



# **Guidance Note on Target Company Statements**

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## **Introduction**

1. This Guidance Note has been prepared to assist market participants to understand the Panel's approach to the Code's requirements for target company statements.
2. The Guidance Note consolidates and updates the guidance previously given by the Panel on selected issues.
3. As with all matters that come before the Panel, any examples referred to in this Guidance Note are illustrative only and do not bind the Panel.

## **Panel executive available**

4. As many market participants are already aware, the Panel executive routinely checks takeover offer documents and target company statements in draft for compliance with the Code. In 2010, the High Court stated that the Panel executive may properly assist market participants by reviewing draft documents with a view to ensuring compliance with the Code.<sup>1</sup> The Panel executive will continue with this practice.
5. The Panel executive is also available to discuss takeover compliance issues with the legal advisers to target companies before documents are finalised.

## Clear, concise, and effective target company statements

6. The Panel expects user-friendly target company statements for shareholders. Drafting should follow a clear and concise style, with minimal use of jargon and repetition, and plain English used where possible. If information is summarised, a balanced view of any advantages and disadvantages should be provided.
7. More specifically, target company statements should be:
  - (a) Clear:
    - (i) use plain language;
    - (ii) use a font and font size that are easily readable;
    - (iii) be logically ordered and easy to navigate;
    - (iv) highlight important information; and
    - (v) explain complex information in plain language and include a clear explanation of any necessary jargon;
  - (b) Concise:
    - (i) use short sentences;

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<sup>1</sup> *Marlborough Lines Limited v Takeovers Panel* HC Wellington CIV 2010-485-1150 [2010] NZHC 1863 (12 October 2010) at [48].

- (ii) avoid unnecessary repetition;
  - (iii) highlight important information in balanced summaries;
  - (iv) use diagrams and graphs effectively; and
  - (v) minimise the use of brand information, photographs and other images;
- (c) Effective:
- (i) give adequate and accurate information about the transaction; and
  - (ii) convey an accurate and balanced impression.

### **Approach of the Panel**

8. In cases where the Panel identifies, or it is brought to the Panel's attention, that a target company may not have complied with the Code, the Panel will, if appropriate, and having regard to interests of the target company shareholders, work with the parties involved to find a pragmatic solution.

### **Compliance with the Code**

9. This section of the Guidance Note discusses some areas where compliance with the Code has raised difficult issues for target companies.

#### Disclosure of principal assumptions underlying forecasts

10. The Panel interprets Schedule 2 as meaning that the independent adviser's report on the merits of an offer (as required by rule 21) is part of the target company statement for the purposes of clause 21 of Schedule 2.
11. Clause 21 of Schedule 2 of the Code states that if any information provided in the target company statement refers to prospective financial information, the principal assumptions on which the prospective financial information is based must be included in the target company statement.
12. Independent adviser reports will ordinarily set out prospective financial information, comprising financial forecasts of the target company for one or more years, as it could reasonably be expected to be material to the decision of offerees to accept or reject an offer. Prospective financial information usually comprises forecasts that are based on information provided by the target company management.
13. The Code requires the target company statement (including the independent adviser's report) to state the principal assumptions on which any prospective financial information is based. The Panel expects that the assumptions will directly accompany the relevant prospective financial information in the document and be set out in a way that is helpful and relevant for shareholders reading the report.
14. Prospective financial information will usually be based on many assumptions about future conditions and events which may or may not occur, and that the quality of the information will be dependent largely on the appropriateness of the assumptions.

Providing shareholders with these assumptions assists them to make their own informed judgement on the quality and reliability of the information.

15. Assumptions can range from being reasonably certain to very uncertain. In setting out assumptions in a useful and relevant way, it is likely to be helpful to address, among other things:
  - (a) the degree of certainty/risk associated with particular assumptions and the key factors that could cause them to be incorrect;
  - (b) the extent to which assumptions relate to matters within or outside the control of the entity; and
  - (c) source material that has been used in deriving assumptions (e.g. past performance, third party reports or research, other market data).
16. For shareholders to make their own informed judgement, it may also be necessary to provide information which assists them in assessing the sensitivities of prospective financial information, where appropriate (for example, where there may be significant risks that could render those assumptions invalid and therefore alter key financial information and impact valuation or merits).
17. In determining what information to provide, the key question is whether it could reasonably be expected to be material to the making of a decision by the offerees to accept or reject the offer.

#### Prospective financial information and rule 64

18. The incumbent target board and management, whether supporting or resisting an offer, must ensure that statements about the value of the target company comply with the prohibition against misleading and deceptive conduct in rule 64 of the Code.
19. Where target company statements and independent adviser reports do not include an adequate description of the principal assumptions underlying any prospective financial information that they contain, the Panel has generally required the target company to issue a correcting statement. This has to be distributed to all target company shareholders to mitigate the effect of what is, in essence, a breach of the Code.

#### Information about asset valuations

20. The Code states that if any information in the target company statement refers to a valuation of any asset, the target company statement must include:
  - (a) the date of the valuation, the identity of the valuer, and a summary of the valuation that discloses the methodology and the key assumptions on which the valuation is based; and
  - (b) an address or addresses where copies of the valuation are available for inspection and a statement that a copy of the valuation will be sent to any offeree on request (clause 20 of Schedule 2).

21. This requirement applies whether the independent adviser's report or another part of the target company statement refers to the valuation of the asset. The disclosure required by clause 20 can be in the body of the independent adviser's report and/or in the body of the target company statement. Disclosure in either place will comply.
22. Where a target company has a significant number of investment properties which are included in the company's financial statements at market value, this reference in the financial statements will not generally constitute a reference to the valuation of an asset for the purposes of clause 20. Specific reference to valuations of one or more individual assets would be needed for the disclosure requirements to be triggered.
23. If a target company commissions its own expert opinion on the value of its shares and refers to this value in the target company statement (in addition to the independent adviser's report), the Panel is likely to consider that this is the valuation of an asset (being the value of the target company itself). This should be summarised in the target company statement to the extent required by clause 20 and be available to any shareholder who requests it.
24. The Panel's position on valuation reports arise from three cases, which highlight the meaning and importance of clause 20 of Schedule 2 of the Code. These cases have shown:
  - (a) that valuations must be summarised and made available to shareholders if they are referred to specifically in the target company statement or the independent adviser's report);
  - (b) that valuation reports do not just concern assets of the target company, but they may concern the target company itself, or other assets of relevance;
  - (c) the Panel can grant an exemption to allow parts of valuation reports containing commercially sensitive information to be deleted before being given to shareholders.

*Trans Tasman Properties Limited*

25. On 20 May 2004, the Panel considered a complaint from Latimer Holdings Limited relating to Trans Tasman Properties Limited's refusal to release to Latimer valuation reports it alleged were referred to in Trans Tasman Properties' target company statement. The complaint arose after Trans Tasman Properties issued a target company statement and an independent adviser's report by Ferrier Hodgson & Co to its shareholders, in response to a takeover offer from SEA Holdings New Zealand Limited dated 20 April 2004.
26. Clause 20 refers to valuations of assets that are identified specifically in the target company statement. Trans Tasman Properties' target company statement had not focused on a particular valuation of a particular asset. The independent adviser was content to deal with property values on a global basis, consistent with the last published financial statements.
27. The Panel determined that the target company statement had complied with clause 20 of Schedule 2 of the Code. The Panel did not accept that the reference by the independent adviser to the financial statements contained in the annual report (which referred to

valuations) amounted to a reference to “a valuation” in terms of clause 20. The clause requires a reference “to a valuation of any asset”.

28. In addition to the obligation under clause 20, Schedule 2 of the Code also imposes obligations on the target company directors to consider matters such as asset valuations where they may be material, irrespective of the requirements of clause 20. If such valuations are considered material, the directors are obliged to make such information known to the company’s shareholders.

*Wrightson Limited*

29. In May 2004, the target company statement issued by Wrightson Limited in response to the partial takeover offer from Rural Portfolio Investments Limited included references to a valuation report prepared by Cameron & Company.
30. Wrightson advised shareholders that it had sought from its advisers, Cameron & Company, a valuation report in addition to the rule 21 report that was prepared by Grant Samuel (the independent adviser appointed to prepare the rule 21 report). The Panel sought comment from Wrightson as to whether the reference made to Cameron & Company’s valuation report in the target company statement would require the company to provide the report to shareholders on request, as part of its obligation under clause 20 of Schedule 2 of the Code.
31. Wrightson said that it did not need to comply with clause 20 because Cameron & Company’s valuation was a valuation of Wrightson as a whole rather than of a specific asset or assets held by Wrightson.
32. The Panel considered that clause 20 did not have the narrow interpretation suggested by Wrightson. The requirements in clause 20 apply if the target company statement refers to a valuation of any asset and is not restricted to a specific asset of the target company. Subsequently, Wrightson took steps to provide the information required by clause 20 to shareholders, including a statement that a copy of the valuation would be available, in full, to any offeree on request.

*Kingsgate International Corporation Limited*

33. In June 2004, the Panel granted an exemption to Kingsgate International Corporation Limited from clause 20(b) of Schedule 2 of the Code. The exemption allowed Kingsgate to provide upon request, copies of the relevant valuation reports in a form which excluded information which the Panel had agreed was commercially sensitive.
34. Grant Samuel, in its independent adviser’s report, had referred to valuations of various Australian properties owned by Kingsgate, which were carried out by CB Richard Ellis. These valuation reports had not been prepared with a view to public disclosure, and contained very detailed information about the properties involved.
35. In considering whether to approve Kingsgate’s request for the exclusion of certain information from the valuations, the Panel used the following criteria:
  - (a) Is the information sought to be withheld material to a decision by Kingsgate shareholders to accept or reject the current takeover offer?

- (b) Is the information sought to be withheld likely to be “value destroying” information for shareholders of Kingsgate?
- (c) Is the information sought to be withheld commercially sensitive?

Material changes in the financial or trading position of the target company

- 36. The target company statement must include all material changes in the financial or trading position, or prospects, of the target company since the most recent annual report or a statement that there are no known material changes (clause 18(4) of Schedule 2).
- 37. Sometimes quite a long time may have elapsed between the company’s last annual report and the target company statement. Interim financial statements may have been published in that time. An independent adviser’s report will usually include prospective financial information. However, clause 18(4) requires all material changes in the financial position or prospects of the target company since the last annual report to be identified.
- 38. Subsequent interim financial statements or the independent adviser’s report are not enough for compliance, unless the independent adviser’s report specifically identifies the material changes that have occurred since the last annual report.

Directors’ recommendation

- 39. Clause 15 of Schedule 2 requires a target company statement to include either a recommendation by the directors to accept or reject an offer, or a statement that the directors are unable to make or are not making a recommendation.
- 40. The recommendation must be accompanied by the directors’ reasons for making or not making a recommendation.
- 41. In order to make a recommendation to the target company shareholders on the merits of a takeover offer, it is important that the board reaches an informed opinion on the merits of the takeover offer. The board should bring to bear its own knowledge about the target company’s business when considering the information before it, including:
  - (a) the target company’s internal management advice;
  - (b) any expert advice sought by the directors; and
  - (c) the independent adviser’s valuation and assessment of merits.
- 42. By undertaking this exercise, directors will be well placed to explain their reasons for their recommendation.
- 43. The Panel encourages directors to form their *own* opinions of the offer and reminds directors that when making recommendations to shareholders, directors should be making their own recommendation, in the best interests of the shareholders. In some instances, the directors’ recommendation might differ from the conclusion of the independent adviser. In that case, the reasons for those differences should be clearly explained by the directors.

### Approval of target company statement

44. The target company statement must include:
  - (a) a statement that the contents of the target company statement have been approved by the board of directors of the target company; and
  - (b) if any of the directors of the target company do not approve of the statement, their names and their reasons for not approving (clause 25 of Schedule 2).
45. It is common for a target company board to establish a committee of independent directors to handle all aspects of a takeover. This committee normally has delegated authority from the board of directors.
46. The Panel considers it is acceptable for a committee of independent directors to approve the contents of the target company statement for the board of directors. If any of the directors of the target company do not approve of the target company statement, their names and their reasons for not approving the contents of the must be outlined.
47. This obligation is not to be confused with the directors' other obligation in respect of recommendations to shareholders to accept or reject an offer under clause 15 of Schedule 2 of the Code.
48. A problem can arise if the target company statement includes information relating to the interests of directors and officers of the target company in material contracts with the offeror (as required by clause 13 of Schedule 2). In particular, officers or directors of the target company who are also officers or directors of the bidder, will probably have contractual arrangements with the bidder. However, the independent directors of the target company, who have to approve the target company statement, may not be privy to information about the interests of directors and officers unless those persons tell them. Non-independent directors are obliged to disclose information about any contractual arrangements with the offeror to the independent directors who are to approve the statement.

### Directors' interests in contracts of offeror

49. It is essential that information about the nature and extent of the interests of directors and officers of a target company in the material contracts of the offeror is made available by all directors of a target company, regardless of whether or not they are independent directors of the parties to a takeover.
50. This information is required to be disclosed under clause 13 of schedule 2. All directors of the target company have a duty to disclose this information even though it may be only the independent directors who sign the target company statement.

### Directors' disclosure obligations – specialist advice

51. The target company statement must contain all the information required under Schedule 2 of the Takeovers Code. The directors must disclose in the target company statement any information that could reasonably be expected to be material to the making of a decision by the offerees to accept or reject the offer.

52. Commonly, the board of a target company obtains advice from professional advisers in relation to a takeover offer. The Panel endorses the seeking of specialist advice by directors because it puts them in a better position to give advice to shareholders on the merits of the offer.
53. The onus is on the target company's directors to turn their minds to the content of the advice and determine whether it includes information or views that could reasonably be expected to be material to the offerees' decision as to whether to accept or reject the offer. If the advice does include such information, then the target company statement must be drafted in a way that ensures all such material information is disclosed.
54. If the directors have taken advice, they should consider whether their recommendations and general approach to the takeover are consistent with that advice. If the advice received by the directors is inconsistent with their recommendations and general statements, then it would be appropriate for the directors to consider carefully whether the advice should be disclosed (or described) for the offerees.

#### Exemptions from clause 26 of Schedule 2 of the Code

55. The target company statement must be certified by two directors and two senior executives of the company in accordance with clause 26 of Schedule 2 of the Code.
56. The Panel considers that the clause 26 certification is an important requirement of the Code. The Panel has declined several applications for exemption from the requirements of clause 26. This section aims to help market participants understand the Panel's approach when considering requests for exemption from clause 26.
57. Clause 26 requires the chief executive officer, the chief financial officer, and two directors of the target company to certify that to the best of their knowledge and belief, after making proper enquiry, the information contained in or accompanying the target company statement is *true and correct and not misleading, whether by omission of any information or otherwise, and includes all the information required to be disclosed by the target company under the Takeovers Code*.
58. The Panel has only granted one exemption from clause 26 - The Takeovers Code (Trans Tasman Properties Limited) Exemption Notice 2004. SEA Holdings New Zealand Limited (SEA Holdings), already the controlling shareholder, made a controversial takeover offer for the shares it did not own in Trans Tasman Properties Limited. The independent directors of Trans Tasman Properties were expected to reject the takeover offer. The independent adviser's report prepared under rule 21 of the Code had concluded that it was neither fair nor reasonable. There were several shareholders who appeared quite hostile to SEA Holdings increasing its interest in Trans Tasman Properties.
59. Trans Tasman Properties applied for an exemption from the requirement that the chief executive officer certify the target company statement. The same person was chief executive officer of both Trans Tasman Properties and SEA Holdings. He was also chairman of Trans Tasman Properties and a director of SEA Holdings.

60. The Panel granted the exemption for the stated reason that it was necessary to take into account the conflict of interest inherent in [the same person's] roles as the chief executive officer of the offeror and also of the target company.
61. Some market participants interpreted this explanation to mean that an exemption from clause 26 will be appropriate in every case where a chief executive officer or chief financial officer is conflicted.
62. The Panel did not intend the explanation to be interpreted in this way. The circumstances of the SEA Holdings takeover offer were unusual and the Panel granted the exemption in recognition of the particular difficulties faced by the chief executive officer, which went beyond the conflict of roles.
63. Clause 25 did not assist the chief executive officer. Clause 25 requires the target company statement to include a statement that its contents have been approved by the "*board of directors of the target company*" and, if "*any of the directors of the target company*" do not approve of the statement, their names and their reasons for not approving it. The independent directors of Trans Tasman Properties had approved the target company statement.
64. The chief executive officer, because of his association with SEA Holdings, was not a member of the committee. As a result, he was not asked to approve the target company statement in his capacity as a director of Trans Tasman Properties.
65. The exemption was subject to the condition that the chief executive officer sign a modified form of certificate, stating that he had provided all relevant information that Trans Tasman Properties was obliged to disclose under the Code and necessary to enable Trans Tasman Properties' directors to sign the clause 26 certificate. The modified certificate also required the chief executive officer to state that the information he had provided was *true and correct and not misleading*.
66. The clause 26 certificate is an important component of the target company statement. The Panel will only grant exemptions from this requirement when there are particularly compelling reasons to do so. The Panel expects such circumstances to be rare.

#### Signing of certificates for target company statements

67. The Code prescribes the certificates that must be signed for the target company in the target company statement. The certificate requires a combination of executive and board level responsibility to be taken for the contents of the target company statement (clause 26 of Schedule 2).
68. The executives who must sign the certificate in the target company statement are specified in clause 26(2)(a) of Schedule 2. This clause states that the certificate must be signed by the chief executive officer and the chief financial officer of the target company, or their respective agents authorised in writing, or if there is no chief executive officer or chief financial officer, the person or persons fulfilling those roles respectively, or their respective agents authorised in writing.
69. Where target company statements have been issued without being signed by the responsible executives, the Panel has acted swiftly to have the matter remedied. In one

case the target company had overlooked the need to have the chief executive sign the document while the chief financial officer (a secondee from an accounting firm) had not signed because he thought that the contractual arrangements between the accounting firm and the target company prevented him from doing so. It was only after the Panel had called a section 32 meeting to deal with the non-compliance that the chief financial officer signed (by way of an addendum) the target company statement.

70. The requirement for the chief executive officer and the chief financial officer (or the persons fulfilling these roles) to sign the target company statement is a legal obligation that must be complied with. The only exception would be if the Panel granted an exemption.

The requirements for “particulars” in target company statements

71. The target company statement must include the particulars of agreements or arrangements entered into, or of interests in contracts, or of restrictions in company constitutions that are relevant to the takeover transaction (clauses 10-13 and 16 of Schedule 2). There is a tendency in takeover documents for responses to the requirements of these clauses to be general rather than particular.
72. In the Panel’s view, “particulars” means names and amounts and other relevant details.
73. Clause 12 of Schedule 2 covers the circumstances where a target company has entered into certain arrangements with its directors and/or senior officers. These arrangements relate to payments or other benefits for compensation for loss of office, or remaining in or retiring from office. These payments may be quite modest and reasonable, or they may be poison pills, i.e., very large payments that entrench existing management by having a significant adverse effect on the value of the target company if a takeover succeeds.
74. The Panel expects the names of the people concerned and the amounts of the prospective payments to be disclosed. The amounts may be disclosed in terms of multiples of salary (e.g., 3 months’ salary, one year’s salary) in some instances.
75. If the amounts are modest and reasonable, disclosure should not cause any embarrassment or discomfort. If the amounts are large, disclosure of the amounts, and the names of the recipients, is very important. If the names and amounts are not disclosed, the offerees and the market will not know if there is reason for concern.

**Omission of material information in target company statement**

76. The Panel has held one section 32 meeting to consider issues relating to the omission of material information from a target company statement. The meeting related to the contest for control of Oyster Bay Marlborough Vineyards Limited (“Oyster Bay”) in July 2005 by Delegat’s Wine Estate Limited (“Delegat’s”) and Peter Yealands Investments Limited (“PYIL”).
77. The Panel received two complaints from PYIL:
- (a) the first related to the alleged non-disclosure of certain detailed information about Oyster Bay’s grape harvest and the sale of its grapes to Delegat’s under existing long-term arrangements. (After considering information summoned from Oyster Bay

and comments from the independent directors, the Panel decided to take no action); and

- (b) the second complaint was a claim that the target company statement should have included information about the market value of Oyster Bay's vineyard assets, unencumbered by long term agreements with Delegat's.

#### Section 32 meeting

- 78. The Panel held a meeting under section 32 to determine the issue on 20 September 2005.
- 79. The Panel decided that information about the market value of Oyster Bay's vineyards could reasonably be expected to be material to the making of a decision by Oyster Bay shareholders to accept or reject the Delegat's offer.
- 80. The Panel determined that it was not satisfied that Oyster Bay had complied with the Code in that the target company statement omitted information (relating to the market value of Oyster Bay's vineyards) that could reasonably have been expected to be material to the making of a decision by Oyster Bay shareholders to accept or reject the Delegat's offer.
- 81. Following High Court litigation after the Panel's decision, Delegat's offer was voided and the takeover process was restarted.

#### Panel view

- 82. The Oyster Bay case occurred before the introduction of rule 64 of the Code, the prohibition against misleading and deceptive conduct. If the Oyster Bay case was considered today, it would be considered under rule 64 of the Code (see *CodeWord 22* for more information on that rule).
- 83. However, the case emphasises the importance of the role of directors in preparing the target company statement and the care needed to fulfil that role. In preparing the target company statement, directors must consider all relevant information about the assets, liabilities, prospects and affairs of the target company that could reasonably be expected to influence a shareholder's decision on whether or not to accept a particular bid, and ensure all such information is disclosed. Directors must be very careful not to prejudge shareholders' ability to assimilate complex information. Directors are responsible for providing information in a form which shareholders can understand and interpret. It is also vital that directors and the independent adviser ensure that they have the most up-to-date information.