PRACTICE NOTE - VARIABLE PRICING

The question has been raised with the Takeovers Panel as to whether rule 20 of the Takeovers Code, or any other provision in the Code, prohibits offers which provide for the consideration payable in the event of the acceptance level being reached to be increased if a pre-specified higher acceptance level is reached.

An example of an offer containing variable pricing would be one which offers $1.00 per share if an acceptance level of more than 50% is reached and $1.20 per share if the compulsory acquisition threshold of 90% is reached. To date no such offers containing variable pricing have been made in New Zealand under the Code.

The Panel considers that this kind of pricing variation in an offer does not breach the Code as all shareholders receive the same consideration. The offer would of course need to comply fully with rule 20 and all other provisions in the Code.

A variable pricing offer of this kind is different from a two-tier offer as the same final price is paid to all security holders. A two-tier offer may comprise an offer for a certain percentage of the target company at one price with a different price being offered for the remainder.

Rule 20 of the Code provides that a takeover offer must be made on the same terms and provide the same consideration for all securities belonging to the same class of equity securities under offer. Two tier offers do not comply with rule 20 as they involve different consideration being offered to different shareholders.

The Panel will be monitoring the use of variable pricing particularly in regard to the requirements of rule 20.

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

11 December 2002