



**Australian Government**

**Takeovers Panel**

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## AMENDMENT OF GN 14

### PUBLIC CONSULTATION RESPONSE STATEMENT

26 NOVEMBER 2015

#### **Introduction**

On 6 October 2015, the Takeovers Panel released a Consultation Paper seeking public comments on amendments to Guidance Note 14 *Funding arrangements*.

Comments on the Consultation Paper were due by 26 October 2015 and the Panel received 3 submissions in response. The Panel thanks the respondents. Attached to this response statement are the submissions (Annexure A).

Consistent with the Panel's published policy on responding to submissions, this statement sets out the Panel's response to the public consultation.

No changes are proposed from the draft GN 14 in the consultation paper (Annexure B).

#### **Material comments received and Panel's conclusions**

##### Section 602 policy basis for funding requirement

###### *Comment*

All three submissions supported the proposed amendments.

###### *Response*

The proposed amendments will be made. The amendments will clarify the Panel's reliance on the s602 principles as the basis for determining whether a bid funding issue gives rise to unacceptable circumstances. The current GN 14 refers to s631, which has recently been interpreted in *ASIC v Mariner Corporation*<sup>1</sup> differently to the Panel's 'reasonable basis' test. The amendments will ensure that there is no confusion as to the test that the Panel will apply when considering whether a funding issue gives rise to unacceptable circumstances.

##### Further amendments

###### *Comment*

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

One respondent commented that it would be useful to clarify the timing in paragraph 11 as to whether the 'sufficiently detailed binding commitment' should be ready by the time of either (a) the announcement of the bid or (b) the lodgement of the bidder's statement.

*Response*

Clarification may be useful and can be considered when the GN is next amended.

*Comment*

One respondent commented that paragraph 13 appears to apply a higher standard to intragroup financing, which is not necessary because arguably it is more certain than third party financing.

*Response*

The longer time provided to third party financiers recognises that the bidder is unable to control a third party's process and may require more time.

Law reform

*Comment*

One respondent commented that law reform to remove the inconsistency between the tests in GN 14 and s631(2)(b) was appropriate.

*Response*

This is for the government.



**Australian Government**

**Takeovers Panel**

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**ANNEXURE A**

**Submissions**

**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  
Director, Takeovers Panel  
Level 10  
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MELBOURNE VIC 3000  
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**



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**ANNEXURE B**

**Mark-up of GN 14 as per consultation paper**



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**Takeovers Panel**

## Guidance Note 14 – Funding arrangements

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### **Background**

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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)<sup>1</sup> 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.<sup>2</sup> 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))<sup>3</sup> and~~

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

~~<sup>2</sup> 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~~

~~<sup>3</sup> 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)~~

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

## Funding

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### Source

6.5. A bidder may fund its bid from any source, internal or external.<sup>4</sup> 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,<sup>5</sup> or unmarketable parcels in a proportional bid,<sup>6</sup> 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

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<sup>3</sup> 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 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."

<sup>4</sup> 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]~~

<sup>5</sup> See s617(2)

<sup>6</sup> *GoldLink IncomePlus Limited* 03 [2008] ATP 21 at [18]

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 currency even if there is a material adverse exchange rate movement.<sup>7</sup>

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.<sup>8</sup> 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

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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 acceptances<sup>9</sup> 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

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

<sup>8</sup> 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

<sup>9</sup> 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 \[280\]-\[313\]](#)

- (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.<sup>10</sup>) 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?

- | 11.10. 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.
- | 12.11. If funding arrangements have not been formally documented<sup>11</sup> or remain subject to conditions precedent to drawdown,<sup>12</sup> the bidder may still have a reasonable basis if there is a sufficiently detailed binding commitment in place when it announces its bid<sup>13</sup> or the bidder's statement is given to ASIC. However, documentation<sup>14</sup> 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.
- | 13.12. 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.
- | 14.13. If funding is by or through the bidder's corporate group, it should be binding<sup>15</sup> 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

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<sup>10</sup> 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

<sup>11</sup> 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])

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

<sup>13</sup> See *Indophil Resources NL* [2008] ATP 18 at [17]

<sup>14</sup> 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

<sup>15</sup> 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



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'.

~~15.14.~~ 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.~~ 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.~~ 17.16. If the bidder (or a group company) is realising non-liquid assets<sup>16</sup> 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.~~ 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.<sup>17</sup> 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.~~ 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 ~~1112~~ 1112)
- (b) internal approval by the lender if the requirements of paragraph ~~1213~~ 1213<sup>18</sup> are not met
- (c) unusual repayment or expiry provisions that may result in the funding not being available to pay for acceptances<sup>19</sup> or

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<sup>16</sup> 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

<sup>17</sup> 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

<sup>18</sup> *Taipan Resources NL (No 10)* [2001] ATP 5

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

- (d) conditions precedent to drawdown, unless it is likely that the conditions will be satisfied or waived when the bid becomes unconditional.<sup>20</sup>

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” basis<sup>21</sup> or
- (b) if the lender has insufficient funds to pay for acceptances.

### Disclosure

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

22.21. A bidder should consider making disclosure in relation to:

- (a) establishing that its funder has the necessary financial resources.<sup>25</sup> 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)<sup>26</sup>

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<sup>20</sup> 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

<sup>21</sup> *Taipan Resources NL (No 10)* [2001] ATP 5

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

<sup>23</sup> Section 602(c)

<sup>24</sup> Section 636(1)(f) requires disclosure in relation to cash consideration under a bid. See also ASIC RG [937](#)

<sup>25</sup> *Tower Software Engineering Pty Ltd 01* [2006] ATP 20

<sup>26</sup> *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 [43](#)

- (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
- (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.<sup>27</sup>

### Publication History

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First Issue            4 March 2004

Second issue        11 February 2010

[Third issue](#)        [ ] 2015

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<sup>27</sup> 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]