

ALL-AT-SEA - ASIC TAKES AIM AT MARINER AND ITS DIRECTORS

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Legal Briefings - By **Andrew Rich** and **Clayton James**

SUMMARY

- Mariner Corporation Limited (**Mariner**) announced a cash bid for Austock Group Limited (**Austock**) on 25 June 2012.
- Austock countered that Mariner's bid breached the minimum bid price rule and was not made subject to necessary regulatory approvals. Austock also queried Mariner's ability to fund the bid.
- In August 2012, the Takeovers Panel made a declaration of unacceptable circumstances against Mariner on the grounds it did not have a reasonable basis to expect that it would have the funding in place to pay for acceptances when the bid became unconditional.
- In April 2014, ASIC announced it intended to commence civil action against Mariner and its directors.

MARINER'S BID FOR AUSTOCK

On 25 June 2012, Mariner announced its 10.5 cent a share cash bid for Austock. The Mariner bid was subject to certain conditions, including a 50% minimum acceptance condition and a condition prohibiting any material transactions, but it was not conditional on the obtaining of any regulatory approvals. Mariner also announced that it intended to acquire up to 20% of the issued capital in Austock on market.

On 29 June 2012, Mariner upped its bid to 11 cents a share, but noted that because of 'regulatory issues' it had decided to stand in the market at 11 cents per share for only up to 15% of Austock. Mariner's announcement also flagged that the bid conditions would also include 'the receipt of a number of regulatory approvals'.

On 2 July 2012, Austock announced that it had written to Mariner inviting Mariner to withdraw its bid citing what it saw as several fundamental flaws. The flaws related to:

- the failure of Mariner to make its bid conditional on obtaining a number of necessary regulatory approvals; and
- its offer price of 10.5 cents a share breached the minimum bid price rule (an offer price of 11 cents a share was required by the minimum bid price rule).

Austock's announcement also queried how Mariner would fund a cash bid of over A\$14 million.

On 4 July 2012, Mariner confirmed that it was intending to proceed with its bid.

On 9 July 2012, Austock announced that it had entered into an agreement for the sale of all of the shares in its subsidiary, Austock Property Funds Management Pty Limited, to Folkestone Limited. The transaction was subject to the approval of the Austock shareholders (**Folkestone Transaction**).

On 12 July 2012, Mariner made an application to the Takeovers Panel submitting that the Folkestone Transaction was intended to frustrate Mariner's bid and that the break fees included in the Folkestone Transaction would have a coercive effect on the Austock shareholders when comparing the Mariner bid and the Folkestone Transaction.

The Panel stated that it would examine the Mariner bid as part of the proceedings. The review of Mariner's bid raised concerns for the Panel, specifically:

Despite requests from the Panel, Mariner provided no evidence to the Panel of any written agreement in relation to funding of its proposed bid. [...] The Panel infers that Mariner did not have funding arrangements that had been formally documented, or sufficiently detailed binding commitments in place, when it announced its proposed bid.

The Panel further stated:

Announcing or making an unfunded bid is a serious matter. The penalties for breach of section 631 are the heaviest of any section in Chapter 6. [...]

Mariner's omission to arrange finance for its proposed bid was unacceptable, having regard to the effect that it would have had on the proposed acquisition of a controlling interest in Austock, by bid and on-market purchases. [...]

This unacceptability is exacerbated by the risk that Mariner would have succeeded in its objective of stopping Austock shareholders approving the Folkestone transaction. [...]

Although the finding is a grave one, we are not satisfied that Mariner at any stage had detailed or binding commitments to fund its proposed bid, or any reasonable basis for believing that it could pay for more than a few acceptances.

The Panel's Guidance Note on bid funding requires that a bidder must believe that it will be able to pay for acceptances of its offer and that it must have (and maintain) a reasonable basis for that belief. In particular, the Panel states that a bidder is unlikely to have a reasonable basis for external funding where the funding is subject to documentation without a binding commitment. The Panel also notes that a person would be in breach of section 631(2)(b) of the *Corporations Act* where a person announces a bid and the person is reckless as to whether they will be able to perform their payment obligations relating to the bid.

Ultimately, the Panel made a declaration of unacceptable circumstances against Mariner. The Panel found, amongst other matters, that Mariner did not have a reasonable basis to expect that it would have the funding in place to pay for the Austock acceptances when its proposed bid became unconditional. As part of the Panel orders, Mariner was prohibited from announcing or making another bid for Austock unless it first obtained independent verification from ASIC that it had funding, or a reasonable basis that to believe it would have funding, to pay for all acceptances.

ASIC CIVIL ACTION IN THE FEDERAL COURT

On 3 April 2014, ASIC announced that it had commenced civil action in the Federal Court seeking financial penalties and disqualifications orders against Mariner, and its current and former directors, in relation to its bid for Austock. ASIC is alleging:

- Mariner was reckless as to whether it could perform its obligations under the proposed bid because it did not have the financial resources to fund the bid or any commitment or assurance from another party to fund the bid at the time of the announcement [of the bid on 25 June 2012].
- The announcement was misleading because it was at a price less than Mariner was permitted to offer and because it misled the market as to Mariner's ability to fund the bid.
- The directors breached their duties by failing to give sufficient consideration to the steps needed to be taken before making the announcement.

COMMENTARY

The actions of ASIC in this case are an interesting development in relation to the enforcement of alleged breaches of Australia's takeover laws, which breaches have previously been the subject of proceedings before the Takeovers Panel.

For its part, the Takeovers Panel has also demonstrated an increasing inclination to refer matters to ASIC for further investigation following the conclusion of the Panel proceedings where it considers it appropriate to do so. The recent Panel matters of *Re STI-Global Limited* [2013] ATP 12 and *Re Argosy Minerals Limited* [2014] ATP 7 are examples of this.

These recent developments should serve as salient reminders to market participants that ASIC may seek to bring civil (and possibly even criminal) proceedings in relation to alleged breaches of Australia's takeover laws where ASIC considers there may have been serious breaches of such laws. It is not safe for market participants to assume that a declaration of 'unacceptable circumstances' from the Panel, and any related orders, in relation to a breach of Australia's takeovers laws will necessarily be the end of the matter.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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