



Liability issues arising in relation to exploration, mineral resource and ore reserve reports included in takeover documents

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The Australasian Code for Reporting of Mineral Resources and Ore Reserves, September 1999 edition (the '**JORC Code**') and the ASX Listing Rules may give rise to unintended liability issues for persons who have prepared exploration, mineral resource and ore reserve reports that are included in, or which form the basis for other reports or statements appearing in, takeover documents (that is, bidder's statements and target's statements).

This newsletter examines some of the ways in which such liability may arise in a takeover setting.

The JORC Code and ASX Listing Rule consent requirements

The JORC Code and the Listing Rules require a 'public report', which includes a statement appearing in a takeover document, issued by a public mining company concerning its exploration results, mineral resources or ore reserves to be based on, and fairly reflect, estimates and supporting documentation prepared by a 'Competent Person'. (A 'Competent Person' is a person who is a Member or Fellow of The Australasian Institute of Mining and Metallurgy and/or the Australian Institute of Geoscientists with a minimum of five years relevant experience.)

The public report must either state that it is based on information prepared by the Competent Person or be accompanied by a statement to that effect signed in the same manner as the report.

If the company needs to edit the supporting documentation in preparing information for inclusion in a takeover document, then it may only do so if:

- the Competent Person has given their written consent to the inclusion in the takeover document of the matters based on the information they have compiled in the form and context in which the matters are to appear; and
- the takeover document states, or is accompanied by a statement that says, it is based on information compiled by the Competent Person.

The takeover consent requirements under the Corporations Act

There are additional consent requirements in the takeover provisions in the Corporations Act which operate in parallel with the JORC Code and Listing Rule requirements. The effect of the takeover provisions is that a takeover document can only contain a statement by a Competent Person, or a statement said in the takeover document to be based on a statement by a Competent Person, if the Competent Person has consented to the inclusion of the statement in the form and context in which it is included. (The company that issued the takeover document must keep the consent.)

The takeover consent regime links in to the liability regime in the takeover provisions. Any person (such as a Competent Person) named in a takeover document, with their consent, as having made a statement:



- that is included in the document; or
- on which a statement made in the document is based,

may be liable for any loss or damage suffered by any investor as a result of the investor's reliance on such statements. Accordingly, Competent Persons should ensure that any attributed statements are not misleading or deceptive.

Furthermore, if the Competent Person gives their consent, they will be obliged to notify the issuer of the takeover document if they subsequently become aware that the statement is misleading or deceptive, suffers from an omission or new circumstances have arisen that require disclosure.

For completeness it should also be noted that even if a person has not given consent for the inclusion of a statement in a takeover document, if they are 'involved in' any misleading or deceptive statement in, or omission from, a takeover document they may still be potentially liable for any consequential loss or damage.

Policy behind the takeover consent requirements

The requirement for consent in the takeover provisions is a manifestation of parliament's public policy concern to protect investors. Parliament has formed the view that investors may give considerable authority to a statement in a takeover document if it is made by, or supported by, a person who is held out as independent or having a particular expertise.

Accordingly, Parliament has determined that where persons, such as Competent Persons, have consented to being named in the takeover document it is appropriate for them to assume liability for their statements.

Exception from the takeover consent requirements

The Australian Securities and Investments Commission has modified the consent provisions in the Corporations Act to provide for a limited exception. The effect of that exception is that bidder and target companies will not be required by the takeover provisions to obtain a consent from a Competent Person where the relevant statement attributed to the person has previously been made in a document released to the ASX or ASIC *before* the release of the takeover document.

The underlying policy rationale for this exception is that where a person makes a statement in a document lodged with the ASX or ASIC, they do so in a regulated context for the purpose of informing investors and the market. Accordingly, ASIC considers that persons making statements in such documents should be mindful of potential liability arising in relation to statements which it is reasonably foreseeable may be quoted in the context of a takeover bid.

Accordingly, in circumstances where a Competent Person is named in a document released to the ASX or ASIC *before* the release of the takeover document, and material from that document is included in a takeover document without the Competent Person's knowledge, the Competent Person may still be liable for misleading or deceptive conduct under general statutory provisions of both the Corporations Act and other legislation (although not under the specific misleading or deceptive conduct provisions in the takeovers provisions).



However, despite the existence of the exception to the takeover consent regime, the ability of a Competent Person, a bidder or a target to rely on that exception is restrained by the consent requirements under the JORC Code and the Listing Rules which continue to operate during a takeover.

Due diligence defence

The takeover liability regime contains a number of important defences to liability, including the so-called 'due diligence' defence. To ensure that this defence is available to the maximum extent possible, it will be necessary for a Competent Person to be able to show (among other things):

- a proper system to provide against misleading or deceptive statements was laid down; and
- adequate supervision was provided to ensure that the system was properly carried out.

Competent Persons may consider it appropriate to keep in mind the appropriateness of a due diligence system and process when drafting exploration, mineral resource and ore reserve reports which may be included in takeovers documents.

No direct or indirect attribution

Another possible means for a Competent Person to avoid liability for a statement in a takeover document would be for the document not to directly or indirectly attribute any statement to them. However, this option is not available under the JORC Code and Listing Rules as presently drafted.

If the attribution requirements in the JORC Code and Listing Rules were relaxed or waived in the case of takeover documents this would enable the directors of the bidder or target company to assume responsibility for the relevant statements in the takeover document even though the statements were prepared by, or with the assistance of, a Competent Person.

Concluding comments

Given the combined effect of the consent requirements in the JORC Code, the Listing Rules and the takeover provisions, when drafting statements that may be included in takeover documents, Competent Persons, like all other persons involved in the preparation of takeover documents, clearly need to be alert to the possibility that, if a statement for which they are responsible is found to be misleading or deceptive, they could face the prospect of personal liability.

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