



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
Question No.	047
Topic	Schemes
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Committee member	Senator Deborah O'Neill

Question

CHAIR: Yes—75 per cent of them having to go back and make some changes? Clearly, there's something not quite right there. Is this gaming?

Mr Longo: I don't think there are issues of that kind, with respect. We don't intervene on every scheme; we see all the scheme documents and we appear occasionally. The approval of a scheme is the subject of a very structured court-supervised process. I will ask Calissa to elaborate.

Ms Aldridge: When we are reviewing schemes, it is looking at the booklet and all of the associated material that must be provided, including expert reports and a range of other things. Often we find areas where we think we need to have additional disclosure or clarification. So that percentage may not necessarily represent a significant failure in a proposed scheme booklet.

CHAIR: Who would be the experts in that situation?

Ms Aldridge: These are experts depending on the nature of the proposed acquisition. For example, you might have experts in the mining sector giving opinions on the appropriateness of the takeover bid.

CHAIR: Could they be general consultants without any professional affiliation?

Ms Aldridge: I might need to take that away and come back to you on it.

CHAIR: You are probably getting a sense of why I am asking these questions.

Ms Aldridge: I am, yes.

Answer

ASIC has published guidance in *Regulatory Guide 111: Content of expert reports* (RG 111) and *Regulatory Guide 112: Independence of experts* (RG 112) to set expectations in relation to conduct and content where reports are prepared for transactions under Chapters 2E, 5, 6 and 6A of the *Corporations Act 2001*.

Independent Expert Reports (IERs) typically constitute the giving of financial product advice, which requires an expert to hold an Australian financial services (AFS) licence. Reports are commonly provided by advisory, accounting or specialised valuation firms through a corporate entity holding an AFS licence. An AFS licensee should have sufficient human and technological resources to provide the services specified in its licences and should ensure its staff are adequately trained and competent to provide those services: s912A(1). [RG 111.138]. Additionally, the expert's profession or reputation should be relevant to the matters upon which the expert is opining [RG 111.134], and the expert or licensee should state its qualifications and experience in the report provided.

Reports provided for other reasons, for example, a geologist's report, are often referred to as Specialist Reports (SRs). These reports may stand on their own but are commonly incorporated into IERs where the expert has sought external expertise in a particular area (for example, a SR on mineral resources and reserves, real property valuations, or plant and equipment valuations). When retaining a specialist to advise on matters beyond the expert's expertise for a specific transaction, an expert should ensure that the specialist is competent in the relevant field. [RG112.67]

Question

CHAIR: These letters of the alphabet were sacrosanct almost. Then there are the consultancy businesses that are in a constellation around the reputation that is so fundamental and so important to

audit for the proper functioning of the markets. Then there is this licence to operate for people who sit outside any body of scrutiny and oversight. It feels as though I am watching the wild west on so many days; I am trotting down George Street and seeing saloon bars and guns. The whole conflagration of the wild west in the financial services sector is my visual now, as I walk down the main street of Sydney. Who are these experts and professionals? Also, perhaps on notice, you could give some sense of shape and form to where your risk rating comes from and what triggers your investigation on a risk-weighted basis. That would be great.

Mr Yanco: We will do that, but publication of some of these things may lead to someone gaming the system.

CHAIR: In that case, if there is anything you need to provide to the committee in confidence, we would always give that serious consideration. If that is your rationale and it is not in the public interest, you should expect the committee to be favourable. If we have a different view and we think it is in the public interest, that is a different matter.

Senator SCARR: Mr Yanco, I genuinely understand your concern. I would happily cooperate with the chair in terms of taking evidence in camera to make sure that it doesn't prejudice any of the activities of ASIC.

Mr Yanco: Thank you, Senator.

Answer

See response to the first part of QON 48 above for qualifications and affiliations of experts.

ASIC applies a risk lens to its review of prospectus documents, and this was shared with the Parliamentary Joint Committee on Corporations and Financial Services, Oversight of the Australian Securities and Investments Commission, the Takeovers Panel and the Corporations Legislation No. 1 of the 46th Parliament, 18 June 2021, in QoN 004.

Question

Ms Aldridge: To clarify, it sometimes gets confused when we are talking about schemes of arrangements relating to acquisitions, which are different from fundraising activities, for example. We review all of the schemes of arrangements around acquisitions because we are required to inform the court or give the court a view. It is the fundraising activity where we have that risk-rating approach. We might provide to you on notice some material across the fundraising as well as the scheme of arrangement.

CHAIR: Great. Once you have that, I will rethink what I heard.

Ms Aldridge: About 75 per cent is in relation to the schemes.

Answer

ASIC's risk-based approach for reviewing prospectuses was shared with the Parliamentary Joint Committee on Corporations and Financial Services, Oversight of the Australian Securities and Investments Commission, the Takeovers Panel and the Corporations Legislation No. 1 of the 46th Parliament, 18 June 2021, in QoN 004.

In relation to schemes of arrangement, s411(17)(b) of the Corporations Act states that a Court must not approve a compromise or arrangement under this section unless there is produced to the Court a statement in writing by ASIC stating that ASIC has no objection to the compromise or arrangement.

Further, at s412(7) and (8) positive obligations are placed on ASIC to review the statement, and it is stated that ASIC is not to register the statement unless it appears to comply with the Act, and that the document does not contain any matter that is false in a material particular or materially misleading. As such we do not presently apply risk criteria to documents of this type.