**Please Note:** **This comparison *only* shows the principal changes to the previous version of this guidance note. In particular, the deletion of certain parts of the schedule to the previous version of the guidance note have not been shown. This approach was taken because the volume of changes (largely resulting from a re-structure of the document) made identification of the substantive changes difficult. Accordingly, this guidance note is for illustrative purposes and *should not be relied on as providing a definitive statement of the changes the Panel has made.***

**Guidance Note on ~~the Process for~~ Costs Recovery~~Reimbursements under the Takeovers Act 1993~~**

## 1 Introduction

~~1. Until an amendment to the Takeovers Act 1993 was made in 2017, takeovers costs disputes were governed by rule 49 of the Takeovers Code. Reimbursement disputes under rule 49 were adjudicated by the District or High Court, although were often settled out of Court.~~

~~1. The replacement of rule 49 with new sections 48-53 of the Takeovers Act transfers to the Panel the role of primary adjudicator of reimbursement disputes.~~[1]

1.1 The Takeovers Act provides that target companies and their directors are entitled to be reimbursed for certain costs (see sections 48-53).

1.2 Specifically:

(a) in accordance with section 48(1), a director of a target company is entitled to be reimbursed by the target company for "any expenses properly incurred by the director on behalf, and in the interests, of holders of equity securities of the target company in relation to the offer or takeover notice"; and

(b) in accordance with section 49(1), the target company is entitled to be reimbursed by the offeror for "any expenses properly incurred by the target company in relation to the offer or takeover notice, whether as a result of section 48 or otherwise".[2]

1.3 This guidance note summarises the relevant provisions of the Takeovers Act and relevant case law. In addition, this guidance note sets out the Panel's expected approach in the event that any costs disputes come before it.[3]

1.4 While the Panel has sought to provide guidance on how it will approach relevant matters, it is conscious that it will likely develop and refine its views as disputes come before it. As this happens, the Panel will revise this guidance note to include any additional guidance it considers to be of general assistance.

## 2 Cost reimbursement procedure ~~under the Takeovers Act~~

Making a claim and providing expense information

---

[1] ~~Sections 47-53 of the Takeovers Act apply in relation to an offer or a takeover notice only if the takeover notice is received by the target company on or after 31 March 2017, the date on which the new provisions came into force.~~

[2] The directors' costs, which the Target Company reimburses in accordance with section 48(1), may, in turn, be passed on to the offeror under section 49(1).

[3] Please note that each matter will be assessed on a case-by-case basis in light of the relevant facts.

2.1 A costs recovery process is initiated by a party making a claim to the person liable for the relevant amount.

2.2 The Code does not specify what information a target company (or director) is required to provide to an offeror (or target company) in relation to the expenses it is seeking to recover.

2.3 However, the Panel would expect the target company (or director) to provide the offeror (or target company) with sufficient details of the nature of the advice provided by advisers and/or the services provided by suppliers in respect of which recovery of expenses is sought, to enable the offeror (or target company) to be satisfied that the expenses are "properly incurred" for the purpose of section 49(1).

Interim invoicing

2.4 In the ordinary course of events, the Panel expects that claims for costs reimbursements should be made following payment by the target company (i.e., reimbursements should be made during the course of a takeover).

Negotiation first

~~2.1~~2.5 The Panel strongly encourages parties to ~~deal with the question of~~negotiate and agree costs ~~through negotiation~~reimbursements themselves. If negotiation is successful, the amount to be reimbursed is the amount agreed to by the relevant director and the target company, or by the target company and the offeror ~~(~~, as the case may be~~) in accordance with~~ (see sections 48(2)(a) and 49(2)(a) of the Takeovers Act~~.~~).

~~However, at any time, before or during any~~Reimbursement Applications

~~2.2~~2.6 Although negotiation is encouraged, an application may be made to the Panel by any party to ~~the~~a reimbursement dispute ~~for~~ requesting that the Panel ~~to~~ determine the amount to be reimbursed (a ~~"~~**Reimbursement Application**~~"). In accordance with section 50, if~~). A Reimbursement Application ~~is received, the Panel must:~~may be made at any time.

~~(d) determine the amount to be reimbursed; and~~

~~(f) order that amount to be paid.~~

~~2. The parties entitled to be reimbursed are:~~

~~(j) directors of a target company, by the target company (section 48); and~~

~~(l) the target company, by the offeror (section 49).~~

~~2. The Panel will not usually commence processing a Reimbursement Application while a takeover is ongoing.~~

~~2.16~~2.7 A Reimbursement Application must be made in writing and include the following:[4]

(a) an overview of the transaction and the parties involved;

[4] See paragraph 2.8 below regarding the identification of any privileged information.

(b) a formal request for a determination under section 50(a) and for orders under section 50(b) of the Takeovers Act;

(c) a summary of the negotiations up to the date of the Reimbursement Application;

(d) details of any costs which have been (or are to be) reimbursed which are not in dispute;

(e) a statement from the director or target company's board (as applicable) to the effect that all costs for which reimbursement has been claimed were appropriate and properly incurred;

(f) all primary documents relating to the disputed costs for which reimbursement is sought;[5]

(g) a submission for each item of expenditure referred to in paragraph 2.7(f) explaining how it meets the criteria provided in section 48(1) or 49(1) (as ~~the case may be~~applicable); and

(h) any other relevant information.

Panel process on receipt of a Reimbursement Application

2.8 The Panel will typically provide a copy of a Reimbursement Application to the other parties to the dispute. If a party wishes for any information to be withheld, it must clearly identify the relevant information and demonstrate why it should not be disclosed.

~~2.17~~2.9 On receipt of a Reimbursement Application, the Panel will seek written submissions from the other parties to the Application.

~~2.18~~2.10 The Panel will then determine the amount to be reimbursed, and make reimbursement orders on the basis of that determination. This amount will constitute the sum of each of the costs "*properly incurred in relation to the offer or takeover notice*". The Panel's interpretation of this test is summarised in sections 3 and 4 below.

~~2. Any of the parties identified in sections 48 or 49 may appeal to the High Court against The Panel's determination. The appeal process is set out in sections 51-53 of the Takeovers Act.~~

~~**Determining the amount to be reimbursed**~~

~~2. In accordance with section 48(1), the director of a target company is only entitled to be reimbursed by the target company for *"any expenses properly incurred by the director on behalf, and in the interests, of holders of equity securities of the target company in relation to the offer or takeover notice."*~~

~~2. In accordance with section 49(1), the target company is only entitled to be reimbursed by the offeror for *"any expenses properly incurred by the target company in relation to the offer or takeover notice, whether as a result of section 48 or otherwise."*~~

~~2. If a Reimbursement Application is made to the Panel under section 48(2)(b) or 49(2)(b), then in accordance with section 50(a), the Panel will determine the amount to be~~

[5] This includes invoices, terms of engagement, and any other primary documents necessary for identifying each expense claimed.

~~reimbursed. This amount will constitute the sum of each of the costs *properly incurred in relation to the offer or takeover notice.*~~

~~2.30~~2.11 The Panel's determination under section 50(a) ~~will usually~~) may be made "on the papers", meaning that it will be a factual assessment of the primary documents and other information provided to it, without holding a hearing.

~~2.31~~2.12 The Panel may, if it considers that it would be beneficial, seek oral submissions from the parties to the Reimbursement Application. If the Panel hears oral submissions from one party, it will ensure that all parties have the same opportunity. The Panel may also exercise its powers to receive evidence on oath under section 31MA or to summon witnesses under section 31N of the Takeovers Act, if the Panel believes that it is appropriate to do so for the proper determination of the Reimbursement Application.

2.13 Any of the parties identified in sections 48 or 49 may appeal to the High Court against the Panel's determination. The appeal process is set out in sections 51 to 53 of the Takeovers Act.

## 3 Costs that are "properly incurred"

~~*Determination for the purposes of section 49(2)(b)* -~~ Expenses incurred by a target company (section 49(2)(b))

3.1 No two takeovers are alike. For that reason, it is not possible to prescribe in advance which of the expenses incurred by a target company in responding to a takeover notice or takeover offer will be recoverable under section 49. Each item of expenditure ~~will~~must be assessed ~~by the Panel~~ on a case-by-case basis, in light of the relevant facts.

3.2 ~~However,~~ In general terms, the Panel's view is that the principles put forward by the High Court in *Abano Healthcare Group Limited v Healthcare Partners Holdings Limited* [2018] NZHC 817 ("*Abano v HPH*") in considering the meaning of "properly incurred" expenses should be applied to section 49(1).

3.3 In interpreting section 49(1), the Panel will apply the following broad principles articulated in *Abano v HPH*:

(a) the use of the term "any" implies full recovery of properly incurred expenditure;

(b) expenses must be properly incurred in relation to an offer or a takeover notice, but the term "in relation to" is broad and should be read widely;

(c) expenses must be reasonable and proportionate, and reasonableness and proportionality should be assessed with reference to circumstances at the time, not with the comfort of hindsight; and

(d) properly incurred expenditure in relation to a takeover notice is not a normal incident of the target company's business, and hence is not an expense the target company should bear.

~~3.2~~3.4 The Panel considers that for an item of expense to have been properly incurred under section 49(1), the claimant must prove (to the civil standard) that the following four elements have been satisfied:

~~(a)~~ that the expenditure ~~falls under any of the following three categories:~~

~~( ) expenditure~~was not incurred while engaging in ~~complying with~~any activity prohibited by the Code ~~and the law, and the directors' fiduciary obligations which touch on the target company's response to a takeover;~~

~~( ) expenditure incurred (~~for ~~the purpose of safeguarding the offerees' interests (including the countering of propaganda). The merits of a bid (with value representing a subset thereof) should be used as a key measure of the offerees' interests; or~~

~~(f)~~(a) ~~expenditure incurred~~example engaging in ~~reimbursing directors for expenses properly incurred on behalf of, and~~"defensive tactics" which are prohibited by rule 38 or engaging in ~~the interests of, the offerees~~misleading or deceptive conduct in relation to ~~the takeover offer or notice;~~a transaction regulated by the Code (see rule 64));

~~(g)~~(b) that it was reasonable (with reference to circumstances existing when the expense was incurred) to incur the expense by engaging in that kind of activity;

~~(h)~~(c) that it was reasonable (with reference to circumstances existing when the expense was incurred) to spend that amount on that kind of activity; and

~~(i)~~(d) that there is a sufficient nexus between the incurring of the expenditure and the takeover offer or notice.

~~3. Full information on the three categories identified in paragraph 18(a) above is set out in the Schedule of this guidance.~~

~~3. In addition to the four elements described above, the Panel's consideration of whether an item of expense was properly incurred may involve an objective assessment of why the expense was considered necessary by the board of the target company.~~

~~3. Examples of items of expenditure that the Panel considers are not properly incurred for the purposes of sections 48(1) and 49(1) include:~~

~~(j) expenses incurred by engaging in defensive tactics (the meaning of which is taken from rule 38 of the Code);~~

~~(l) expenses incurred by the board of a target company in investigating or seeking competing offers; and~~

~~(n) costs imposed by the Panel under the Takeovers (Fees) Regulations 2001 for enforcement action taken under section 32 of the Act.~~

~~3.16~~3.5 ~~The Panel also~~For clarity, the Panel does not envisage that the following would necessarily be properly incurred for the purposes of sections 48(1) and 49(1):

~~(b) success fees, whether explicit or implied by the structure of the terms of engagement;~~

~~(c)~~(a) costs associated with negotiating settlement of a reimbursement dispute; ~~and~~

~~(d)~~(b) costs involved in making a Reimbursement Application to the Panel~~.~~; and

~~(e)~~(c) costs imposed by the Panel for enforcement action taken under section 32 of the Act.

~~3.17~~3.6 However, there may be appropriate circumstances in which the Panel could decide otherwise.

3.7 The Panel considers that properly incurred expenses will generally fall into the following categories, although they are not exhaustive:

(a) expenses related to notices and target company statement obligations (**Category 1**);

(b) expenditure incurred safeguarding offerees' interests (**Category 2**); and

(c) director reimbursement for expenses properly incurred in the interests of shareholders (**Category 3**).

~~Direct or indirect inducements~~

~~Target companies may consider making payments to shareholders to encourage them not to accept a particular takeover offer.~~

~~1.1 The Panel has seen no examples of direct inducement payments. The Panel considers that if they were to occur the costs of any such payments would not be recoverable under section 49(1) as they do not properly fall within any of the above Categories of recoverable expenses.~~

~~1.1 If the target company, for whatever reason, proposes to pay broker handling fees as indirect inducements to reward brokers whose clients vote against a partial takeover offer, then the Panel would similarly see the cost of such fees as not being recoverable under section 49(1) as they do not properly fall within any of the above Categories of recoverable expenses.~~

~~Directors' fees~~

Category 1 (expenses related to notices and target company statement obligations)

~~3.18~~3.8 In broad terms, this category is directed to the regulatory obligations of target company boards in responding to takeover offers. ~~The manner in which the category is expressed by the Court reflects the limited regulatory requirements of both the Companies Amendment Act 1963 and the law generally in 1972. Applying the principle to which this category is directed in the light of today's takeover environment,~~ The Panel recognises two parts to this general category:

~~3.19~~3.9 Part 1 – costs incurred in complying with the procedural requirements of the Takeovers Code. By way of example, such costs would include costs associated with:

(a) preparation, printing and supply of the target company statement;

(b) preparation, printing and supply of the independent adviser's report;

(c) the supply of the share register;

(d) approving variations to the takeover offer where prior approval of directors of the target company has been sought under rule 44(1)(b)(ii) of the Code; and

(e) attendances with the Panel in relation to the target company statement.

~~3.20~~3.10 Part 2 – costs incurred in complying with the law and directors' fiduciary obligations which touch on the target company's response to a takeover. By way of example, this ~~such costs~~may include:

(a) costs of meeting NZX requirements;

(b) costs of meeting Financial Markets Conduct Act requirements (e.g., substantial product holder and continuous disclosure requirements);

(c) ~~satisfying itself through advice, that it (the target company) is not engaging in defensive tactics in breach of the~~Codethe target company's costs of obtaining advice to satisfy itself that it is not engaging in defensive tactics in breach of the Code (or would not do so if it took a certain course of action);

(d) costs of monitoring the offeror's compliance with the Code for issues which may affect target company shareholders;

(e) costs incurred in instigating complaints (provided they are not vexatious or an abuse of process) to the Panel which arise from actions of the offeror which may affect target company shareholders; and

(f) costs incurred in responding to complaints made to the Panel by the offeror or associates of the offeror (other than in respect of actions or omissions of the target company, which the Panel determines have caused a breach of the Code).

~~3.21~~3.11 The line between complaints about matters which affect target company shareholders and complaints designed to frustrate the course of the bid can be a fine one. Offerors should not be expected to pay for relentless target company actions regarding legal compliance.

~~3.22~~3.12 Expenses which are incidental to the above should also be recoverable. It is recognised that there may be some overlap between Part 1 and Part 2.

Category 2 (expenditure incurred safeguarding offerees' interests)

*General*

~~The Panel considers that the category of expenses identified by the Court in Canterbury Frozen Meat as countering propaganda is an appropriate category, but should be treated as a subset of the category defined as safeguarding offerees' interests (which is an appropriate category of expense to be recovered by a target). Accordingly, the Panel treats Canterbury Frozen Meat's Categories 2 and 3 as a combined Category 2. 4.6~~

3.13 ~~The Panel notes that the Court in Canterbury Frozen Meat suggested that share value might be a key measure of offerees' interests. In the modern New Zealand takeover environment the Code identifies the merits of the bid as a key measure of offerees' interests, and value as simply a subset of this, with its importance varying depending on the nature of the relevant bid. For example, in a partial bid, the consequences of the bid both in terms of the control of the target company and the effect on a shareholder's holding are of critical importance.~~The Panel considers that a broad view should be taken of

offerees' interests, consistent with the Code's focus on merits. This covers, in the Panel's view, ~~steps taken in relation to matters such as~~the following broad categories of expenses:

(a) expenses incurred by directors in fulfilling their fiduciary responsibilities in a takeover to act in the interests of the shareholders. However, generally the Panel envisages that expenses incurred in seeking competing offers are unlikely to be sufficiently proximate to the relevant transaction to be recoverable;

~~(g)~~(b) expenses incurred in ensuring that shareholders are properly informed, there being two aspects to this:

(i) the directors putting themselves in a position to be able to give advice to shareholders on the merits of the bid. It needs to be recognised that takeovers are rare events in the life of a company and, as such, directors commonly have no experience of takeovers and consequently little knowledge of how to respond to them. In order to respond properly they may need to retain an expert or experts versed in these matters (whether financial, legal, strategic or otherwise) to provide advice so that they are in a position to ensure that shareholders are properly informed; and

(ii) the communicating of received advice to shareholders, effectively and appropriately. Depending on the circumstances, this may give rise to the need to retain communications consultants~~and the need to provide that communication by way of public notices. However, there should be demonstrated a clear justification for employing these strategies in substitution for, or in addition to, direct communication with shareholders~~; and

(c) expenses incurred in countering communications from the offeror calculated to influence the offerees' choice are a part of seeing that shareholders are appropriately informed. The situation sometimes arises, particularly in hostile takeovers, where target company shareholders receive information from the offeror extolling the virtues of the bid and/or criticising the performance of the incumbent management and board. The target company must be able to respond to such information in a balanced and meaningful way and should be able to recover its costs in doing so. ~~There should be clear justification for employing the use of PR consultants and/or public notices in substitution for, or in addition to, direct communication with shareholders.~~ Again, depending on the circumstances, this may give rise to the need to retain communications consultants.

3.14 If the target company, for whatever reason, proposes to pay broker handling fees to brokers whose clients vote in a particular way in relation to a shareholders' meeting in relation to a takeover offer, then the Panel would see the cost of such fees as not being recoverable under section 49(1).

*Properly incurred expenses – sufficient nexus and reasonableness*

3.15 Expenses must be properly incurred in relation to an offer or a takeover notice to be recoverable. Consequently, the party seeking recoverability must demonstrate that there is an appropriate nexus between the expense and the relevant transaction. For example, general retainer fees agreed to prior to the takeover being announced may not be recoverable.

3.16 The recoverability of an expense will also depend on its reasonableness. This will be assessed in the particular circumstances in which the underlying fee was agreed or expense incurred. The Panel will consider the reasonableness of any particular expense or fee by reference to both:

(a) the nature of the expense or fee (including the manner in which it is structured – see further below); and

(b) the quantum of the expense or fee.

3.17 Importantly, the decision in *Abano v HPH* does not preclude fixed fees or other non-time-based fees (e.g., success fees, contingency fees or outcome-based fees) from being recovered. The structure of a fee does not, in and of itself, mean that the fee is not recoverable. Rather it is the reasonableness of the fee that is relevant. Further, when considering the nature of a fee, the Panel will look to its substance rather than its form.

3.18 Accordingly, legal and advisory fees may be structured in a number of ways and still be recoverable. Target company boards are entitled to seek the advice that they consider necessary for the discharge of their legal or fiduciary obligations.

Category 3 (Director reimbursement for expenses properly incurred in the interests of shareholders)

3.19 This category includes expenses incurred by the individual directors in relation to additional board attendances to consider the merits of the takeover and other takeover matters.

~~3.24~~3.20 All Code companies face the possibility of takeover offers made under the Code. Accordingly, the additional duties, responsibilities and attendances that arise for directors of Code companies on receipt of a takeover notice or offer, are an ordinary risk of holding office.

3.21 The Panel recognises that some takeover offers may be of such legal and commercial complexity that directors' attendances may significantly exceed those attendance levels that would normally be expected for a takeover situation. In these circumstances, it may be proper and reasonable for a Code company to compensate its directors for the additional attendances involved and these remuneration expenses may be recoverable undersection 49(1). Whether such additional directors' remuneration is properly incurred, and therefore recoverable undersection 49(1), will need to be determined on a case by case basis in the light of the relevant facts.

~~Expenses for resisting a takeover bid~~

~~4.10 In Canterbury Frozen Meat the Court took the view that expenses incurred for the purpose of resisting a takeover bid are not recoverable. In the Panel's view, a distinction needs to be madebetween:~~

- ~~first, expenses incurred by the board of the target company in resisting a bid by engaging in defensive tactics which are not permitted by rule 38 of the Code. The Panel considers that these expenses are what the Court considered as being not properly incurred in Canterbury Frozen Meat. These expenses, which may include items such as the costs of sale of key assets, are not recoverable undersection 49(1); and~~

- ~~secondly, expenses incurred by the board of the target company in resisting a takeover bid considered by the board not to be in the interests of shareholders of the target company. These expenses, mostly related to communications with shareholders, should be recoverable under Category 2 above, as they are incurred in trying to ensure that shareholders are fully informed when making a decision as to whether to accept or reject a takeover offer. There should be clear justification for employing the use of~~

PR consultants and/or public notices in substitution for, or in addition to, direct communication with shareholders.

4.11 Expenses incurred in resisting a bid are not always easily identifiable as falling within either of these categories. Whether they are properly incurred will turn on an objective view of the reason why they were considered by the board to be necessary. Competing offers

4.12 The Panel is aware that in the United States directors may have a fiduciary obligation to maximise value for shareholders when presented with a takeover offer, by seeking competing offers. In New Zealand there is no established law requiring directors to seek competing offers. However, target companies are able to seek competing offers if they wish to do so, provided they do not breach rule 38 of the Code, and must consider any such offers should they come forward.

4.13 The Panel considers that because the decision to seek a competing offer is a voluntary decision of the board and is not made pursuant to a legal or fiduciary obligation, the expenses in investigating or seeking competing offers are not recoverable under section 49(1) as they do not properly fall within any of the above Categories of recoverable expenses.

4.14 The Panel suggests that if a target company board wishes to investigate or seek competing offers, then it should structure its adviser mandate in such a way that the expenses relating to the seeking of competing offers are clearly identifiable and separable from other expenses (i.e. expenses which may be recoverable undersection 49(1)).

4.15 For the purposes of section 49(1) each competing offer should be viewed in isolation, to the effect that the offeror under the offer is only liable to pay the properly incurred expenses of the target company relating to that offeror's offer and not expenses incurred in relation to any competing offer.

Success fees

4.16 Sometimes in a takeover transaction advisers' fees (usually financial adviser fees) are structured so that the adviser receives a larger fee if a certain result is achieved (e.g. a larger fee if the initial offer is increased).

4.17 The key role of advisers, in the context of the Code, is to assist the target company board in carrying out its duties under the Code by providing objective expert advice. By engaging the adviser it is expected that the board of the target company will receive the required advice, regardless of whether a "success" outcome has been achieved or not. Most commonly, the adviser is engaged to assist the board in deciding on the appropriate response in the face of the takeover. To specify a success fee outcome in advance of receiving the advice required by the board to determine the target's response suggests in itself that the fee is not properly incurred for the purposes of section 49(1).Whether or not this might be the case, as the adviser is expected to provide the target company board with appropriate objective advice in any event, any "success" component of the fee must relate to an outcome that is not of itself an outcome that must be achieved as a legal or fiduciary obligation of the directors of the target company under Category 1.

4.18 For these reasons, the Panel takes the view that while the target company may have sound commercial reasons for entering into a "success fee" arrangement with the adviser, it is difficult to envisage the circumstances in which the costs incurred under such an arrangement

~~could be regarded as being properly incurred and therefore recoverable undersection 49(1). However, that does not necessarily rule out success fees from being recoverable under section 49(1) in appropriate circumstances.~~

Determination for the purposes of section 48(2)(b) – expenses incurred by a director

~~3.25~~3.22 The Panel's determination of the amount to be reimbursed under section 48(2)(b) will be made on a case-by-case basis in light of the facts and circumstances before it.

~~3.26~~3.23 However, as a guideline, the Panel's determination will constitute the sum of each of the costs that it considers to have been:

(a) properly incurred; and

(b) incurred on behalf, and in the interests of holders of equity securities of the target company.

~~3.27~~3.24 The Panel's consideration of whether an item of expenditure was incurred on behalf, and in the interests, of, holders of equity securities in the target company will include an objective assessment of why the item of expenditure was considered necessary by the director.

## 4 Costs incurred "in relation to" the takeover process

General

4.1 Sections 48 and 49 provide an entitlement to claim costs incurred in relation to a takeover offer or takeover notice. The words "*in relation to*" have a very broad meaning. For the purposes of the Panel's determination under section 50(a), costs which may be reimbursed according to section 48(1) or 49(1) may include those incurred prior to receipt of a takeover notice by the target company, provided that:

(a) the costs were properly incurred; and

(b) the takeover notice was eventually sent.[6]

4.2 As a general guideline, the Panel will consider the takeover process to have ended on:

(a) the date on which the offer becomes unconditional, or closes (whichever is the later);

(b) the date on which the offer lapses; or

---

[6] If the takeover notice is never actually sent, costs cannot be claimed under sections ~~49-50. This is because these sections refer to recovery from an "offeror", being a person who makes an "offer" under the Code.~~ 48 – 50. However, where a takeover notice is sent, but never followed ~~up with a~~by an actual takeover offer, costs in connection with the takeover notice may be claimed ~~under sections 49-50~~ from the prospective ~~offerors~~offeror. This is because ~~interpreting the word~~these sections refer to recovery from an "offeror" ~~to include prospective offerors is consistent with rule 41 of~~or a "target company" (as applicable). These terms bear their definitions from the Code~~, which sets out the requirements for the sending of~~ (see section 47). In general terms,

(a) an "offeror" includes a person who gives a takeover notice ~~by an "offeror."~~as well as a person who makes an offer under the Code; and

(b) a "target company" includes a company which has received a takeover notice and a company whose voting securities are subject to an offer under the Code.

(c) the date on which the takeover notice lapses.

4.3 However, the Panel reserves the discretion to include in its determination under section 50 costs incurred subsequent to the times described above, if:

(a) the costs were properly incurred; and

(b) the costs were incurred within a reasonable time from the end of the takeover process.

Expenses prior to takeover notice

4.4 Section 49(1) provides that expenses properly incurred by the target company in relation to an offer or a takeover notice are recoverable from the offeror. *Abano v HPH* does not address the issue of recovery of expenses incurred prior to the target company receiving an offer or takeover notice.

4.5 Generally, it will be easier to show that expenses incurred after a takeover notice is received (as opposed to those incurred before receipt) were incurred in relation to an offer or a takeover notice. However, this does not preclude the recovery of expenses incurred prior to receiving a takeover notice, provided that:

(a) such expenses were properly incurred in relation to an offer or a takeover notice; and

(b) a takeover notice is actually sent.

4.6 The requirement that a takeover notice be sent is because section 49(1) allows recovery of expenses from an "offeror", being a person who makes an "offer" under the Code. No "offer" can be made under the Code without a takeover notice first being sent. Similarly, if a takeover notice has been sent, but no offer was made to shareholders, section 49(1) allows recovery of expenses incurred in relation to the takeover notice from a prospective offeror (being a party that has sent a takeover notice).

4.7 Regardless of whether the expenses were incurred prior to, or after, the receipt of the takeover notice, such expenditure will only be recoverable from the offeror if there is a sufficient nexus between the incurring of the expenditure and the offer or the takeover notice. Such nexus can only be determined on a case by case basis.

4.8 Target boards are free to contractually agree with potential offerors that certain pre-bid expenses, such as due diligence costs, will be recoverable from the offeror and also the circumstances in which they will be recoverable. The Panel suggests that by contractually agreeing such matters from the outset, the parties may minimise the risk of a dispute later arising over the recovery of pre-offer expenses.

## 5 The Panel's fees

5.1 The Panel will charge for its time relating to Reimbursement Applications in accordance with the Takeovers (Fees) Regulations 2001.

5.2 The Panel will usually bill its fees equally to each party to the Reimbursement Application, unless there is good reason to charge one party more than the other.