

EXPLANATORY STATEMENT for
ASIC CORPORATIONS (CONSENTS TO STATEMENTS)
INSTRUMENT 2016/72

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Consents to Statements) Instrument 2016/72 under sections 655A, 741 and 1020F of the *Corporations Act 2001* (the *Act*).

Paragraphs 655A(1)(b), 741(1)(b) and 1020F(1)(c) respectively provide that ASIC may declare that Chapters 6, 6D and Part 7.9 of the Act apply to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

1. Background

Chapter 6 of the Act relates to takeover bids and Chapter 6D relates to fundraising. Part 7.9 deals with financial product disclosure.

The Act allows a bidder's and target's statement in relation to a takeover bid under Chapter 6, a fundraising disclosure document under Chapter 6D and a product disclosure statement under Part 7.9, to include statements attributed to, or based on a statement made by another person (e.g. an expert or advisor), but only if:

- (a) the person has consented to the statement being included in the document, or accompanying it, in the form and context in which it is included;
- (b) the document states that the person has given this consent; and
- (c) the person has not withdrawn this consent before the document is lodged with ASIC.

ASIC has previously granted relief, exempting bidders, targets and issuers, as the case may be, from the requirement to obtain consent when citing and quoting certain sources.

Statements made by official persons, contained in public official documents or already published in a book, journal or comparable publication

Class Order [CO 13/523] enabled an issuer to make a statement in a disclosure document without obtaining consent, which cites or is based on statements made by an official person, contained in a public official document or already published in a book, journal or comparable publication. Class Order [CO 13/523] gave similar relief to a bidder in relation to a bidder's statement, and a target in relation to a target's statement. Class Order [CO 02/141] provided analogous relief for product disclosure statements.

The relief given by Class Orders [CO 13/523] and [CO 02/141] did not extend to circumstances where the original statement was made in connection with the responsible person, issuer, or bidder/target (as the case may be), an offer, takeover bid, or any business, property or person that was the subject of the product disclosure statement, disclosure document, or the bidder's or target's statement.

Trading data and historical geological reports

Class Orders [CO 07/428] and [CO 07/429] granted relief from the requirement to obtain consent when citing and quoting certain trading data reflecting trading on approved financial markets and historical geological report references in disclosure documents, product disclosure statements, bidders statements and targets statements.

Consolidation of consent relief

ASIC has recently reviewed the policy underlying Class Orders [CO 07/428], [CO 07/429] and [CO 02/141] as part of a wider review of class orders relating to the fundraising provisions in Chapter 6D and considers that the relief in these class orders is still both necessary and appropriate. Accordingly, ASIC has decided to reissue the relief underlying Class Orders [CO 07/428], [CO 07/429], [CO 02/141] in ASIC Corporations (Consents to Statements) Instrument 2016/72.

The *Legislation Act 2003* (the *LA*) provides for the periodic expiry of legislative instruments ('sunsetting') to ensure that they are kept up to date and only remain in force for as long as they are needed. Class Orders [CO 07/428], [CO 07/429] and [CO 02/141] are legislative instruments and were scheduled to eventually expire under the sunsetting provisions of the *LA*.

ASIC's review of the policy underlying Class Orders [CO 07/428], [CO 07/429] and [CO 02/141]—and subsequent decision to reissue the relief—has provided an opportunity to deal with this imminent expiry and ensure that the relevant relief will continue to be available.

Furthermore, ASIC has elected to consolidate the relief in [CO 13/523] into ASIC Corporations (Consents to Statements) Instrument 2016/72 in order to promote brevity and accessibility through the centralisation of all relief relating to 'consent' in one legislative instrument.

Under ASIC Corporations (Repeal) Instrument 2016/171, ASIC has repealed Class Orders [CO 02/141], [CO 07/428], [CO 07/429] and [CO 13/523] effective from the date that ASIC Corporations (Consents to Statements) Instrument 2016/72 commences.

2. Purpose of the instrument

An issuer, bidder or a target is required under the Act to obtain the consent of a person who makes a statement before using the statement in the disclosure document, product disclosure statement or the bidder's or target's statement. This enables the person to:

- (a) control or limit their liability; and

- (b) control the overall effect of the statement.

ASIC Corporations (Consents to Statements) Instrument 2016/72 modifies the consent requirements in a selection of discrete circumstances.

Statements made by government officials, or those published in books or journals

ASIC Corporations (Consents to Statements) Instrument 2016/72 allows an issuer, bidder or target to include the following statements made by other persons in their disclosure document, product disclosure statement or bidder's or target's statement without having to obtain the person's consent:

- (a) a statement made by an official person;
- (b) a statement that is, or is an extract from, a public official document; or
- (c) a statement, or an extract from, a statement that has already been published in a book, journal, or comparable publication.

Without this relief, issuers, bidders or targets would be required to obtain consent to refer to the statements of government officials and government publications—for example, publications of the Australian Bureau of Statistics or the Commonwealth Bureau of Meteorology. To obtain the consent of Government to use such a general statement may be onerous for the issuer, bidder or target. There is a low risk of liability for the Government in these circumstances.

The Crown in right of the Commonwealth may be exposed to civil liability for damages for a misleading statement included in a disclosure document, a bidder's or target's statement: subsections 5A(3) and (5) of the Act. However, liability is unlikely if the statement was not made for the purpose of being included in the disclosure document, bidder's or target's statement.

Similarly, with regard to books, journals and comparable publications, it is generally impractical for the issuer, bidder or target to obtain the consent of the author of the statement, if the statement is not specific to the offer, issuer, bid, bidder, target or their businesses. There is also a low risk of liability for the author in this case.

Historical geological data

A disclosure document, product disclosure statement, bidder's or target's statements relating to mining tenements will often contain an independent technical assessment or valuation of the mining tenements. 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 the operator of a prescribed financial market. The historical results are often obtained from geologists' reports commissioned by previous holders of the tenements. ASIC Corporations (Consents to Statements) Instrument 2016/72 gives relief from the consent requirement for a geologist's report dealing with the estimation, assessment or evaluation of minerals in a disclosure

document, product disclosure statement, bidder's statement or target's statement to cite a previous geological report.

Trading data

Where issuers, bidders or targets seek to include in a disclosure document, product disclosure statement, bidder's statement or target's statement (as applicable) 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), the consent of the relevant market operator or of any other party who provided the trading data (e.g. Bloomberg, Reuters or IRESS) is required. This is impractical. 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.

3. Operation of the instrument

Statements made by government officials, or those published in books or journals

ASIC Corporations (Consents to Statements) Instrument 2016/72 modifies the Act to give relief such that consent does not need to be obtained in relation to a statement in a disclosure document, product disclosure statement, bidder's or target's statement that:

- (a) fairly represents what purports to be a statement made by an official person; or
- (b) is a correct and fair copy of, or extract from, what purports to be a public official document; or
- (c) is a correct and fair copy of, or extract from, a statement which has already been published in a book, journal or comparable publication.

For the relief to apply, the statement must not have been made in connection with:

- (a) the particular fundraising or in connection with the issuer's business or property (in the case of a disclosure document);
- (b) the responsible person or their business, or the promotion the subject of the product disclosure statement or any property to be acquired by the responsible person which is the subject of the product disclosure statement (in the case of a product disclosure statement); or
- (c) the takeover bid or the business or property of the bidder or target (in the case of a bidder's or target's statement).

'Official person'

The term 'official person' contemplates a government official or staff member of a government department, authority or agency. A statement made by an official person refers to a statement made by such a person in their capacity as an official person and that reflects the view of the relevant government body. Summaries of reports lodged by third parties are not covered as they do not state the views of the relevant government body.

'Public official document'

Guidance on the meaning of the phrase 'public official document' can be found in cases that have considered the term 'public document' in an evidentiary context. A public document is one made by a public official as the result of a public inquiry and is available to the public: Lord Blackburn in *Sturla v Freccia* [1874–80] All ER Rep 657.

For the purposes of the relief, the term 'public official document' contemplates a document that is:

- (a) made by an 'official person' as the result of carrying out their duties or exercising their powers in their capacity as an 'official person';
- (b) made public; and
- (c) reflects the view of the relevant government body.

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.

'Book, journal, or comparable publication'

For the purposes of the relief, the phrase 'book, journal or comparable publication' includes references to statements in a form, and of a standard, similar to that normally contained in a book or journal, but which are made available through the internet or other electronic means. This excludes, for example, references to statements made in internet chat rooms, news groups and homepages with unaccountable content (i.e. with anonymous participants or without editorial control).

Historical geological data

ASIC Corporations (Consents to Statements) Instrument 2016/72 modifies the Act to give relief from the consent requirement for a geologist's report dealing with the estimation, assessment or evaluation of minerals in a disclosure document, product disclosure statement, bidder's statement or target's statement 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 five years experience relevant to estimating, assessing and evaluating the resources the subject of the report;
- (b) the statement is made in, or based on a statement made in, the previous geological report and that previous geological report is publicly available (with or without payment of a fee) from:
 - (i) a government department, authority or agency of an Australian state or territory;
 - or

- (ii) the operator of a prescribed financial market;
- (c) in the case of a disclosure document or product disclosure statement:
- (i) the previous geological report was not prepared in connection with the offer of products under the disclosure document or product disclosure statement;
 - (ii) the previous geological report was not prepared or commissioned by a person with or from whom the issuer (or any associate of the issuer):
 - A. has a shared interest in the tenement that is the subject of the disclosure document or product disclosure statement; or
 - B. has purchased the tenement that is the subject of the disclosure document or product disclosure statement;
- (d) in the case of a bidder's statement, the previous report was not prepared in connection with the takeover bid or was not prepared or commissioned by a person:
- (i) who is the bidder or an associate; or
 - (ii) with whom the bidder, or an associate, has shared an interest in a tenement the subject of the current report; or
 - (iii) from whom the bidder, or an associate, has purchased the tenement; or
 - (iv) where securities are offered as consideration under the bid and the bidder, or an associate, is not the body that has issued or will issue the securities:
 - A. with whom the issuer, or an associate, has shared an interest in a tenement that is covered by the current report; or
 - B. from whom the issuer, or an associate, has purchased the tenement;
- (e) in the case of a target's statement, the previous report was not prepared in connection with the takeover bid or was not prepared or commissioned by a person:
- (i) who is the target or an associate; or
 - (ii) with whom the target, or an associate, has shared an interest in a tenement the subject of the current report; or
 - (iii) from whom the target, or an associate, has purchased the tenement; or
 - (iv) where securities are offered as consideration under the bid and the bidder, or an associate, is not the body that has issued or will issue the securities:

- A. with whom the issuer, or an associate, has shared an interest in a tenement that is covered by the current report; or
 - B. from whom the issuer, or an associate, has purchased the tenement; and
- (f) 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.

Trading data

ASIC Corporations (Consents to Statements) Instrument 2016/72 provides relief from the consent requirement in circumstances where the information included in the disclosure document, product disclosure statement, bidder's statement or target's statement is quantitative data on financial product trading prices and volumes quoted on a prescribed financial market or an approved foreign exchange (the full list of these is set out in the instrument).

The disclosure document, product disclosure statement, target's statement or bidder's statement must state, close to the trading data reference:

- (a) the name of the person who prepared the trading data; and
- (b) that the person who prepared the trading data has not consented to the use of the reference in the bidder's statement or the accompanying document (as applicable).

4. Consultation

On 17 September 2015 ASIC released CP 239 *Disclosure documents: Update to ASIC instruments and guidance (CP 239)* seeking feedback on proposals to update and consolidate a number of regulatory guides relating to Ch 6D of the Act. CP 239 also sought feedback on proposals to reissue the legislative instruments associated with ASIC's updated guidance (including ASIC Class Orders [CO 02/141], [CO 07/428], [CO 07/429] and [CO 13/523]) and to make legislative instruments addressing some discrete policy issues. The consultation period closed on 27 November 2015.

ASIC received four submissions in response to CP 239. Details of the submissions are contained in REP 473 *Response to submissions on CP 239 Disclosure documents: updates to ASIC instruments and guidance* which is available on ASIC's website at www.asic.gov.au.

Notwithstanding ASIC's consultation, ASIC considers that ASIC Corporations (Consents to Statements) Instrument 2016/72 is of a minor or machinery nature and does not substantially alter existing arrangements.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Corporations (Consents to Statements) Instrument 2016/72

ASIC Corporations (Consent to Statements) Instrument 2016/72 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The Instrument modifies subsections 636(3), 638(5), 716(2) and 1013K(1) of the Act. It permits particular information to be included, without the consent of the owner of that information, in a disclosure document (under Chapter 6D), product disclosure statement (under Part 7.9.), bidder's statement or target's statement (under Chapter 6). The Instrument specifically deals with:

- (a) statements from government officials or documents;
- (b) statements already published in books, journals or comparable publications;
- (c) certain statements in geological reports available from government departments and bodies, or a prescribed financial market; and
- (d) trading data from prescribed financial markets or approved foreign exchanges.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

Australian Securities and Investments Commission