



Australian Government

Takeovers Panel

Consultation Paper

Revision of

GN 14 Funding arrangements

6 October 2015

Introduction

1. The Panel invites comments on the draft Guidance Note attached. The time for comments is open until **Monday, 26 October 2015**.
2. Comments or queries can be directed to:

<p>Allan Bulman Director, Takeovers Panel Email: takeovers@takeovers.gov.au</p>

3. It is Panel policy that submissions are published on its website.
4. The Panel will consider all comments and reserves the right to make changes to the draft Guidance Note in response to comments or otherwise.

Background

5. The recent Federal Court decision in *ASIC v Mariner Corporation*¹ held that, to contravene s631(2)(b) a person had to be reckless. To determine recklessness, a subjective test was applied,² which required the following factors to be established:
 - (a) Mariner, by its directing minds, was actually aware of a substantial risk that it would not be able to perform its obligations if a substantial proportion of offers under the bid were accepted and
 - (b) having regard to the circumstances known to Mariner, it was unjustifiable to take that risk.³
6. As the court noted, it was required to “*construe and apply the text*”⁴ of s631 and the Panel had a different focus. Looking at the Panel’s decision in *Austock*⁵ it said: “*Whether there were unacceptable circumstances required a focus on outward effect, rather than on any internal and subjective state of mind of Mariner.*”⁶
7. Following the interpretation of s631 adopted in *ASIC v Mariner* it is proposed to amend Guidance Note 14 to ensure that the Guidance Note does not cause confusion.

¹ *Australian Securities and Investments Commission v Mariner Corporation Limited* [2015] FCA 589

² [2015] FCA 589 at [248]-[279]

³ [2015] FCA 589 at [261] and [334]

⁴ [2015] FCA 589 at [247]

⁵ *Austock Group Limited* [2012] ATP 12

⁶ [2015] FCA 589 at [393]

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8. Guidance Note 14 focuses on the effect on target shareholders and the broader market of a bid being announced or made without funding arrangements for the cash component of the consideration being sufficiently in place. The key consideration is section 602(a) – whether the acquisition of voting shares is taking place in an efficient, competitive and informed market. Thus, for example, the Panel said in *Pinnacle 04* in 2001:

*...in accordance with the principle that acquisitions of control over the voting shares in a listed company should take place in an efficient, competitive and informed market, a bidder should have sufficient funding arrangements in place to ensure that the consideration offered under the bid can be provided.*⁷

9. The factors articulated in Guidance Note 14 remain relevant to that consideration.
10. The rationale for the Panel's position on requiring a reasonable basis for funding, as set out in GN 14, is the need for reasonable certainty in the market, which underpins the purposes in Chapter 6 set out in s602(a) and to some extent s602(b)(iii).⁸ Such a policy is given expression in a number of provisions which deal with certainty of conduct on the part of a bidder, including those which require the maker of an announcement normally to follow up with a bid,⁹ require a bid not to contain conditions that the bidder itself can trigger,¹⁰ require a bid to be open for a minimum time,¹¹ and allow only limited rights to withdraw a bid.¹²
11. At a practical level, the lack of certainty in the funding of a bid can create problems in the market for which disclosure alone is not a sufficient protection. Thus, for example, if a bidder cannot pay for acceptances, shareholders risk being exposed to loss and transactions in the market might proceed in a false market. This is also why the Panel requires more certainty about the availability of funds as the likelihood of bid conditions being fulfilled or waived increases.¹³
12. The Panel's policy position on funding is consistent with the position in other markets. For example, in the UK a bidder must have "*every reason to believe it can and will continue to be able to implement the offer.*"¹⁴ The UK Panel requires confirmation of resources from

⁷ *Pinnacle VRB Ltd 04* [2001] ATP 7 at [31]

⁸ Section 602(a) addresses an efficient, competitive and informed market, and s602(b)(iii) addresses enough information being given to shareholders to enable them to assess the merits of a proposal. References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

⁹ Section 631(1)

¹⁰ Section 629

¹¹ Section 624(1)(b)

¹² Section 652A

¹³ Guidance Note 14, 2nd issue, 2010, at para [18]

¹⁴ UK Takeovers Code, rule 2.7

the bidder's financial adviser. If the adviser did not act responsibly and take all reasonable steps to assure itself that the consideration was available, it may be required to put up the consideration itself. A similar position is adopted in Hong Kong.¹⁵ In New Zealand, the offeror must confirm as part of the offer documentation that resources will be available to meet the consideration to be provided on full acceptance of the offer.¹⁶

13. Accordingly, the Panel proposes to clarify its position on funding arrangements by amending GN 14.

Amendments

14. It is proposed to:
- (a) amend paragraph 4, by reference to the policy bases of ss602(a) and (b)(iii)
 - (b) delete paragraph 5 and
 - (c) amend paragraph 10 (new paragraph 9), by clearly linking it to s602.
15. It is also proposed to update references to ASIC Regulatory Guide 9 *Takeover bids*, formerly RG 37.

Issues

16. While comments are sought generally, particular attention is directed to the following issues:
- (a) Does the amendment clarify that the Panel relies on the s602 principles as the bases for determining unacceptable circumstances?
 - (b) If not, are other – and what – amendments needed?

Attachment

Revised draft GN 14 - Funding arrangements

¹⁵ Hong Kong Takeovers Code and Share Buy-backs Code 2014, General Principle 4 and rule 3.5

¹⁶ NZ Takeovers Code, Schedule 1, cl 9



Australian Government

Takeovers Panel

Guidance Note 14 – Funding arrangements

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Background

1. This guidance note has been prepared to assist market participants understand the Panel’s approach to funding arrangements for the cash component of consideration under a takeover.
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. While focused on debt facilities, the principles in this note apply with the necessary adaptation to funding, in whole or in part, by raising equity.

~~4. Section 631(2)(b)¹ requires that a person not announce a bid if:~~

~~“the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted.”~~

~~5. A bidder, therefore, must believe it will be able to implement its offer.² It must have (and maintain) a reasonable basis for that belief.~~

~~4. The policy bases for this note are:~~

~~(a) the acquisition of control over voting shares must take place in an efficient, competitive and informed market (s602(a))³ and~~

~~¹ Unless otherwise indicated, all references are to the *Corporations Act 2001 (Cth)*~~

~~² See also ASIC Regulatory Guide 59 at [59.3]. As to s631, see cases cited in *Realestate.com.au.Ltd* [2001] ATP 1 at [52] and [65] [71], *Brisbane Broncos Ltd (No 3)* [2002] ATP~~

~~³ Other sections of the *Corporations Act* deal with funding as well: eg, s588G (Director’s duty to prevent insolvent trading) and s588V (Holding company liability for subsidiary insolvent trading)~~

~~³ Unless otherwise indicated, all references are to the *Corporations Act 2001 (Cth)*. See also s631(2). As to the interpretation of s631(2), see *Australian Securities and Investments Commission v Mariner*~~

5-(b) shareholders and directors must be given enough information to enable them to assess the merits of a proposal (s602(b)(iii)).

Funding

Source

6-5. A bidder may fund its bid from any source, internal or external.⁴ It may have a combination of sources. It may also have alternative arrangements in place (eg, it has cash reserves but seeks debt funding). If alternatives are disclosed, each must be in place or provide a reasonable basis for the bidder to expect that it will be in place.

Examples: cash reserves, liquidating assets, bank loan, accommodation from group member

7-6. A bidder may alter its funding arrangements after it bids. However, the altered funding will be assessed at the time of the alteration as to whether:

- (a) it is in place, or there is a reasonable basis for the bidder to expect that it will be in place and
- (b) it materially adversely affects target shareholders and the market for target (and bidder) shares.

Amount

8-7. In considering the amount of funding required, the Panel takes into account:

- (a) if the bid extends to securities issued during the offer period,⁵ or unmarketable parcels in a proportional bid,⁶ whether funding arrangements are sufficient to pay for them as well
- (b) whether the bidder has reasonable grounds not to expect acceptances in respect of particular securities

Examples:

1. *The bidder or its subsidiary holds securities in the bid class*

Corporation Limited [2015] FCA 589. As to s631 and its connection to s602, see SSH Medical Limited [2003] ATP 32 at [41] where the Panel said: "Section 631 is central to the scheme of Chapter 6, for breach of which there are substantial penalties. The announcement of a bid may lead to a false market in shares in the target (and perhaps of the bidder) if a bid is not made as announced. A breach of the section tends directly to defeat the principle in paragraph 602(a) of the Act that acquisitions of shares in companies should take place in an efficient, competitive and informed market."

⁴ Includes by loan or other accommodation from a member of the same corporate group. The ultimate source of funding and sufficient details must be disclosed: see ASIC Regulatory Guide 9 Takeover bids at [9.271] - [9.299]³⁷ at [37.14] and [37.16]

⁵ See s617(2)

⁶ GoldLink IncomePlus Limited 03 [2008] ATP 21 at [18]

2. A target shareholder has agreed not to accept the bid
 3. Convertible securities are materially out of the money
- (c) whether foreign currency funding has been hedged or is enough to ensure that there will be sufficient funds in Australian currency even if there is a material adverse exchange rate movement.⁷

9.8. Initial funding need not cover additional amounts that might be required if the bidder were to increase the offer price or offer to pay costs and expenses.⁸ However, the bidder ought to have a reasonable basis to expect that funding of the increased amount will be in place before it announces the increase. The funding arrangements for the increase do not need to be the same as for the original bid.

Unacceptable circumstances

10.9. It may give rise to unacceptable circumstances, based on the purposes of Chapter 6 set out in s602, if:

- (a) a bidder does not have funding in place, or a reasonable basis to expect that it will have funding in place, to pay for all acceptances⁹ when its bid becomes unconditional
- (b) funding arrangements fail (because of changes in circumstances or otherwise) and are not replaced promptly
- (c) funding arrangements become inadequate because of a change in the bid (eg, declaring the bid free from a condition or increasing the bid consideration)
- (d) the bid becomes unconditional when the funding arrangements are conditional and there is a real risk of the funding conditions not being fulfilled
- (e) the bidder proposes to pay accepting shareholders faster than originally proposed before funding arrangements are certain or
- (f) the bidder does not actually pay accepting shareholders. The offer might contain terms that allow the 'accepted shares' to be transferred before payment is made. (Compare an offer that might contain a term that the accepting shareholder retains an equitable interest in the shares until

⁷ See *Parker & Parsley Petroleum Australia Pty Ltd v Gantry Acquisition Corp* (1994) 13 ACSR 689

⁸ See *AAPT Ltd v Cable and Wireless Optus Ltd* (1999) 17 ACLC 974 at 1010 and *Associated Dairies Ltd v Central Western Dairy Ltd* (1993) 117 ALR 433 at 439. Cf *Re Archaean Gold* (1997) 15 ACLC 382 at 384

⁹ Section 631(2)(b) uses the expression "substantial proportion of the offers", as to which see *Australian Securities and Investments Commission v Mariner Corporation Limited* [2015] FCA 589 at [280]-[313]

paid.¹⁰ If payment is not made, this may give rise to a declaration of unacceptable circumstances and orders returning the shares to the acceptor.

What is a reasonable basis?

[41.10.](#) Whether the bidder has a reasonable basis to expect that it will have funding in place is assessed objectively and will depend on the circumstances of each case.

[42.11.](#) If funding arrangements have not been formally documented¹¹ or remain subject to conditions precedent to drawdown,¹² the bidder may still have a reasonable basis if there is a sufficiently detailed binding commitment in place when it announces its bid¹³ or the bidder's statement is given to ASIC. However, documentation¹⁴ should be completed and signed before offers are sent to target shareholders, and security documents should be finalised and executed before the bid becomes unconditional.

[43.12.](#) If external debt funding is subject to approval by the lender's credit committee, the bidder may still have a reasonable basis if the bidder is of substantial worth relative to the funding requirement, reasonably believes it has access to other sources of funds and has been informed that credit committee approval is likely.

[44.13.](#) If funding is by or through the bidder's corporate group, it should be binding¹⁵ and fully documented before the bidder's statement is given to ASIC. The parent of the group should agree to procure compliance by group members with the arrangements. The existence of outside interests between the lender and bidder may require arms-length negotiations, which is a factor the Panel would take into account when considering whether to regard the funding as provided by an 'external lender'.

¹⁰ See *George Hudson Holdings Limited v Rudder* (1973) 128 CLR 387: the usual rule in transactions involving payment in return for a transfer of property is that the transfer of title to the property only occurs when payment is made, unless the contract provides otherwise

¹¹ In *Goodman Fielder* [2003] ATP 1 the Panel granted withdrawal rights until the funding was settled and signed. In *Pinnacle VRB Ltd (No 6)* [2001] ATP 11 and *Consolidated Minerals Ltd 03* [2007] ATP 25 at [44] the Panel looked at the funding of the bidder by its funder (on review: *Consolidated Minerals Ltd 03R* [2007] ATP 28 at [32]-[34])

¹² See for example *ACI Ltd v Rossington Holdings Ltd* (1992) 106 ALR 221 and *Goodman Fielder* [2003] ATP 1

¹³ See *Indophil Resources NL* [2008] ATP 18 at [17]

¹⁴ Executed loan or other financing documents, although a facility or commitment letter or term sheet may be acceptable if it is binding and sets out all material terms and conditions

¹⁵ If the group lender's ability to fund the bid depends, in turn, on an external facility, the internal facility should have an appropriate condition precedent to drawdown

GN 14 Funding arrangements

15-14. If funding is by using cash reserves, the reserves should not be subject to security interests, rights of set off or other arrangements (such as being required for other group operations) that may materially affect the bidder's ability to use them. If they are, the bidder should have standby funding available or other sources of cash.

16-15. If funding is by drawing down pre-existing facilities, the bidder should ensure that the funds are available and not required for other group operations. Otherwise, the bidder should have standby funding available or other sources of cash.

17-16. If the bidder (or a group company) is realising non-liquid assets¹⁶ to fund the bid, the assets must be realisable on a timely basis for a sufficient amount. If they may not be, the bidder should have standby funding available or other sources of cash.

18-17. The degree of certainty about the availability of the funds may increase during a bid as the likelihood of bid conditions being fulfilled or waived increases.¹⁷ A bid should not be declared, or allowed to become, unconditional until:

- (a) binding funding arrangements are documented in final form and
- (b) commercially significant conditions precedent to drawdown have been fulfilled or there is no material risk that they won't be.

19-18. A bidder would be unlikely to have a reasonable basis for external funding that is subject to:

- (a) documentation without a binding commitment (see paragraph 11)
- (b) internal approval by the lender if the requirements of paragraph 12¹⁸ are not met
- (c) unusual repayment or expiry provisions that may result in the funding not being available to pay for acceptances¹⁹ or
- (d) conditions precedent to drawdown, unless it is likely that the conditions will be satisfied or waived when the bid becomes unconditional.²⁰

¹⁶ In *Taipan Resources NL (No 10)* [2001] ATP 5 and *Taipan Resources NL (No 11)* [2001] ATP 16 the relevant asset was a portfolio of listed shares. However, the major part of the portfolio was a single parcel of more than 10% in another company – in the circumstances this was a non-liquid asset

¹⁷ In *Indophil Resources NL* [2008] ATP 18 the Panel declined to commence proceedings on an announcement. See also *Magna Pacific (Holdings) 02* [2007] ATP 3

¹⁸ *Taipan Resources NL (No 10)* [2001] ATP 5

¹⁹ *ICAL Ltd v County Natwest Securities Australia Limited* (1988) 6 ACLC 467

²⁰ For example, funding that is subject to a bid's minimum acceptance condition. Before waiving the minimum acceptance condition, the bidder needs to take reasonable steps to ensure that the funding will be available or alternative funding is available

~~20-19.~~ A bidder would be unlikely to have a reasonable basis for funding:

- (a) that is informal or unenforceable or on a “best endeavours” basis²¹ or
- (b) if the lender has insufficient funds to pay for acceptances.

Disclosure

~~21-20.~~ Timely disclosure of funding arrangements, and updated disclosure as needed, is an important aspect of an efficient, competitive and informed market,²² and ensures that holders of shares are given enough information to enable them to assess the merits of the proposal.²³ Disclosure is specifically required in a bidder’s statement.²⁴

~~22-21.~~ A bidder should consider making disclosure in relation to:

- (a) establishing that its funder has the necessary financial resources.²⁵ If the funder is an Australian bank, this may require only that it is identified. For other financial institutions, there may need to be limited disclosure (eg, its latest audited net assets and a description of its prudential regulation). For other funders, more disclosure may be needed (eg, full accounts, or in most cases an accountant’s certificate as to its ability to meet the obligation with disclosure of the content of the accountant’s certificate or enough of it to allow shareholders to be satisfied of the sufficiency of the arrangements)²⁶
- (b) if the funder is a group member, the terms of the intra-group arrangements
- (c) the amount available for drawdown, or under alternative or stand-by funding, or available by way of any other sources of cash or non-cash assets relied on (and arrangements for realization of non-cash assets)
- (d) the basis for any expectation that there will not be acceptances for particular securities
- (e) material conditions precedent to drawdown, and any basis on which the bidder believes it will be able to satisfy the conditions

²¹ *Taipan Resources NL (No 10)* [2001] ATP 5

²² Section 602(a). See also *MYOB Ltd* [2008] ATP 27 at [11]

²³ Section 602(c)

²⁴ Section 636(1)(f) requires disclosure in relation to cash consideration under a bid. See also ASIC RG ~~937~~

²⁵ *Tower Software Engineering Pty Ltd 01* [2006] ATP 20

²⁶ *GoldLink IncomePlus Limited 03* [2008] ATP 21. Compare *Golden West Resources Ltd 01* [2007] ATP 31 at [18]-[19] where the Panel did not require information about sub-underwriters to be disclosed when the underwriting of the bid was by an ASX-regulated broker. See also fn 4

- (f) the status of conditions precedent to drawdown if the bid is declared or allowed to become unconditional. If there are remaining conditions, the basis on which the bidder believes it will be able to satisfy them and
- (g) material changes to funding terms or to circumstances which affect the availability or sufficiency of the arrangements.

23.22. The terms of the funding arrangement (interest rate, repayment, covenants, security) may not need to be disclosed unless the bid is likely to result in a continuing minority shareholding in the target and:

- (a) the bidder intends to rely on the target for help with the funding arrangement (eg, provision of security) or
- (b) the target will require on-going funding which may be affected by the bidder's funding.

24.23. If the bid consideration comprises foreign currency, additional disclosure regarding any exchange rate risks and their management may also be needed.²⁷

Publication History

First Issue 4 March 2004

Second issue 11 February 2010

Third issue [] 2015

²⁷ In *Rinker Group Ltd* [2006] ATP 35 the Panel likened foreign currency to a scrip offer in which the value of the shares offered as consideration may vary during the offer but the number does not vary: see para [25]