



ASIC
Australian Securities &
Investments Commission

Committee	Parliamentary Joint Committee on Corporations and Financial Services
Inquiry	Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 46th Parliament
Question No.	051-01
Date	9 February 2022
Topic	Nuix auditor
Reference	Written, 9 February 2022
Committee member	Senator O'Neill

Question

- a) Is it common practice for companies to indemnify their auditors? Does this not raise potential conflicts of interest? I note that Nuix disclosed on page 21 of its 2021 annual accounts that it had indemnified its then auditor, PwC, whom it had also paid \$5.3 million during the 2021 financial year? Indeed, it says “Nuix has agreed to indemnify its auditors, PricewaterhouseCoopers, to the extent permitted by law, against any claim by a third party arising from Nuix’s breach of their agreement. The indemnity stipulates that Nuix will meet the full amount of any such liabilities including a reasonable amount of legal costs.
- b) What date did ASIC consent to the change of auditor for Nuix? Why did ASIC give its consent?
- c) Is ASIC aware whether PwC participated in the tender for the audit or declined to participate?
- d) Is ASIC aware whether the new auditor, KPMG, will, as part of the half year review, provide an opinion on the carrying value of Nuix's intangible assets on its balance sheet and the status of the business as a going concern?

Answer

a) Auditor indemnity

Section 199A of the Corporations Act 2001 prohibits a company from indemnifying its auditor for certain liabilities to third parties that could arise from the conduct of the audit.

Item 10 of the directors’ report of Nuix Limited (Nuix) for the year ended 30 June 2021 (page 61 of the annual report) says that Nuix has indemnified the auditor for certain third party claims but only to the extent permitted by law. Item 10 says (emphasis added):

“10. INDEMNIFYING OF AUDITORS

Nuix has agreed to indemnify its auditors, PricewaterhouseCoopers, **to the extent permitted by law**, against any claim by a third party arising from Nuix’s breach of their agreement. The indemnity stipulates that Nuix will meet the full amount of any such liabilities including a reasonable amount of legal costs.”

Note 9.3 to the financial report of Nuix for the year ended 30 June 2021 (page 136) shows remuneration for PricewaterhouseCoopers Australia (PwC) for providing audit, assurance and non-audit services totalling \$5,201,268. Such fees for services would not include any indemnification payments.

Subsection 199A(2) of the Act prohibits a company from indemnifying its auditors against third party claims, such as a damages claims for negligence in the conduct of an audit. Subsection 199A(2) provides that:

“A company or a related body corporate must not indemnify a person ... against any of the following liabilities incurred as an ... auditor of the company:

- (a) a liability owed to the company or a related body corporate; ...
- (c) a liability that is owed to someone other than the company or a related body corporate and did not arise out of conduct in good faith.

This subsection does not apply to a liability for legal costs.”

In relation to legal costs, s199A(3) provides that:

“A company or related body corporate must not indemnify a person ... against legal costs incurred in defending an action for a liability incurred as an ... auditor of the company if the costs are incurred:

- (a) in defending or resisting proceedings in which the person is found to have a liability for which they could not be indemnified under subsection (2); or
- (b) in defending or resisting criminal proceedings in which the person is found guilty; or
- (c) in defending or resisting proceedings brought by ASIC or a liquidator for a court order if the grounds for making the order are found by the court to have been established; or
- (d) in connection with proceedings for relief to the person under this Act in which the Court denies the relief.

Paragraph (c) does not apply to costs incurred in responding to actions taken by ASIC or a liquidator as part of an investigation before commencing proceedings for the court order.”

ASIC does not have information on whether it is common for companies to indemnify their auditors, such as statistics on the number or proportion of companies that have indemnified auditors of their financial reports.

b) **Date of consent**

ASIC notified PwC and Nuix in letters dated 19 January 2022 that ASIC consented to PwC’s resignation as auditor of Nuix with effect from the day Nuix makes a continuous disclosure notice to the relevant market operator and ASIC about the change in auditor.

Nuix gave the continuous disclosure notice to ASX on 31 January 2022.

In deciding whether to consent to the resignation of an auditor, ASIC’s overriding concern is that the quality and independence of the audit function are not compromised.

ASIC’s policy is to generally consent to the resignation of an auditor of a public company unless concerns are raised by the outgoing auditor about a disagreement with management or other evidence suggests that we should not provide our consent (see paragraph RG 26.5 of ASIC

Regulatory Guide 26 *Resignation, removal and replacement of auditors*). In general, we will give our consent if (paragraph RG 26.17):

- (a) we consider that there is no evidence of an actual or perceived compromise of the auditor's independence;
- (b) there is no evidence of 'opinion shopping';
- (c) the nature and extent of any disagreements with the company's management or directors is not of concern to us;
- (d) there is an inability by the auditor to fulfil all of their obligations under the Corporations Act due to a genuine incapacity of the auditor to complete the audit engagement that is beyond their control;
- (e) given the timing of the proposed change in auditors, there is no reason to suggest that the proposed incoming auditor could not conduct an effective audit;
- (f) all the information has been provided with the application for our consent; and
- (g) there are no other circumstances or matters connected with the auditor ceasing to hold office that of concern.

After assessing the PwC application to resign, ASIC did not identify any such concerns and consent was given for the resignation of PwC.

c) Tender for the audit

PwC was not invited by the Board of Nuix to participate in the tender for the audit. This was noted in a Directors' Resolution of 3 December 2021 that was lodged with PwC's application seeking ASIC's consent to the resign as auditors of Nuix.

d) Review opinion

The auditor is not required to form a separate opinion on the carrying value of intangible assets or whether a company is a going concern at the half year. However, the auditor may report on exceptions identified in their audit or review of a financial report as a whole.