



29 May 2012

International Valuation Standards Council
41 Moorgate
London EC2R6PP
UNITED KINGDOM

By email: CommentLetters@ivsc.org

Dear Sir/Madam,

Comments on Exposure Draft– Procedural Guidelines for Fairness Opinions

Thank you for the opportunity for The Institute of Chartered Accountants in Australia (“The Institute”) to provide comments on the International Valuation Standards Council (“IVSC”) exposure draft: Procedural Guidelines for Fairness Opinions.

Overall, The Institute supports the evolution of the competencies, practice standards and professionalism within the valuation profession as contemplated by this exposure draft. Detailed comments on the exposure draft are set out in the Appendix to this letter. These were prepared by the Institute’s Business Valuation Special Interest Group (“BVSIG”), a special interest group whose members are most affected by the exposure draft.

The Institute, established by Royal Charter in 1928, is the professional body for chartered accountants in Australia and members operating throughout the world.

Representing more than 70,000 professionals and business leaders, The Institute has a pivotal role in upholding financial integrity in society. Members strive to uphold the profession’s commitment to ethics and quality in everything they do, alongside an unwavering dedication to act in the public interest.

Chartered Accountants hold diverse positions across the business community, as well as in professional services, government, not-for-profit, education and academia. The leadership and business acumen of members underpin the Institute’s deep knowledge base in a broad range of policy areas impacting the Australian economy and domestic and international capital markets.

The Institute is a founding member of the Global Accounting Alliance (GAA), which is an international coalition of accounting bodies and an 800,000-strong network of professionals and leaders worldwide.

In July 2005 the Institute established the Business Valuation Special Interest Group (BVSIG) for the benefit of the Institute, members and stakeholders, including regulators and the community. The BVSIG currently has over 1000 members working in the field of business valuation. The key aim of this group is to provide standards in the area of business valuations. The BVSIG is represented in most states and nationally.

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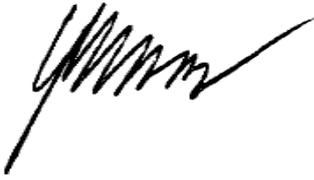
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Should you have any questions in relation to the matters discussed in the attached document, please contact Richard Stewart, Chair, BVSIG on +61 2 8266 8839 or at richard.j.stewart@au.pwc.com.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Yasser El-Ansary', with a long horizontal stroke extending to the right.

Yasser El-Ansary
General Manager – Leadership & Quality
The Institute of Chartered Accountants in Australia

OVERALL OBSERVATIONS

The exposure draft (ED) provides a useful summary of the issues that need to be considered by a fairness opinion (FO) provider when accepting an engagement to provide a FO and undertaking the work related to the provision of a FO. However, Australia, relative to a number of other geographic jurisdictions has what we would regard as an advanced regulatory (and experienced practitioner) environment for the provision of FOs.

In Australia, FOs are encompassed within what are widely known in the market as Independent Expert Reports (IERs). IERs are governed by the Corporations Act and Australian Securities and Investments Commission (ASIC) Regulatory Guides (the RGs) (in particular Regulatory Guide 111 (RG111) in relation to the content of IERs, and Regulatory Guide 112 (RG112) independence of experts, found at www.asic.gov.au). IERs provide an opinion as to whether:

- A proposed transaction is 'fair and reasonable' (it should be noted that in such circumstances, the opinion can be 'fair and reasonable', 'not fair but reasonable' and 'neither fair nor reasonable')
- A proposed transaction is in 'the best interests of the members of the company'
- The proposed terms in the buy-out or acquisition notice give a 'fair value' for the securities

RG 111 provides extensive guidance in relation to the content of IERs and the work that an expert would be expected to undertake in formulating his/her view on the proposed transaction.

RG 112 provides extensive guidance with respect to the independence of experts and maintaining independence through the course of the expert's work.

In some cases, IERs must be reviewed by ASIC prior to being released to the stakeholders. Some IERs must also be approved by the Courts prior to being released to the stakeholders.

Experts who prepare an IER are required to hold an Australian Financial Services Licence ("AFSL"). The AFSL, which is administered by ASIC, has additional obligations. Failure to comply with these obligations (including compliance with the RGs) could mean that the expert would be stripped of their AFSL. This would then mean that they would not be able to provide such services and penalties may be payable to ASIC.

We consider that the ED is sufficiently broadly drawn to encompass the significant variations that, almost inevitably, will exist between jurisdictions and across asset types. This is particularly important with respect to FOs and how the ED would be applied in the Australian context. However, we have made some comments below.

RESPONSE TO GENERAL QUESTIONS

1. **The Board recognises that, in many jurisdictions, laws or regulations exist that govern when a fairness opinion is required, who may provide the opinion and matters that the opinion has to address. As indicated in the preamble to the proposed Guidelines, they are intended for use where there are either no equivalent statutory requirements or to supplement statutory requirements where these are silent on matters addressed in the Guidelines. While some jurisdictions may have more prescriptive or additional requirements to those proposed in the Guidelines, the Board is interested in knowing if any of the proposals conflict or contradict national regulatory requirements.**

Do these Guidelines contradict any particular regulatory requirements in the jurisdiction within which you operate? If so please provide a brief description of the conflicting provision and a reference to the relevant law or regulation.



On the whole, the Guidelines do not appear to contradict the requirements within the Australian market. However, we would note:

- i) Introduction – the introduction refers to ‘all shareholders’. Whilst FOs can be considered to be relevant to a **group** of stakeholders, it could be the case that they apply to holders of other types of instruments (i.e. not always shares) or a particular sub-set of shareholders (holders of Class A shares)
- ii) paragraph 3 – the ED considers a FO to only deal with financial matters. However, it is typical in the Australian market for IERs to consider non-financial and/or commercial matters
- iii) paragraph 17 – under the RG112 (paragraph 112.27), setting up ethical walls would not always be viewed as a procedure that can manage or mitigate potential conflicts
- iv) paragraph 18 – under the RG112 (paragraph 112.27), disclosure of action taken to avoid or mitigate a potential threat to independence would not always be viewed as a procedure that can manage or mitigate potential conflicts
- v) paragraphs 23 and 24 – RG111 (paragraph 111.109) allows an expert to prominently explain the nature of the uncertainties and the impact on its opinion so that security holders can assess what weight to attach to the opinion if an expert decides that its report will assist security holders despite limitations that the expert cannot resolve.

2. **The Board considered whether a distinction should be made between a fairness opinion, contained in a comprehensive and detailed report delivered to the commissioning party (sometimes known as the “Board Book” or “Board Presentation”), and any abbreviated document that is publicly is closed. It is agreed that while it is common practice to prepare a summary of the conclusions reached by the opinion provider for publication or circulation to all stakeholders, a clear line does not exist between the different formats used for reporting, and they are part of the same service.**

Do you agree with this conclusion? If not, what distinction do you believe should be made in the Guidelines between the content of an opinion intended for the commissioning party and one intended for public disclosure?

We agree. However, we note that it, in Australia, while complex transactions may result in the expert producing an executive summary it is also common for the detailed report to be appended to the executive summary. This is because the RGs require the expert to publicly disclose all matters of relevance (notwithstanding that the RGs also require the expert to produce ‘clear, concise and effective communication’). Therefore, IERs can be quite extensive documents (in some cases more than 100 pages). Therefore, there is typically no distinction drawn between the document prepared for the commissioning party and the document intended for public disclosure (other than those distinctions drawn to manage independence of the expert).

3. **Paragraphs 3 and 4 of the ED describe what a fairness opinion is and also what it is not.**
- a) **Is this description consistent with fairness opinions delivered in those jurisdictions within which you operate?**
 - b) **Do you consider it helpful for users and in the wider public interest for the IVSC Guidelines to attempt to define the nature of a fairness opinion?**

- a) Yes, the description is consistent with FOs delivered in Australia. However, and for clarity, we would note the following:
 - i) Whilst IERs are addressed to the commissioning party, they are prepared for the benefit of a group of stakeholders
 - ii) As noted above, IERs also require consideration of non-financial factors and/or commercial factors.



b) No, we do not consider it helpful for users and in the wider public interest for the IVSC Guidelines to attempt to define the nature of a FO as each region will be governed by their own regulatory requirements regarding the definition of a FO. Attempting to define a FO uniformly across the world may contradict regulatory requirements in various regions.

4. **The Board has tentatively decided that the Guidelines should be confined to the process of establishing independence and objectivity, matters that should be addressed in determining the scope of work, the conditions applicable to the assignment and matters to be included in a typical fairness opinion. It considered that extending the guidance into matters that might indicate whether a proposed transaction was fair or not, e.g. the nature, extent and timing of a proposed transaction, would be impractical in an international context and could be interpreted as constraining a fairness opinion provider's judgement in certain cases.**

Do you agree with the Board's decision to exclude guidance on criteria to be considered in determining whether a proposed transaction can be determined Fair or not? If you disagree, please indicate the types of additional guidance that you believe could usefully be included.

Yes, we agree.

5. **The Board considers it vital that the provider of a fairness opinion is sufficiently independent to provide, and be seen to provide, an opinion that is objective and unbiased. These criteria apply to all valuation related services and the Code of Ethical Principles for Professional Valuers (the "Code") published by IVSC in 2011 includes discussion and guidance on how professional valuers can identify threats to their independence, and actions that may be undertaken to avoid or mitigate such threats. Paragraphs 10-18 of these Guidelines supplement the Code by providing some specific examples of threats to a fairness opinion provider's independence.**

Do you consider that the Guidelines, when read in conjunction with the code, adequately cover the threats to independence and objectivity that are likely to arise when considering whether an individual or firm should accept an appointment to provide a fairness opinion? If not please indicate either the additional threats that you believe should be identified or any threats that are identified in the draft that you believe should be modified or excluded.

Whilst we agree with the Board's principles, we consider the onus on independence for FO providers in the Australian market is greater given they have regard to the particulars of IERs as they apply to the Australian market than that required under the Code or the ED.

6. **IVS 101 Scope of Work lists matters that should be addressed in agreeing the scope and terms of any valuation assignment. These are applicable to valuation advice contained within a fairness opinion. Paragraphs 19-21 of the draft Guidelines set out some specific matters additional to those in the IVS that should be considered when agreeing the scope and terms for providing a fairness opinion.**

Do you consider that the Guidelines, when read in conjunction with IVS 101, adequately identify the principal matters that should be considered in agreeing the scope of work and terms for the provision of a fairness opinion? Please identify any additional matters that you consider should be included.

Whilst we agree with the Guidelines, we consider the regulatory requirements in Australia on the principal matters that should be considered by a FO provider in agreeing the scope of work and the terms for the provision of the FO are greater given they have regard to the particulars of IERs as they apply to the Australian market than that required under the ED.



7. **Where a fairness opinion includes a valuation, the principles of IVS 103 Reporting are applicable. Paragraphs 28-32 of these Guidelines discuss the principles that should be considered in determining the content of a fairness opinion and then list matters that it is recommended should be included in a typical Opinion.**

Do you consider that this list of recommended contents is a)helpful and b)sufficiently comprehensive? Are there any matters that you believe should be excluded, or additional matters included?

Whilst we agree with the Guidelines, we consider the regulatory requirements in Australia on the contents of a typical Opinion are greater given they have regard to the particulars of IERs as they apply to the Australian market than that required under the ED.

We also note that the expert and the commissioning party have obligations to update security holders of any material change in circumstances up to the date of them making their decision which is generally viewed as being the date of the security holder meeting (i.e. implicitly, the effective date of the FO needs to be up to the date of the meeting).

8. **Paragraph 31 r) includes some recommended restrictions and limitations for inclusion in a fairness opinion.**

Do you consider that these restrictions and limitations are a) reasonable and b) applicable in the jurisdiction in which you operate? Are there any additional restrictions and limitations that you believe could usefully be added to those recommended?

We consider these restrictions and limitations to be reasonable and applicable in Australia. However, we would note that:

- i) An expert cannot limit their statutory liability for the report through disclaimers
- ii) ASIC will not allow experts to take broad indemnities from the commissioning party and such indemnities will not diminish the liability of an expert to security holders.

In line with paragraph 24 of the ED, it would be typical for the expert to also disclaim responsibility for independently verifying some of the data relied upon in undertaking their work.

9. **The Guidelines are intended to be helpful to those who commission fairness opinions, those who provide them and those who rely on them.**

Are there any additional matters that you believe should be addressed in the guidance in order to best meet this objective?

None identified.

