



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 37

Takeovers—financing arrangements

Chapter 6 — Acquisition of shares (Part 6.12)

Issued 27/9/1993

From 5 July 2007, this document may be referred to as Regulatory Guide 37 (RG 37) or Practice Note 37 (PN 37). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 37.1) or their practice note number (e.g. PN 37.1).

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Purpose

RG 37.1 In this guide the ASC considers:

- the operation of cl 11 in Pt A and cl 8 in Pt C in s 750 of the Corporations Law (Law) (disclosure requirements); and
- its responsibilities regulating the disclosure of an offeror's financing arrangements under the disclosure requirements.

RG 37.2 This guide supersedes Practice Note 16.

The Law

RG 37.3 Clause 11 in Pt A of s 750 states that:

“If the consideration for the acquisition of the shares to which the takeover offers relate or for the acquisition of any shares, renounceable options or convertible notes referred to in clause 9 is to be satisfied in whole or part by the payment of cash, the statement shall set out:

- (a) if the offeror is to provide some or all of the cash from the offeror’s own funds — particulars sufficient to identify the cash amounts held by the offeror for or in respect of payment of the consideration; and
- (b) if the offeror is not to provide all of the cash, or is not to provide any of it, from the offeror’s own funds:
 - (i) particulars sufficient to identify the other person who is, or each of the other persons who are, to provide, whether directly or indirectly, some or all of the cash from that person’s or those persons’ own funds; and
 - (ii) particulars of the arrangements by which that cash will be provided by that other person or those other persons.”

The same particulars must be included in a Pt C statement (cl 8 of Pt C in s 750). The difference in wording between the two clauses is because the consideration paid for shares acquired under a takeover announcement is always cash.

RG 37.4 The disclosure requirements are for all material purposes the same as cl 3 of Pt A and C of the Schedule to the Companies (Acquisition of Shares) Act and Codes (CASA).

Object of disclosure requirements

RG 37.5 In interpreting the disclosure requirements and their CASA predecessors, the courts have chosen not to formulate precise guidelines. They have judged the sufficiency of particulars in any given case against the fundamental object of the disclosure requirements. This object has been identified as ensuring that the offeror gives sufficient information to shareholders in the target company to establish whether it is able to pay for the shares it is offering to buy (*Peters (WA) Ltd v NCSC* (1986) 13 ACLR 487; *North Sydney Brick & Tile Co Ltd v Darvall (No 2)* (1986) 5 NSWLR 681;

Augold NL v Yaramin Pty Ltd (1987) ACLC 295; *QIW Retailers Ltd v Davids Holdings Pty Ltd (No 1)* (Supreme Court (Qld), Whyte J, 12 June 1992, No 848 of 1992, unreported); *Australian Consolidated Investments Ltd v Rossington Holdings Pty Ltd* (1992) 10 ACLC 600).

RG 37.6 The disclosure requirements do not require an offeror to have all the funds necessary to pay for all the shares for which offers will be made available to it on the date of the Pt A or Pt C statement. The focus of the disclosure requirements is disclosure. The offeror must disclose the material details of its financial arrangements that are relevant to the offeree in deciding whether the offeror can meet its obligations. An offeror's ability to fulfil its obligations under a takeover bid is governed by provisions such as s746(2). This section requires an offeror to have reasonable grounds for believing it will be able to fulfil its obligations under the takeover bid if a substantial proportion of the offers are accepted.

Particulars

RG 37.7 To comply with its obligations under the disclosure requirements an offeror must:

- (a) disclose the total amount necessary to pay for all the shares to which the bid relates, including amounts necessary to pay for any other securities referred to in cl 9 of Pt A of s750 and cl 7 of Pt C of s750;
- (b) disclose whether the offeror holds, or has access to, sufficient funds to pay for all the shares and other securities that are the subject of the bid. If the funds available to the offeror are less than the amount necessary to pay for all the shares and other securities that are the subject of the bid, that should be made explicit;
- (c) identify how much of the cash amounts will come from the offeror's funds, if applicable (see para 9 below);
- (d) identify the person or persons providing the funds and the arrangements for the funds to be provided, if some or all of the consideration is not from the offeror's funds; and
- (e) clearly disclose any restriction on the availability of funds (see para 17 below).

RG 37.8 In *Wright Heaton Ltd v PDS Rural Products Ltd* [1982] 2 NSWLR 301, Needham J (at 308–9) accepted a submission by the offeror that cl 3(a) of Pt A to the Schedule of CASA did not require

particulars of cash amounts unless they were set aside for the sole purpose of providing the cash consideration. An offeror which has not earmarked any particular fund to pay for the shares to be acquired under the bid must disclose that fact. The disclosure may be under the disclosure requirements or under the provisions which require the offeror to disclose any other information material to the offeree in deciding whether to accept the offer (cl 17 in Pt A or cl 14 in Pt C). This disclosure may be supplemented under s 643, for example, should the offeror wish to disclose that it has ample uncommitted funds.

RG 37.9 An offeror which has not appropriated sufficient funds to pay for all of the shares and other securities to which the offers relate must disclose whether it expects to be able to pay for all of the shares for which it may receive acceptances, bearing in mind the requirements of s746(2) (cl 17 in Pt A and cl 14 in Pt C).

RG 37.10 An offeror which states that it expects that funds will not be needed to pay for certain shares because acceptances will not be received for them should disclose the basis for its expectation. Examples of such a basis are:

- (a) where the offeror or one of its subsidiaries holds shares for which it cannot accept an offer; and
- (b) where arrangements exist with certain target shareholders not to accept the bid nor to sell to persons who might accept. Since an offeror will almost certainly become entitled to shares that are the subject of such arrangements, it should be conscious of the potential for breach of the prohibition in s615.

RG 37.11 A shareholder which allows itself to be identified as being bound not to dispose of its shares during the bid, and which subsequently sells into the bid or elsewhere, may be liable under s995 and 1005. This conduct may also contravene s999 and 1308. Conduct of this nature may be classified as “unacceptable” within the meaning of s732. An offeror may also be liable under s704, 995, 1005 or 1308. Accordingly, it should disclose in its Pt A or Pt C statement any circumstance reasonably likely to obstruct the agreement not to sell into or outside the bid. For example, it should disclose the possibility of a mortgagee of the shares taking possession or exercising a power of sale.

Sources of consideration

RG 37.12 An offeror must disclose in its Pt A or Pt C statement details of the arrangements for cash to be provided by persons other than the offeror (credit providers). Credit providers may include financial institutions and the offeror's related bodies corporate.

Identity

RG 37.13 The offeror must disclose the names of any persons who are credit providers either directly or indirectly.

RG 37.14 It is insufficient to disclose only anticipated borrowings to be made directly by the offeror. The offeror must disclose the ultimate source of borrowings (*ACI v Rossington*). The offeror must also disclose if those borrowings are not for general purposes but are specific to the funding of the offer. For example, the depositors of banks need not be disclosed, whereas back to back funding arrangements or guarantees must be disclosed.

RG 37.15 If more than one credit provider is to finance the offeror, the proportion of funding to be provided by each credit provider must be disclosed (*ACI v Rossington*).

Funding arrangements

RG 37.16 Offerees are entitled to be told the essential provisions of funding arrangements (*ACI v Rossington*). They must be told of the material details of any funding agreements which are relevant to the offeror being able to fund its offer. It is insufficient to state that an offeror "has a loan facility", "subject to the usual condition precedents" and to which "there are no unusual banking terms or conditions applicable" (*QIW Retailers Ltd v Davids Holdings Pty Ltd (No 1)*) (Supreme Court (Qld), Whyte J, 12 June 1992, No 848 of 1992, unreported).

Conditions

RG 37.17 Examples of the restrictions on the availability of funds which the offeror must disclose (see para 7(e) above) include where:

- (a) a credit provider is able to demand repayment of funds after unusual events of default contained in the loan facility (for example, the acquisition of shares by the offeror or the disposal or acquisition of certain assets before the end of the offer period);

- (b) the availability of a loan facility is subject to conditions precedent beyond the offeror's control (that is, the execution of formal loan documentation); and
- (c) a loan facility expires before the end of the offer period.

RG 37.18 A condition contained in a loan facility which requires a defeating condition of the offer to be satisfied as a prerequisite to draw-down may become a restriction if the offeror declares the offer to be free of the condition when:

- (a) the condition has not been satisfied; and
- (b) the credit provider has not waived compliance.

The offeror should disclose this potential consequence.

Surveillance and enforcement

RG 37.19 The disclosure requirements are pivotal to the promotion of an informed market and the ASC will interpret the provisions accordingly. For example, disclosure of the details of funding arrangements should be consistent with the provisions of such arrangements.

RG 37.20 In line with its strict views of the disclosure requirements, the ASC considers that inadequate disclosure of funding arrangements may be false or misleading. The ASC will take appropriate enforcement action against such conduct to ensure compliance with the Law and with its policy of promoting an informed market.

RG 37.21 The ASC will consider the accuracy and appropriateness of offerors' disclosure of funding arrangements, as part of its takeover surveillance program. This may occur during, or some months after a takeover scheme or announcement. This post-vetting of takeover documents (including the requisition and review of board minutes, business plans and loan facilities) is an effective means of ensuring that offerors have complied with cl 11 in Pt A and cl 8 in Pt C.