



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 55

Disclosure documents and PDS: Consent to quote

Related instruments [CO 00/193], [CO 02/141], [CO 03/635], [CO 05/1230], [CO 01/1543], [CO 07/428], [CO 07/429].

Chapter 6D—Fundraising

Chapter 7—Financial services and markets (Part 7.9)

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From 5 July 2007, this document may be referred to as Regulatory Guide 55 (RG 55) or Practice Note 55 (PN 55). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 55.1) or their practice note number (e.g. PN 55.1).

What this guide is about

RG 55.1 This guide sets out:

- (a) how we administer the requirement for an issuer to obtain a consent (consent requirement) before citing a person in a disclosure document or product disclosure statement (PDS): s716(2) and 1013K(1) of the *Corporations Act 2001* (Corporations Act); and
- (b) the relief we give from the consent requirement to cite government officials, publications, credit ratings, geological reports and trading data.

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

RG 55.2 This guide states that:

- (a) the consent requirement applies if the cited statement is:
 - (i) in the body of the text of the disclosure document or PDS;
 - (ii) in a document included in the disclosure document or PDS;
or
 - (iii) incorporated by reference into the disclosure document (see RG 55.10);
- (b) the consent requirement applies irrespective of the expertise of the person to whom the statement is attributed. The person does not have to be an 'expert' (see RG 55.12);
- (c) the consent requirement applies if a statement is attributed to a person but they are not named (see RG 55.13);
- (d) the consent requirement does not apply where the issuer or directors make a statement in reliance on a person but do not cite the person (see RG 55.15);
- (e) the consent requirement applies even where the citation of a person is only apparent when different parts of the disclosure document or PDS are read together (see RG 55.18-RG 55.19);
- (f) the consent must be in writing and name the person giving it (see RG 55.35);
- (g) relief is available for citing:
 - (i) government officials (see RG 55.37);
 - (ii) statements already published in books, journals or comparable publications (see RG 55.45);
 - (iii) credit ratings of some ratings agencies (see RG 55.49);
 - (iv) certain statements taken from geological reports available from government departments, authorities and agencies or the ASX (see RG 55.57); and
 - (v) trading data (see RG 55.60).

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Important note: The content of this guide is based on the law as at 3 July 2007. If there are relevant changes to the Corporations Act, we will consider revising our policy to take them into account. Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements. This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act applies to you. It is your responsibility to determine your obligations under the Corporations Act.

A What is the purpose of the consent requirement?

RG 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.

RG 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.

RG 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), 1022B(2) and 1022B(3)(c). These provisions have their origin in the report of the Cohen Committee *Report of the Committee on Company Law Amendment*, London, HMSO, 1945, para 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...'

In Australia, the Explanatory Memorandum to the *Corporate Law Economic Reform Program Act 1999* para 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 statement is misleading or deceptive and is materially adverse from the point of view of a reasonable person considering whether to acquire the financial product: s1021L(1).
- (c) Issuers have a defence for a defective disclosure document if they prove that they reasonably relied on information provided by the cited person: s733(1). Issuers have a defence for including a defective statement in a PDS if they took reasonable steps to ensure that it would not be defective: s1022B(7).

RG 55.6 The consent requirement is not concerned with, or designed to protect, any intellectual property or rights to confidentiality that any party may have in cited statements or information. Nor does the relief we give from the consent requirement abrogate any rights any person may have in cited statements, including rights to restrain the use of that statement or information.

RG 55.7 The consent requirement is independent of the prohibitions on making misleading and deceptive statements in a disclosure document or PDS: s728(1) and 1041E(1). ASIC relief from the consent requirement does not affect issuers' liability for misleading or deceptive statements. In any event, there would be no statutory liability for a maker of a statement included in a disclosure document without consent under item 5 of s729(1).

B When is consent required?

RG 55.8 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.

What is a statement?

RG 55.9 A 'statement' is not limited to text. For a PDS, a 'statement' is expressly defined to include a 'matter that is not written but conveys a message': s9. This includes diagrams, graphs, charts and maps. 'Statement' includes a statement of fact as well as a statement of opinion. Neither the language nor the underlying policy of s716(2) or 1013K(1) limit those provisions to statements of expert opinion.

Included in a disclosure document or PDS

RG 55.10 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) There is currently no equivalent provision to s712 permitting incorporation by reference for a PDS. While a PDS may consist of two or more documents (s1013L) and may be added to by a supplementary PDS (s1014A and 1014D), the consent requirement does not apply to statements made in other documents referred to by the PDS (e.g. a statement made in material that may be excluded from, but is referred to, in a PDS by virtue of s1013FA). See the Explanatory Memorandum to the *Financial Services Reform Act 2001* at paras 14.111-119.

Statement is 'made by' a person

RG 55.11 A person's consent is needed only if a disclosure document or PDS holds out that a statement was 'by' or 'made by' a person (i.e. the statement is a quote that has the authority of that

person). For example, s716(2) and 1013K(1) do not apply in any of the following situations:

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

RG 55.12 The consent requirement applies irrespective of the profession, reputation, qualifications, skills or expertise of the person to whom the statement is attributed. Following the *Corporate Law Economic Reform Program Act 1999*, the consent requirement does not use the language 'expert'. If the disclosure document or PDS holds someone out to be a person making a statement, we will require that person's consent without inquiring if the person in fact has the expertise to make the statement.

Unnamed attribution

RG 55.13 The consent requirement also applies where a statement contains a view attributed to a person, but the person is not named. For example, it applies to statements like:

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

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

RG 55.14 We note the developing practice of including averaged, anonymous broker valuations without the consent of the brokers concerned. We will monitor this practice both in the disclosure document or PDS and takeover contexts to ensure that investors are not disadvantaged by this practice.

No attribution

RG 55.15 The consent requirement does *not* apply where the issuer or directors use a statement without any kind of attribution. For example, directors cannot attribute a statement to an expert in pharmaceuticals without the expert's consent. But the directors may include a detailed analysis of the properties of a pharmaceutical product in a disclosure document or PDS without attribution, even though they have no technical expertise in pharmaceuticals themselves.

RG 55.16 Directors can use a statement without attribution (and so without consent) even if it may be apparent to some readers of the disclosure document or PDS that none of the directors have the expertise to make the statement. Such an assessment by a reader does not mean that there is an implied attribution to an unidentified person: contrast this with the examples in RG 55.13. In such cases, the issuer and directors will be liable for the statement (subject to defences) not the maker of the statement.

RG 55.17 However, if the disclosure document or PDS mentions the name of a person (e.g. a biochemist) and elsewhere in the disclosure document or PDS the directors make a statement about a matter that is within the person's area of expertise (e.g. the properties of a drug), we may conclude that there is an implied attribution to that person and that the consent requirement applies.

Implied and split mentions

RG 55.18 If several passages in a disclosure document or PDS can fairly be read together and clearly attribute a view to a person, the consent requirement applies to those passages.

RG 55.19 The test is always how potential investors will understand the relevant passages. The principle applies when:

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

RG 55.20 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

RG 55.21 The issuer must obtain a person's consent where a disclosure document or PDS includes a statement said in the document to be based on a statement by the person. This ensures that the consent requirement cannot be avoided by giving a person's views in indirect speech. A distinction needs to be drawn between the following types of statements.

Summary of a statement

RG 55.22 The first type of statement is based on the views of a person in the sense that it represents or summarises those views. Consent is required to include a statement of this type. The person should have the opportunity to control the effect of a statement or veto its inclusion.

RG 55.23 This applies even if the person's statement is set out fully in another part of the disclosure document or PDS with the person's consent (e.g. a disclosure document or PDS that includes an investigating accountant's report with consent and elsewhere states that 'in the investigating accountant's report at page 7, the company's assets are valued at...').

Deduction from a statement

RG 55.24 The second type of statement is a deduction made by a person (e.g. the directors of the issuer) from another person's statement. The other person's consent is not required for every deduction drawn from what that person has said. Consent is only required if:

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

RG 55.25 Where a disclosure document or a PDS includes a statement by a person and elsewhere makes inferences based on that statement, the inferences are part of the context in which the person's statement appears. The person may withhold consent to include their statement in this context.

RG 55.26 We will not require a person to consent to a statement (e.g. by the directors) containing a deduction based on the views of that person, if:

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

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

RG 55.27 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

RG 55.28 The consent requirement applies even if a statement attributed to a person is not material or new. We will not overlook non-compliance with, or give exemptions from, s716(2) or 1013K(1) merely because a statement seems unimportant or standard.

RG 55.29 Directors who feel that a statement is not important enough to seek consent can use it without any type of attribution to another person: see para (b) of RG 55.11 and RG 55.16.

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

How to disclose consent

RG 55.30 Both the consent under s716(2) or 1013K(1) and the statement in the disclosure document or PDS that the person has given the consent should identify the person's statement specifically and follow the language of the provisions. For example, s716(2) and 1013K(1) draw attention to 'the form and context in which' a statement 'is included' because these may colour the way it is read.

RG 55.31 The disclosure document or PDS must state that the person has given, and has not withdrawn, consent.

RG 55.32 For example, a disclosure document can include statements under s716(2) such as:

- (a) 'Consultant Pty Ltd has consented to the valuation of Blackacre on page 10 being included in the form and context in which it is included, and has not withdrawn this consent as at the date this disclosure document is lodged with ASIC'; or
- (b) 'Consultant Pty Ltd has given its written consent to all statements by it or said to be based on statements by it in the form and context in which they are included, and has not withdrawn this consent as at the date this prospectus is lodged with ASIC. The statements are in sections 4.1, 4.2...of this prospectus'.

RG 55.33 We may take regulatory action where a person places artificial limitations on the context in which a statement may be read. For example, we may impose an interim stop order on the disclosure document or PDS: s739(3) or 1020E(5). This is because people are already protected by the power to withhold consent to anything in the disclosure document or PDS that gives a misleading colour to their statements. By consenting to the inclusion of the statement in the form or context in which it appears, a person is not assuming liability for the disclosure document or PDS as a whole: see paragraph (a) of RG 55.5.

Ongoing or general consent

RG 55.34 Where a person gives ongoing or general consent or licence to use a statement (e.g. to all customers), this does not meet the consent requirement. This is so even if the consent is for limited purposes and subject to conditions (e.g. that issuers attribute the information to the author). The person has not consented to the use of

the statement in the form and context in which the issuer includes it:
s716(2)(a).

Names required

RG 55.35 The consent must be in writing and name the person giving it. The consent must be kept in its physical form or an electronic form capable of being reproduced in physical form: s735, 1013K(2) and Regulation 7.9.76.

Company's consent

RG 55.36 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

RG 55.37 Class Order [CO 00/193] *Experts: Citing in disclosure documents* exempts an issuer from s716(2) so that the disclosure document may include a statement by an official person or a statement in a public official document without consent. Class Order [CO 02/141] *Experts: Citing in product disclosure statements* gives an equivalent exemption from s1013K(1) for offers under a PDS.

RG 55.38 These class orders do not apply where the original statement was made in connection with the issuer, the offer or any business, property or person that is the subject of the disclosure document or PDS.

RG 55.39 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 may 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.

RG 55.40 Without our relief, issuers would need to obtain consent to refer to statements of government officials and government publications (e.g. the Australian Bureau of Statistics and the Bureau of Meteorology). To obtain the consent of a government may be onerous for an issuer. There is also a low risk of civil liability for a government.

Note: In any event there would be no statutory liability for a government under e.g. item 5 of s729(1) if it did not consent.

RG 55.41 Guidance on the meaning of 'public official document' used in RG 55.37 can be found in cases on evidence that have considered the term 'public document'. A public document is one made by a public official as a result of a public inquiry and available to the public: Lord Blackburn in *Sturla v Freccia* (1874–80) All ER 657. Documents do not become public official documents merely because they have been lodged with a government department or statutory authority and are maintained for public access on a registry by the department or authority.

RG 55.42 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’.

RG 55.43 [CO 00/193] and [CO 02/141] only cover statements by government officials made in their capacity as government officials.

RG 55.44 We have seen disclosure documents containing information based on summaries prepared by staff of government departments, authorities and agencies of resource exploration reports lodged by holders of exploration permits. We do not regard these summaries, as statements by official persons or contained in public official documents. They do not state the views of the government department, authority or agency. However, other relief may be available for the use of these summaries or the underlying exploration reports: see RG 55.57.

Books and journals

RG 55.45 Class Orders [CO 00/193] and [CO 02/141] exempt statements by authors used in disclosure documents or PDS from the disclosure requirement. The class orders apply to a correct and fair copy of (or an extract from) a book, journal or comparable publication.

RG 55.46 The class orders do not apply where the original statement was made in connection with the issuer, the offer or any business, property or person that is the subject of the disclosure document or PDS.

RG 55.47 It is generally impractical for an issuer to obtain the consent of the author of a statement in a book, journal or other comparable publication where the statement is not specific to the issuer or its business. There is also a low risk of civil liability for the author in this case.

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

RG 55.48 The phrase ‘book, journal or comparable publication’ includes statements in a form and of a standard similar to those normally contained in a book or journal, but made available through the internet or other electronic means. It excludes, for example, references to statements made in internet chat rooms, news groups and home pages with unaccountable content (i.e. with anonymous participants or without editorial control).

Credit ratings agencies

RG 55.49 Class Order [CO 07/428] *Consent to quote: Citing credit ratings, trading data and geological reports in disclosure documents and PDS* gives relief for issuers to cite credit ratings in a disclosure document or PDS without the consent of ratings agencies.

RG 55.50 [CO 07/428] applies to citations of credit ratings where the financial product offered under the disclosure document or PDS is a:

- (a) debt product (e.g. a debenture); or
- (b) hybrid product (i.e. a product that combines both debt and equity characteristics, such as a convertible note or a redeemable preference share).

Note: the Corporations Act does not use the term "hybrid". Accordingly, [CO 07/428] refers to debentures or redeemable preference shares (see s254A(3)). Products such as convertible notes with a debt component are "debentures" although they also have an equity component.

RG 55.51 The relief only applies where the credit rating is a statement, opinion or research on:

- (a) the ability of the issuer to meet its obligations under the debt or hybrid product the subject of the offer (i.e. the credit rating must be of the product offered under the disclosure document or PDS itself); or
- (b) the creditworthiness of the issuer.

RG 55.52 [CO 07/428] also applies to credit ratings citations in a disclosure document or PDS for equity securities of an Australian authorised deposit-taking institution (ADI), or for options or warrants over equities of an Australian ADI, where the credit rating provides an opinion on the creditworthiness of the ADI. Credit ratings are relevant to a decision to invest in equities of an Australian ADI because of the nature of their business: the taking and lending of money. An ADI's creditworthiness is an indication of the soundness of its lending and borrowing practices, gearing and financial risk management systems.

RG 55.53 The relief in [CO 07/428] is available where:

- (a) the disclosure document or PDS includes disclosure about the credit rating close to the citation including:
 - (i) the name of the ratings agency;
 - (ii) a statement that the rating is current;

- (iii) a statement that the rating is not a recommendation to apply for the financial product; and
- (iv) a statement that the rating is subject to revision or withdrawal at any time;
- (b) the disclosure document or PDS includes all other current ratings that are known to the issuer and that the investors would reasonably require to make an informed assessment of the issuer's ability to meet its obligations or creditworthiness; and
- (c) the disclosure document or PDS includes a statement close to the first occurring credit rating reference that the ratings agency has not consented to the use of the rating.

RG 55.54 These disclosures should be prominent.

RG 55.55 [CO 07/428] applies to credit ratings issued by those ratings agencies to which we currently give Australian financial services (AFS) licence relief: see Class Order [CO 05/1230] *Credit rating agencies*. These are: Moody's Investor Service Pty Ltd, Standard & Poor's (Australia) Pty Ltd, Rapid Ratings Pty Ltd and Fitch Australia Pty Ltd.

Note: See ASIC consultation paper *Licensing: Credit rating agencies* (June 2005).

RG 55.56 We expect that in any citing of credit ratings in a disclosure document or PDS, the issuer will prominently explain the meaning of the credit rating including:

- (a) the function of a credit rating;
- (b) that it is a statement of opinion;
- (c) that it relates only to creditworthiness;
- (d) that it may only relate to a part of a financial product being offered;
- (e) when used for an offering of securities of Australian ADIs, the limited relevance of ratings to equity securities; and
- (f) if the rating is a 'provisional' or 'expected' rating, the status of that designation and its implications.

Geological reports

RG 55.57 [CO 07/428] gives relief from the consent requirement for a geologist's report dealing with the estimation, assessment or evaluation of minerals in a disclosure document or PDS to cite a previous geological report where:

- (a) the current geologist is either (or both) a Member or Fellow of the Australasian Institute of Mining and Metallurgy (AusIMM) or the Australian Institute of Geoscientists (AIG) with a minimum of 5 years' experience relevant to estimating, assessing and evaluating the resources the subject of the report; and
- (b) the statement is made in, or based on, a statement made in the previous geological report and publicly available (with or without payment of a fee) from:
 - (i) a government department, authority or agency of an Australian State or Territory of the Commonwealth; or
 - (ii) the ASX;
- (c) the previous geological report was not prepared in connection with the offer of products under the disclosure document or PDS;
- (d) the previous geological report was not prepared or commissioned by a person with or from whom the issuer (or any associate of the issuer):
 - (i) has a shared interest in the tenement that is the subject of the disclosure document or PDS; or
 - (ii) has purchased the tenement that is the subject of the disclosure document or PDS; and
- (e) the current geological report states, close to the first occurring reference to the previous geological report, that the author of the previous report has not consented to its use in the current report.

RG 55.58 A disclosure document or PDS relating to the acquisition or exploitation of mining tenements will often contain an independent technical assessment or valuation of the mining tenements. This is generally prepared in accordance with the Valmin or JORC Codes by a member of the AusIMM or the AIG. AusIMM and AIG have adopted the Valmin Code for independent experts' reports concerning mineral and petroleum assets and securities. The JORC Code is incorporated in the listing rules of ASX: see ASX Listing Rule 5.6 and ASX Listing Rules Appendix 5A. The JORC Code applies when reporting certain matters to ASX (e.g. mining exploration results).

RG 55.59 Inherent in the preparation of the reports is the need to refer to previous results and assessments on the mining tenements (historical results). In many cases, the historical results are obtained from an open file register or website of a government department, authority or agency or an open register or website of ASX. The

historical results are often obtained from geologists' reports commissioned by previous holders of the tenements.

Trading data

RG 55.60 [CO 07/428] gives relief from the consent requirement for issuers to include in a disclosure document or a PDS trading data relating to trading on a prescribed financial market (e.g. ASX) or an approved foreign exchange (e.g. the New York Stock Exchange) without the consent of the relevant market operator or of any other party who provided the trading data (e.g. Bloomberg, Reuters or IRESS). The disclosure document or PDS must also include a statement close to the first occurring trading data reference that the person who prepared the trading data has not consented to the use of the trading data.

RG 55.61 The class order applies where the information is quantitative data on financial product trading prices and volumes quoted on a prescribed financial market or an approved foreign exchange.

RG 55.62 Trading data is purely factual information. If the issuer adds commentary, analysis or deduction, the attribution to the market data provider should be clearly limited to the underlying trading data. Our relief extends to a citation where the market data provider:

- (a) presents trading data in pictorial form (e.g. graphs, charts and diagrams); and
- (b) applies to trading data of simpler, objective formulas e.g. volume-weighted average price (VWAP).

For our relief to apply the information must not amount to subjective analysis or financial modelling and must retain its purely factual character.

RG 55.63 The consent requirement applies to raw trading information and other purely factual information just as it applies to professional opinion and analysis. We give relief because the risk of trading data being misleading or inaccurate is limited. It is also unlikely that the market data provider would be liable.

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

Other relief

RG 55.64 We may give case-by-case relief from the consent requirement in other circumstances. Generally, relief will be limited to circumstances where consent to use a statement is wholly

impracticable or impossible to obtain. The following considerations will generally be relevant to our decision:

- (a) will the statement assist potential investors to make better-informed decisions (e.g. because it provides a context in which other material can be better judged);
- (b) was the statement made in connection with a matter other than the issuer, the offer or any business, property or person that is the subject of the disclosure document or PDS;
- (c) is it wholly impractical or impossible to obtain the statement maker's consent (e.g. the person is dead, or in the case of a corporation, does not exist as an entity anymore or is in liquidation);
- (d) is there any practical alternative to citing the statement for the information it contains (e.g. would it be too expensive to replicate the information contained in the statement);
- (e) will the use of the statement in the disclosure document or PDS without the person's consent expose them to civil liability;

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

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

RG 55.65 In considering granting relief, we will be mindful of the policy tension between the disclosure obligations of s710 and 1013E and the consent requirements. Without relief, material information has to be omitted from the disclosure document or PDS because consents are not available.

RG 55.66 Case law indicates that, in general, the author of a statement will not be civilly liable for the inclusion in a disclosure document of that statement (or a statement based on it) if the original statement was not made for the purpose of being included in the disclosure document or PDS: see *Morgan Crucible Co plc v Hill Samuel Bank Ltd* (1991) 1 All ER 148, *Bride as Trustees for the Pinwernying Family Trust v KMG Hungerfords* (1991) 109 FLR 256 and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 188 CLR 241.

RG 55.67 We will not normally give relief on the grounds of expense for reports recently obtained by an issuer, such as valuations and auditors' reports provided to (or issued by) the issuer for internal use or publication in their annual report and notices of meeting. We would want to know why an expert from whom a report had recently been obtained had not consented to the report being used in a disclosure document or a PDS. An exception would be made if, for example, an auditor died after signing the audit report but before consenting to its use in the disclosure document or PDS.

Applying for relief

RG 55.68 Applications for relief must address all of the criteria detailed in RG 55.64 where relevant to the particular circumstances of that application and supply all relevant information.

How to apply for relief

- Lodge applications relating to disclosure documents, bidder's statements and target's statements in writing addressed to

Manager – Applications, Corporate Finance
Australian Securities & Investments Commission
GPO Box 9827
Sydney, NSW 2001
- Lodge applications relating to PDS in writing addressed to

Manager – Applications, FSR
Australian Securities & Investments Commission
GPO Box 9827
Sydney, NSW 2001
- Make sure the application:
 - addresses all the considerations in paragraph RG 55.64;
 - complies with Regulatory Guide 51 *Applications for relief* RG 51; and
 - is accompanied by the prescribed fee.
- Make sure the application is appropriately signed.

You can also contact ASIC Infoline on 1300 300 630 for information and assistance.

Takeovers

RG 55.69 [CO 07/429] *Consent to quote: Citing credit ratings agencies, trading data and geological reports in takeovers* gives relief from the requirement for a bidder or target to obtain consent to cite the

following kinds of statements in bidder's or target's statements under s636(3) and 638(5):

- (a) credit ratings;
- (b) geological reports; and
- (c) trading data.

RG 55.70 [CO 03/635] gives class order relief from the requirement to obtain consent to use, in bidder's or target's statements, statements made by government officials or statements in public official documents or in books, journals or similar publications.

Note: See Regulatory Guide 159 Takeovers, compulsory acquisitions and substantial holdings at RG 159.215 and Class Order [CO 03/635] Takeovers: Consent to quote officials and publications. See also Regulatory Guide 171 Anomalies and issues in the takeover provisions at RG 171.133 and Class Order [CO 01/1543] Takeover bids.

RG 55.71 Applicants for case-by-case relief from s636(3) and 638(5) should use this guide as a guide.

Key terms

RG 55.72 In this guide, terms have the following meaning.

AIG The Australian Institute of Geoscientists.

ASX Australian Stock Exchange.

AusIMM The Australasian Institute of Mining and Metallurgy.

bidder's statement Has the meaning given at s9.

consent requirement The requirement for an issuer to obtain the consent of a person to include in a disclosure document or PDS a statement by the person, or a statement said in the disclosure document or PDS to be based on a statement by the person, under s716(2) or 1013K(1).

disclosure document For an offer of securities, this includes a prospectus, a profile statement and an offer information statement.

JORC Code Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (prepared by the Joint Ore Resources Committee).

PDS A product disclosure statement.

prescribed financial market Has the meaning given at s9.

Regulation 7.9.76 (for example) A provision of the Corporations Regulations.

section 716 or s716 (for example) A provision of the Corporations Act.

target's statement Has the meaning given at s9.

Valmin Code Code for the Technical Assessment and Valuation of Mineral and Petroleum Assets and Securities for Independent Expert Reports (prepared by the Valmin Committee).

Related information

RG 55.73

Headnotes

Australian authorised deposit-taking institution, ADI, brokers, disclosure document, product disclosure statement, PDS, statement, misleading statement, consent, consent requirement, issuer, director, expert, independent expert, government official, geologist, auditor, adviser, consultant, biochemist, rating agency, valuer, publication, public official document, rating, market data providers, 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 05/1230] Credit rating agencies

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

[CO 07/429] Consent to quote: Citing credit ratings agencies, trading data and geological reports in takeovers

Regulatory guides

RG 159 *Takeovers, compulsory acquisitions and substantial holdings*

RG 171 *Anomalies and issues in the takeover provisions*

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

Sturla v Freccia (1874–80) All ER Rep 657

Morgan Crucible Co plc v Hill Samuel Bank Ltd (1991) 1 All ER 148

Bride as Trustees for the Pinwernying Family Trust v KMG

Hungerfords (1991) 109 FLR 256

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

Information releases

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

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