

Practice Note - Conditions in Takeover Offers – Payment of Consideration

Rule 25 of the Takeovers Code provides that a takeover offer may be subject to conditions, except conditions that depend upon the judgement of the offeror or any associate of the offeror or conditions whose fulfilment is in the power, or under the control of the offeror or any associate of the offeror. If the offer is subject to conditions it must specify a date by which the offer is to become unconditional. There are restrictions in rule 25 as to when this date must be. No condition contained in the offer can have effect beyond the date specified by which the offer is to become unconditional. The offer will lapse if it does not become unconditional by the specified date. If the offer does become unconditional then written notice must be sent to the target company, the Panel and, if the target company's voting securities are quoted, the New Zealand Stock Exchange.

Rule 33 of the Takeovers Code provides that an offer document must specify the date by which the consideration for accepting the offer must be sent to those persons whose securities are taken up under the offer. The rule requires that the date specified in the offer document must not be later than 7 days after the later of:

- a) the date on which the offer becomes unconditional; or
- b) the date on which an acceptance is received; or
- c) the end of the offer period first specified in the offer.

The intention of this rule is to ensure that offerees who accept a takeover are paid promptly within the context of a takeover. For example an offeror cannot postpone the time of payment of consideration for an offer that is unconditional simply by extending the offer period.

Some offer documents have included, as part of the rule 33 statement, a statement that the date that is specified in the offer document as the last day for the payment of consideration may change "if the offer's closing date is subsequently extended in accordance with the Code." The Panel considers that such a statement is not inconsistent with the requirements of rule 33.

Rule 34 of the Code provides that, if the consideration is not sent to persons whose securities are taken up under the offer within the period specified in the offer, then the offeree may withdraw acceptance by notice in writing to the offeror. However, the offerees' acceptance may only be withdrawn if:

- a) written notice has been given to the offeror of the intention to withdraw; and
- b) 7 days have expired since the written notice was given; and
- c) the offeree does not receive the consideration from the offeror during that 7-day period.

Some offer documents received by the Panel have included a statement to the effect that “the offeror’s obligations in respect of settlement will be subject to the registration of the transfer of the relevant securities from the offeree to the offeror.” Some of these offer documents have also included a further statement to the effect that “the offeror will present all forms of acceptance and transfer to the target company for registration as soon as possible following the offer being declared unconditional or the conditions being waived in respect of the offer by the offeror.”

Confusion has arisen as to whether statements of the kind referred to in the preceding paragraph are a condition of the offer which must be satisfied before the offer can become unconditional for the purposes of rule 25 of the Code. One view is that such statements merely prescribe the requirements of settlement between the offeror and the offerees and are not a condition of the offer. The other view is that the statements are a condition of the offer.

The Panel considers that such statements are a condition of the offer. As such the offer cannot become unconditional until the condition contained in the statements is either satisfied or waived. The Panel takes this view because the statements have the effect of making the offeror’s obligations under rule 33 of the Code subject to registration of the transfer by a third party – the target company’s directors.

The view has been expressed that the Panel’s approach may mean that any offeror would be required to waive the requirement of registration and pay accepting shareholders by the end of the 7-day period even if registration of particular transfers is denied. The Panel considers that it is a matter for the offeror to formulate in the offer protections against the failure of the target company to register the share transfers so that the offer can be made unconditional and the consideration paid in compliance with the requirements of the Code. This does not of course require payment where the seller itself is in breach of any of the terms of the contract formed by acceptance of the offer e.g. by not providing the documentation required by the contract or where the existence of the charge means that the seller is not delivering unencumbered title to the shares.

This Practice Note is provided for guidance only. While it signals the attitude of the Takeovers Panel at this time the Panel is not bound by this or any other guidance note.