



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 60

Disclosure documents and PDS: Consent to quote [PN 55]

January 2005



ASIC

Australian Securities & Investments Commission

Draft [PN 55]

Disclosure documents and PDS: consent to quote

Related instruments [CO 00/193], [CO 01/1543], [CO 02/141],
[CO 03/635], [CO 05/xx]*

Chapter 6D, Part 7.9

Issued 23/1/1995

Updated 17/6/1996, 27/1/2005

This draft update of Practice Note 55 was issued 27/1/2005 for comment before publishing a final version. During the comment period we will apply the policy in this draft practice note.

***References to [CO 05/xx] refer to a class order that will be issued when the practice note is finalised.**

What this practice note is about

[PN 55.1] This practice note sets out:

- (a) how we administer the requirement for an issuer to obtain a person's consent before citing them in a disclosure document or product disclosure statement (PDS): s716(2) and s1013K(1) of the *Corporations Act 2001* (consent requirement); and
- (b) the relief we give from the consent requirement for statements by government officials, publications, credit ratings and geological reports.

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

[PN 55.2] Under this practice note e.g.:

- (a) the consent requirement applies if it 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) incorporated by reference into the disclosure document;
- (b) 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 (see [PN 55.9]);
- (c) the consent requirement will not apply where directors make a statement in reliance on a person but do not cite the person (see [PN 55.12]);
- (d) the consent requirement will apply even where the citation of a person is only apparent when different parts of the disclosure document or PDS are read together (see [PN 55.15]);
- (e) the disclosure document or PDS must name the person making the statement (see [PN 55.31]), although consent is required for statements attributed to a person whether or not they are named (see [PN 55.10]);
- (f) we have given relief for the citing of:
 - (i) government officials (see [PN 55.33]);
 - (ii) credit ratings of some ratings agencies (see [PN 55.42]);
 - (iii) certain statements taken from geological reports on a mines department public file or website (see [PN 55.54]); and
 - (iv) statements already published in books, journals or comparable publications (see [PN 55.62]).

Contents

What this practice note is about ... [PN 55.1]

A What is the purpose of the consent requirement?
... [PN 55.3]

B When is consent required? ... [PN 55.6]

C What must you do to comply with the consent
requirement? ... [PN 55.27]

D What relief is available? ... [PN 55.33]

Key terms... [PN 55.71]

Related information... [PN 55.72]

Important note: We are issuing this draft update of Practice Note 55 for comment before publishing a final version. For a summary of the key changes in this updated version and particular questions for feedback, see Information Release [IR 05/4] *ASIC seeks comment on draft updated practice note: consent to quote* (27 January 2005).

Comments are due by **Friday 11 March 2005** and should be sent to:

Andrew Fawcett, Assistant Director (Policy Services), Regulatory Policy
Australian Securities & Investments Commission
GPO Box 5179AA
Melbourne VIC 3000
fax: 03 9280 3306
email: andrew.fawcett@asic.gov.au

During the comment period we will apply the policy in this draft practice note.

A What is the purpose of the consent requirement?

[PN 55.3] A disclosure document may include a statement by a person (or a statement said in the disclosure document to be based on a statement by a person) only if:

- (a) the person has consented to that statement being included in the disclosure document in the form and context in which it is included;
- (b) the disclosure document states that the person has given this consent; and
- (c) the person has not withdrawn this consent before the disclosure document is lodged with us: s716(2).

Section 1013K(1) contains the equivalent requirement for offers of financial products under a PDS.

[PN 55.4] Sections 716(2) and 1013K(1) allow persons that an issuer wants to cite to:

- (a) control the effect of a statement in the context of the disclosure document or PDS as a whole; and
- (b) control their liability.

[PN 55.5] 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), s1022B(2) and 1022B(3)(c). This originated in the report of the Cohen Committee *Report of the Committee on Company Law Amendment*, London, HMSO, 1945, paragraph 44:

'...an expert who makes a report and authorises the inclusion of that report or a summary thereof in a prospectus should be liable to those who subscribe on the faith of that prospectus...'

The Explanatory Memorandum to the *Corporate Law Economic Reform Program Act 1999* paragraph 8.31 stated:

'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 relevant 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) The issuer has a defence for a defective disclosure document if it proves that it reasonably relied on information provided by the cited person: s733(1). The issuer has 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).

B When is consent required?

[PN 55.6] The consent requirement applies if:

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

Statement

[PN 55.7] A 'statement' is not limited to text. For a PDS, a 'statement' is expressly defined to include 'matter that is not written but conveys a message': s9. This includes diagrams, graphs, charts and maps. 'Statement' includes a statement of fact as well as a statement of opinion. Neither the terms nor the policy of s716(2) or 1013K(1) limit those provisions to statements of expert opinion.

Included in a disclosure document or PDS

[PN 55.8] The consent requirement applies to a statement in a document that forms part of a disclosure document or a PDS:

- (a) The document can be incorporated bodily or by reference in a disclosure document under s712. For example, an issuer may re-use its annual report in a disclosure document. While we support this practice, auditors' reports, valuations and other material in an annual report should not be used in a disclosure document without the consent of their authors.
- (b) A PDS may only incorporate by reference information that is not material: see the Explanatory Memorandum to the *Financial Services Reform Act 2001* at paragraph 14.113. A PDS may be made up of two or more separate documents: s1013L(1).

Made by

[PN 55.9] 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. that the statement 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 Act does not require each statement in a disclosure document or PDS to be attributed to someone authoritative on that matter. The issuer assumes responsibility for everything in a disclosure document or PDS (subject to defences in s731, 733 and 1022B(7)) except statements attributed to a person with their consent. An issuer can assume responsibility for a statement by not attributing it to another person: see [PN 55.11].
- (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 a document if it is apparent that the document is listed as authority for a statement in the disclosure document or PDS. For example, this may be the case where a document relates to the issuer, the offer or any business, property or person that is the subject of the disclosure document or PDS.

Unnamed attribution

[PN 55.10] The consent requirement 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'.

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.

Assuming responsibility for a statement

[PN 55.11] The consent requirement does not apply where the issuer or directors assume responsibility for a statement made by another person by adopting the statement without any kind of attribution. For example:

- (a) in a disclosure document, directors can assume responsibility by signing the disclosure document; or

- (b) in a PDS, the issuer can assume responsibility by not attributing the statement to another person.

[PN 55.12] They can also expressly assume responsibility in the disclosure document or PDS. For example, although directors cannot attribute a statement to an expert in pharmaceuticals, geology or property by name or otherwise without consent, it is open for:

- (a) directors with no technical expertise in pharmaceuticals to make a detailed analysis in a disclosure document or PDS of the properties of a pharmaceutical product to be developed using funds raised under the disclosure document or PDS; and
- (b) directors with no technical expertise in geology to make a detailed geological analysis in a disclosure document of a mining tenement that is the subject of the disclosure document or PDS.

[PN 55.13] Directors can assume responsibility 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 unknown expert (contrast this with the examples in [PN 55.10]).

[PN 55.14] However, if the disclosure document or PDS mentions the name of a person (e.g. a geologist) and elsewhere in the disclosure document or PDS the directors make a statement relating to that person's speciality (e.g. the value of a mining project), it may be open for us to conclude that there is an implied attribution to that person so that the consent requirement applies.

Implied and split mentions

[PN 55.15] 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.

[PN 55.16] 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.

[PN 55.17] 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.

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

[PN 55.18] The issuer must obtain a person's consent where a disclosure document or PDS includes a statement by the person (a quote) or is 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 two types of statements.

Summary of statement

[PN 55.19] 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 and there is no reason to imply a limitation which excludes these cases. If the statement misrepresents the person's views, the person should have the opportunity to veto its inclusion.

[PN 55.20] 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 expert'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 statement

[PN 55.21] 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.

[PN 55.22] 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 rely on those inferences to withhold consent to include their statement.

[PN 55.23] 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.

[PN 55.24] Consider the following more detailed 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

[PN 55.25] The consent requirement applies even if a statement attributed to a person is not material or novel. We will not overlook non-compliance with, or give exemptions from, s716(2) or 1013K(1) merely because a statement seems unimportant or standard.

[PN 55.26] Directors who feel that a statement is not important enough to seek consent can assume responsibility for it by omitting reference to the person: see [PN 55.9(b)] and [PN 55.11].

C What must you do to comply with the consent requirement?

[PN 55.27] A consent under s716(2) or 1013K(1) 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 in which it is read.

[PN 55.28] The disclosure document or PDS must state that the person has given, and has not withdrawn, consent when identifying the statement for which consent was obtained.

[PN 55.29] For example, a disclosure document can include statements under s716(2) to the effect that:

- (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 disclosure document is lodged with ASIC. The statements are on pages 10, 18...'

[PN 55.30] We may take regulatory action where a person places artificial limitations on the context in which a statement may be read (e.g. by imposing an interim stop order on the disclosure document or PDS: s739(3) or 1020E(5)). This is because persons 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 [PN 55.5(a)].

Names required

[PN 55.31] The consent must be in writing and name the person giving it. The consent must be retained: s735 and 1013K(2).

Company's consent

[PN 55.32] 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.

D What relief is available?

Government officials

[PN 55.33] Class Order [CO 00/193] exempts an issuer from s716(2) so that the disclosure document may include a statement by an official person or in a public official document without consent. Class Order [CO 02/141] provides an equivalent exemption for offers of financial products under a PDS.

[PN 55.34] 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.

[PN 55.35] 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 would not give the relief where:

- (a) the Commonwealth's 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.

Liability is more likely in these cases: see [PN 55.52].

[PN 55.36] Without our relief, issuers would be required 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 government may be onerous for an issuer. There is a low risk of liability for government.

[PN 55.37] The Crown in right of the Commonwealth may be exposed to civil liability for damages for a misleading statement included in a disclosure document: s5A (3) and 5A(5). But liability is unlikely where the statement was not made for the purpose of being included in a disclosure document. The Crown will not be bound in a particular capacity under the Act in connection with statements included in a PDS unless specified in the *Corporations Regulations 2001*: s5A(4).

[PN 55.38] Guidance as to the meaning of the phrase 'public official document' used in [PN 55.33] can be found in cases that have considered the term 'public document' in an evidentiary context. 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 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.

[PN 55.39] Our relief applies to statements made by a foreign ‘official person’ or contained in a foreign ‘public official document’. However, 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’.

[PN 55.40] Class Orders [CO 00/193] and [CO 02/241] only cover statements by government officials made in their capacity as government officials. These class orders do not provide an issuer with a defence against liability under s728(1) or 1041H if the citation of a government official is misleading.

[PN 55.41] We have considered a number of disclosure documents containing material based on summaries of exploration reports prepared by staff of the mines department of a State or Territory and included in the public files or website of the department. To the extent that the summaries are abstracts of reports lodged with the department by holders of exploration permits, and do not purport to state the views of the department, we do not regard them as statements by official persons or contained in public official documents. However, other relief may be available for the use of these summaries or the underlying exploration reports: see [PN 55.50].

Ratings agencies

[PN 55.42] Class Order [CO 05/xx] gives relief from the consent requirement for issuers to cite credit ratings without the consent of the ratings agencies in a disclosure document or a PDS.

[PN 55.43] Class Order [CO 05/xx] applies where:

- (a) the rating provides an opinion:
 - (i) on the ability of the issuer to meet obligations under the securities;
 - (ii) on the relative creditworthiness of the issuer; and
 - (iii) on a debt security (e.g. a debenture or convertible note) offered under the disclosure document or PDS. The opinion must be directly relevant to the financial products offered.

- (b) the disclosure document or PDS includes a prominent statement next to the citation of the rating with:
 - (i) the name of the ratings agency;
 - (ii) the date and time the rating was made;
 - (iii) a brief description of the meaning of the rating;
 - (iv) a statement that the rating is not a recommendation to buy, sell or hold the securities; and
 - (v) a statement that the rating is subject to revision or withdrawal at any time;
- (c) the disclosure document or PDS includes all other material ratings that are known to the issuer; and
- (d) the disclosure document or PDS includes a statement that the ratings agency has not consented to the rating and that it is not liable for the statement under s729(1) or 1022B(2).

[PN 55.44] Class Order [CO 05/xx] applies to ratings of certain ratings agencies to which we currently give Australian financial services (AFS) licence relief: see Class Order [CO 03/1093] *Credit rating agencies*. These are Moody's, Standard & Poor's and Fitch.

[PN 55.45] We may give case-by-case relief where [CO 05/xx] does not apply. In considering applications for relief, we will take into account the criteria set out in [PN 55.51]. The case for relief would have to be strong.

[PN 55.46] A disclosure document or PDS may refer to ratings by one or more ratings agencies. The consent requirement applies to these statements and ratings agencies receive numerous requests for consent. However, there are unique characteristics of ratings agencies that justify relief.

[PN 55.47] Ratings agencies provide independent opinions on the creditworthiness of companies. Ratings agencies use a combination of public and private or confidential information. Some of this is information provided by the issuer; the rest is obtained from a number of public sources including competitors. Most of this information is not independently verified. To insist that ratings undergo such a verification process of the information would be abnormally expensive and impractical.

[PN 55.48] Ratings are provided to investors via subscription services, ratings desks and, sometimes, in a disclosure document or PDS.

[PN 55.49] In practice, it is often difficult for issuers to obtain the consent of ratings agencies. The policy objective of the disclosure document and PDS provisions is that investors are able to make informed investment decisions on the basis that a disclosure document or PDS contains all information material to a decision to invest. Relief from the consent requirement for ratings is consistent with this policy objective. It facilitates inclusion of material information where it may be impractical for issuers to obtain consent from some ratings agencies.

No connection with issuer

[PN 55.50] We may give case-by-case relief from the consent requirement where consent will not be available because a person has no connection with the issuer or the disclosure document or PDS. In some cases, an issuer can best discharge its obligation to disclose matters material to an investment decision by using a person's statement without consent.

[PN 55.51] The following considerations are relevant to our decision whether to give relief:

- (a) whether citing a statement would assist potential investors to make better-informed decisions (e.g. because it provides a context in which other material can be better judged);
- (b) whether the statement was 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) why the person's consent cannot be obtained (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) whether there is any practical alternative to citing the statement for the information it contains (e.g. it would be abnormally expensive to replicate the information contained in the statement); and
- (e) whether the use of the statement in the disclosure document or PDS without the person's consent may expose the person to civil liability.

In such a case, the policy of s710 and 1013D is in tension with that of the consent requirement. Without relief, material information has to be omitted from the disclosure document or PDS because consents are not available.

[PN 55.52] 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) 142 ALR 750.

[PN 55.53] We give class order relief to cite a statement by a person that has no connection with the issuer for:

- (a) geological reports; and
- (b) books and journals.

Geological reports

[PN 55.54] Class Order [CO 05/xx] gives relief from the consent requirement for an independent expert's report in a disclosure document or PDS to cite a previous geological report where:

- (a) the current independent expert 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 5 years' experience in the estimation, assessment and evaluation of mineral resources and ore reserves that is relevant to the style of mineralisation and the type of deposit under consideration (this requirement is consistent with the relevant competency requirement of Australian Stock Exchange Limited (ASX) under ASX Listing Rule 5.10); and
- (b) the statement is made in or based on a statement made in the previous geological report publicly available from:
 - (i) an open file register or website of a department of mines of a State or Territory; or
 - (ii) an open register or website of ASX (where the report was lodged with ASX under ASX Listing Rule 5 in compliance with ASX Listing Rule 5.6);
- (c) the current independent expert is of the opinion that attribution of the statement is required to satisfy the disclosure document content requirements in s710;
- (d) the current independent expert's report fairly represents the statement in the previous geological report;
- (e) the previous geological report was not prepared for inclusion in a disclosure document or PDS or for related purposes;

- (f) the geological report was prepared in accordance with the Valmin or JORC Code (if it was prepared after the issue of either the Valmin or JORC Codes);
- (g) the author of the previous geological report is not a person or commissioned by a person:
 - (i) with whom the issuer has a shared interest in the tenement that is the subject of the disclosure document or PDS; or
 - (ii) from whom the issuer has purchased the tenement that is the subject of the disclosure document or PDS; and
- (h) the disclosure document or PDS includes a prominent statement next to the citation, to the effect that the author of the previous geological report has not consented to the inclusion of the statement in the disclosure document or PDS because the statement was not intended for inclusion in a disclosure document or PDS.

[PN 55.55] A disclosure document or PDS for the acquisition or exploitation of mining tenements will often contain an independent technical assessment or valuation of the mining tenements. This assessment or valuation is generally prepared in accordance with the Valmin or JORC Codes by a member of the AusIMM or the AIG. AusIMM and AIG have adopted the Valmin Code for independent experts' reports dealing with mineral assets and mining securities. 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).

[PN 55.56] 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 State or Territory department of mines or an open register or website of ASX (where the reports are lodged with ASX under ASX Listing Rule 5.6 in compliance with ASX Listing Rule Appendix 5A). Further, the historical results are often obtained from geologists' reports commissioned by previous holders of the tenements.

[PN 55.57] It can often prove difficult for the issuer to obtain consent due to the reluctance (for a variety of reasons) of previous experts to give it.

[PN 55.58] Alternatively, consent is not required if the current independent expert assumes responsibility for the historical results

without any express or implied attribution to the previous expert. This can be explained by the following example:

- (a) The statement ‘JP Geologist conducted tests on the tenement in 1992 and produced results Y’ would require the consent of JP Geologist. This is because the ‘results Y’ are expert statements and are attributed to JP Geologist.
- (b) The statement ‘In 1992, results on the tenement of Y were produced’ would not require consent. There is no attribution. There has been an assumption of responsibility for the statement by the geologist making the statement.

[PN 55.59] However, the independent expert may be of the opinion that in order to better inform an investor of significant information, it is preferable that the statement included in the disclosure document or PDS attribute the historical results of the previous geologist.

[PN 55.60] The following is an example of where attribution may be considered necessary:

- (a) the historical results were produced using now obsolete methods; and
- (b) the independent geologist needs to specifically refer to the previous work in order to distinguish the results produced then from those which could be produced now using modern methods.

[PN 55.61] In giving relief under Class Order [CO 05/xx], we have taken into account the considerations in [PN 55.50]–[PN 55.51]. We consider that the relief strikes a balance between the policy behind s716(2) and 1013K(1) and facilitating the issue of a disclosure document or PDS with all information material to the investment decision.

Books and journals

[PN 55.62] Class Orders [CO 00/193] and [CO 02/141] exempt an issuer from s716(2) and 1013K(1) so that a disclosure document or PDS may include a statement by an author. The class orders apply to a correct and fair copy of (or an extract from) a book, journal or comparable publication.

[PN 55.63] 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.

[PN 55.64] 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 liability for the author in this case.

[PN 55.65] The phrase ‘book, journal or comparable publication’ includes reference to 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).

Other relief

[PN 55.66] We may give case-by-case relief from the consent requirement in other circumstances. We will take into account the criteria set out in [PN 55.50]–[PN 55.51].

[PN 55.67] Some considerations are:

- (a) Relief may be given for the use of statements contained in unpublished material comparable to published books or journals.
- (b) 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 its 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.
- (c) Otherwise, in general, we will only give relief if it is impossible or wholly impracticable to comply with the consent requirement.

[PN 55.68] An application for relief in a particular case must address all of the relevant criteria.

Takeovers

[PN 55.69] We also give class order relief from the requirement that a bidder or target must obtain consent to cite statements in bidders’ or targets’ statements under s636(3) and 638(5): see Policy Statement 159 *Takeovers: Discretionary powers* at [PS 159.215], Class Order [CO 03/635], Policy Statement 171 *Anomalies and issues in the takeover provisions* at [PS 171.133], and Class Order [CO 01/1543].

[PN 55.70] Applicants for case-by-case relief from s636(3) and 638(5) should use this practice note as a guide.

Key terms

[PN 55.71] In this practice note, terms have the following meaning.

AIG The Australian Institute of Geoscientists.

ASX Australian Stock Exchange Limited.

AusIMM The Australasian Institute of Mining and Metallurgy.

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 s1013K(1).

Disclosure document for an offer of securities includes a prospectus, a profile statement and an offer information statement.

JORC Code Australasian Code for reporting of mineral resources and ore reserves.

PDS means a product disclosure statement.

Section 716 (for example) means a provision of the Corporations Act.

Valmin Code Code and guidelines for technical assessment and/or valuation of mineral and petroleum assets and mineral and petroleum securities for independent expert reports.

Related information

[PN 55.72]

Headnotes

Disclosure document, product disclosure statement, statement, misleading statement, consent, consent requirement, person, issuer, director, expert, independent expert, government official, geologist, auditor, adviser, underwriter, sub-underwriter, meteorologist, statistician, rating agency, valuer, publication, public official document, rating, geological report.

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 03/1093] Credit rating agencies

[CO 05/xx] Credit ratings agencies: consent to quote

Policy statements

Policy Statement 159 *Takeovers: Discretionary powers* [PS 159]

Policy Statement 171 *Anomalies and issues in the takeover provisions* [PS 171]

Legislation

Corporations Act 2001 s5A, 707, 710, 711, 712, 714, 715, 716(2), 720, 728(1), 729(1), 730–731, 733, 735, 1013K(1), 1015B(1), 1015B(2), 1015D, 1021L(1), 1021L(2), 1022A(1), 1022B, 1022B(7)

Corporations Regulations 2001

Corporate Law Economic Reform Program Act 1999 (Explanatory Memorandum)

Financial Services Reform Act 2001 (Explanatory Memorandum)

Cases

Lord Blackburn in 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) 142 ALR 750

Media and information releases

Information Release [IR 97/13] *Proposed amendments to Practice Note 55—Citing experts* (12 September 1997)

Information Release [IR 05/4] *ASIC seeks comment on draft updated practice note: consent to quote* (27 January 2005)