



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.

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)

Funding

Source

6. A bidder may fund its bid from any source, internal or external.³ 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. 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. In considering the amount of funding required, the Panel takes into account:
- (a) if the bid extends to securities issued during the offer period,⁴ or unmarketable parcels in a proportional bid,⁵ 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*
- 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

³ 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 37 at [37.14] and [37.16]

⁴ See s617(2)

⁵ *GoldLink IncomePlus Limited 03* [2008] ATP 21 at [18]

currency even if there is a material adverse exchange rate movement.⁶

9. 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.⁷ 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. It may give rise to unacceptable circumstances 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 acceptances 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 paid.⁸) If payment is not made, this may give rise to a declaration of unacceptable circumstances and orders returning the shares to the acceptor.

⁶ See *Parker & Parsley Petroleum Australia Pty Ltd v Gantry Acquisition Corp* (1994) 13 ACSR 689

⁷ 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

⁸ 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

What is a reasonable basis?

11. 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.
12. If funding arrangements have not been formally documented⁹ or remain subject to conditions precedent to drawdown,¹⁰ the bidder may still have a reasonable basis if there is a sufficiently detailed binding commitment in place when it announces its bid¹¹ or the bidder's statement is given to ASIC. However, documentation¹² 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.
13. 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.
14. If funding is by or through the bidder's corporate group, it should be binding¹³ 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'.
15. 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.

⁹ 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])

¹⁰ See for example *ACI Ltd v Rossington Holdings Ltd* (1992) 106 ALR 221 and *Goodman Fielder* [2003] ATP 1

¹¹ See *Indophil Resources NL* [2008] ATP 18 at [17]

¹² 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

¹³ 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

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16. 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. If the bidder (or a group company) is realising non-liquid assets¹⁴ 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. 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.¹⁵ 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. 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 12)
 - (b) internal approval by the lender if the requirements of paragraph 13¹⁶ are not met
 - (c) unusual repayment or expiry provisions that may result in the funding not being available to pay for acceptances¹⁷ or
 - (d) conditions precedent to drawdown, unless it is likely that the conditions will be satisfied or waived when the bid becomes unconditional.¹⁸
20. A bidder would be unlikely to have a reasonable basis for funding:
 - (a) that is informal or unenforceable or on a "best endeavours" basis¹⁹ or

¹⁴ 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

¹⁵ 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

¹⁶ *Taipan Resources NL (No 10)* [2001] ATP 5

¹⁷ *ICAL Ltd v County Natwest Securities Australia Limited* (1988) 6 ACLC 467

¹⁸ 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

- (b) if the lender has insufficient funds to pay for acceptances.

Disclosure

21. Timely disclosure of funding arrangements, and updated disclosure as needed, is an important aspect of an efficient, competitive and informed market,²⁰ and ensures that holders of shares are given enough information to enable them to assess the merits of the proposal.²¹ Disclosure is specifically required in a bidder's statement.²²
22. A bidder should consider making disclosure in relation to:
- (a) establishing that its funder has the necessary financial resources.²³ 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)²⁴
 - (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

¹⁹ *Taipan Resources NL (No 10)* [2001] ATP 5

²⁰ Section 602(a). See also *MYOB Ltd* [2008] ATP 27 at [11]

²¹ Section 602(c)

²² Section 636(1)(f) requires disclosure in relation to cash consideration under a bid. See also ASIC RG 37

²³ *Tower Software Engineering Pty Ltd 01* [2006] ATP 20

²⁴ *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 3

- (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. 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. If the bid consideration comprises foreign currency, additional disclosure regarding any exchange rate risks and their management may also be needed.²⁵

Publication History

First Issue 4 March 2004

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²⁵ 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]