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Submission

Consultation Paper 326

Submission – ASIC Consultation Paper 326

This is a submission from Herbert Smith Freehills in response to ASIC Consultation Paper 326: *Chapter 6 relief for share transfers using s 444GA of the Corporations Act*, released on 16 January 2020 (**CP 326**).

Please let us know if it is helpful to discuss any aspect of this submission.

This submission reflects input from Rebecca Maslen-Stannage, Andrew Rich, Nick Baker, George Durbridge, Mark Clifton, Paul Apathy, Konrad de Kerloy, David John, Nikki Smythe, Rowena White, and Michael Compton.

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1 Introduction

We welcome ASIC's consultation regarding section 444GA applications. It is a good idea to review this now that a body of case law has developed regarding applications under section 444GA in the listed company context.

The tension between shareholder and creditor interests raises particular challenges in an insolvency context.

The takeovers law framework in Chapter 6 of the Corporations Act was developed primarily in the context of opportunities arising where the company has positive equity value which is appealing to a bidder. The takeovers laws and regulatory guidance set a "best practice" framework to ensure that shareholders share equally in the benefits of that equity value and have the highest quality of information to consider the opportunity.

In contrast, the insolvency laws have been formed in the more adverse context where it is likely that creditors will not be paid in full. The voluntary administration regime (of which section 444GA is a part) was intended to be an efficient process and "*as uncomplicated and inexpensive as possible*".[1] Every dollar that needs to be spent to administer the insolvency process is a dollar less that creditors will recover. In that context, "nice to have" elements that are appropriate in a takeover context are a luxury that, pragmatically, may fail a cost/benefit test in an insolvency context. It is important to bear in mind that in an insolvency scenario, the creditors that are often hardest hit are small family-owned businesses for whom every dollar counts.

Section 444GA and its practical application by the Courts have aimed to strike the right balance in this context. The Court acts as a check and balance that the interests of members are not being "unfairly prejudiced" by the transfer. This safeguard is necessary because the insolvency test is a cash flow test rather than a balance sheet test. It is possible that a company can have positive equity value – i.e. its assets exceed its liabilities – and be insolvent because of a liquidity crunch. It would not be appropriate for the company's shares to be sold for the benefit of creditors under section 444GA on that scenario, because on a liquidation, creditors would be paid in full and shareholders would receive a return. The Court therefore tests for unfair prejudice by comparing what the outcome would be for shareholders on a liquidation compared to under the relevant deed of company arrangement.

Courts are very used to testing evidence, including valuation evidence. They are practised at assessing the credibility of witnesses and taking into account any conflicts which the witness may have in that assessment. The Courts have demonstrated for over a century that they are very conscious of, and well skilled in, assessing the economic interests of shareholders in insolvency and restructuring scenarios[2], and Parliament intended that the Court should be the ultimate arbiter on whether unfair prejudice to shareholders exists in the section 444GA context[3].

At this stage, because of ASIC's practice to date of requiring an independent expert report which complies with RG 111, administrators have tended to rely on that as part of their evidence to persuade the Court that there is no unfair prejudice. It has not been tested what valuation evidence administrators would otherwise provide, or the Courts would otherwise require, in particular circumstances of DOCAs of companies which are subject to Chapter 6 of the Corporations Act, to discharge the administrator's onus of proving that there is no unfair prejudice to creditors. It would stand to reason that, in clear cases of a net asset deficiency the Courts may be willing to rely on evidence from the

[1] ALRC Report 45, 1998 at [54]

[2] See, for example, *Re Tea Corporation Ltd* [1904] 1 CH 12 at 23-25; and *Re Opes Prime Stockbroking Ltd (No 1)* (2009) 73 ACSR 385 at 405 [76]

[3] *Corporations Amendment (Insolvency) Bill 2007* Explanatory Memorandum at [7.57]-[7.58]

administrators, but that in cases where it was not so clear that there was a net asset deficiency – or if the Court had any concern as to the administrators' evidence due to the existence of a conflict in respect of the DOCA – the Court may require additional valuation evidence.

We agree with ASIC's proposal not to require a going concern valuation in a section 444GA context, consistent with the Court's own approach. We suggest going further by:

- not requiring an independent expert report which meets the requirements of RG 111. Rather, we suggest leaving it to the Court to assess whether it is satisfied, based on the valuation evidence put forward by the administrator in the Court application, that the shareholders will be no worse off than on a liquidation scenario and therefore are not being unfairly prejudiced; but
- requiring shareholders to be notified of the section 444GA application, and that they be given access to the valuation evidence which the administrator is relying on in support of the application[4], so that the shareholders may decide whether to appear to oppose the application.

Our suggested approach to granting relief

In summary, in our view ASIC relief should be granted for an acquisition arising from a transfer under section 444GA subject to two conditions:

1. shareholders receive notification of the section 444GA application and are given access to the valuation evidence in support of it; and
2. the Court orders the transfer under section 444GA.

That would strike an appropriate, necessarily pragmatic, balance in the circumstances. We do not consider it is necessary to have a separate independent expert's report, prepared in accordance with RG 111 by an expert who meets the requirements of RG 112, for the reasons set out in this submission.

We have set out our responses to the specific questions in the consultation paper below.

2 Proposal B1

> **Proposal B1:** We propose to include guidance in RG 6 about when we will grant relief to facilitate a s444GA transfer, namely where:
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> (a) an IER is prepared in accordance with RG 111; and
>
> (b) the IER and explanatory materials are made available to shareholders before the s444GA hearing.

We have set out below our responses to each of the questions posed by ASIC in relation to Proposal B1.

2.1 Question B1Q1

> **B1Q1:** Do you agree that ASIC should require an IER to be prepared in accordance with RG 111 and that the IER and explanatory materials should be provided to shareholders before the hearing? If not, why not?

[4] Where applicable, with any necessary arrangements to protect any commercially sensitive information.

Courts already adequately protect shareholders' interests

Given the insolvency context, we submit that the key question is whether:

- an independent expert report – which would undoubtedly be a "nice to have" in a solvent context – should be required by ASIC in order to grant relief from Chapter 6; or
- whether it is appropriate for ASIC instead to rely on the Court process to assess the valuation evidence, on the basis the Court will need to be satisfied – based on that evidence put before the Court – that there no material prejudice to shareholders.

As ASIC notes in the consultation paper, the administrators are required to prepare a detailed report on the affairs of the insolvent company. While of course there are differences in the purpose of that report (given that it is principally a report to creditors) compared with an IER prepared in accordance with RG 111, that report includes an estimate of returns to creditors on a winding up of the company and a comparison of estimated returns under the DOCA compared with estimated returns on a liquidation. This report will, in many cases, provide the information needed to address the principal question relevant to the protection of shareholders' interests in a section 444GA context – namely, whether there would be any residual value for shareholders on a winding up of the company.

In addition to preparing the report to creditors, it is also then incumbent on the administrators to apply to the Court for leave and present sufficient evidence to the Court to satisfy the Court that no unfair prejudice would arise to shareholders on a transfer of their shares. Since, to date, in applications to which Chapter 6 applies, ASIC has required an IER to be prepared in accordance with RG 111, administrators have tended to use this as the valuation evidence. This has led to practical issues and extra cost because a typical report produced under RG 111 does not necessarily comply with the usual form of Court requirements for expert evidence, and the experts who prepare RG 111 reports tend not to be used to providing expert evidence for a Court or giving evidence in Court.

For example in the *Nexus Energy* case, the opposing shareholders took those evidentiary points to seek to object to the original form of report (as sent to shareholders together with the explanatory statement required by ASIC) being tendered as evidence in the Court proceedings. This ultimately required the deed administrators to produce supplementary evidence in the form of an expanded report (incorporating additional commentary to the version of the report which was provided to shareholders together with the explanatory statement) and a series of underlying documents on which the experts had relied[5].

In any event, in cases which are not very clear based on the administrator's own report, if ASIC does not require an RG 111 report, that does not mean there will be no other expert valuation evidence. The onus is on the administrator to produce sufficient valuation evidence in the circumstances to satisfy the Court that there is no residual shareholder value – i.e. no unfair prejudice.

As ASIC has identified in CP 326 (at [13]), the Courts have accepted that the ultimate question for the Court in deciding whether to grant leave under section 444GA(1)(b) is whether there would be any unfair prejudice as a result of the transfer – measured by whether shareholders have any residual equity is based on a comparison of their position under a DOCA with their position under a liquidation of the company[6]. The Takeovers Panel in *Re Pasminco Ltd (Administrators Appointed)* [2002] ATP 6 considered it anomalous that Chapter 6 would apply to acquisitions of shares in insolvent companies

[5] *Re Nexus Energy Limited* [2014] NSWSC 1689 at [7]-[8]

[6] *Weaver v Noble Resources Ltd* [2010] WASC 182 at [79]; *Re Mirabela Nickel Ltd (subject to deed of company arrangement)* [2014] NSWSC 836 at [42]

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which were insolvent on a balance sheet basis and in which the shares, as a result, are essentially worthless. Specifically, the Takeovers Panel observed that:

- it was "*anomalous and unreasonable that the reconstruction, involving about $3 billion of creditors' money, should be subject to a veto by shareholders with essentially no value at stake*";
- "*Chapter 6 is designed to prevent people getting control of companies by coercion, or rushed, uninformed or selective dealing*"; and
- "[t]*he law* [had] *placed Pasminco under the control of the Creditors by means which neither contravened nor avoided Chapter 6*"[7].

While the decision in that matter related to a share issue and was made before section 444GA was introduced, the Pasminco administration was part of the impetus for the introduction of section 444GA, and the same reasoning should now apply to the application of Chapter 6 to a transfer with leave of the Court under section 444GA.

It would be a legitimate exercise of ASIC's discretion as to whether to grant relief to conclude that, in such circumstances, relief should be given as a matter of course subject to:

1. shareholders being notified of the application and provided with the opportunity to receive a copy of the Court application and valuation evidence[8]; and
2. the Court granting leave under section 444GA given that a Court will only grant that leave if satisfied that there is no unfair prejudice to shareholders.

If, in a particular case, ASIC had any specific concerns as to whether there is unfair prejudice that arises to shareholders on the transfer, ASIC could also exercise its right under section 444GA(2)(d) to appear and raise those matters to be tested in Court, or require the administrator to draw those matters to the Court's attention as a further condition of the relief.

In due course, in addition to updating ASIC's published guidance in RG 6, ASIC may wish to consider issuing class order relief to reflect the above approach, to avoid the need for it to deal with applications on a case-by-case basis.

If RG 111 is to apply, it should be supplemented by specific guidance for liquidation valuations in a section 444GA context

If, contrary to our primary submission above, ASIC was still minded to require an independent expert's report in accordance with RG 111 as a condition to it granting relief from Chapter 6 to facilitate a section 444GA transfer, RG 111 should be updated to provide specific tailored guidance for such reports prepared in the section 444GA context.

We agree with ASIC's Proposal B2 that the appropriate valuation methodology for any valuation prepared in this context will generally be a liquidation valuation. See our comments below at B2Q1 for further detail in relation to this point.

RG 111 does not currently provide tailored guidance to an independent expert for the preparation of an expert's report based on a liquidation valuation methodology in the section 444GA context. The following points raised by the Courts are of particular relevance in a section 444GA valuation context, in contrast with the usual position in a solvent company takeover, and could usefully be included in a tailored section of RG 111:

- "*the question whether shareholders have any residual equity in the company has to be determined by comparison with their position on a winding-up, at least*

[7] *Pasminco Ltd (Administrators Appointed)* [2002] ATP 06 at [98]

[8] Where applicable, with any necessary arrangements to protect any commercially sensitive information.

where that is the likely or necessary consequence of the transfer of shares not being approved"[9];

- (consistent with ASIC's position in the consultation paper) a going concern valuation is not relevant to the matters which the Court is required to determine in an application under section 444GA[10];
- it is inappropriate to assume that a company's current financial difficulties do not exist and that sufficient funds are available to support its ongoing operations (when they are not)[11];
- given that valuations which adopt the discounted cash flow methodology involve the "*evaluation of inherently uncertain matters and the making of fairly speculative assumptions in highly significant areas*", that weight should be given to "*the more mundane realities of the marketplace*" – particularly where there is a high degree of uncertainty in assumptions which experts make in respect of significant matters[12]; and
- that it is appropriate for a valuation prepared on a liquidation basis to be prepared relying on recent offers received by the company or its administrators for the business or for particular assets, and that there is "*little utility, in a liquidation or receivership scenario, of addressing a theoretical valuation*" in circumstances where there have been recent offers received for a business or particular assets[13].

Therefore, if ASIC was to proceed with Proposal B1 (having regard to Proposal B2), we submit that RG 111 should be updated to include specific guidance about the approach to preparing a valuation (on a liquidation basis) in the context of an application under section 444GA, which distinguishes it from the guidance currently in RG 111 on the approach to analysing control transactions for solvent companies.

2.2 Question B1Q2

B1Q2: Are there situations where you consider the IER might be unnecessary? If so, please outline the circumstances.

Yes. See answer to B1Q1 above and B1Q3 below.

2.3 Question B1Q3

B1Q3: Do you consider that the administrator's report to creditors could be used instead of an IER? If so, on what basis? If not, why not?

Yes, in clear cases. In less clear cases, administrators would be prudent to supplement that report with further evidence to discharge their onus of proof that the return to shareholders on a winding up would be nil and that, therefore, there is no unfair prejudice to shareholders.

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[9] *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].

[10] *Re Nexus Energy Limited* (2014) 105 ACSR 246 at 269 [70]; *Re Ten Network Holdings Limited* (2017) 123 ACSR 253 at 276 [72]; *Re Paladin Energy* [2018] NSWSC 11 at [7]

[11] *Re Ten Network Holdings Limited* (2017) 123 ACSR 253 at 267 [45]

[12] *Elkington v Shell Australia Ltd (1992)* 10 ACSR 568 at 571; *Re Nexus Energy Limited (*2014) 105 ACSR 246 at 257 [34]

[13] *Re Nexus Energy Limited (2014)* 105 ACSR 246 at 266 [60]

The administrator, who must be a registered liquidator[14], has a statutory responsibility to investigate the business, property, affairs of a company in administration and form an opinion about whether it would be in the interests of creditors for the company to enter into a DOCA, for the administration to end, or for the company to be wound up[15]. The administrator is required to prepare a report to creditors setting out these matters, which includes information known to the administrator which will assist creditors to make an informed decision about those matters and, to the extent that a DOCA is proposed, details of the DOCA[16].

ASIC notes (at [24] of CP 326) that the Australian Restructuring, Insolvency and Turnaround Association (**ARITA**) has published guidance on what that report should contain, which includes an estimate of returns on a winding up of the company and a comparison of estimated returns under the DOCA compared with estimated returns on a liquidation, but notes (in contradistinction to RG 111 as it applies to an IER) that this guidance is not mandatory.

While it may be correct that the ARITA guidance is not mandatory, in the sense of it being expressly set out in the Corporations Act or other law as mandatory content requirements for such a report, administrators are subject to the usual officer's duties to act with reasonable care and diligence in discharging their role as an administrator, and accordingly in practice there is a degree to which administrators would be expected to follow the ARITA guidance in the preparation of their reports to creditors in order to comply with their duties.

In practice, an administrator (in carrying out the investigations and forming the views required of it under section 438A) will:

- develop a detailed working understanding of the financial position, assets and operations of the company; and
- obtain realistic and current indications (typically through a sale process in which any party is invited to submit either whole-of-company, refinancing, or asset-level proposals) of the likely realisable value of the company's assets and its prospects of returning to solvent trading, in the absence of a DOCA proposal.

The administrator is therefore both well qualified and (given the knowledge and understanding of the company in administration that they would have accumulated during the administration process) well placed to carry out a valuation and report on other information regarding the company and its affairs which would assist shareholders and the Court to form a view as to whether any unfair prejudice arises to shareholders on a 444GA transfer (in the way the Courts have defined that concept).

The Court will ultimately assess whether it is comfortable to rely on the administrator's evidence in the particular case. If the Court has concerns based on any conflicts or other matters, the Court will consider these in determining whether the administrator has discharged its evidentiary onus.

3 Proposal B2

Proposal B2: If we proceed with Proposal B1, we propose that the IER should be prepared solely on a liquidation basis where the only alternative is liquidation. Where the valuation shows no likely return for shareholders on this basis, we will normally grant

[14] Section 448B of the Corporations Act

[15] Section 438A of the Corporations Act

[16] Section 75-225(3) of the Insolvency Practice Rules

relief, subject to the IER and explanatory materials being provided to shareholders and the Court granting leave.

We have set out below our responses to each of the questions posed by ASIC in relation to Proposal B2.

B2Q1 Do you agree with our proposal that an IER should only be prepared on a liquidation basis? If not, why not?

Yes.

If the Court comes to consider an application for leave under section 444GA(1)(b) of the Corporations Act for a transfer of shares under any DOCA proposal, necessarily the DOCA would represent:

- the best available option for creditors; and
- a superior outcome to all other proposals which have been made to the administrators.

In circumstances where the alternative to a DOCA is a liquidation, a liquidation valuation is the only valuation approach which reflects the actual position of a company and which could be performed on a reasonable basis. That form of valuation is consistent with the principles which underpin Part 5.3A and the question that the Court is required to consider in determining whether or not unfair prejudice would arise from the transfer within the meaning of section 444GA(3).

Specifically, as ASIC notes in CP 326, the Courts have said that:

(a) "*if the members would be unlikely to receive any distribution in the event of a liquidation, and if liquidation is the only alternative to the transfer proposed, then it is difficult to see how members could in those circumstances suffer any prejudice, let alone prejudice that could be described as unfair*"[17]; and

(b) "*the question whether shareholders have any residual equity in the company has to be determined by comparison with their position on a winding-up, at least where that is the likely or necessary consequence of the transfer of shares not being approved*"[18].

It follows that, if a valuation is performed, it is appropriate that it should be based on expected returns from a sale under a liquidation process, unless the facts suggest that is not the expected outcome if the section 444GA order is not granted.

As noted above, in our view it would be appropriate for the administrator to have to make the Administrator's report and any other valuation evidence available to shareholders. Shareholders could use that evidence and information to decide whether to appear and oppose the application.

B2Q2 Should an independent expert consider, when performing a liquidation valuation, potential recoveries from voidable transactions and other matters as a result of the administrator's investigations? If not, why not?

Administrators already have an express obligation under IPR 75-225(3) to include a statement as to whether there are any transactions that appear to the administrator to be voidable transactions in respect of which money, property or other benefits may be recoverable by a liquidator under Part 5.7B.

Separately, in making a recommendation that creditors approve a DOCA that involves a section 444GA application, Administrators are necessarily required to report on and

[17] *Weaver v Noble Resources Ltd* [2010] WASC 182 at [79].

[18] *Re Mirabela Nickel Ltd (subject to deed of company arrangement)* [2014] NSWSC 836 at [42].

attribute a value to potential recovery actions in the course of preparing their report to creditors, since the ability of the liquidator to recover any such sums is relevant to the recovery a creditor might expect to receive in a winding up (being the relevant comparator to the DOCA).

In terms of whether any consideration or analysis should be included in a valuation report by an independent expert, the relevant considerations are:

- persons who are commonly engaged to under asset valuations, do not generally have the necessary expertise and experience to analyse the merits of voidable transaction claims which often involve complex questions of fact and law and issues of practicality including availability and cost of funding to pursue such claims and the capacity of prospective defendants to satisfy a judgment;
- administrators are best placed to conduct an analysis as to the impact of any prospective liquidation recoveries on the return to creditors and the Court is experienced in considering and evaluating the opinions of administrators. The Court regularly does so in applications to set aside DOCAs on the basis that they are unfairly prejudicial or that the report contains errors or omissions. However, it is also important to recognise that the analysis of potential recoveries by a liquidator undertaken in a report prepared for the purposes of a meeting convened under section 439A are invariably preliminary and subject to inherent uncertainty[19] and the Court's task is to form a view, on the material before it, as to whether there is a real prospect that in a liquidation such claims could and would be successfully pursued;[20]
- most claims available to a liquidator cannot result in a surplus for shareholders[21]:
  - unfair preference claims merely result in the substitution of an asset with a liability (to the creditor required to repay the unfair preference) of an equivalent amount[22]. As a result, unfair preference claims cannot enlarge the pool of assets available for creditors (or shareholders);
  - certain other liquidation claims can only be pursued to the extent that creditors have suffered a loss[23]. In assessing whether creditors have suffered a loss, the Court is required to take into account the realisable value of the company's assets and other amounts available to satisfy the claims of creditors. As a result, the recoverable amount is naturally capped at an amount sufficient to pay creditors in full; and
- in our experience we are not aware of a liquidation where the amounts recovered from voidable transactions and other liquidator actions have resulted in a return to shareholders. Requiring a detailed independent expert analysis of potential liquidation recoveries would impose a burden that is out of proportion to the risk that such a requirement would be seeking to avert.

Any estimate of recoveries under any voidable transactions would be analogous to forecast financial information which might be included in a takeover or corporate

[19] Consequently, it is usual practice for administrators to include a relatively wide range (with the 'high' case assuming complete success) of potential outcomes for prospective voidable transactions claims in a liquidation.

[20] *Helenic Pty Ltd v Retail Adventures Pty Ltd (Administrators Appointed)* [2013] NSWSC 1973 at [66].

[21] An exception would be a claim for recovery of assets or compensation where assets have been sold or transferred at an undervalue prior to the administrators' appointment but claims of this nature are readily capable of being addressed by administrators and the Courts in the manner referred to above.

[22] See section 588FI

[23] See, for example, section 588M

fundraising document. Any recovery from voidable transactions is inherently uncertain, as these actions are often hotly contested. Accordingly, it may be misleading to include such information in a report to shareholders, given the difficulties in forming a reasonable basis for the estimate of any recovery where there are such inherent uncertainties.

Accordingly, in our view, any independent expert report should be limited to a liquidation valuation of the company's assets. Potential liquidation recoveries should be addressed in the administrators' report to creditors and the affidavit evidence of the administrators as to the absence of unfair prejudice to the interests of shareholders as currently occurs.

B2Q3 Do you consider that a 'going concern' valuation of the business is relevant or useful for a company in administration? If so, why?

No.

As noted above, the purpose of any valuation prepared in this context should be to assist shareholders and the Court to consider whether there would be unfair prejudice in connection with a transfer of shares under a DOCA pursuant to section 444GA. As noted above, the Courts have said that going concern valuations are not relevant to the question to be determined in a section 444GA application and involve making inappropriate and unrealistic assumptions.

A business in voluntary administration may continue trading with some degree of temporary financial support (for example, from existing creditors or indeed the DOCA proponent). However, unless it is actually able to exit the administration process operating independently as a going concern (an outcome which, if a DOCA is being proposed by the administrators, would not be the case), then it is a factual reality that a business in such a position is no longer trading as a 'going concern'.

It would therefore not be appropriate for a going concern valuation to be included in any valuation prepared in this context. Providing a going concern valuation to shareholders runs the real risk of confusing or misleading them, rather than informing them.

A going concern valuation which indicated value in shares on a (false) assumption that the company could continue as a going concern (when, in reality, shareholders would receive no distribution on a winding-up) would only serve to mislead shareholders into thinking they had a valid basis to oppose the section 444GA application when, in fact, the value of the shares on a going concern basis is irrelevant to the question to be considered by a Court on a section 444GA application.

B2Q4 If you agree with the previous question, should ASIC refuse relief where the going concern value shows the shares have some value?

Not applicable (given that we do not agree with the proposition in B2Q3).

But in any event we do not consider that ASIC should refuse to grant relief where a theoretical going concern valuation shows that the shares may have some residual value but a liquidation valuation does not.

B2Q5 Are there other factors that we should take into account when considering whether to grant relief?

Only the additional points made above.

4 Proposal B3

Proposal B3: If we proceed with Proposal B1, we propose that the IER should be prepared consistent with the principles in RG 112. In our view, this would preclude the administrator (or another member of the administrator's firm or party associated with their firm) being the independent expert.

We have set out below our responses to each of the questions posed by ASIC in relation to Proposal B3.

B3Q1 Do you agree with this view? If not, why not?

No.

As noted above, any cost incurred in an insolvency context adds to the creditor shortfall. As noted below, there are certain statutory protections in the administration regime. In addition, if the Court is not satisfied in the particular circumstances with the administrator's evidence – either on independence or other grounds – the Court will not grant the orders unless the administrator provides further valuation evidence which satisfies the Court.

Although (as ASIC points out in CP 326 (at [33])) as a technical matter, administrators act as agents of the company in administration and are 'officers' of the company, administrators are appointed to this role for the limited statutory purpose of investigating the affairs of a company in administration and recommending a course of action to creditors, resulting in the company either being wound up, entering into a deed of company arrangement, or exiting administration.

Administrators are also required, as soon as practicable after being appointed, to make a declaration of their relevant relationships stating whether they, any partner of their firm (if a partnership) or their firm (if a body corporate) has had a relationship with the company, an associate of the company, or a secured creditor of the company, and if they do have any such relationship, give reasons for why such a relationship does not result in a conflict of interest or duty[24]. It is then open to creditors, at the first creditors' meeting (which must be held within 8 business days after the administration begins), to resolve to remove the administrator[25], and, as ASIC notes at [35] of CP 326, it is open to the Court to remove an administrator if there is an actual or apprehended conflict of interest or bias.

Although the position of administrators means that, as a technical matter, they are not able to comply with certain requirements of RG 112 (including the examples referred to by ASIC in [32] of CP 326), the regime summarised above in our submission provides a sufficient degree of substantive independence that it would be sufficient to rely on the integrity of a valuation provided by the administrators as part of their report to creditors for the purposes of assessing whether unfair prejudice arises to shareholders within the meaning of section 444GA(3).

The effect of precluding the administrators (or another member of their firm) from preparing the IER in this context would be to require the administrators to fund (from the assets of the company in administration) the substantial costs of engaging, and getting up to speed with what is often a very complex set of facts, another professional valuation firm to investigate the affairs of the company and prepare their own view of the likely value of the company's assets on a liquidation scenario and therefore the likely return, if any, to the shareholders of the company following a liquidation. This analysis would overlap extensively with analysis which would already be contained in the administrator's report to creditors.

[24] Sections 437DA and 60(1) of the Corporations Act.

[25] Section 436E of the Corporations Act.

As noted above, if it is not clear whether there is residual value for shareholders, or if the Court had any doubts in relation to the evidence presented by the administrator, the administrator would likely need to produce additional valuation evidence to the Court to persuade the Court that there is no unfair prejudice to shareholders.

In our submission, outside that context, the additional value of having an independent third party valuation firm conduct this analysis does not outweigh the detriment to creditors in terms of the cost and delay in the administration process that would result.

B3Q2 Do you agree that the concepts of independence should be based on RG 112? If not, what other standards should be applied?

No.

As discussed above, the standards of independence that already apply to administrators provide adequate assurance to creditors, shareholders, and the Court of the independence of administrators in discharging their functions under Part 5.3A. If the Court is not satisfied with the evidence provided – including if the Court is concerned by a conflict in the particular circumstances – the Court will not grant the order under section 444GA.

B3Q3 Do you believe that another member of the administrator's firm or party associated with the administrator's firm (or their advisory/consulting arm), who has not been involved in the administration, should be allowed to prepare an 'independent expert' report? If so, why? If not, why not?

Yes.

Our views above on the adequacy of independence arrangements for the administrators themselves to prepare a report in the context of a section 444GA transfer apply equally to other members of their firm or to parties associated with their firm. Again, if the Court is not satisfied with the evidence provided – including if the Court is concerned by a conflict in the particular circumstances – the Court will not grant the order under section 444GA.