

ASIC CLASS ORDER [CO 07/428]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes Class Order [CO 07/428] *Consent to quote: Citing credit ratings, trading data and geological reports in disclosure documents and PDS* under subsections 741(1) and 1020F(1) of the *Corporations Act 2001* (the Act).

Subsection 741(1) provides that ASIC may declare that Chapter 6D of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Subsection 1020F provides that ASIC may declare that Part 7.9 of the Act applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

1. Background

Obligation to obtain consent for statements in a disclosure document or PDS
Subsection 716(2) of the Act, in relation to disclosure documents, and subsection 1013K(1) of the Act, in relation to a Product Disclosure Statement (PDS), provide that these documents must not include a statement made by a person, or a statement said to be based on a statement made by person, unless the person has consented to its inclusion, in the form and context in which it is included.

Potential liabilities of persons named with their consent

Persons who consent to the use of a statement by them in a disclosure document or PDS may be civilly liable for the statement to someone suffering loss or damage by reason of the statement under item 5 of subsection 729(1), in relation to statements made in a disclosure document, or paragraph 1022B(3)(c), in relation to statements made in a PDS. In certain circumstances, these persons may be criminally liable for these statements as well (e.g. the person becomes aware that new circumstances have rendered the statement misleading or deceptive and does not alert the issuer of the document as soon as possible) under section 730 in relation to disclosure documents and section 1021L in relation to a PDS.

Other relief from the consent requirement

ASIC has previously granted exemptions to the obligation to obtain consent to use statements under the Act in relation to:

- (a) statements made by official persons;
- (b) copies or extracts from public official documents; and
- (c) statements made in books, journals or comparable publications,

in Class Order [CO 00/193] in relation to disclosure documents and Class Order [CO 02/141] in relation to a PDS.

2. Purpose of the class order

The purpose of Class Order [CO 07/428] is to provide relief in certain circumstances from the obligation to obtain the consent of the maker of the statement where the following kinds of statements, or statements said to be based on the following kinds of statements, are included in a disclosure document or PDS:

- (a) credit ratings of some credit ratings agencies;
- (b) certain statements taken from geological reports available from government departments, authorities and agencies or the ASX; and
- (c) trading data relating to trading on a prescribed financial market (eg ASX) or an approved foreign exchange (eg the New York Stock Exchange).

The Class Order gives relief because it is often impractical for the issuer to obtain consent for these statements and the statements may be important to investors in making an informed decision whether to accept the offer under the disclosure document or PDS.

3. Operation of the class order

Inclusion of credit ratings without consent

Class Order [CO 07/428] modifies sections 716 and 1013K so that a disclosure document or a PDS may include a credit rating reference issued by certain credit rating agencies without obtaining the consent of the credit rating agency to the inclusion of the reference in the following circumstances:

- (a) the disclosure document or PDS is for an offer of debt or hybrid financial products or equity securities of an Australian authorised deposit-taking institution (ADI) or for options or warrants over an Australian ADI;
- (b) the credit rating is information that investors would reasonably require to make an informed assessment of creditworthiness of the issuer or the Australian ADI or the ability of the issuer of the securities or financial products to meet its obligations under the debt or hybrid product offered; and
- (c) the disclosure document or PDS sets out certain required information listed in the class order.

Inclusion of historical geological data without consent

Class Order [CO 07/428] modifies sections 716 and 1013K so that a geological report in a disclosure document or PDS may include statements from a previous geological report without obtaining the consent of the previous geologist in the following circumstances:

- (a) the previous report is available from a government department, agency or authority or the ASX;
- (b) the previous report was not prepared in connection with the offer under the disclosure document or PDS; and
- (c) the disclosure document or PDS sets out certain required information listed in the class order.

Inclusion of trading data without consent

Class Order [CO 07/428] modifies sections 716 and 1013K so that a disclosure document or PDS may include a reference to trading data without obtaining the consent of a market operator or data provider (eg Bloomberg) in the following circumstances:

- (a) the data reflects trading in financial products on a prescribed financial market or on a foreign financial market listed in the class order; and
- (b) the disclosure document or PDS sets out certain required information listed in the class order.

4. Consultation

The declarations in Class Order [CO 07/428] were the subject of public consultation in the context of updating Practice Note [PN 55] *Disclosure documents and PDS: consent to quote* (released for comment on 27 January 2005), which foreshadowed this relief. Submissions were received from credit rating agencies, law and accountancy firms, a financial institution, professional bodies and the Australian Stock Exchange (as it then was).