

# ASIC CLASS ORDER [CO 07/429]

## EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes Class Order [CO 07/429] *Consent to quote: Citing credit ratings agencies, trading data and geological reports in takeovers* under subsection 655A(1) of the *Corporations Act 2001* (the Act).

Subsection 655A(1) provides that ASIC may declare that Chapter 6 of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

### 1. Background

#### **Obligation to obtain consent for statements in a bidder's statement or target's statement**

Subsection 636(3) of the Act, in relation to bidder's statements, and subsection 638(5) of the Act, in relation to target's statements, provide that these documents must not include or be accompanied by 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 or context in which it has been included.

#### **Potential liabilities of persons named with their consent**

Persons who consent to the use of a statement by them in a bidder's statement or target's statement may be civilly liable for the statement to someone suffering loss or damage by reason of the statement under item 10 of subsection 670B(1). 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 subsection 670C(1).

#### **Other relief from the consent requirement**

ASIC has previously granted exemptions in Class Order [CO 03/635] to the obligation under the Act to obtain consent to use statements in a bidder's statement or target's statement in relation to:

- (a) statements made by official persons;
- (b) extracts from a public official document; or
- (c) statements that have already been published in a book, journal or comparable publication.

### 2. Purpose of the class order

The purpose of Class Order [CO 07/429] 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 followings kinds of statements, are included in or accompany a bidder's statement or a target's statement:

- (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 takeover bid.

### **3. Operation of the class order**

#### **Inclusion of credit ratings without consent**

Class Order [CO 07/429] modifies sections 636 and 638 so that a bidder's statement or target's statement 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 bidder's or target's statement 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 bidder's or target's statement sets out certain required information listed in the class order.

#### **Inclusion of historical geological data without consent**

Class Order [CO 07/429] modifies sections 636 and 638 so that a geological report in a bidder's statement or target's statement 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 bidder's or target's statement; and
- (c) the bidder's or target's statement sets out certain required information listed in the class order.

#### **Inclusion of trading data without consent**

Class Order [CO 07/429] modifies sections 636 and 638 so that a bidder's or target's statement 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 market conducted by a foreign body approved by ASIC for the purposes of item 14 of section 611; and

- (b) the bidder's or target's statement sets out certain required information listed in the class order.

#### **4. Consultation**

The declarations in Class Order [CO 07/429] 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).