and on possible actions by an entity
related party	Has the meaning given in s228 of the Corporations Act
reg 5.1.01 (for example)	A regulation of the Corporations Regulations (in this example numbered 5.1.01)
RG 175 (for example)	An ASIC regulatory guide (in this example numbered 175)
s648A (for example)	A section of the Corporations Act (in this example, numbered 648A), unless otherwise specified
Sch 4 (for example)	A schedule of the Corporations Act (in this example numbered 4), unless otherwise specified

<b>Term</b>	<b>Meaning in this document</b>
scheme of arrangement	A scheme of arrangement conducted under Pt 5.1
securities	Has the meaning given in s9 of the Corporations Act
security holder	The holder of interests or securities
target	Has the meaning given in s9 of the Corporations Act
Valmin Code	Code for the Technical Assessment and Valuation of Mineral and Petroleum Assets and Securities for Independent Expert Reports

## Related information

### Headnotes

experts, expert report, analysis of control transactions, substance of transaction not legal mechanism used, assumptions, methodology, valuing assets, clear communication, incorporation by reference, supportable statements, prospective financial information, disclaimers, indemnities, expertise, related party transactions

### Regulatory guides

[RG 6](#) *Takeovers: Exceptions to the general prohibition*

[RG 9](#) *Takeover bids*

[RG 10](#) *Compulsory acquisitions and buyouts*

[RG 60](#) *Schemes of arrangement*

[RG 74](#) *Acquisitions agreed to by shareholders*

[RG 76](#) *Related party transactions*

[RG 104](#) *AFS licensing: Meeting the general obligations*

[RG 105](#) *AFS licensing: Organisational competence*

[RG 110](#) *Share buy-backs*

[RG 112](#) *Independence of experts*

[RG 146](#) *Licensing: Training of financial product advisers*

[RG 170](#) *Prospective financial information*

[RG 175](#) *Licensing: Financial product advisers—Conduct and disclosure*

### Legislation

ASIC Act, s12DA

Corporations Act, Chs 2E, 2J, 6 and 7; Pt 5.3A; s9, 210, 218, 219, 220, 221, 256C(4), 444GA, 606, item 7(b) of 611, 636(1)(g), 636(1)(h)(iii), 636(2), 640, 663B, 664C, 665B, 667A, 667C, 670A(2), 766B(3), 766(4), 912A(1) and Sch 4, cl 29(4)

Corporations Regulations, reg 5.1.01, Sch 8, cls 8303 and 8306

## Cases

*ASIC v Solution 6 Holdings Ltd* (1999) 30 ACSR 605

*Re Australian Co-operative Foods Ltd* (2001) 38 ACSR 71

*Re BNQ Sugar Pty Ltd and Others* (1994) 12 ACSR 695

*Capricorn Diamonds Investments Pty Ltd v Catto* (2002) 41 ACSR 376

*Duke Group v Pilmer* (1999) 31 ACSR 213

*Lewis, In the matter of Diverse Barrel Solutions Pty Ltd (subject to a Deed of Company Arrangement)* [2014] FCA 53

*Re EPHS Ltd* [2002] ATP 12

*Re Goldfields Kalgoorlie; Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd* (2000) 34 ACSR 737

*Re Mirabela Nickel Ltd (subject to a Deed of Company Arrangement)* [2014] NSWSC 836

*Re Nexus Energy Limited* (2014) 105 ACSR 246

*GIO Australia Holdings Pty Ltd v AMP Insurance Investment Holdings Pty Ltd* (1998) 29 ACSR 584

*Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705

*Re Matine* (1998) 28 ACSR 268

*MGICA (1992) Ltd v Kenny & Good Pty Ltd* (1996) 140 ALR 313

*Northern Energy Corporation Limited* [2011] ATP 2

*RAIA Insurance Brokers v FAI General Insurance Co Ltd* (1993) 112 ALR 511

*Reiffel v ACN 075 839 266 Ltd* (2003) 45 ACSR 67

*Teh v Ramsay Centauri* (2002) 42 ACSR 354

*Troy Resources NL v Taipan Resources NL* (2000) 36 ACSR 197

*Weaver v Noble Resources Ltd* [2010] WASC 182

*Winpar Holdings Ltd v Austrim Nylex Ltd* [2005] VSCA 211

## Consultation papers and reports

[CP 62](#) *Better experts' reports*

[CP 142](#) *Related party transactions*

[CP 143](#) *Expert reports and independence of experts: Updates to RG 111 and RG 112*

[CP 326](#) *Chapter 6 relief for share transfers using s444GA of the Corporations Act*

[REP 233](#) *Response to submissions on CP 142 Related party transactions*

[REP 234](#) *Response to submissions on CP 143 Expert reports and independence of experts*

[REP 670](#) *Response to submissions on CP 326 Chapter 6 relief for share transfers using s444GA of the Corporations Act*

## **Miscellaneous**

ASX Listing Rule 10

International Valuation Standard 104: Bases of Value (effective 31 January 2020)