

PROSECUTIONS POLICY

Introduction

- 1 Since 2013, Cabinet has required that all Crown entities that have a prosecution function have a publicly available prosecution policy that:
 - (a) identifies the objectives of the entity's prosecution activities;
 - (b) outlines when prosecution is appropriate, as opposed to alternative enforcement actions;
 - (c) ensures that prosecution decisions are cost-effective and in the public interest; and
 - (d) is publicly available.
- 2 The Panel has a prosecution function in respect of breaches of sections 31F, 44, 44C, 44H, 44J(3) and 44P of the Takeovers Act 1993 (the **Act**), and has developed this policy accordingly.

Scope

- 3 This policy applies to all potential and actual exercises of the Panel's prosecution function under sections 31F, 44, 44C, 44H, 44J(3) and 44P of the Act.
- 4 The Panel's objective in taking any prosecution is to:
 - (a) provide for the appropriate enforcement of the Takeovers Code (the **Code**) by taking enforcement action (where appropriate) against persons who interfere with the Panel's exercise of its functions and duties in specified ways; and
 - (b) enforce the provisions of the Act which create offences for knowingly making false or misleading statements or knowingly disseminating misleading information in relation to Code-regulated transactions (the **Misleading Conduct Offences**).
- 5 Notably, the Misleading Conduct Offences overlap, to a degree, with the restriction on misleading or deceptive conduct under the Code in rule 64. In summary, rule 64 is of broader application as rule 64 of the Code does not:
 - (a) contain the knowledge element in the Misleading Conduct Offences; or
 - (b) require that the relevant misleading conduct or statement has one of the effects specified in the Misleading Conduct Offences.
- 6 To the extent there is an overlap, the Panel may seek to take administrative actions, obtain enforceable undertakings, impose civil penalty proceedings and/or obtain other civil remedy orders.
- 7 This policy is not exhaustive and is not intended to be legally binding. The Panel may revise this policy from time to time. This policy is necessarily general, and for greater specificity, interested persons should refer to the Act and other relevant legislation in relation to the offence or enforcement activity.

Policy

- 8 The Panel acknowledges that the Solicitor-General has published Prosecution Guidelines (the **Guidelines**). The Panel adopts the Guidelines (or any amended or updated version thereof) in full in relation to any prosecutions under the Act.

Enforcement options

- 9 There are a range of enforcement options available to the Panel (although some options may only exist where there have been breaches of the Code, as opposed to offences within the Act). From least to most severe, these are:
- (a) Non-statutory enforcement tools. Such tools include informal interventions such as communications with individual market participants to outline their responsibilities under the Code and Act and to request compliance, making public statements and issuing market guidance.
 - (b) Exercise of the Panel’s statutory powers. Principally the Panel’s powers are exercised in relation to the holding of meetings under section 32 of the Act and associated orders which can be made. However, the Panel has other powers available to it such as varying or revoking exemptions and accepting enforceable undertakings.
 - (c) Civil proceedings. These can include seeking civil remedies under the Act and/or seeking pecuniary penalties.
 - (d) Criminal prosecutions under the Act.

Panel consideration of prosecutions

- 10 All prosecutions must be approved by the Panel (usually acting via a division), and the reasons for its decision documented.
- 11 In considering whether to commence or continue a prosecution under the Act, the Panel will:
- (a) consider whether civil proceedings or other enforcement action would represent a more appropriate response to the conduct alleged (prosecution is reserved for the most serious contraventions);
 - (b) ensure that prosecution decisions are cost-effective and in the public interest;
 - (c) make its decision in the context of, and in accordance with, the considerations set out in the Guidelines, the applicable law and all relevant facts, matters and circumstances; and
 - (d) without limiting the above matters, apply the “Test for Prosecution” set out in the Guidelines being, as at the date of this policy, the application of a two stage test:
 - (i) *The Evidential Test*: whether there is enough evidence to prove the proposed charge beyond reasonable doubt; and
 - (ii) *The Public Interest Test*: whether the public interest requires a prosecution to be brought.
- 12 A decision not to prosecute does not preclude the Panel from further considering the case if new and additional evidence becomes available, or if a review of the original decision is required (provided always that the Panel acts within the applicable limitation period for bringing a prosecution).

Parallel investigations

- 13 Where another agency has an interest in the matter which is the subject of a Panel prosecution, the Panel will seek to consult with and coordinate its activities with that agency.
- 14 The Panel will, where applicable and practicable, seek to consult and coordinate with other relevant agencies. In particular, this working relationship may include, but is not limited to, information sharing and co-regulatory investigations.

Applicable limitation periods

- 15 In accordance with the Criminal Procedure Act 2011, most criminal charges must be filed in the relevant Court within defined limitation periods after the date on which the offence was committed. Those limitation periods depend upon the level of penalty that may be imposed under the offence.
- 16 However, in respect of an offence against sections 44H, 44J(3), or 44P of the Act, a charging document may be filed at any time (section 44PA of the Act).

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