

**Submission from**  
**ASIC**



ASIC

Australian Securities & Investments Commission

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26 October 2015

Mr Allan Bulman  
Director: Takeovers Panel

**By email: [takeovers@takeovers.gov.au](mailto:takeovers@takeovers.gov.au)**

Dear Mr Bulman

**ASIC's response to Takeovers Panel Consultation Paper – GN 14 Funding arrangements**

ASIC is grateful for the opportunity to provide comments in response to the Takeover Panel's (**Panel**) Consultation Paper regarding the revision of Guidance Note 14 *Funding arrangements* (**GN 14**). The purpose of this letter is to set out ASIC's response and comments to the Consultation Paper and the attached draft guidance note (**draft GN**).

**ASIC Comments**

ASIC supports the Panel's efforts to clarify the policy bases of the draft GN while maintaining the existing policy settings in the draft GN relating to when unacceptable circumstances may arise in connection with the funding arrangements for the cash component of takeover bids. ASIC agrees with the Panel's decision to emphasise that the policy bases for the draft GN stems from the principles set out in s602 of the *Corporations Act 2001* (**Act**), in particular that:

- (a) the acquisition of control over voting shares must take place in an efficient, competitive and informed market (s602(a)); and
- (b) shareholders and directors must be given enough information to enable them to assess the merits of the proposal (s602(b)(ii)).

In ASIC's view the Panel's proposed approach is appropriate having regard to the recent decision of the Federal Court in *Australian Securities and Investments Commissions v Mariner Corporation Limited*<sup>1</sup> (**Mariner**). ASIC continues to be of

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<sup>1</sup> [2015] FCA 589.

the view that the requirement that a bidder have a reasonable basis that it will be able to fund the cash component of an announced bid, as set out in GN 14, is a fundamental market integrity measure. It is key to ensuring that the market in the target's (and in some cases the bidder's) securities, as affected by a proposed or current control transaction, is efficient, competitive and informed. In addition, as noted in the consultation paper, it is consistent with the expectation of reasonable certainty in connection with announced proposals evident from the broader framework of Chapter 6.

ASIC also notes that the policy is in line with the comparative requirements regarding funding for bids under the takeovers regimes of other jurisdictions, such as the UK and Hong Kong, as referred to in the Panel's consultation paper.

ASIC also supports the Panel's proposal to update references in GN 14 to ASIC's current policy on takeover bids in RG 9.

### **Consultation**

If you wish to discuss any aspects of this letter, please do not hesitate to contact me.

Yours sincerely



Jane Eccleston  
Senior Executive Leader  
Corporations  
Australian Securities and Investments Commission

**Submission from  
Herbert Smith Freehills**



26 October 2015

## 1 Introduction

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This submission is being made in response to an invitation for comments by the Takeovers Panel (the **Panel**) on its consultation paper dated 6 October 2015 relating to proposed revisions to GN 14 Funding arrangements (**GN 14**) (**Revised Guidance Note**).

Our responses to the particular issues identified in the consultation paper are set out below in section 2 with our general submissions set out below in section 3.

Please note that the views expressed in this submission do not necessarily represent the views of all Herbert Smith Freehills partners or of our clients.

## 2 Specific submissions

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### 2.1 Does the amendment clarify that the Panel relies on the s602 principles as the bases for determining unacceptable circumstances?

In our view, the Panel's revisions to paragraph's 4, 5 and 10 of the Revised Guidance Note provide sufficient clarity that the Panel relies on the s602 principles as the bases for a determining whether unacceptable circumstances are present. We do not consider any further revisions are required to the Revised Guidance Note.

**Our recommendation:**

We do not consider any further revisions are required to the Revised Guidance Note to clarify that the Panel relies on the s602 principles for determining unacceptable circumstances in connection with bid funding.

## 3 General submissions

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### 3.1 Determining whether and when the bidder has a reasonable basis that it will have funding in place

In our view, it would be useful for the Panel to clarify the examples given in paragraphs 11 and 13 of the Revised Guidance Note, which relevantly provide:

*"11. If funding arrangements have not been formally documented or remain subject to conditions precedent to drawdown, the bidder may still have a reasonable basis if there is a sufficiently detailed binding commitment in place **when it announces its bid or the bidder's statement is given to ASIC. However, documentation should be completed and signed before offers are sent to target shareholders ...***

...

*13. If funding is by or through the bidder's corporate group, it should be binding and fully documented **before the bidder's statement is given to ASIC ...***



[emphasis added and footnotes have been omitted].

It is unclear from paragraph 11 whether the Panel expects the “sufficiently detailed binding commitment” to be ready by the first or by the second of the two events – that is, by announcement of the takeover or by lodgment of the bidder’s statement.<sup>1</sup> If the Panel is saying that it depends on the circumstances when one or the other will be appropriate, it would be helpful if the Panel could give some examples of when it expects the more onerous standard to apply (ie by announcement).

We are also unsure why a different standard should be placed on a bidder who is funding its potential obligations by way of intragroup financing (ie full documentation by the time the bidder’s statement is lodged with ASIC – see paragraph 13) as opposed to a bidder reliant on third party financing (ie full documentation by the time the offer period commences – see paragraph 11).<sup>2</sup>

While difficult to generalise, it could be argued that bid financing to be provided by a sibling entity of a corporate group is, in fact, more ‘certain’ that that to be provided by a third party financier, particularly where the third party financing is subject to drawdown conditions. If this argument is accepted, then the current requirement for intragroup financing to be fully documented and executed when the bidder’s statement is given to ASIC appears to be anomalous when contrasted with the position for third party financing, where, for example, the Panel recognises that a binding term sheet may form a reasonable basis as regards funding when the bidder’s statement and offers are sent to target shareholders.

We consider it is important for the Panel to address the seemingly anomalous / inconsistent positions as between the circumstances referred to in paragraph 11 and 13, or otherwise provide some explanation for the different positions adopted in those paragraphs, in the Revised Guidance Note.

### 3.2 Law reform and s631(2)(b)

As identified by the Panel in its consultation paper, the rationale for the Panel requiring a reasonable basis for funding, as set out in GN 14, is the need for reasonable certainty in the market in relation to bid funding. The recent construction and interpretation of s631(2)(b) by the Federal Court in *Australian Securities and Investments Commission v Mariner Corporation Limited* [2015] FCA 589 makes it clear, in determining recklessness, a subjective test must be applied. This interpretation has significant implications when assessing whether there has been a breach of s631(2)(b) in relation to bid funding as it is:

- (a) looking only to the subjective belief of the bidder when a bid is announced; and
- (b) not requiring guaranteed funding to be in place even at the stage when offers are made to target shareholders.

While it is welcome that the Revised Guidance Note continues to observe higher standards in relation to bid funding than that required under s631(2)(b), we consider that law reform remains appropriate to remove the inconsistency between GN14 and s631(2)(b).

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<sup>1</sup> We note there could be approximately 6 weeks between the announcement of the takeover and lodgment of the bidder’s statement with ASIC (see s631(1)(b) and item 6 of s633(1) of the *Corporations Act 2001* (Cth)).

<sup>2</sup> We note there could be 14-28 days between lodgment of the bidder’s statement with ASIC and the offer period commencing (see item 6 of s633(1) of the *Corporations Act 2001* (Cth)).

**Submission from  
Law Council of Australia**



Law Council  
OF AUSTRALIA

*Business Law Section*

Mr Allan Bulman  
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Via email: [takeovers@takeovers.gov.au](mailto:takeovers@takeovers.gov.au)

26 October 2015

Dear Allan,

### **Response to Consultation Paper – Funding Arrangements**

This is a submission by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) in response to the Consultation Paper issued by the Takeovers Panel (the **Panel**) on 6 October 2015 in relation to the revision of Guidance Note 14 on Funding Arrangements.

The Committee supports the amendments to Guidance Note 14, and considers that the amendments clarify the Panel's reliance on the s602 principles as the basis for determining unacceptable circumstances.

The Committee has no further comments on the contents of the Guidance Note.

The Committee would be pleased to discuss this submission if that is helpful. Please contact the Chair of the Committee, Bruce Cowley, on 07 3119 6213 if you would like to do so.

Yours sincerely,

**John Keeves, Chairman**  
Business Law Section

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**BLS**