



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 112

# Independence of experts

March 2011

### **About this guide**

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

It explains how ASIC interprets the requirement that an expert is independent of the party that commissions the expert report (commissioning party) and other interested parties.

**Note:** An interested party is a person with an interest in the outcome of the transaction different from the interest of the general body of security holders.

### 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 on 30 March 2011 and is based on legislation and regulations as at 30 March 2011. The reference to the relief instrument in RG 112.37 was updated in August 2015 because this instrument was reviewed as part of the sunseting of legislative instruments under the *Legislative Instruments Act 2003*.

Previous versions:

- Superseded Regulatory Guide 112, issued 30 October 2007

### Disclaimer

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

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

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## A Overview

### Key points

This guide gives ASIC's view on:

- the need for an expert to be independent (see Section B);
- how previous and existing relationships with commissioning and other interested parties may affect the independence of an expert (see Section C);
- how an expert should deal with the commissioning party and other interested parties to maintain its independence (see Section D); and
- when and how an expert should use a specialist when preparing an expert report (see Section E).

### Reports covered by this guide

- RG 112.1 This guide focuses on reports prepared for transactions under Chs 2E, 5, 6 and 6A of the *Corporations Act 2001* (Corporations Act), whether the reports are required in 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 (see Section E) for inclusion in Ch 6D disclosure documents and Ch 7 Product Disclosure Statements (PDSs).
- RG 112.2 We consider that security holders regard an expert report as being prepared by an independent expert irrespective of whether the report has been prepared voluntarily or because it is required under statute.
- RG 112.3 This approach is consistent with the obligations on the holder of an Australian financial services licence (AFS licensee) to manage conflicts of interest. An AFS licensee's obligation to manage conflicts of interest applies to all of its activities as an AFS licensee and, as such, an expert who holds an AFS licence needs to manage conflicts of interest in respect of all expert reports it prepares.
- RG 112.4 This guide does not apply to independent or investigating accountant reports.

### Underlying principles

- RG 112.5 An expert report that is biased frustrates rather than assists informed decision-making. Security holders will assume that an expert report is an independent opinion and will be misled if the opinion is not.

RG 112.6 Brooking J described the role of an expert in *Phosphate Co-operative v Shears (No 3)* (1988) 14 ACLR 323 (*Pivot*) at 339 in the following terms:

Those who prepare experts' reports in company cases carry a heavy moral responsibility, whatever their legal duties may be. These reports are either required by the [Corporations Act] or provided by way of analogy with those requirements. In either case, they are supposed to be for the protection of individuals who are being invited to enter into some kind of transaction. Unless high [independence] standards are observed by those who prepare these reports, there is a danger that systems established for the protection of the investing public will, in fact, operate to their detriment through reliance on these reports and on the reputations of those who furnish them. In lending his name, the expert will often, as in this case, be lending a name to conjure with ... The expert's integrity and freedom from baneful influences are essential.

RG 112.7 The Corporations Act indicates the need for an expert to be independent:

- (a) an expert must not be associated with certain interested parties, and must disclose certain interests and relationships, when preparing reports required by the Corporations Act for:
  - (i) a takeover bid under Ch 6 (s648A);
  - (ii) a scheme of arrangement (reg 5.1.01 and Sch 8, cls 8303 and 8306 of the Corporations Regulations 2001 (Corporations Regulations)); and
  - (iii) a compulsory acquisition or buy-out under Ch 6A (s667B); and
- (b) as an AFS licensee, an expert needs to establish and maintain systems to comply with its obligations to manage conflicts of interest.

## B Expert needs to be independent

### Key points

An expert should be, and should appear to be, independent: see RG 112.8–RG 112.15.

An expert should give an opinion that is genuinely its own opinion: see RG 112.16–RG 112.20.

### Independence

RG 112.8 The Corporations Act contains indicators that an expert must be, and must appear to be, independent in the provisions requiring an expert report for certain takeover bids, schemes of arrangement, for any compulsory acquisition and in the AFS licensee conflicts management provisions.

RG 112.9 The need for an expert to be, and to appear to be, independent is also indicated in case law establishing that the independence of an expert is critical for the protection of security holders. Mullighan J observed in *Duke Group v Pilmer* (1998) 27 ACSR 1 at 268:

It may be seen that a true state of independence on the part of the expert is crucial to the efficacy of the [takeover] process and for the protection of the public generally and the company and its members in particular.

RG 112.10 We will consider regulatory action if we have concerns about the independence of an expert: see Regulatory Guide 111 *Content of expert reports* (RG 111) at RG 111.128–RG 111.130.

Note: In addition to the term ‘independence’, language also used by the courts, our policies and commentators include: ‘impartial judgment’; ‘disinterested’; ‘objective’; ‘unbiased’; ‘genuine expression of opinion’; ‘integrity’ and, negatively: ‘conflict of interest’; ‘compromised’; ‘collusion’ and ‘acting in a partisan capacity’.

### AFS licensee obligations to manage conflicts

RG 112.11 An expert report typically includes a statement of opinion or recommendation intended to influence investors in making a decision on a financial product: s766B(1). This means the expert report usually constitutes financial product advice, triggering the need for an AFS licence: s766A and 911A(1). Accordingly, in most cases, an expert who prepares an independent expert report that will be made available to retail investors will hold an AFS licence.

RG 112.12 Under s912A(1)(aa), an AFS licensee must:

have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities

undertaken ... in the provision of financial services as part of the financial services business of the licensee or the representative ...

- RG 112.13 This conflicts management obligation applies irrespective of:
- (a) whether the expert states that it is independent of the commissioning party;
  - (b) any requirement that the expert not be an associate of the commissioning party or any other interested party to a transaction (e.g. s648A); or
  - (c) whether the expert report has been prepared to meet a statutory obligation.
- RG 112.14 Whether an expert's conflicts management arrangements (i.e. measures, processes and procedures) are adequate will depend on the nature, scale and complexity of the expert's business and the circumstances of the expert's engagement. The expert should document its conflicts management policies and procedures. The expert should keep records demonstrating how it has complied with those procedures. General guidance on these obligations is provided in Regulatory Guide 181 *Licensing: Managing conflicts of interest* (RG 181) at RG 181.10–RG 181.11.
- RG 112.15 Expert reports are exempt from the licensing regime (reg 7.6.01(u)) when the advice is an opinion on matters other than financial products (e.g. a geologist report) and:
- (a) it does not include advice on a financial product;
  - (b) the document includes a statement that the person is not operating under an AFS licence when giving the advice; and
  - (c) the expert discloses remuneration, interests and relationships.

## Genuine opinion

- RG 112.16 The courts have required the opinion of an expert to be genuine and a product of the expert's professional judgment. An expert's opinion that is tailored to support the views of the commissioning party or any other interested party is not a genuine opinion. It may also be misleading or deceptive.
- RG 112.17 A court found that a commissioning party's active role in shaping an expert report meant that the expert report was not the product of 'an exercise of judgment' by the expert 'uninfluenced by pressure brought to bear by or on behalf of [the commissioning party]' and was not 'a genuine expression of opinion ... but was the result of an exercise carried out for the purpose of arriving at a desired result': *Pivot* at 340 and 342 per Brooking J.
- RG 112.18 An expert is subject to statutory obligations to avoid making misleading or deceptive statements and engaging in misleading or deceptive conduct.

Note: See, for example, s412(8), 670A(1)(h), 1041E, 1041F and 1041H and s12DA of the *Australian Securities and Investments Act 2001* (ASIC Act).

- RG 112.19 An expert has been found to have engaged in misleading or deceptive conduct when the expert did not hold the opinions expressed in the expert report: *MGICA v Kenny & Good* (1996) 140 ALR 313 at 356–357 (a case involving a property valuation).
- RG 112.20 Similarly in *Reiffel v ACN 075 839 226* (2003) 45 ACSR 67 at 92–93, the court held that the expert report was misleading and deceptive in circumstances when ‘there was no reasonable basis for the [expert’s] statement in the report’ and the expert ‘did not hold the opinion it expressed’. The court held that the expert should have disclosed that it disagreed with the methodology used by a promoter in its forecasts and disclosed the methodology that the expert in fact used.

## C Relationship between the expert and the commissioning party

### Key points

An expert should identify relationships and interests that may affect, or may be perceived to affect, the expert's ability to prepare an independent report: see RG 112.21–RG 112.24.

The expert should then consider whether, on the basis of that relationship or interest:

- it should decline the engagement (see RG 112.25–RG 112.27); or
- the relationship or interest can be adequately dealt with by way of disclosure in the expert report (see RG 112.28–RG 112.37).

The expert may also need to take other actions to manage a conflict of interest: see RG 112.38.

Before engaging an expert, a commissioning party should be satisfied that the expert is independent and has sufficient expertise and resources to provide a thorough report: see RG 112.39–RG 112.41.

Note: A reference to expert in this guide is to the person or entity that issues the report. In most cases, this will be a corporate entity holding an AFS licence, even though a senior director or employee may sign the report in the name of the corporate entity and be principally responsible for preparing the report.

### Identifying relationships

- RG 112.21 Previous and existing relationships may threaten, or appear to threaten, the independence of an expert. The objectivity of an expert may also be compromised, or called into question, if the expert has an interest in the outcome of the transaction that is the subject of its report.
- RG 112.22 The closer the relationship between the expert and a commissioning party or any other interested party, the greater the onus on the expert to demonstrate the absence of bias.
- RG 112.23 In identifying relationships and interests that may affect, or may be perceived to affect, the expert's ability to prepare an independent report, the expert should not only identify relationships with, and interests of, the expert but also of:
- (a) the expert's associates;
  - (b) those directors and senior employees who are principally responsible for preparing and issuing the expert report; and
  - (c) the spouse, children and associates of the directors and senior employees who are principally responsible for preparing and issuing the expert report.
- RG 112.24 The need to undertake this identification process also arises from the obligation to manage conflicts of interest if the expert is an AFS licensee.

## Declining the engagement

- RG 112.25 An expert should seriously consider declining an engagement when:
- (a) a person to be involved in preparing the expert report is an officer of the commissioning party or an interested party;
  - (b) the expert, a director or a senior employee who is involved in preparing the expert report has a substantial interest in or is a substantial creditor of the commissioning party or has other material financial interests in the relevant transaction;
  - (c) the expert has participated in strategic planning work for the commissioning party as a lawyer, financial consultant, tax adviser or accountant, whether in connection with the relevant transaction or generally (e.g. advising on possible takeovers or takeover defences); or
  - (d) the expert has acted as a lawyer, financial consultant, tax adviser or accountant to the commissioning party (other than providing professional services strictly for compliance purposes rather than strategic or operational decisions or planning).
- RG 112.26 The Corporations Act specifically states that an expert must decline an engagement for the preparation of an expert report in each of the following circumstances:
- (a) when the report is to be cited or included in a target statement if the expert is an ‘associate’ (as defined in s12) of the bidder or the target and the bidder has 30% or more of the voting power in the target entity or there are common directors of the target and the bidder (s640 and 648A(2));
  - (b) when the report is to be cited or included in a bidder’s statement if the expert is an ‘associate’ (as defined in s12) of the bidder or the target and the consideration for a pre-bid stake acquired in a target was unquoted securities (s636(1)(h)(iii), 636(2) and 648A(2));
  - (c) when the report is to be cited or included in the explanatory statement for a scheme of arrangement if the expert is an ‘associate’ (as defined in s12) of the parties to the scheme if the other party to a reconstruction in a scheme of arrangement has at least 30% of the voting shares of the scheme company or there are common directors (reg 5.1.01(b) and Sch 8, cls 8303 and 8306 of the Corporations Regulations); and
  - (d) if the expert is an ‘associate’ (as defined in s12) of the person issuing a compulsory acquisition or buy-out notice (s663B, 664C, 665B and 667B).
- RG 112.27 An expert’s AFS licensee obligations to manage conflicts of interest may oblige an expert to decline engagements in some circumstances. Licensee experts may be offered an engagement in which relationships and interests pose such a serious risk of conflict of interest that the threat to the expert’s

independence cannot be adequately managed through disclosure or internal controls. The only way an expert can adequately manage these threats is to avoid them and the expert's conflicts management policies and procedures should give specific guidance on circumstances when it should decline engagements: see RG 181.42–RG 181.43 and RG 181.60.

## Disclosing relationships and interests

### Requirement

- RG 112.28 As security holders rely on an expert report, they should be clearly informed about any relationships or interests (including financial or other interests) that could reasonably be regarded as relevant to the independence of the expert. This requirement arises from the Corporations Act and case law: see *ANZ Nominees v Wormald* (1988) 13 ACLR 698 at 707.
- RG 112.29 Disclosure of relationships or interests is required under the Corporations Act for an expert report when the report is required to be included in:
- (a) a target statement, when the bidder has 30% or more of the voting power in the target entity or there are common directors of the target and the bidder (s648A(3));
  - (b) a bidder's statement, when the consideration for a pre-bid stake acquired in a target is unquoted securities (s648A(3)); and
  - (c) a compulsory acquisition or buy-out notice (s667B(2)).
- RG 112.30 Similarly, as an AFS licensee, an expert needs to make appropriate disclosure of conflicts of interest to commissioning parties and to those relying on the report as part of the conflicts management obligation: see RG 181.49–RG 181.63.

### Content of disclosure

- RG 112.31 An expert should prominently disclose in the report:
- (a) the business or professional relationships with a commissioning party or any other interested party;
  - (b) any financial or other interest that could reasonably be regarded as capable of affecting the expert's ability to give an unbiased opinion on the matter being reported on; and
  - (c) any fee or benefit (whether direct or indirect) to be received in connection with the report (s648A(3) and 667B(2)).
- RG 112.32 If an expert has, within the previous two years, valued assets representing more than a *de minimus* (i.e. trivial) proportion by value of the assets that it

has been engaged to value for the commissioning party, this should also be prominently disclosed in the report.

Note: Disclosure is also required by RG 112.31 if the expert was previously engaged to value the relevant assets by the commissioning party or any other interested party.

RG 112.33 These disclosures should be made in all expert reports irrespective of whether the report is required to be prepared by the Corporations Act or is voluntarily commissioned and supplied to security holders.

RG 112.34 These disclosures should relate to relationships or interests existing at the time of preparation of the report or existing in the previous two years. This two-year period is a minimum period for disclosure and earlier relationships might be so significant that they warrant disclosure as well.

Note: In *Duke Group v Pilmer*, Mullighan J referred to this benchmark with approval (at 268).

RG 112.35 Disclosures should be timely, prominent, specific and meaningful. An expert should not use 'boilerplate' disclosures (e.g. that the expert has been paid 'a normal professional rate'). An actual amount should be shown for fees paid to an expert for the report.

RG 112.36 When an expert report is cited or included in a bidder's statement in which any securities in the bidder (or a person who controls the bidder) are offered as consideration under the bid, these disclosures must also meet the specific disclosure obligations that apply to prospectuses under s711(2)–(4), including:

- (a) any interests that the expert has in the bidder; and
- (b) any fees or benefits given or agreed for the expert's services (s636(1)(g)).

RG 112.37 As an expert report will usually constitute financial services advice, an expert will need to give retail investors a Financial Services Guide (FSG). We have given relief to allow an expert to include a FSG as a separate and clearly identifiable part of an expert report: see ASIC Corporations (Financial Services Guides) Instrument 2015/541. In view of this relief, we consider that an expert should include all of its disclosure of interests and benefits, whether flowing from the FSG requirements, conflicts management, s648A or case law, in the FSG rather than duplicating that disclosure in another part of the expert report.

## Other measures

RG 112.38 In addition to disclosing any conflict of interest, an expert will need to consider whether other measures to properly manage the conflict of interest are appropriate (e.g. implementing information barriers): see RG 181.35–RG 181.37.

## Commissioning an expert

- RG 112.39 In commissioning an expert, a commissioning party should consider whether the expert is independent and whether the expert has sufficient expertise and resources to give a thorough opinion on the proposed transaction. The quality of an expert report may be affected if this is not the case. If an expert considers that it is not independent or does not have sufficient expertise or resources to give a thorough opinion, it should decline the engagement.
- RG 112.40 In selecting an appropriate expert, we consider that relevant factors are likely to include:
- (a) whether the expert has adequate resources (which may include access to appropriate third party specialists) to perform the necessary work;
  - (b) the qualifications of the expert and whether the expert has the requisite level of technical expertise (including whether the expert meets the requirements of any relevant industry codes);
  - (c) the experience of the expert. For example, a commissioning party may ask what comparable transactions the expert has given an opinion on and whether that experience is relevant to the current transaction;
  - (d) whether the expert can meet the timeframe required for the report to be produced; and
  - (e) whether there are any independence issues.
- RG 112.41 While a commissioning party should satisfy itself that an expert is competent, it should ensure that any pre-engagement discussions do not compromise the expert's independence. For example, these discussions should not deal with how the expert proposes to evaluate the transaction or the merits of the transaction: see RG 112.46–RG 112.48.

## D Expert's conduct in preparing its report

### Key points

An expert should:

- obtain written terms of engagement from the commissioning party before commencing work;
- take care to avoid any communication with the commissioning party or any other interested party that may undermine, or appear to undermine, independence; and
- consent to the use or incorporation of its report.

Commissioning parties should be careful not to release the conclusions of an expert report in advance of the final report.

## Interactions with commissioning party

### Terms of engagement

- RG 112.42 Before commencing work, an expert should obtain written terms of engagement from the commissioning party that:
- (a) set out the scope and purpose of the report;
  - (b) set out the facts of the proposal and relevant data;
  - (c) recognise the expert's right to refuse to give an opinion or report at all if it is not given the information and explanations it requires to prepare the report;
  - (d) give the expert the same access to the commissioning party's records as the auditor of the commissioning party; and
  - (e) set out the fee.

### Approval of appointment

- RG 112.43 It is possible that some directors of a commissioning party may have a conflict of interest in the proposed transaction, such as cross-directorships held in the target and the bidder. In these circumstances, the expert and commissioning party should ensure that the directors without a conflict select and engage the expert.
- RG 112.44 The commissioning party should ensure that the method by which an expert is appointed, and the scope of its engagement, is consistent with the concepts of independence and perceived independence of the expert. For example, it may be appropriate to have a non-executive director oversee the appointment process if management is likely to be perceived to have a strong interest in the outcome of the expert report.

## Expert's fee

RG 112.45 We will consider that an expert is not independent if the amount it is to receive for the expert report depends in any way on the outcome of the transaction to which the report relates. This is consistent with the requirement that a person who provides financial services must not hold itself out as 'independent', 'impartial' or 'unbiased' if it is paid success fees or has a conflict of interest arising from a relationship with an issuer of financial products that might reasonably be expected to influence the report: s923A.

## Manner of communication

RG 112.46 Ensuring security holders receive an objective expression of opinion in an expert report involves more than identifying and dealing with previous or existing relationships or interests. An expert's objectivity, or the appearance of objectivity, may be undermined by the interactions between the expert and the commissioning and other interested parties.

RG 112.47 We are likely to view the following interactions as indicators of a lack of independence:

- (a) the commissioning party having rejected another expert after the expert disclosed its likely approach to evaluating the proposal;
- (b) an expert attending discussions on the development of the transaction, the merits of the transaction or on strategies to be adopted by the commissioning party;
- (c) an expert taking instructions from, or holding discussions with, a commissioning party, its advisers or any interested party on the choice of methodologies for the report or evaluation of the transaction (including the underlying assumptions or reasoning), although the expert may interrogate those parties for the purpose of the expert's own analysis;
- (d) an expert accepting from a commissioning party, its advisers or any interested party their analysis of the transaction, although the expert may interrogate those parties for the purpose of the expert's own analysis;
- (e) the expert discussing preliminary views or findings with the commissioning party or any other interested party;
- (f) the expert entering into a success fee arrangement with the commissioning party or any other interested party;
- (g) the expert discussing future business relationships with the commissioning party or any other interested party before finalising the report. This includes refraining from cross-selling other services of the expert; and
- (h) the expert changing its opinion at the suggestion of the commissioning party or any other interested party without adequate explanation: see RG 112.56–RG 112.57.

- RG 112.48 We expect that an expert who is an AFS licensee will include in its internal policies and procedures guidelines to address:
- (a) communications and interactions with the commissioning party and any other interested party during the commissioning of the expert and the preparation of the report;
  - (b) remuneration arrangements; and
  - (c) supervision of the preparation of the report.

## Preparing the report

### Access to information

- RG 112.49 The expert, not the commissioning party, should determine what information will be required for the report. The commissioning party should give the expert all the information it is aware of about the subject of the expert report, in sufficient detail to enable the expert to determine its relevance.
- RG 112.50 If the expert is not given access to the records it requires, or is given an unduly short time to complete the report (relative to any applicable statutory time constraints), it should consider refusing to prepare a report at all. An expert should not prepare an unsatisfactory report and attempt to deal with deficiencies in the report by disclaiming responsibility.

### Communication

- RG 112.51 An expert and its commissioning party may communicate and meet with each other during the preparation of the expert report for the expert to:
- (a) discuss the progress of the report;
  - (b) gain access to information;
  - (c) ascertain matters of fact or to correct factual errors (*Re Matine* (1998) 28 ACSR 268 at 288); and
  - (d) interrogate the commissioning party or another interested party for the purposes of its own analysis.
- RG 112.52 To help maintain independence and negate any inference of bias, we consider that an expert should direct and lead all meetings and discussions with the commissioning party, its advisers and any other interested party. The expert should keep appropriate file notes of discussions and retain copies of documents worked on in discussions with the commissioning party, its advisers and any other interested party.
- RG 112.53 Brooking J in *Pivot* at 339 summarised this issue in the following terms:
- The guiding principle must be that care should be taken to avoid any communication which may undermine, or appear to undermine, the independence of the expert.

## Drafts of reports

- RG 112.54 An expert may give draft copies of parts of its report to a commissioning party or its advisers for factual checking before delivery of a full draft copy of the report. These early drafts should not contain the expert's analysis of the transaction, the merits of a transaction or the methodologies employed: *Pivot* at 339.
- RG 112.55 The expert should only provide a full draft copy of the report to the commissioning party for factual checking when the expert is reasonably assured that the conclusions in the report are unlikely to change.
- RG 112.56 If a commissioning party or an adviser disagrees with the expert's analysis in a draft of the expert report, the report should only be altered if the expert is persuaded that all or part of the expert's assessment is based on an error of fact. We would expect an expert, in this situation, to independently reassess the whole or relevant part of the report based on its view of the revised facts.
- RG 112.57 After a full draft copy of an expert report has been provided to a commissioning party or its advisers, any alteration of the report made at the suggestion of the commissioning party or its advisers that affects an expert's analysis of the transaction or the expert's conclusions should be clearly and prominently disclosed in the report. This disclosure should include an explanation of the changes, the reasons why the expert considered the changes appropriate and the significance of the changes to the expert's opinion.
- RG 112.58 Minor factual corrections made at the suggestion of the commissioning party or its advisers that are immaterial to an expert's analysis, conclusions or opinion need not be disclosed in the report.

## Use and distribution

- RG 112.59 If a party commissions two or more reports, a copy of each report should be sent to security holders. This should be done regardless of whether more than one report is prepared by the same expert or by different experts: *Pivot* at 339. It should also be done regardless of whether the commissioning party is obliged to do so under s648A(1).
- RG 112.60 An expert should deliver its final, signed report to the commissioning party even if the commissioning party requests otherwise (unless the transaction is discontinued or varied substantially).
- RG 112.61 The directors of a commissioning party should not adopt or recommend that security holders accept the findings of an expert report without critically analysing the report. The directors should satisfy themselves that the information relied on in the report is accurate and that the report has not omitted material information known to the directors but not given to the expert.

## Release of conclusions of expert reports

- RG 112.62 An expert report needs to contain sufficient information to assist security holders to make a decision, including providing details of the methodologies and material assumptions on which the report is based, together with any qualifications: see RG 111.64–RG 111.79. The directors of a commissioning party need to ensure that an expert report is not used or referred to in a way that may be misleading or deceptive.
- RG 112.63 If a commissioning party releases the conclusions of an expert report in advance of the final report, this is likely to be misleading or deceptive, particularly if the final report contains any ‘surprises’ for a person who has only read the conclusions. Releasing conclusions without providing relevant supporting information may cause confusion or uncertainty since security holders and the market will not be able to determine whether those conclusions are reasonable.
- Note: In *Re Origin Energy Limited 02* [2008] ATP 23, the Takeovers Panel considered that it was potentially misleading to quote the conclusions of a technical expert’s report in a target’s statement without giving shareholders a copy of the report or the underlying assumptions and qualifications.
- RG 112.64 Consequently, a commissioning party that releases the conclusions of an expert report in advance of the final report risks regulatory action for contravention of the misleading or deceptive conduct provisions or other regulatory action. For example, if a report is provided in relation to a bid, the commissioning party risks an application by us, or another party, to the Takeovers Panel for a declaration of unacceptable circumstances.
- RG 112.65 There may be limited situations in which a commissioning party’s continuous disclosure obligations will require disclosure of the conclusions of an expert report in advance of the final report (e.g. if confidentiality has been lost before the final report is ready for release to the market). Commissioning parties and experts should put in place processes that minimise the risk that preliminary disclosure will be required before the report has been finalised. If preliminary disclosure is required, commissioning parties should ensure that this is done in a way that is not misleading or confusing (e.g. by highlighting the limitations of the preliminary disclosure and providing all available material information about the report).

## Consent of expert

- RG 112.66 An expert report may only be incorporated or referred to in a bidder’s statement or target statement if the expert has consented to the use of the report in the form and context in which it appears: s636(3) and 638(5). Before consenting, the expert should consider whether the report has been accurately reproduced and used for the purpose for which it was commissioned. The expert should also consider the appropriateness, or otherwise, of express or implied representations about its report, the conclusions or recommendations: see Regulatory Guide 55 *Prospectus and PDS: Consent to quote* (RG 55), which also applies to the consent obligations in s636(3) and 638(5).

## E Use of specialists

### Key points

If an expert does not have the necessary specialist expertise on a matter that must be determined for the purposes of the report, it should retain an appropriate specialist for that matter who is independent of the commissioning party: see RG 112.67–RG 112.70.

The specialist should report to the expert rather than the commissioning party: see RG 112.71–RG 112.72.

The expert should ensure that the specialist has consented to the use of its report: see RG 112.73–RG 112.77.

### Engagement of specialists

- RG 112.67 It is the expert's responsibility to:
- (a) determine that a specialist's assistance is required on a matter that must be determined for the purposes of the report;
  - (b) select the specialist and ensure that the specialist is competent in the field;
  - (c) negotiate the scope and purpose of the specialist's work and ensure that this is clearly documented in an agreement (though the agreement may be with the commissioning party or the expert); and
  - (d) be satisfied that the specialist is independent of, and is perceived to be independent of, the commissioning party and any other interested party.
- RG 112.68 We consider best practice would be for the expert to pay the specialist its fees and recover those fees from the commissioning party.
- RG 112.69 We would expect a specialist report to be specifically commissioned and prepared for the transaction the subject of the expert report. We would also expect the expert to make it clear to the specialist that the report is being commissioned for inclusion in the expert report. If the specialist report is not prepared specifically for the current transaction, this should be clearly explained to security holders. The Takeovers Panel in *Re Great Mines Limited* [2004] ATP 01 expressed the disclosure requirement in the following terms (at [56]):
- Wherever a report is re-used in this way, however, shareholders should be advised of the purpose for which the report was prepared. It would be inappropriate to re-use a report in this way to satisfy a requirement for an independent experts report and in general, it would be misleading to describe a report re-used in this way as independent.
- RG 112.70 While these comments were made in the context of an independent expert report, we consider they are equally applicable to the use of a specialist report.

## Review of specialist report

- RG 112.71 The expert should:
- (a) critically review the specialist report, particularly to consider whether the specialist has used assumptions and methodologies which appear to be reasonable and has drawn on source data which appears to be appropriate in the circumstances;
  - (b) have reasonable grounds for believing the specialist report is not false or misleading;
  - (c) ensure the specialist signs its report and consents to its use in the form and context in which it will be published; and
  - (d) ensure that the specialist report is used in a way that will not be misleading or deceptive.
- RG 112.72 A specialist report commissioned by the expert should be dated close enough to the date of the expert report to ensure that assumptions applied have not been overtaken by time or events.

## Use of specialist report

- RG 112.73 The expert should ensure that the specialist consents to the use of its report in the form and context in which it will be published. If a specialist does not take responsibility for, or authorise the use of, its report and the expert considers that the material the subject of the report needs to be included in the expert report, the expert must accept entire responsibility for the statements as the expert's own and, as such, must have reasonable grounds for believing the statements not to be misleading or deceptive. This is consistent with our approach to directors assuming responsibility for statements in a prospectus or PDS that are not attributed to another person: see RG 55.11–RG 55.12.
- RG 112.74 The expert should exercise its judgment to determine whether to include the specialist report in full or include a concise or short form version or cite or extract the specialist report.
- RG 112.75 We encourage an expert to consider whether it is appropriate to have the specialist prepare a concise or short form specialist report for inclusion in the expert report with a longer specialist report available on request free of charge or accessible online.
- RG 112.76 An expert should only quote or cite the specialist's work in a way that is fair and representative. Otherwise the expert risks misleading security holders. If the full specialist report contains any 'surprises' for the security holder who only reads the short form or concise report, this would indicate the short form specialist report was misleading.

RG 112.77 In the situation when an expert has obtained more than one specialist report on the same matter, we consider that security holders will not be given all material information if the expert merely supplies abridged results of those reports, and states, without comment or analysis, the result is the sum of the values given in each of the specialist reports.

## Key terms

Term	Meaning in this document
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>
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
expert	The meaning given to that term in s9 of the Corporations Act
Financial Services Guide (FSG)	A document that must be given to a retail client in relation to the provision of a financial service in accordance with Div 2 of Pt 7.7 of the Corporations Act  Note: See s761A for the exact definition.
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act  Note: See s761A for the exact definition.
reg 5.1.01 (for example)	A regulation of the Corporations Regulations (in this example numbered 5.1.01)
RG 181 (for example)	An ASIC regulatory guide (in this example numbered 181)
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

## Related information

### Headnotes

experts, expert reports, independence, genuine opinion, relationships or interests, declining the engagement, disclosing relationships or interests, conduct of experts, use of specialists

### Regulatory guides

RG 55 *Disclosure documents and PDS: Consent to quote*

RG 111 *Content of expert reports*

RG 181 *Licensing: Managing conflicts of interest*

### Legislative instruments

ASIC Corporations (Financial Services Guides) Instrument 2015/541

### Legislation

Corporations Act, Chs 2E, 6 and 6A, s12, 412(8), 636, 638, 640, 648A, 663B, 664C, 665B, 667B, 670A(1)(h), 711, 766A, 766B(1), 911A(1), 912A(1)(aa), 1041E, 1041F and 1041H, Corporations Regulations, regs 5.1.01 and 7.6.01(u), Sch 8, cls 8303 and 8306

ASIC Act, s12DA

### Cases

*ANZ Nominees v Wormald* (1988) 13 ACLR 698

*Re AuIron Energy Limited* [2003] ATP 31

*Duke Group v Pilmer* (1998) 27 ACSR 1

*Re Great Mines Limited* [2004] ATP 01

*Re Matine* (1998) 28 ACSR 268

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

*Re Origin Energy Limited 02* [2008] ATP 23

*Phosphate Co-operative Co of Aust Ltd v Shears & Anor (No 3)* (1988) 14 ACLR 323

*Reiffel v ACN 075 839 226* (2003) 45 ACSR 67

### Consultation papers and reports

CP 62 *Better experts' reports*

CP 143 *Expert reports and independence of experts: Updates to RG 111 and RG 112*

REP 234 *Response to submissions on CP 143 Expert reports and independence of experts*