EXPERT REPORTS

By Ewan Vickery*

INTRODUCTION

An expert is defined as a person who has special skill or knowledge in some particular field. Considered as educated and experienced in a field of endeavour, an expert is, in a commercial sense, required to opine on a specific topic and may be held accountable for that opinion. From the broad range of experts in society, those with which this paper is concerned generally include economists, valuers, engineers, geologists, merchant bankers, auditors and solicitors, all being persons whose expertise may be called upon in resource-related commercial matters.

Expert opinions are introduced into a myriad of everyday transactions and issues. Such opinions may be used by choice or may be a mandatory requirement by law. Their uses range from contentious dispute resolution which parties themselves cannot resolve, to providing an objective view of a particular transaction.

Human Frailties

It is evident that society considers the expert an authority figure in the relevant field of expertise. Reliance is placed upon the professional conduct of experts by others when uninformed or seeking direction. The law recognises, however, that people cast in the role of experts are themselves only human and as such are subject to human frailties and outside influences.

Accordingly, indicators and guides have been developed at common law and by legislation and its administration[1] to balance those frailties and make aware to those who rely on expert opinions the problems associated with reliance upon them.

Expertus Opinio

The word 'expert' is derived from the Latin word '*expertus*' meaning 'having tried' and the word 'opinion' from '*opinio*' meaning 'supposition'. An expert opinion is, therefore, a supposition from one who has tried. A supposition from one who has tried should not be interpreted as

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1 The National Companies and Securities Commission ('NCSC') has published policy releases on expert reports for particular commercial settings. While these Releases do not have legislative force, they are designed for 'the guidance of persons professionally engaged or responsibly interested in corporate affairs and the securities industry'. Releases 102 and 351 deal with expert reports in relation to the Companies Code and Takeovers Code and Release 149 deals more specifically with expert reports on mining and petroleum securities and other assets in these contexts. These Practice Notes are generally referred to throughout the paper as 'NCSC Release No.' or simply as 'Release No'.

being itself conclusive or definitive of a particular issue and as such an expert opinion should not be taken at face value without consideration of the surrounding circumstances. Those circumstances may include the reason why an expert opinion is required, the existence of any other expert opinions, who selected the expert, how the expert is remunerated, what information is made available to the expert and whether all the expert's findings and opinions are made available to those to whom such information should be made available. Whilst invaluable to provide an objective assessment, an expert opinion must be tempered against the reality of its circumstance.

The legal maxim, *cuilibet in sua arte perito est credendum* ('credence should be given to one skilled in his peculiar profession'), highlights the term 'credence', not unquestioned reliance. Value must be given certainly, but not without some enquiry into the nature of the opinion and the circumstance of the expert.

Scope of Paper

In a commercial environment expert reports are frequently used to provide an objective viewpoint of particular transactions. Depending upon the nature and context of a report, an expert may be requested to comment for example upon the fairness and reasonableness of an offer,[2] to value particular assets[3] or assess whether a proposal is in the best interests of the shareholders of a company.[4] This paper is principally concerned with expert reports in the commercial environment, with specific emphasis upon the resource industry context. Accordingly, assessment will be made of the requirement for expert reports pursuant to the Companies (State) Code ('Companies Code'), Companies (Acquisition of Shares) (State) Code ('Takeovers Code') and Australian Stock Exchange Listing Rules ('ASX Listing Rules'). It seeks to provide an informative overview of some of the legal issues pertaining to expert opinions and expert reports. It also seeks to increase awareness of the reasoning behind the common law developments and legal guidelines in the use of expert reports. The paper will not discuss the myriad of situations where expert opinions are required for general commercial transactions, audit reporting or the use of experts in litigation.

Use of Expert Reports

Expert reports are legally required in the following circumstances:[5]

2 Companies (Acquisition of Shares) Code, ss.23(1) and 43(5).
3 Ibid.
4 Companies Code, s.315
5 Corporations Act 1989 (CA). The following references indicate the relevant CA sections:

Companies Code		CA
s. 98	Prospectuses	s. 1021
s. 106	Consent	s. 1032
s. 107	Civil Liability	ss. 96, 1005–1012
s. 108	Criminal Liability	s. 996
s. 316	Scheme of Arrangement	s. 412

— Companies Code
  - Section 106 — Prospectuses
  - Section 315/316 — Compromise or arrangement.
  - Section 133GB-GD — Share buy-backs, Subdivision J & K.

— Takeovers Code
  - Section 12(g) — Shareholder approval for transactions.
  - Section 23 — Part B Statement
  - Section 43 — Rights of Remaining Shareholders.

— ASX Listing Rules
  - Rule 2B — Prospectus Requirements.
  - Rule 3J(3) — Acquisition/disposal of assets.
  - Rule 3S(3) — Change of Activity.

Who is an Expert?

An expert is defined in s.5(1) of the Companies Code, which is drawn upon for interpretation of key terms by the Takeovers Code, as 'any person whose profession or reputation gives authority to a statement made by him' in relation to a matter.

Release 102 of the National Companies and Securities Commission ('NCSC') provides that, 'an expert is a person whose profession or reputation gives authority to a statement made by him in a professional capacity. Whether a person's profession or reputation gives such authority to a statement made by him is a question of fact'.

Resources Industry

Expert reports in the resource sector are broad ranging. NCSC Release 149 commences with a general statement of intent,

> . . . the National Companies and Securities Commission sets out the principles and matters which it would expect to be taken into account by a person engaged in the preparation of an expert report concerned with mining assets, being mining and petroleum securities, properties, leases and other assets. Mining and petroleum securities ("**mining securities**") include securities in entities with material interests in mining and petroleum properties, leases and other mining and petroleum assets. "**Petroleum**" includes oil and gas.[6]

The Release refers to the report contexts of the Takeovers Code and the Companies Code, but does not specify that its terms of reference be limited to such reports.

Reliance upon expert opinion in the resource sector is vital. Not only are experts actively involved in the arbitration of disputes[7] but their

Takeovers Code	
s. 11	s. 615
s. 12(g)	s. 623
s. 22(3)	s. 647(3)
s. 23	s. 648
s. 43(5)	s. 703(5)
s. 44	s. 704–706

6 NCSC Release 149, para.1.

7 The use of expert arbitration is discussed in detail in relation to the Roxby Downs Indenture cll.49 and 50 pertaining to Dispute Resolution in an article by L.A. Warnick 'The Roxby Downs Indenture' [1983] *AMPLA Yearbook* 33, 67.

assessments of assets and securities form the foundation for an appraisal of interest in a given venture. Technical reports directed to evaluation of the potential for viable economic production of a property include geological reports, mining and petroleum engineering reports and metallurgical reports. Valuation reports of opinion on the value of resource assets embrace issues such as actual and perceived markets and price projections for anticipated production which impact upon assessments of asset value and in turn affect capital raising, bank security, and shareholder attitudes.

There are obvious difficulties encountered when one attempts to draw an overview of expert reports in the resource sector. Indeed, as one commentator on the topic of takeovers and acquisitions stated in 1983:

> The problems of valuing natural resource projects, whether for s.23 experts' reports or for any other purpose, are not becoming any easier. World commodity markets do not seem to be becoming any less volatile — quite the contrary — and the uncertainties this produces are only becoming more extreme . . . All this causes great difficulties for companies and advisors in producing efficient and optimal strategies.[8]

These comments hold equally true for expert reporting seven years on.

While the regulators strive to impose a structured response to guide experts and their commissioners, real and fast changing market contingencies will continue to impact upon what may be regarded as the soundness and reliability of any expert report.

COMPANIES CODE

Section 315 — Arrangements and Reconstructions — Power to compromise with creditors and members[9]

Section 315 of the Companies Code provides that the Court may approve a scheme of arrangement involving members and creditors of a company.

Where a company requires reorganisation, one method of effecting change is by way of a scheme of arrangement, which may involve amalgamation with another company. An alternative is alteration to its capital structure. If an alteration to the memorandum or articles is required, but such alteration is beyond the power of the members in general meeting, then a scheme of compromise or arrangement envisaged by s.315 may be implemented.[10] This enables the dissenting minority of shareholders to be bound by the alteration where s.315 procedure has been followed. A meeting of members and meetings of creditors in their respective classes must agree in majority to the scheme and the scheme must have court approval. One of the key elements of the scheme is the provision of information to the interested parties.

8 G.J. Samuel, 'Commentary on Takeovers and Acquisitions of Companies with Energy Resources' [1983] *AMPLA Yearbook*, 450, 454.

9 See the comprehensive treatment of this area, by I.A. Renard, 'Takeovers and Acquisitions of Companies with Energy Resources', [1983] *AMPLA Yearbook*, 402, 415.

10 H.A.J. Ford, Principles of Company Law, (4th edn. 1986) 537 et seq.

Part III of Clause 3 of Schedule 9 of the Companies Regulations[11] provides that an expert report must be prepared where a party to the scheme has not less than the prescribed shareholding of 30 per cent. of the voting shares in the company, or where there are common directors. This report must accompany the explanatory statement to members and creditors required by reg. 62 of the Companies Regulations. The statement must include the information prescribed in Sch. 9 depending upon whether the arrangement is one with creditors, members or with members for transfer to a trustee. The expert report is required in relation to an arrangement with members in both contexts.

Clauses 4 and 5 of Schedule 9 follow with directives as to the use of expert reports obtained.[12] Essentially, selective reporting is obviated by a requirement that copies of all reports obtained shall accompany the statement. A report forecasting profits or profitability, or remarking on a discrepancy in asset values as between the books of account of the company to which the scheme relates, and market value, shall not accompany the statement without the prior consent of the NCSC, and subject to any conditions specified by it. Presumably, this process leads to a level of enquiry and negotiation between the expert, those who commissioned the expert, and the NCSC for the purpose of balancing relevance and objectivity in the report process where sensitive and often subjective analyses are involved.

Prospectus Requirements[13]

Section 96 of the Companies Code provides that—

> a form of application for shares in or debentures of a corporation or a form to accompany a deposit of money with, or a loan of money to, a corporation *shall not be issued by the corporation or by any other person unless the form is attached to a prospectus* and a copy of

11 The relevant part of cl.3 of Part III is as follows.

> '... the statement shall be accompanied by a copy of a report made by an expert (not being a person who is associated with the corporation which is the other party to the proposed reconstruction or amalgamation or with the company the subject of the Scheme) stating whether or not, in his opinion, the implementation of the proposed Scheme is in the best interest of the members of the company the subject of the Scheme and setting out his reasons for forming that opinion.

12 They provide:

> '4. Where the company the subject of the Scheme obtains 2 or more reports, each of which could be used for the purposes of compliance with clause 3, the statement shall be accompanied by a copy of each report.
> 5. Where —
> (a) the company the subject of the Scheme obtains a report for the purposes of compliance with clause 3; and
> (b) the report contains —
> (i) a forecast in respect of the profits or profitability of the company the subject of the Scheme; or
> (ii) a statement to the effect that the market value of an asset or assets of the company the subject of the Scheme or of a corporation that is related to the company the subject of the Scheme differs from an amount at which the value of the asset or assets is shown in the books of the company or the related corporation,
> that report shall not accompany the statement except with the consent in writing of the Commission and in accordance with such conditions (if any) as are specified by the Commission.'

13 For a detailed discussion of the law relating to prospectuses in the resources context, see D.N. Scott, 'Prospectuses and Natural Resources' [1986] *AMPLA Yearbook* 70.

the form and a copy of the prospectus have been registered by the Commission under this Code.

A prospectus is defined in s.5(1) of the Companies Code as,

a written notice, circular or other instrument inviting applications or offers from the public to subscribe for, or offering to the public for subscription, shares in or debentures of, or units of shares in or units of debentures of, as the case may be, the corporation.

Where a company seeks to offer shares or debentures to the public it must accord with the prospectus requirements of the Companies Code. The aim of this regulation is to ensure that the potential investor is informed by the company of information likely to impinge on an investment decision. The information required to be disclosed ranges from the rights attaching to classes of shares to the nature of interests of promoters or directors in the company. Where a prospectus contains reports by experts, the prospectus may not be issued unless there has been compliance with the formalities of s.98 of the Companies Code.

Section 98(1) provides that:

To comply with the requirements of this Act a prospectus —

"...

(h) shall, if it contains any statement that is made by an expert or is contained in what purports to be a copy of, or extract from, a report, memorandum or valuation of an expert, state the date on which the statement, report or valuation was made and whether or not it was prepared by the expert for incorporation in the prospectus."

NCSC Release 321, dealing with offers and invitations to the public, notes,

the concept of offer or invitation to the public has a long history in Anglo/Australian company law and remains the corner stone of regulation of the distribution of corporate security. Upon it is based the vital difference between regulated and other offerings.

OFFER TO THE PUBLIC

Determination of what is an offer to the public is difficult. As NCSC Release 321 states,

the legislation does not define "offer to the public" or any of its derivatives.

Section 5(4) is a principal interpretive section which provides that certain circumstances shall *not* be an offer or invitation to the public. Those circumstances are where the offer or invitation —

(a) is an offer or invitation to enter into an underwriting agreement;
(b) is made or issued to a person whose ordinary business is to buy or sell shares, debentures or prescribed interests, whether as principal or agent;
(c) is made or issued to existing members or debenture holders of a corporation and relates to shares in, or debentures of, that corporation;
(ca) is made or issued to holders of prescribed interests made available by a corporation pursuant to a deed that is an approved deed for the purposes of Division 6 of Part IV and is an offer or invitation that relates to prescribed interests made available by that corporation pursuant to the same approved deed; or
(d) is made or issued to existing members of a company in connection with a proposal referred to in section 409 and relates to shares in that company.

REQUIREMENTS

Preparing a prospectus is an expensive and involved task. Where an expert report is included, care must be taken to accord with statutory and regulatory requirements.

Section 106(1) of the Companies Code provides,

> A prospectus in relation to a corporation that includes a statement purporting to be made by an expert or to be based on a statement made by an expert shall not be issued unless —
>
> (a) the expert has given, and has not, before delivery of a copy of the prospectus for registration, withdrawn, his written consent to the issue of the prospectus with the statement included in the form and context in which it is included; and
> (b) there appears in the prospectus a statement that the expert has given, and has not withdrawn, his consent.

The liability of experts and others in relation to statements made in an expert's report and its use in documentation such as a prospectus are discussed later in this paper.

Share Buy-Backs

Parts 3, 4 and 5 of the Co-operative Scheme Legislation Amendment Act ('CSLAA') 1989 amend ss.129 and 130 of the Companies Code to permit buy-backs of company shares. The CSLAA amendments prescribe the procedure to be followed in order to effect share buy-backs in particular circumstances.

Briefly, the term 'buy-back' is defined in s.133BB as, 'an acquisition by a company constituted by the company buying back shares'. The virtues of share repurchases have been espoused internationally for some time. The Canadian Business Corporations Act 1975 incorporated buy-back powers in 1975 and the European Economic Communities Second Directive on Company Law provided for repurchase in 1977. Further, Britain incorporated buy-backs in 1985. The restriction did not exist in the United States, but a certain amount of regulation has been imposed over recent years.[14]

It is evident that there are benefits in a buy-back power including the removal of administrative expenses associated with odd lots, returning excess capital to shareholders, effective alternative to dividends and signals to the market that shares may be undervalued.

The evident disadvantages include improper discrimination between shareholders and insider trading where a company may repurchase on the basis of undisclosed information.

EXPERT REPORTS

An expert report is required in relation to the following buy-back situations —

(a) Section 133GB-GD Buy-Back Scheme auditors report; and s.133MA(b) on the solvency declaration.
(b) Selective Buy-Backs Subdivision J, and K: expert report to comment on whether the consideration was fair and reasonable.

14 E. Magner, 'The Power of a Company to Purchase its Own Shares: A Comparative Approach' (1984) *Companies and Securities Law Journal* 79, 87.

Section 133GB-BD and Buy-back Scheme.

A buy-back scheme may be effected by a public or proprietary company offering all its shareholders the opportunity to sell a proportion of their shares back to the company. The rules which govern a Subdivision F buy-back are similar in nature to Takeovers Code offers which cannot be varied or withdrawn without the consent of the NCSC.

Implementing a buy-back scheme requires the procedure detailed in s.133FB to be followed. The offer must be in writing, specify consideration, specify how the company's obligations are to be satisfied and relevant information pertaining to, for example, the classes of shares and number of shares that have been previously bought back.

Where a proprietary company will exceed the 10 per cent. in 12 months limit or where either a public or proprietary company at the time when the first offer was made under the scheme was in the situation where a director was aware of a proposal to make a takeover bid or that a bid had been made in relation to the company, the buy-back under s.133GA, must be voted upon as an ordinary resolution of the company in general meeting. No resolution is required for proprietary company buy-backs where the buy-back will not exceed the statutory 10 per cent. in 12 months limit.

Sections 133GB to GD specify the content and procedural requirements for the notice of meeting, terms of the resolution to be voted upon and particulars of the offer. Those details include —

— full details of the proposed buy-back offer;
— reasons for proposing the buy-back and the facts and principles underlying those reasons;
— solvency declaration;
— the takeover aspects of the proposed resolution;
— what the directors consider the likely effect on the company's affairs if the buy-back is made and accepted; and
— all other information that is known to any of the directors and may reasonably be expected to influence a person in deciding whether to vote in favour.

It is apparent that the intention behind the requirement to provide information to members for a buy-back scheme is to ensure that they are conversant with the takeover and buy-back implications. In one respect, it is almost as if the directors of a target company are required to accord with aspects of the Takeovers Code, as they must assess the benefit of the buy-back, which could effectively thwart a takeover, against the proposed benefits of the takeover itself. One must enquire if the directors or company secretary would generally be sufficiently objective in preparing the contents of the notice to meet the NCSC's standards. It would seem more appropriate for an independent expert to assess the takeover aspects of a buy-back and the likely effect of the buy-back scheme on the company's state of affairs.

Underlying both of these issues is the reality that directors may be reluctant to present a negative view of why a buy-back is being proposed, if it might serve as a defensive tactic to a takeover. How directors can discharge their duties in good faith where their company is a candidate for takeover may be a question to be tried at some future time.

The objective view in the ss.133GB-GD framework is found in the auditors report required under Subdivision M dealing with solvency requirements.[15] Section 133MA provides that for a buy-back made under a buy-back scheme, unless the company is a proprietary company and the buy-back does not exceed the 10 per cent. in 12 months limit, the company auditor must have provided an auditor's report on the solvency report declared by the company's directors. The solvency declaration (as defined in s.133BH) by the company's directors must detail, as the name suggests, that it is the directors' opinion that the company will remain solvent on the day of signing the declaration and throughout the ensuing 12 months.

Section 133BJ defines the auditor's report on the solvency declaration as a report to the effect that the auditor has enquired into the company's state of affairs and is aware of nothing to indicate that it is unreasonable in all the circumstances to form the opinions described in the declaration.

The auditor is further required to provide information which may qualify or show some inconsistency with the declaration. The apparent check on the system is the auditor being given broad terms of reference to enquire into the state of the company's affairs. Given the cost of such an exercise to the company, it seems likely that buy-backs will often be arranged to fall in concert with the Annual General Meeting and annual review of accounts.

Selective Buy-Back — Subdivisions J & K

Subdivisions J and K detail the procedures for selective buy-backs for public and proprietary companies. A selective buy-back is a buy-back which is not a buy-back scheme, an employee share purchase, an odd lot purchase or an on-market purchase.

The essential element of a public company buy-back is the requirement of approval by special resolution passed by a special majority at a meeting of the company's members. Subdivision K provides that the notice of resolution to approve the selective buy-back must include, inter alia, the text of the proposed resolution, a summary of all material terms of the proposed agreement and an expert report in relation to whether the consideration was fair and reasonable and reasons for forming that opinion.

Section 133KF details as minimum criteria for compliance, disclosure of facts about the expert and his retainer which reflect upon the expert's independence and objectivity. It provides:

> For the purposes of subparagraph 133KD(2)(a)(iii) or paragraph 133KE(1)(d), a report signed by an expert complies with this section if, and only if, it sets out:
> (a) particulars of any relationship of the expert with a person (in this section called an 'interested person'), being:
> (i) the company;
> (ii) any other proposed party to the proposed agreement; or
> (iii) a person associated with the company or with any other such proposed party;

15 Auditor report required for buy-backs other than a buy-back scheme where the company is not a proprietary company and the buy-back does not exceed the 10% in 12 months limit.

including, but not limited to, particulars of circumstances in which the expert furnishes advice to, or acts on behalf of, an interested person in the proper performance of the functions attaching to the expert's professional capacity or to the expert's business relationship with that interested person;

(b) particulars of any pecuniary or other interest of the expert that could reasonably be regarded as being capable of affecting the expert's ability to give an unbiased opinion on the matters to which the report relates; and

(c) particulars of:
(i) any fee; and
(ii) any pecuniary or other benefit, whether direct or indirect;
that the expert has received or will or may receive for or in connection with the making of the report.

It is interesting to observe that an expert is required to disclose any relationship which may exist, but is not precluded from making the expert report if a relationship of any degree does exist. Presumably, the reader of the report will assess the comments with knowledge of the disclosed relationship and background. It may be argued that the average reader remains unable to assess the worth of the report and weight of the disclosures given without personal knowledge of the subject matter of the report, such that it should be a requirement that too proximate a relationship precludes acting as an expert.[16] Problems of characterisation and proximity would undoubtedly emerge as practical difficulties in establishing such a test. Professionals providing expertise in such critically scrutinised situations are obviously aware the slightest transgressions will precipitate severe criticism, and hence the ideals of professionalism must be upheld if the credibility of experts is not to be discounted so as to be worthless, or supplanted by arbitrary, ambiguous and onerous rules.

TAKEOVERS CODE

The Takeovers Code regulates takeover activity and imposes parameters within which certain corporate dealings are to take place.

Acquisitions To Which Section 11 Does Not Apply

Section 12(g) of the Takeovers Code contains an exemption which provides that the restriction on acquisitions of shares contained in s.11 does not apply to:

an acquisition of shares in a company by virtue of an allotment or purchase where the company has *agreed to the allotment or purchase by a resolution passed at a general meeting at which* no votes were cast in relation to the resolution in respect of any shares held by —

(i) the person to whom the firstmentioned shares were to be allotted or by whom or from whom the firstmentioned shares were to be purchased, as the case may be; or

(ii) a person associated with a person referred to in sub-paragraph (i).

NCSC RELEASE 116 AND SECTION 12(g)

Section 12(g) is addressed in NCSC Release 116 which requires all shareholders of a company to be adequately informed of details relating to

16 Note solvency and auditor requirements.

a proposed acquisition or allotment which may result in a change of control of a company and to be given sufficient opportunity to assess the proposal. Section 12(g) requires the proposed acquisition to be passed by ordinary resolution at a general meeting of members of the company. The notice of meeting should specify that special business is proposed but need not necessarily detail the full text resolution.

Release 116 stipulates what the NCSC considers to be the minimum information requirements for shareholders. If the minimum standard is not met, the Commission may regard a consequent acquisition of shares as having occurred in circumstances enabling it to make a declaration pursuant to s.60(1) of the Takeovers Code.[17] The Release indicates that in providing shareholder approved exemption from the prohibition contained in s.11, shareholders forego the right to equality of opportunity to sell their shares themselves and thereby to participate in any benefits accruing to some shareholders when an acquisition proposal is made.

RIGHTS SECURED

According to para.7 of Release 116, the NCSC will regard shareholder rights as being secured if they are provided with the following:

(a) full particulars of the identity of the purchaser or allottee, including in the case of a company, such particulars of its shareholders as will identify the persons who have a controlling interest in it;

(b) full particulars of the shares to which the purchaser or allottee is or will be entitled at the time immediately before the purchase or allotment which is to be approved and at the time immediately after the acquisition of the shares approved to be purchased or allotted including in each case a statement of the percentage of the company's shares to which the purchaser or allottee is or will be entitled;

(c) full particulars of the identity of any person who is intended to become a director if the purchase or allotment is approved;

(d) a statement of the purchaser's or allottee's intentions regarding the future of the company should the purchase or allotment be approved;

(e) particulars of the terms of the proposed purchaser;

(f) a report by an expert stating whether or not in his opinion the proposed purchase or allotment including any proposals disclosed under paragraph (d) is fair and reasonable having regard to the interests of shareholders other than the vendor, the purchaser or allottee and setting out his reasons for forming that opinion.

The details of this guideline amplify the items listed in s.59 of the Takeovers Code, material non-compliance with which may result in the NCSC exercising its discretion pursuant to s.60 of that Code resulting in an acquisition being deemed in breach of s.11.

17 s.60(1) provides:

> Where the Commission is satisfied that an acquisition of shares occurred in circumstances where — ...
>
> (c) the shareholders and directors of a company were not supplied with sufficient information to enable them to assess the merits of a proposal under which a person would acquire...
>
> ... the Commission may ... declare that acquisition ... unacceptable.

Section 23 — Part B Expert Report[18]

Section 23 deals with reports of experts to be included in a Part B statement. Section 23(1) provides,

> Where —
> (a) take-over offers are, or are to be, made in respect of shares in a company by an offeror who has a prescribed shareholding in the target company;
> (b) take-over offers are, or are to be, made in respect of shares in a company by an offeror that is or includes a natural person who is a director of the target company; or
> (c) take-over offers are, or are to be, made in respect of shares in a company by an offeror that is or includes a corporation or corporations, and a director or directors of the target company is or are a director or directors of that corporation or of either or any of those corporations,
> the Part B statement given in accordance with sub-section 22(1) shall be accompanied by a copy of a report made by an expert (not being a person who is associated with the offeror or with the target Company) setting out the particulars referred to in sub-section (1A) stating whether, in his opinion, the take-over offers are fair and reasonable and setting out his reasons for forming that opinion.

The report is despatched to shareholders with the Part B statement where takeover offers attracting s.23(1)(a), (b) or (c) apply, the offeror company having a nexus to the target in each case.

OBJECTIVE ASSESSMENT

The expert is required to state whether in his opinion the takeover offer is fair and reasonable and set out his reasons for forming that opinion.

Clearly the intent of the expert report in this circumstance is to provide shareholders with an objective professional viewpoint of an offer such that each shareholder may be in an informed position when making a decision. It is obviously desirable that shareholders have an objective appraisal of an offer where the offer is made by an offeror connected with the target company's directors.

CONTENT OF REPORT

Section 23(1A) sets out the particulars to be set out in the expert report. Essentially the expert is required to state whether in his opinion the takeover offer is fair and reasonable and must set out details supporting that opinion. Details of any relationship between the expert and the offeror or the target or any associate therewith, the fee and pecuniary interests or other interests that may affect his objectivity must also be disclosed. These elements are discussed later in this paper.

Section 43: Rights of Remaining Shareholders and Holders of Options and Notes

Where an offeror becomes entitled to not less than 90 per cent. of the voting shares of the target company the holders of non-voting shares, renounceable options and convertible notes may require the offeror to acquire their shares options or notes on such terms as are agreed or as the

18 Supra fn.8 for introductory overview of this section.

Court thinks fit to order. The offeror must notify the classes of holder specified that the offeror became entitled to the shares. The notice under s.43(4) shall not however, propose terms for the acquisition by the offeror or on-market offeror unless the notice is accompanied by a copy of a report made by an expert stating whether in his opinion the terms proposed in the notice are fair and reasonable together with reasons for forming that opinion.

Section 43 (5A) and (5B) set out the criteria required by sub-s.(5) to be included in the expert's report. Section 43(5B) mirrors the statutory requirements of s.23(1A) of the Takeovers Code.

AUSTRALIAN STOCK EXCHANGE LISTING RULES

The ASX Listing Rules further regulate the activity of public companies, securities of which are listed on the Australian Stock Exchange. Three contexts in which an expert report is required or preferred are Rule 2B, Rule 3J(3) and Rule 3S. Rule 2B details the requirement for reports in relation to company prospectuses, Rule 3J(3) deals with acquisitions or sale of significant assets and Rule 3S refers to the change of activity of a company.

Although the ASX Listing Rules adopt the terms 'expert' and 'qualified independent person' no definition of these terms appears in the Rules.

Rule 2B — Prospectuses

Rule 2B details the requirements to be included in a prospectus issued by a public company. Rule 2B(2) provides that a report contained in a prospectus shall not be abridged by the company, the expert's qualifications must be set out and the report shall not be dated earlier than one month prior to the date of registration of the prospectus.

Rule 2B(3) provides,

> the prospectus shall not contain a report of any expert on any real or personal property which has been or will be acquired by the company if such expert has any interest, direct or indirect, in such property.

This is an interesting prohibition. As will be discussed later in this paper, an expert is not specifically precluded from reporting in all circumstances where a pre-existing relationship exists. The expert is required however, to disclose the interest or association in the report. Clearly, where a public company is canvassing for shareholders, it is important to safeguard prospective members. In this regard, Rule 2B(3) is a necessary protection.

Rule 2B(3A) provides that an independent qualified person may be required to opine on the fairness and reasonableness of the consideration payable to vendors for an asset. Where the consideration includes securities, account is to be taken of the price at which investors have or will be invited to pay for securities in the company and whether the amount is fair.

Rule 2B(4)(k) details those matters which must be set out in the prospectus. Where an expert report appears, it must be shown whether the

expert has a shareholding in the company, a right to subscribe for securities in the company and a right to nominate persons to subscribe for securities in the company.

There are additional rules which pertain to mining company prospectuses for mining companies seeking official listing. The section commences,

> a prospectus issued by a mining company shall only include reports on geology, geophysics, mining engineering or metallurgy which have been prepared by a person qualified as set out in Rule 3M(7).

Rule 2B then refers to further reporting requirements including:

- in the case of mining ventures, a report on the mining tenement by a qualified geologist or mining engineer (Rule 2B(6));
- in the case of an oil venture in addition to the information required under Listing Rule 2B(6), a geological map and report (Rule 2B(7));
- a report by an independent qualified engineer as to equipment (Rule 2B(8));
- a report as noted in relation to Rule 2B(3A), but in the context of mining tenements (Rule 2B(9)); and,
- an independent qualified geologist required to assess whether a proposed program of exploration expenditure is justified where a company requires or has agreed to acquire an interest in a mining tenement (Rule 2B(11A)).

Rule 3M

Rule 3M(7) provides that any report pertaining to a company's ore or mineralisation must be based upon information compiled by what is termed 'a competent person' as defined in Appendix 17 of the Listing Rules.

Appendix 17 is the Australasian Code for Reporting of Identified Mineral Resources and Ore Reserves, a Report of the Joint Committee of the Australasian Institute of Mining and Metallurgy and the Australian Mining Industry Council. This Code essentially provides an industry standard of reporting mineral resources and ore reserves.

Clauses 10 and 11 summarise the intent of the Code as follows;

> 10. The Committee [Joint Committee] reaffirms its strong belief that the public release of information concerning mineral resources and ore reserves and related estimates must derive from reports prepared by appropriately qualified persons.
> 11. In an endeavour to encourage competent, professional reporting of resources and ore reserves and to eliminate unsatisfactory reporting the Committee recommends to the industry and to the Australian Stock Exchange Limited that resource and ore reserve reports confirm to the Code set out below.

Clause 13 defines a 'competent person' to mean 'a person who is a Corporate Member of the Australasian Institute of Mining and Metallurgy with a minimum of five year's experience in the relevant Resource and Ore Reserve assessment field'.

Rule 3J(3)

The intent of Rule 3J(3) is to provide shareholders with information from independent qualified persons who are required to comment on whether a proposed acquisition or disposition is fair to all shareholders (except to precluded shareholders), with a view to providing those shareholders with confidence to vote upon the proposal at the general meeting. It is intended to protect the interests of minority shareholders when assets worth 5 per cent. of the total issued capital and reserves of the company are being bought or sold from associated parties. Associated parties for the purposes of Rule 3J(3) are defined.[19]

An important requirement of Rule 3J(3)(c) is that notice of a meeting of shareholders to approve any transaction, 'shall be accompanied by copies of reports, valuations or other material from independent qualified persons sufficient to establish that the transaction is fair'. One might question the standard of reporting needed for a report to be 'sufficient'. Is 'sufficient' to be regarded as the highest standard of information provision and quality? Remarkably, in an area given to inform the uninformed and where quantum and quality of information seem variable, the apparent minimum standard of mere 'sufficiency' is required.

Rule 3S — Changes in Control and/or Activity

Rule 3S is concerned with the change in control or the change in activity of a company. Rule 3S(2) provides where a company intends to sell or otherwise dispose of its main undertaking (a term not defined by the Rules), the sale or disposal is conditional upon ratification by the shareholders in general meeting.

The possible requirement for an expert report lies in the context of Rule 3S(3)(a)(1) which provides,

> When a company contemplates changing its activities or when, in the opinion of the Home Exchange, control of the company is likely to change, the Exchange may suspend trading in the company's securities until such time as the Home Exchange is satisfied that shareholders and the investing public have been adequately informed of any changes in the activities of the company and the effect which such changes may have on the company's future earning potential and until shareholders and the investing public have been given such information as the Home Exchange considers necessary with respect to a person or corporation obtaining control of the company together with financial information relating to any other companies or businesses which are or may become associated with the person or company acquiring control.

19 The definition of 'association' in ASX Listing Rule 3J(3) includes:
- a director or officer of the listed company or of its satellite (which is a company or entity which in the opinion of the home exchange has a common purpose with a listed company) in the preceding 6 months,
- a substantial shareholder of the company in the previous 6 months,
- an associated person as defined in s.9 of the Companies Code,
- any other person or company whose association with any of the abovenamed persons or companies is such that in the opinion of the home exchange the proposed disposal or acquisition should be referred to the shareholders of the listed company in general meeting.

ASX Listing Rule 3S(3)(c) provides further that —

> The Home Exchange shall be consulted in advance of any of the foregoing and will advise the information which it requires to be forwarded to it and to shareholders of the company.

Consequently, it remains open for the Home Exchange to insist upon an expert's report to assist the provision of adequate information to shareholders. That is usually adopted in practice.

THE EXPERT OPINION

Having examined the principal mandatory contexts in which expert reports are required, the nature of the opinion, core to such reports, must now be considered. The expert opinion and the reasons for that opinion form the essence of the expert report. What an expert is required to comment upon in detail clearly varies from one transaction to another.

It is evident that the nature of an opinion as to value or the resource viability of a given geological site is different to an opinion on the fairness or reasonableness of an offer, for example. Brief comments as to the latter forms of opinion will now be made.

The expert report required by ss.12(g), 23 and 43 of the Takeovers Code requires an expert to state whether in his opinion a takeover offer or terms of acquisition are *fair and reasonable.* The Australian Stock Exchange Listing Rules requirements vary from Rule 3J(3) which requires that 'reports . . . from independent qualified persons [are] sufficient to establish that the transaction is fair to all shareholders', to Rule 3(S) which speaks of 'adequately informed' shareholders and the investing public.

Where an expert has been specifically engaged to report on the fairness and/or reasonableness of a matter, the NCSC has provided guidelines to assist the expert in the form of published NCSC general policy statements, by which the NCSC states and defines its policy position on the matters reposed to it by statute. These statements take the form of information releases and are numbered for indentification.

Fair and Reasonable

Paragraphs 19 and 20 of Release 102 seek to define 'fair and reasonable'. Sections 23 and 43 of the Takeovers Code require an expert to state whether the takeover offer or terms of acquisition are fair and reasonable, which is to be distinguished from a recommendation whether or not the proposal should be accepted. The question of an offer or proposal being fair and reasonable is distinctly separate from a recommendation whether or not to accept an offer in the absence of a better offer by the end of the offer period. Members are to be given an objective appraisal to enable them to make an informed and autonomous decision.

FAIR

Paragraphs 20(a) and (b) of Release 102 highlight what an expert should consider when considering the fairness and reasonableness of an offer. A comparison of the amount of an offer price and the value which

may be attributed to the relevant securities is regarded as the test of fairness. A range of values most likely to be attributable to the relevant securities is considered appropriate given the uncertainty of the valuation process, and the presentation of a sensitivity analysis should be supported by clearly explained assumptions and conclusions.

REASONABLE

The reasonableness of an offer is determined by other significant factors to which shareholders might give consideration prior to accepting the offer. These factors include an offeror's pre-existing entitlement to target company shares, whether an alternative acquirer exists, tax loss and cash flow benefits accruing to an offeror achieving 100 per cent. target company ownership, known business strategies of the offeror, significant shareholding blocks in the company, taxation considerations of shareholders and the liquidity of the market.

INDEPENDENCE

The independence of the expert is of paramount importance. The concept of independence combines the issues of the expert's relationship with those who engaged him to prepare the report and any other parties to a transaction or matter, the pecuniary interests of the transaction or matter and the remuneration of the expert. The independence of an expert generally is subject to NCSC Releases 102 and 351, and in relation to the resources industry, more specifically Release 149. These Releases seek to reinforce the fundamental element of independence and its perception to recipients of experts' reports.

Release 102

Release 102 concerning ss.23 and 43 of the Takeovers Code was recently updated for the second time in nine months and is effective from 24 January 1990. The NCSC has tightened the controls on expert reporting in an effort to address what has been perceived as a lack of independence and to improve the analytical content of reports.

Release 351

Practice Note Release 351 which operates from 31 January 1990 is titled 'Independence of Expert's Reports and Investigating Accountant's Reports in relation to the Takeovers Code sections 12(g), 16(2a), 23, 37, 38 and 43 and Companies Code sections 98(1)(e), 170(1), 315 and 316'. This Practice Note is issued for the guidance of persons who commission or provide an expert or investigating accountants report for the purposes of the aforementioned sections.

Substance of Release 102

Release 102 essentially provides a guideline as to what the NCSC will regard as the key matters which an expert engaged to write a report under s.23(1) or s.43(5) of the Takeovers Code must consider.

It specifies that the independence of a report must be maintained so that the report may be treated with confidence. Release 102 provides that an expert *must not* be associated with an offeror or target and refers to ss.7(5) and 7(6) of the Takeovers Code for the definitions of associated and non-associated persons. If deemed an associated person, the nominated expert will actually be precluded from acting as expert in the matter. This is to be distinguished from merely disclosing a pre-existing relationship to ensure that the reader is fully informed prior to being invited to make an investment decision. Sections 23(1a) and 43(5) refer to business relationships which must be disclosed, which while not precluding the expert from acting, would be material to an assessment of impartiality. The Release notes that such relationships would include past auditing and accounting services, superannuation fund management, taxation advisory services or management consultancy services. An arbitrary period of two years of prior contact is nominated, although the Release notes that earlier relationships might be so significant as to warrant disclosure.

Paragraph 12 of Release 102 declares that an 'unbiased report . . . is the object of the provisions'. Paragraph 13 then provides that the NCSC may enquire into any case where a perception may be created that a report is not disinterested. Again specific examples are provided ranging from financial involvement to tax advice. Paragraph 14 expressly notes that an expert would not be precluded from providing a report because he had acted, for example, as the target company's auditor, worked on behalf of a corporation that deals in the money market or worked for a company that managed an investment portfolio which included shares in the offeror or target company.

It remains arguable that persons such as the company auditor, would not be completely objective in the sense of having developed links with the target or offeror. However, it is equally cogent that a completely independent expert may not fully appreciate the background history of a company. Does absolute independence necessarily lead to lack of insight, or is this a convenient argument for circumvention of the true independence formality? This debate was highlighted by Bryson J in *Wormald's* case discussed below.

WRITTEN INSTRUCTION

One of the recent additions to Release 102 has been the requirement of written instructions to the expert which must set out the proposal to be assessed. Further, those instructions should recognise the expert's right to refuse to report at all, or to include an opinion in the report, if the expert has been refused access to company records, to the extent an auditor would have received. The fee for the report should also be included, payable irrespective of the success or failure of the takeover. Adoption of this initial retainer formality is aimed, no doubt, at stimulating responsible thinking by those involved in the selection of experts as well as those providing expertise, setting out fundamental ground rules with a view to achieving cooperation without collaboration.

SPECIALIST ASSISTANCE

Release 102 acknowledges an expert may require the assistance of a specialist, and para.16 provides the specialist report shall not of itself be an expert report. The expert must be satisfied as to the credentials and independence of the specialist.

Independence in the Resource Sector — Release 149

NCSC Release 149 devoted to Expert Reports on Mining and Petroleum Securities and other Assets released on 1 March 1990 also refers specifically to the independence of experts. It states that 'the purpose of an expert report is to provide an articulate plain spoken view which is fully independent as well as expert in order to assist investors in their investment decisions'.

Release 149 cross references to Releases 102 and 351 in its independence guidance, and notes a number of additional qualifications specific to the resource sector. These are that the expert should:

(a) have no direct or indirect contingent material interest in a mining asset under review; and
(b) disclose:
  (i) any current interest howsoever arising in the asset under review,
  (ii) any past direct or indirect material interest in or involvement pertaining to the mining asset, and
  (iii) any past or present material interest direct or indirect in any other mining asset adjoining or related to the property or lease under examination in the report.

It further provides, in para. 19, that written instructions should be obtained setting out the proposal to be assessed, respect the expert's independence, recognise the expert's right to refuse to report or to express an opinion unless access to company records is of the same status as its auditor would have, and the fee which is in no way to be contingent upon the success or failure of the takeover. It is interesting to enquire why the word 'takeover' has been expressly used. The introductory paragraphs of Release 149 specifically refer to the Release relating to the several contexts of expert reports. Presumably this is an oversight. Release 149 provides a detailed assessment of expert reports generally, as they relate to securities activity in the resource sector. This is discussed in detail below.

Case Law Development

There have been few cases dealing with expert independence but, from those, some sound principles have been laid down.

(a) Hillhouse v. Gold

In *Hillhouse v. Gold Copper Explorations NL [No. 2]*[20] the issue of independence was discussed in detail, as the expert commissioned to

20 (1987) 13 ACLR 208.

write a report for Rule 3J(3)(b) was closely linked to the commissioner of the report.

The facts must be briefly outlined to appreciate the links. The plaintiffs were shareholders in the first defendant (company). The other defendants were directors of the company. By letter dated 24 November 1987, the directors of the company advised shareholders of a proposed acquisition of shares in Augold NL (Augold). The consideration was proposed to be $16 million in cash to be paid to Yaramin Pty Ltd (Yaramin) and the issue of 25 million fully paid shares in the company to Yaramin. Yaramin was controlled by a Mr Reinhardt who was also chairman of the company. The evidence of shareholding in the company indicated that Yaramin also had de facto control of the company with 29.2 per cent. of the capital. Yaramin also held 51.8 per cent. of the issued capital of Augold.

The expert report required pursuant to Rule 3J(3)(b) of the ASX Listing Rules was prepared by a firm of chartered accountants. The problem was that the accountants also acted as accountants for Yaramin (a party to the transaction), as tax agent for Mr Reinhardt, as accountants for a group of companies controlled by Mr Reinhardt and as auditors to companies in the group.

The Court considered the links between the expert and the parties to the transaction. Dowsett J commenced his appraisal of the link by stating:

> Although I would not be concerned by the fact that the firm might act as auditors, auditors themselves being required to be independent in their relationship with the companies in which they are auditors, nonetheless, it does seem to me to, prima facie, undermine the position of the firm as an independent expert when partners in the firm act as accountants and tax advisers to Yaramin, Reinhardt and another company owned by Reinhardt. There cannot be any escaping the view that Yaramin has a distinct interest in the transaction, as does Reinhardt, and the status of Douglas, Heck and Burrell as advisers, in one way or another, to the Reinhardt interests would seem to me to be the basis for a serious challenge to the position of independence required by Rule 3J(3)(b).[21]

It was argued by the expert that the relevant accounts were not handled by the same partners who prepared the report. This argument was discounted by Dowsett J, who concluded:

> It would be inconsistent with the whole function of a partnership to suggest that the requirements of independence could be satisfied by different partners assuming responsibilities. This would be akin to the argument sometimes advanced by solicitors that to have one partner acting on one side of a conveyance and another on the other side creates sufficient independence, although the courts have often indicated that this is not so.[22]

The implications of this statement are hardly surprising to members of the legal profession, conscious as they are of conflicts of interest. Arguably, this principled opposition to 'chinese walls' extends to all professions operating as partnerships and there can be no objection to the principle extending to incorporated experts if substantive consistency is to be maintained, and justice is to be seen as done.

21 Ibid. 211.
22 Ibid.

(b) Pivot's Case

The case of *Phosphate Co-operative Company of Australia Ltd v. Shears* (Pivot's case)[23] dealt with a scheme of arrangement pursuant to s.315 of the Companies Code and an associated reduction of capital under s.123.

In this case, an independent expert's report was required for the valuation of shares. The problem hinged on the fact that prior to the engagement of the expert, meetings were held between the interested parties including the expert. The discussions at the meetings centred on the valuation approach and preparation of the expert report.

Brooking J found that —

> [T]he danger is that through his [the expert] being privy to this kind of thing, he may come to be regarded and to regard himself as *part of a 'team'*. Moreover, it is undesirable that the prospective independent expert should disclose to its prospective employer its *probable general approach* in evaluating the scheme.[24]

The expert in this case submitted a final report (after many drafts were reviewed by the commissioner of the report) to the shareholders for their consideration. Brooking J in deprecating this approach, remarked:

> It is one thing to submit to a client or third person acting on behalf of a client a draft of a report which reviews the facts. This may well be perfectly proper and perfectly safe and, indeed, desirable, but to submit a draft of argumentative matter or of reasoning is, I think, asking for trouble.[25]

and further,

> It is impossible to lay down specific rules dealing with communications between the expert, on the one hand, and the company and those representing it on the other: everything depends on the circumstances. The guiding principle must be that care should be taken to *avoid any communication which may undermine, or appear to undermine, the independence of the expert.* What appeared here was quite unsatisfactory.'[26]

(c) *Wormald's Case*

The case of *ANZ Nominees Pty Ltd v. Wormald International*[27] dealt with the circumstance where an expert report prepared pursuant to ASX Listing Rule 3J(3) was challenged by a shareholder on the grounds that the expert had been pressured by various companies referred to in the report and that a consequential rewritten report submitted to shareholders was improper.

As Bryson J said—

> Consideration whether an expert is independent is not always susceptible of an answer in absolute and unqualified terms.[28]

This statement was qualified by a prior comment as follows:

> In appraising whether [the shareholders] would treat an expert's report as an independent report, and in considering the weight that they would be prepared to give to it, it would, in

23 [1989] VR 665.
24 Ibid. 680 (emphasis added).
25 Ibid. 681.
26 Ibid. 683 (emphasis added).
27 (1988) 6 ACLC 780.
28 Ibid. 787

> my view, be quite necessary that shareholders should have the opportunity to see that there had been such revision and information material to the report had been withheld from them; that is to say, they should be told so by the expert or by the directors.[29]

Bryson J stressed that where the independence of a report is impeached, this must be disclosed to the shareholders so that they may assess for themselves the value of the report in light of the intervening circumstance.

It is interesting to note Bryson J's comments on the practical exegesis of commercial dealings and associations developed in business. Bryson J used the example of a merchant banker (who would quite likely have associations with many persons in commerce) and reflected that 'an entirely pure absence of any association with parties to the transactions of a large public company is probably too much to hope for or insist on.'[30]

He proceeded to assess what he perceived to be the quality of independence as being the disclosure to shareholders of the facts of any association between the expert and the parties which could reasonably be regarded as relevant to the expert's independence. In his opinion:

> They would then be in a position to decide for themselves whether they wanted to insist on there being no omissions if they were to act on the report, or whether they were prepared to act on the report notwithstanding that the material omitted was not made available to them.[31]

Bryson J concluded that the shareholders should have been informed of the nature of the omission. Notably, notwithstanding the disclosure requirements, the expert report was in itself not to be negatived but the surrounding material should have been revealed; hence, the introductory remarks to this paper. The expert report or opinion must be tempered against the circumstances where an expert is linked to parties by prior association, albeit professional, but is not precluded from acting as an expert. Once prospective readers are given the background information, they may decide for themselves the inherent value of the expert report.

The present attitude of the courts seeks to ensure experts do not form part of a team of any party to a transaction or proposed transaction and that the report is not subjected to scrutiny by the commissioner of the report, during its preparation. There is realistic recognition that an expert may know persons related to the matters to be commented upon, but there is a fine line between a working knowledge of parties and a knowledge of the workings of the parties.

THE REPORT

Commissioning the Report

NCSC Release 351 deals specifically with commissioning an expert report. It notes that there is no particular way to commission a report owing to the peculiarities of circumstance, but the NCSC 'believes it is

29 Ibid.
30 Ibid. 787–788.
31 Ibid. 788.

desirable to provide . . . guidelines which are based on the judgements in the Wormald and Pivot cases'.[32]

WHAT TO AVOID

Release 351 commences with an appraisal of what should be avoided when commissioning a report in order to minimise the risk of tainting the objectivity of the report. Where an expert must comment on the fairness of a proposal, the expert should not be perceived as an advocate for the adoption or rejection of that proposal or being involved in the formation of a transaction. Circumstances where this may arise are noted in Release 351; they are where —

(a) the expert is commissioned to report before the proposal has been finalised;
(b) the expert is present at discussions on the development of the proposal;
(c) instructions evaluate relevant facts as to report formulation or indicate evaluation technique;
(d) other experts have disclosed their likely approach to evaluating the proposal before being discarded; and
(e) the expert commences writing the report prior to the proposal being finalised;

The NCSC indicates that the greatest risk is occasioned by situations (b) and (c), a point which is reinforced by the facts of both the *Pivot* and *Wormald* cases.

Certainly any instance where an expert is involved in the formative aspect of a deal or transaction would affect his objectivity. The difficulty, as was apparent in *Wormald's* case is the reality of business links. Whilst a retained expert may not be personally present at discussions in situation (b), would an awareness of those negotiations infer the same result?

Paragraph 9 of Release 351 also dissuades from the use of the practice of 'shopping around' for an expert opinion to obtain the type of report preferred by the commissioning party.

FEES

Paragraph 10 of Release 351 states that —

> it will usually be appropriate for the commissioning party and a prospective expert to discuss non-substantive matters such as the expert's fee.

In para.15 of Release 102, it is noted that a fee must not be contingent upon the success or failure of a takeover. Paragraph 36 refers to s.23(1A)(c) of the Takeovers Code which provides that any fee and benefit must be disclosed:

> An actual amount must be shown in *each* case. It is not sufficient for the expert to state that the fee is on the basis of normal rates. If an estimate is used, it should be indicated that it is an estimate.[33]

The issue of fee disclosure is a key factor in testing the independence of an expert. The concept of contingency fees must not be allowed

32 NCSC Release 351, para. 6.
33 Ibid. para. 36.

to affect the remuneration of experts as reports could reflect the underlying requirements of the commissioning party to ensure appropriate recompense.

Report Preparation

Report preparation can be separated into two distinct areas — content and sources.

CONTENT

An expert is required to assess the merits of a proposal or provide an expert opinion independently of the parties.[34]

The content of the report will naturally vary in relation to the facts and the requirements. Paragraph 19 of Release 351 notes that,

> [A]n expert should take the utmost care to ensure that not only all professional standards are observed in assessing a proposal, but that the contents of the report are accurate and its conclusions are as certain as possible.

The critical element of the content of a report is its accuracy, which embraces the standard requirements for the type of report commissioned. The accuracy of a report is the foundation of its reliability.

Accuracy

Paragraphs 20 and 21 seek to reinforce the accuracy of an expert report by prohibiting reliance on assumed elements. Although assumptions of the veracity of individual facts may be made, a report should not be prepared on the basis of undetermined essential elements. Further, a report should not be qualified on the basis of a range of possible outcomes which would not enable a person relying on a report to make a decision, 'with a reasonable degree of certainty as to the outcome in relation to the structure of the proposal'.[35]

In the case of *Hillhouse v. Gold Copper Explorations NL* [No. 2],[36] difficulties arose in respect of a valuation report for the purposes of Rule 3J(3)(b). The report by the accountants on the purchase price of the shares was based on cash flow projections of the company and other information provided by the defendant directors. The Court considered the report and the information as to cash flow.

Particular clauses of the report were cited in the judgment. Although unnecessary to be reproduced here, it is notable that the wording of the report drew specific comment.

On this point, Dowsett J said:

> I have difficulty in coming to the conclusion that the report can be accurately described as a report, valuation or other material sufficient to establish that the price is fair. It seems to me to be more a series of assertions that the directors have made assumptions and provided cash flows that seem to suggest that the acquisition can be financed.[37]

34 Ibid. para. 12.
35 Ibid. paras 20 and 21.
36 (1987) 13 ACLR 208.
37 Ibid. 213.

Although Dowsett J was reticent in drawing a conclusion as to validity of the report, he did say

> . . . I will simply say there seems to me to be a serious question to be tried as to whether or not there is indeed any evidence of fair value in this report.[38]

Another view was advanced in the case of *Residues Treatment and Trading Company Ltd v. Southern Resources Limited*[39] where it was held that a 3J(3) report need not include all information subject, however, to the overriding requirement that it be sufficiently clear as to how the opinion was reached.

The report must, therefore, not be qualified in such a way that the reader is unable to make a decision upon the opinion expressed in it.

Basic Inclusions

Release 102 lists matters to be considered in an expert report for ss.23A and 43 of the Takeovers Code:

— Value of consideration if other than cash;
— Valuation or other assessment criteria;
— Where market value is used, the movement in price and turnover during an appropriate period of time with significant events noted;
— Application of earnings or cash flow capitalisation multiples appropriate for the business or industries in which the target company or its profit centres are engaged, to the estimated future maintainable earnings or cash flows of that company added to the estimated realisable value of any surplus assets on the basis that a controlling shareholder would seek to maximise the value of its investment;
— Application of the discounted cash flow method;
— The amount which an alternative acquirer might be willing to offer if all the securities in the target company were available for purchase; or
— The amount that would be distributed to shareholders on an orderly realisation of assets.[40]

It appears an expert should justify valuation methods so as to enable another expert to replicate the procedure used and thereby assess the valuation. Where appropriate the expert should compare figures derived by alternative methods and comment on any differences.

Content of Resource Sector Reports

Paragraphs 26, 27 and 28 of Release 102 discuss particular valuations and cross reference to Releases 135 and 149 in relation to valuation of intangibles and valuations of mineral, oil and gas tenements respectively.

38 Ibid.
39 (1988) 147 Law Society of S.A. Judgment Scheme 310.
40 NCSC Release 102, para. 24.

Release 149 provides a general overview additional to the requirements as to content of particular expert reports in the Resource Sector.

Paragraph 33 of Release 149 commences —

> The report should commence with a key data summary, as concise as possible and preferably of no more than two pages, which sets out the important assumptions used and conclusions drawn by the expert. The summary should be designed and laid out to be easily comprehended by investors and should include no information that is not in the body of the report. The use of tables, charts and other 'graphics' may enhance the utility of the report to investors.

Technical Detail

Release 149 then continues with an assessment of content requirements of a technical nature. It provides, in para. 37 for example, that in the context of mineral assessments, an expert must consider mineral and petroleum occurrences on adjoining or nearby properties. An expert should disclose and explain the implications of absence of mineralisation on adjoining properties, 'where such disclosure is material to an objective evaluation'.

Details are required of properties and leases, and relevant characteristics such as access, previous exploration, source of essential components of production, description of improvements, details of costs of acquisitions, reclamation or clean up costs and 'any other matters relevant to an informed evaluation of the property or lease or proposal which is the subject of the expert report'.[41]

Clearly, disclosure of methodology is important. In *Eddy v. W.R. Carpenter Holdings*,[42] a valuation of mining leases which was out of date was nevertheless held to be valid as it had been adjusted to reflect the current situation without revaluation. As Rowland J said:

> The particular valuations relied upon were made in 1984 and they may well be out of date and it may well be that the adjustments to reflect current exchange rates may not always be an appropriate method of valuing such assets, particularly mining interests. Nonetheless, there is no hard evidence to challenge the correctness of the resultant valuations and I can find nothing intrinsically wrong with the method or the result.[43]

One further feature highlighted by Release 149 is the history of a mining asset. Paragraph 40 requires that, 'where production has ceased, this should be stated together with reasons for the cessation'. The evidentiary problem encountered in this regard is obvious. The expert must have recourse to the historical corporate records, invariably of another company, and such records may be difficult to access in all circumstances.

Finance

Paragraph 42 of Release 149 requires enquiry of the expected or proposed program and level of assessment needed for full production, and

41 NCSC Release 149, para. 39.
42 *Eddy v. W.R. Carpenter Holdings Ltd* (1985) 10 ACLR 316.
43 Ibid. 319.

the validity of the proposal in this regard. Timing and rates of recovery on investment should also be addressed.

Clearly, when dealing with such projections, one often enters an arena of esoteric reasoning.

Accordingly, provision has been made that 'in circumstances where it is inappropriate or impossible to provide this information the expert should clearly disclose this and the reasons for non-disclosure in the report.'[44]

Highly speculative ventures are expressly commented upon in paras. 71 to 74. The expert must stress where possible that there may be no technical basis for valuation and 'specifically state that he or she cannot arrive at an assessment of value . . . and give reasons'[45] if appropriate.

SOURCES

Paragraphs 29 to 35 of Release 102 detail an expert's obligation to disclose the basis of assessment, material and sources relied upon as reasonably necessary for the purposes of the report. If material is so commercially sensitive that disclosure would be irresponsible the expert should note that sensitive material has been withheld from publication in the report. The nature of the information should be explained in a report to the NCSC if so requested.

Independent Opinion

Paragraph 32 of Release 102 notes that the function of the expert for the purposes of the Takeovers Code is to provide an assessment independent of the board of the target company. In accepting a retainer to provide such a report, the expert undertakes a duty to shareholders to decide for himself in the light of the purposes for which the report is required how far it is reasonable for him to base his appraisal on the information provided to him by the board of the target company.

Paragraph 33 provides that the expert's responsibility will not be considered to be discharged if the expert has not provided an evaluation of the kind contemplated by the legislation. The expert must be seen to evaluate information provided to him and objectively question, enquire and analyse the information in order to make statements in the report.

Paragraph 35 of Release 102 requires that directors valuations and management accounts must be reviewed by the expert. An expert will ordinarily be entitled to take at face value valuations provided by outside experts, audited accounts, the accounting records of the company and the arithmetic of management accounts.

As noted earlier, where an expert uses the services of a specialist to provide specialised advice on a particular aspect of a proposal, the expert must be satisfied of the status of the specialist.

LIABILITY OF EXPERTS

Experts may be liable at common law or pursuant to legislation for statements or omissions in an expert report.

44 NCSC Release 149, para. 42.
45 Ibid. para. 18.

Statutory Liability

Each of the Codes discussed in this paper imposes penalties for misleading statements in or omissions from an expert report.

TAKEOVERS CODE

Section 44 of the Takeovers Code imposes civil and criminal liability for false or misleading material or omissions in expert reports. The intent of this section may be likened to ss.52 and 53 of the Trade Practices Act ('TPA') in that it protects the rights of shareholder interests just as the Trade Practices Act protects the right of consumers. A complainant may elect to apply under the TPA or the Takeovers Code in relation to a false or misleading statement.[46]

Application of Section 44

Section 44(4) provides, where —

(a) there is —
  (i) in a report that is set out in a Part B Statement in accordance with paragraph 22(3)(a) or accompanies Part B Statement in accordance with Section 23;
  (ii) in a report that is set out in a Part D Statement in accordance with paragraph 32(3)(a);
  (iii) in a report that accompanies, or is included in, a statement issued with the consent of the Commission under section 37 or 38; or
  (iv) in a report that accompanies a notice given under sub-section 43(4)
  matter that is false in a material particular or materially misleading in the form or context in which it appears; or
(b) there is an omission of material matter from such a report, the person who made the report and, if that person is a corporation, any officer of the corporation who is in default are, subject to this section, each guilty of an offence.

Section 44(20) provides:

The penalty for an offence arising under this section is a fine not exceeding $5,000 or imprisonment for a period not exceeding one year, or both.

Section 44 applies to a statement which is false in a material particular or misleading in either the form or context in which it appears. Sections 44(1), (2) and (3) refer to matters that are false in material particulars and materially misleading in the form or context reported or if there is an omission of material matter. The difficulty with this section is the interpretation of 'materiality of a particular matter', and it is an issue which must be determined on the facts of each case.[47] The recent case of *ICAL Ltd v. County Natwest Securities Australia Ltd*[48] provides an example of modern judicial reasoning and determination of materiality and immateriality under the Takeovers Code specifically in relation to Part C Statements. In that case:

— it was a material omission to exclude reference to the fact that one facility to be provided to an offeror by a bank was subject to repay-

46 *Bell Resources Ltd v. BHP Co. Ltd* (1986) ATPR 40–702.

47 For a pertinent example of this issue in relation to the valuation of a gold mine, see *Carr Boyd Minerals Ltd v. Queen Margaret Gold Mines NL* (1987) ASLC para.76–184.

48 (1988) 13 ACLR 129.

ment in full by a date which was three days prior to expiry of the offer period;

— it was not a material omission to disclose the existence of a condition precedent which was withdrawn 10 days after service of a Part C Statement;

— it was not, on reading the Part C Statement, a material omission to leave out reference to,
  (a) the fact that a financier required security; and
  (b) details of the type of security;

— it was a material omission not to include detail of an announcement by a government minister which related to a company in which the target had a significant investment;

— it was a material omission not to include reference to a shareholders agreement that, inter alia, regulated the distribution of sub-contracting work to, inter alia, the offeror and the target company; and

— it was a material omission not to disclose that the offeror intended after the takeover to sell off a large part of the target's assets.

The case law interpretation as to what may amount to misleading statements made in the takeover context indicates that statements should be expressed in clear and unambiguous language so that the meaning is apparent even on a hasty reading. The test appears to be one of explanation in terms in which the average shareholder ought to be able to understand. It appears that the court perceives that some shareholders will not consider documentation in detail and perhaps with a degree of haste, whilst others will carefully examine the salient features of the document. It seems, therefore, minimal comprehension levels of the unsophisticated investor set the standard of content and expression of takeover information provided to security holders.

Clearly one of the problems with any discussion of presentation of information to shareholders is the fact that one is contemplating an illusory 'interested' shareholder. One may certainly pose the question whether shareholders really take notice of the information with which they are furnished, and if they do, whether they are really able to understand and appreciate the contents? Do we presume that shareholders, in listed companies at least, have such a level of interest in the activities of the company?

While the courts recognise shareholders will often consider materials in haste, the problem is often that corporate manoeuvres are comprehended only by those who engineer them, and the information requirements take time and can often serve to stifle and impede those manoeuvres. The benefit, however, in ensuring that information is provided to shareholders and that expert reports assessing the fairness and reasonableness of a particular transaction are disseminated is the reality that such requirements serve to slow down the pace of particular transactions which in itself offers a check and balance to the process. There are many examples of oversight and inadequate analysis which could have been avoided if a little more time were available to professional advisers during the process, as no two transactions are identical, and the exercise of

experience, skill and judgment continues to outweigh methods often considered routine by the professional's clients and even the regulators.

COMPANIES CODE 1981

Section 564 of the Companies Code is the penalty provision in respect of false or misleading statements. Section 563(2) provides:

> A person who, in a document required by or for the purposes of this Code or lodged with or submitted to the Commission, makes or authorises the making of a statement that to his knowledge is false or misleading in a material particular, or omits or authorises the omission of any matter or thing without which the document is to his knowledge misleading in a material respect, is guilty of an offence. Penalty: $10,000 or imprisonment for 2 years, or both.

While there is little case law on this area, it is evident that an omission of any matter or thing from a report which may lead to the report being misleading in a material respect, could result in an infringement of this section.

Prospectuses

Section 107 provides for civil liability for untrue statements or non-disclosure in prospectuses. Section 107(2) imposes liability on the expert to pay compensation for loss or damage by those who subscribe on the faith of the prospectus in respect of —

(a) an untrue statement in the prospectus purporting to be made by him as an expert; and

(b) a non-disclosure in the prospectus of any material matter for which he is responsible in his capacity or purported capacity as an expert.

An expert may rely upon the defences in s.107(7) which are that the expert withdrew consent for the company to use the report, or that he was competent to make the statement and had reasonable grounds to believe that the statement was true.

Section 108 provides for criminal liability for an untrue statement or non-disclosure in a prospectus. An expert who authorises a report which contains an untrue statement or non-disclosure is guilty of an offence unless he proves that the statement or non-disclosure was immaterial, he had reasonable grounds for that belief or a non-disclosure was inadvertent. If convicted, the expert may face a $20,000 fine and/or imprisonment for five years.

AUSTRALIAN STOCK EXCHANGE LISTING RULES

The foreword to the ASX Listing Rules provides,

> The main board listing rules that follow are additional and complementary to companies' common law and statutory obligations. The rules impose strict requirements on companies which, if not complied with, render them liable to removal from the official list and the securities to lose official quotation.
>
> As such the listing rules are the strongest elements in the regulation of listed companies in Australia and have received judicial and legislative recognition . . .
>
> The Exchange in its absolute discretion (without qualification whatsoever) may accept or reject any application for admission to the official list and has absolute discretion in administering the listing rules and in so doing looks to companies to comply

> with the spirit as well as the letter of those listing rules. The Exchange may at any time and from time to time in its absolute discretion waive compliance by a company with any rule or part of a rule contained in these listing rules. The grant of any waiver to these listing rules will be advised by the Home Exchange of the company to the Corporate Affairs Commission in the State of the Home Exchange.

Section 4(1) of the Securities Industry Code defines 'listing rules' in relation to a stock exchange as those laws governing or relating to—

> (a) the admission to, or removal from, the official list of the Stock Exchange of bodies corporate, governments, unincorporated bodies or other persons for the purposes of the quotation of those securities by the Stock Exchange and for other purposes;
> (b) the activities or conduct of bodies corporate, government, unincorporated bodies and other persons who are admitted to that list.

In *Kwikasair Industries Ltd v. Sydney Stock Exchange Ltd*[49] the shares of Kwikasair Industries were suspended on the basis that the spirit of the rules of the Stock Exchange were not upheld. The Court found:

> A stock exchange is not only entitled but is bound to be vitally concerned with the maintaining of a fair market for the buying and selling of securities ... paramount and predominant amongst all [of its] objects is to promote and protect the interests of all members of the public having dealings on the Sydney Stock Exchange or with members of the Sydney Stock Exchange Limited ...
>
> The powers of the Committee [Stock Exchange Committee] in this regard are arbitrary: they are intended to be exercised summarily and fearlessly in protecting the public interest.[50]

The Securities Industry Code gives legislative effect to the listing rules in s.42 entitled, 'Power of Court to order observance or enforcement of business rules or listing rules of stock exchange'.[51]

Common Law Liability

Experts are liable in respect of false or misleading statements which could amount to defective advice under the general principles of negligence and contract law.

NEGLIGENCE

The case of *L. Shaddock & Associates Pty Ltd v. Council of the City of Parramatta*[52] is considered to be the current leading Australian decision on the subject of negligent misstatement. Derived from the tradition of negligence cases, it concludes that where a professional adviser should realise that he is called upon for information or advice and it is

49 (1968) CCH Securities Law Reporter 30, 701.
50 Ibid.
51 s. 42(1) provides:

> Where any person is under an obligation to comply with, observe, enforce or give effect to the business rules or listing rules of a securities exchange fails to comply with, observe, enforce or give effect to any to those business rules or listing rules, as the case may be, the Court may, on the application of the Commission, the securities exchange or a person aggrieved by the failure and after giving to the person against whom the order is sought an opportunity of being heard, make an order giving directions to the last-mentioned person concerning the compliance with, observance or enforcement of, or the giving effect to, those business rules or listing rules.

52 (1981) 150 CLR 225.

reasonable for another person to rely on that information or advice a duty of care has arisen and liability ensues.[53] Gibbs CJ said:

> It would appear to accord with general principle that a person should be under no duty to take reasonable care that advice or information which he gives to another is correct, unless he knows, or ought to know, that that other relies on him to take such reasonable care and may act in reliance on the advice or information which he is given, and unless it would be reasonable for that other person to so rely and act. It would not be reasonable to act in reliance on advice or information given casually on some social or informal occasion or, generally speaking, *unless* the advice or information concerned 'a business or professional transaction whose nature makes clear the gravity of the enquiry and the importance and influence attached to the answer' . . . Equally it would not be reasonable to rely upon advice or information given by another unless the person giving it either had some special skill which he undertook to apply for the assistance of another or was so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful enquiry. Further a person should not be liable for advice or information if he had effectually disclaimed any responsibility for it.[54]

He added:

> . . . I find it difficult to see why in principle the duty [of care] should be limited to persons whose business or profession includes giving the sort of advice or information sought and to persons claiming to have the same skill and competence as those carrying on such a business or profession, and why it should not extend to persons who, on a serious occasion, give considered advice or information concerning a business or professional transaction.[55]

Duty of Care

Where experts are retained to report and express expert professional opinion on a particular matter, they must be aware that a broad range of people will read the report and adopt a course of action on the basis of the opinion provided in the report. Accordingly, the range of persons who may attempt to bring an action against an expert where the expert opinion was negligently made is very broad and extends from existing shareholders to potential investors in a company.

Consequently if one takes for example, s.23 of the Takeovers Code, the duty of care in assessing whether an offer was fair and reasonable would extend not only to the target company (a direct contractual relationship as well as negligence principles) but would also extend to the individual target company shareholders.

Standard of Care

In the case of *Lloyd v. Citicorp Australia Ltd*,[56] Rogers J stated, in relation to the standard of care required from a foreign exchange adviser,

> It may be that the nature and extent of the advice required from a foreign currency exchange advisor will vary with the known commercial experience of the client. It seems

53 For comprehensive treatments of the ambit of the professional liability of experts, see M. Sharwood, 'Civil, Criminal and Professional Liability of Experts' Unpublished paper prepared for Australasian Institute of Mining and Metallurgy and presented at MINVAL 1989 and also G.E. Hart, 'The Deterrent Effect of Civil Liability in Investor Protection' (1987) 5 *Companies and Securities Law Journal* 162.

54 (1981) 150 CLR 225, 231.

55 Ibid. 234.

56 (1986) 11 NSWLR 286.

> to me likely that the advice to be given to the treasurer of the multi-national incorporation in relation to dealing in foreign currencies will be minimal compared to that required to be given to a farmer in western New South Wales who, to the knowledge of the advisor, is entering the foreign exchange market for the first time.[57]

Accordingly, although an expert may be commissioned by the directors of a company to comment on the fairness and reasonableness of a transaction, for example, the report is fundamentally written for and aimed at the shareholder whose intimate knowledge of commercial matters is likely to be of a lesser standard than that of a director.

As Denning LJ observed in the case of *Greaves & Co (Contractors) Ltd v. Baynham Meikle and Partners:*

> It seems to me that in the ordinary employment of a professional man, whether it is a medical man, a lawyer or an accountant, an architect or engineer, his duty is to use reasonable care and skill in the course of his employment.[58]

CONTRACT

The principle of contractual liability for misstatements or omissions that lead to loss or damage is limited to the parties to the contract. Privity will serve to exclude those parties not directly involved in the contract of engagement of an expert.

It must be remembered, however, that responsibility in negligence often arises at the same time as liability in contract, and out of the same circumstances giving rise to complaint.

Disclaimer

Releases 102 and 149 expressly provide—

> 40. The statutory liability of an expert cannot be affected by a disclaimer included in the report (ie a statement to the effect that the expert will not be liable to a reader for loss or damage incurred by reliance on the report), and the Commission would consider it misleading for an expert to purport, by the use of a disclaimer, to exclude his statutory liabilities.
> 41. By purporting to exclude liability, the report would fail to comply with the statutory requirements, the whole point of which is to give shareholders an assessment on which they can rely. An expert who is unable to give a definite answer to the question upon which he is required to report should decline to provide any report at all, rather than provide a facade of a report, which states that it is not to be relied upon for the very purpose for which it was called into being.

It is, therefore, established that statutory liability of an expert may not be disclaimed. Consequently, attention centres upon the ability to disclaim common law liability.[59]

Disclaiming responsibility for negligence is a difficult task and ultimately depends upon the extent of the responsibility assumed.[60] The courts are reluctant to interpret such clauses broadly[61] and unless drawn

57 Ibid. 288.
58 [1975] 3 All ER 99, 104–105.
59 NCSC Release 351, paras 20 and 21.
60 Sharwood, op. cit. 13.
61 *BT Australia Ltd v. Raine & Horne Pty Ltd* (1983) 3 NSWLR 221 where a disclaimer to exclude liability was rejected where the expert knew that the reader (with whom he had contracted) was relying on its skill and judgment.

to the specific attention of the person being advised, such clauses may be of little effect.

A particular difficulty faced by experts arises where they are forced to rely upon others for information, which may include for example, directors of the company.

If an expert has relied on information from others, this should be so reported, and preferably not presented as if the expert had obtained it himself.

The circumstance where a disclaimer is allowed is where the expert disclaims responsibility for matters outside the scope of his retainer and his report.[62] The curious will ask if a matter is beyond the expert's retainer and report, why would the expert seek to comment upon that matter at all? Reporting experts should avoid superfluous information and describe background information as being outside the scope of their retainer and report if they regard its inclusion warranted to trace historical context.

It seems that notwithstanding the importance of disclaimers, one salient fact remains. That is, if an expert prepares a report and seeks to include a broad disclaimer, he must be prepared to face market forces if he seeks to rely on the disclaimer for defective work practices. Professional credibility remains an important element in the business of expert reporting and one which must not be overlooked. A reputation for disclaiming responsibility for a badly prepared report as opposed to disclaiming the input of a third party or indicating one's lack of expertise, would be damaging to the reputation and credibility of an expert.[63] Of course, where the potential exists to rely upon a disclaimer in the case of large damages liability, reputations may be rebuilt under a new corporate name and image, but with attendant professional and financial cost.

CONCLUSION

Expert reports are required in the commercial setting to provide objective assessments of transactions. They serve to conclude whether an offer is fair or to determine the value of an asset, which enables a layman to make an informed decision. The inherent difficulty remaining is that of ensuring the independence of the expert and maintaining similar standards and forms of reporting across and within industry sectors. Whether experts remain able to comply with the requirements set down in the legislation and guidelines covered in this paper is a matter of concern, for, *expertus opinio*, or speculation from one who has tried, is necessarily founded upon the elements of trust and disclosure. Self regulation of professionals who operate as experts is intrinsic to trust. Indeed, this is a characteristic which cannot ultimately be directed, for it must form part of the professional's business ethic. The disclosure requirement of an

62 NCSC Release 102, para. 43.

63 This is reinforced by the self-regulation of the investment, securities and resources industries. Bodies such as the Australasian Institute of Mining and Metallurgy provides in this Code of Ethics, a requirement to abide by rules of conduct. Other bodies are the Australian Society of Accountants, the Australian Institute of Geoscientists and the Australian Institute of Valuers.

expert's relationship with parties remains the substantive means of testing the independence of the expert.

A value judgment, therefore, must be made when reading an expert's report. If there is a relationship, the view of the expert must be tempered against that nexus. While it would be impractical for total impartiality given the links that form in the business world, the circumstance of the expert must not be overlooked, although one cannot avoid wondering if the significance of disclosed relationships is readily appreciated by the average lay person recipient of expert reports, in the absence of any regulatory requirement for bold print or a mandatory statement designed to draw the attention of the recipient to the relationship.