

PANEL PATCHES UP THE LEAK IN ITS BID FUNDING GUIDANCE NOTE

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Legal Briefings

The Takeovers Panel has moved to amend its bid funding guidance note in light of the recent Court decision in *ASIC v Mariner Corporation*. In short, the Panel is proposing to make it clear that, despite that Court decision, the Panel expects a bidder to have a reasonable basis for believing that it will be able to pay for acceptances under its offer.

SUMMARY

- The Takeovers Panel has released a consultation paper inviting submissions on its proposed revisions to Guidance Note 14 – Funding arrangements.
- The revisions follow the Federal Court finding that the test for ‘recklessness’ in s631(2)(b) (the takeover bid funding provision) is not the objective test propounded by the Takeovers Panel and ASIC, but rather a subjective test. The Federal Court’s interpretation bears little resemblance to bid funding expectations of the Takeovers Panel, ASIC and, most importantly, market participants.
- While the pro-active approach of the Takeovers Panel is welcome, law reform remains appropriate to remove the inconsistency between the Takeovers Panel guidance note on bid funding and s631(2)(b).

RELEASE OF CONSULTATION PAPER ON FUNDING GUIDANCE NOTE

The Takeovers Panel has released a consultation paper inviting submissions on its proposed revisions to Guidance Note 14 – Funding arrangements (**GN14**). The proposed revisions to GN14 follow the recent Federal Court decision in *ASIC v Mariner Corporation*¹. The decision related to civil action brought against Mariner by ASIC alleging that Mariner and its directors had contravened s631(2)(b) of the Corporations Act (the bid funding provision) in relation to its takeover bid for Austock Group Limited.

In summary, the Federal Court in *ASIC v Mariner Corporation* held that in determining whether a contravention of s631(2)(b) had occurred the relevant test was a subjective test, rather than objective one, with ASIC required to show that Mariner's directors were aware of a substantial risk that Mariner would not be able to perform its obligations if a substantial proportion of offers were accepted and, having regard to the circumstances known to the Mariner directors, the directors were not justified in taking that risk.

ASIC's decision to pursue Mariner followed a finding by the Takeovers Panel of unacceptable circumstances in relation to Mariner's bid in relation to its bid financing arrangements.

(A copy of our newsletter article reviewing the Takeovers Panel proceedings is available [here](#) and our article looking at the Federal Court's decision is available [here](#)).

REVISIONS TO GN14

In summary, GN14 requires that a bidder must believe that it will be able to pay for acceptances under its offer and that it must have (and maintain) a reasonable basis for that belief. The revisions to GN14 are focused on identifying that the key policy underpinning of GN14 is a concern that an acquisition of shares takes place in an efficient, competitive and informed market (the principles contained in s602(a) of the Corporations Act). The Panel in commentary accompanying its consultation paper explains:

"The rationale for the Panel's position on requiring a reasonable basis for funding, as set out in GN14, is the need for reasonable certainty in the market, which underpins the purposes of Chapter 6 set out in s602(a) and to some extent 602(b)(ii)."

In its commentary, the Panel also recognises that:

"if a bidder cannot pay for acceptances, shareholders risk being exposed to loss and transactions in the market might proceed on the basis of a false market. This is why the Panel requires more certainty around the availability of funds as the likelihood of bid conditions being waived or fulfilled increases."

GN14 therefore imposes a stricter standard in relation to funding than s631(2)(b).

COMMENTARY

We welcome the pro-active approach of the Panel in seeking to avoid any confusion that may arise for market participants in the wake of the Mariner decision. We also welcome that GN14 continues to observe higher standards in relation to bid funding than that required under s631(2)(b).

However, we consider that law reform remains appropriate to remove the inconsistency between GN14 and s631(2)(b).

This article was written by [Andrew Rich](#), Partner, and Clayton James, Senior Associate, Sydney.

END NOTES

1. [2015] FCA 589.

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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