

Guidance Note

COSTS RECOVERY

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**TAKEOVERS
PANEL**
TE PAE WHITIMANA



Contents

1	Introduction	3
2	Costs reimbursement procedure	4
	Making a claim and providing expense information	4
	Interim invoicing	4
	Disputes	5
	Reimbursement Applications	5
	Panel process on receipt of a Reimbursement Application	6
3	Costs that are “properly incurred”	76
	Expenses incurred by a target company (section 49(2)(b))	76
	Category 1 (expenses related to notices and target company statement obligations)	87
	Category 2 (expenditure incurred safeguarding offerees’ interests)	98
	Category 3 (director reimbursement for expenses properly incurred in the interests of shareholders)	9
	Potential barriers to recovery of expenses / expenses which cannot be recovered	9
	Determination for the purposes of section 48(2)(b) – expenses incurred by a director	1110
4	Costs incurred “in relation to” the takeover process	11
	General	11
	Expenses prior to takeover notice	1211
	Expenses where an offer is not actually made after the issuance of a takeover notice	12
5	The Panel’s fees	1312
	Schedule: Version control, disclaimer and copyright	1413



1 Introduction

1	Introduction	3
2	Cost reimbursement procedure	3
	Making a claim and providing expense information	3
	Interim invoicing	3
	Negotiation first	3
	Reimbursement Applications	4
	Panel process on receipt of a Reimbursement Application	4
3	Costs that are “properly incurred”	5
	Expenses incurred by a target company (section 49(2)(b))	5
	Category 1 (expenses related to notices and target company statement obligations)	6
	Category 2 (expenditure incurred safeguarding offerees’ interests)	7
	Category 3 (Director reimbursement for expenses properly incurred in the interests of shareholders)	8
	Determination for the purposes of section 48(2)(b) — expenses incurred by a director	8
4	Costs incurred “in relation to” the takeover process	8
	General	8
	Expenses prior to takeover notice	9
5	The Panel’s fees	9

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1.1 This Guidance Note summarises how costs reimbursements operate under the Takeovers Act 1993. ~~(the Takeovers Act).~~ It also provides information on how the Panel considers claims for reimbursement should be made and key aspects of the Panel's [likely](#) approach to dealing with disputes which come before it.

1 Introduction

~~1.1.2~~ The Takeovers Act ~~1993~~ provides that target companies and their directors are entitled to be reimbursed for certain costs (see sections 48 ~~–~~ 53).

~~1.2.1.3~~ 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”.¹

~~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.²

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

~~1.5~~ ~~Cost~~As with all matters that come before the Panel, any examples referred to in this Guidance Note are illustrative only and the Panel is not bound by its own precedent.

2 Costs reimbursement procedure

Making a claim and providing expense information

- 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~~ [Takeovers Act](#) 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). [A claimant is not, however, required to provide information that is subject to legal privilege or otherwise privileged under applicable law.](#)

Interim invoicing

- 2.4** ~~In the ordinary course of events, the~~ [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).~~ [A target company can make such claims during the course of a takeover; it does not need to wait for completion of the offer process. The Panel expects that, absent a dispute, the offeror should reimburse the target company promptly after receipt of a reimbursement claim.](#)

¹ 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).

² Please note that each matter will be assessed on a case-by-case basis in light of the relevant facts.



Negotiation first

Disputes

2.5 If a person receives a request for reimbursement and considers that the amount of the request is not required to be reimbursed under the Takeovers Act, that party should promptly:

- (a) identify each specific amount which it considers (in good faith) is not required to be reimbursed (the **Disputed Amount**) and reasonably detailed reasons for its view; and
- (b) reimburse any and all amounts claimed other than the Disputed Amount. For clarity, this applies where part, but not all, of a particular cost (e.g., the fees charged by a professional adviser) is disputed. In that case, the part of the cost that is not the Disputed Amount should be promptly reimbursed.

2.52.6 The Panel strongly encourages parties to ~~negotiate and agree to adopt a reasonable approach in responding to claims for costs reimbursements themselves.~~ If ~~negotiation is successful, the parties agree an amount to be reimbursed is the amount other than what was initially claimed, then that~~ agreed to by the relevant director and the target company, or by the target company and the offeror, as the case may be amount is the amount to be reimbursed (see sections 48(2)(a) and 49(2)(a) of the Takeovers Act). ~~Parties should not dispute reimbursement claims unless they have reasonable grounds to believe that the Disputed Amount has not been properly incurred in terms of sections 48(1) or 49(1) of the Takeovers Act. A failure by a party to act in good faith in disputing a reimbursement claim and otherwise act in the manner described above, may lead to the Panel departing from its starting position of an equal allocation of the Panel's fees.~~

Reimbursement Applications

2.62.7 Although ~~negotiation is~~ parties are encouraged to resolve any disputes themselves, an application requesting that the Panel determine the amount to be reimbursed (a **Reimbursement Application**) may be made by any party to a reimbursement dispute. ~~Although the target company is more likely to make an application, the bidder may also make an application disputing the expenses or the amount to be reimbursed.~~ A Reimbursement Application may be made at any time.

2.72.8 A Reimbursement Application must be made in writing and can take a number of forms. However, the Panel ~~would expect~~ expects the following:³⁴

- (a) a letter or statement that sets out:
 - (i) an overview of the transaction and the parties involved;
 - (ii) details of expense items which have been (or are to be) reimbursed which are not in dispute;
 - (iii) details of each expense item in dispute, with a submission explaining how it meets the criteria provided in section 48(1) or 49(1) of the Takeovers Act (as applicable);
 - (iv) a formal request for a determination under section 50(a) and for orders under section 50(b) of the Takeovers Act; and
 - (v) any other relevant information; ~~(including, if applicable, a brief explanation of any engagement with the other party in respect of the dispute);~~ and
- (b) an affidavit from a director or a member of the applicant's board (as applicable):
 - (i) attesting that all costs for which reimbursement has been claimed were appropriate and properly incurred;

³ See paragraph 2.11 below regarding the identification of any privileged information.

^{4,2} See paragraph 2.911 below regarding the identification of any privileged information.



- (ii) providing factual evidence of all statements/matters referred to in paragraph 2.78(a) and cross-referenced for the Panel's attention;⁵ and
- (iii) attaching all primary documents.⁶⁷

Panel process on receipt of a Reimbursement Application

~~2.82.9~~ The Crown Entities Act 2004 provides that the Panel has the power to regulate its own process. In the exercise of its functions and powers, the Panel will comply with the principles of natural justice. The rules of natural justice generally require that:

- (a) the procedure is fair;
- (b) a person who might be adversely affected has the right to know the case against them and the right to be heard; and
- (c) the adjudicators of the issue are free from bias.

~~2.92.10~~ 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. If the Panel agrees to grant confidentiality, the party is required to provide a copy of the relevant document with the relevant information redacted which the Panel may provide to the other parties to the dispute.

~~2.102.11~~ On receipt of a Reimbursement Application, the Panel will likely seek written submissions from the other parties to the Reimbursement Application; and may set a timetable and process for such submissions and, if applicable, response submissions. Parties should follow any timetable and process set by the Panel. Subject to the rules of natural justice, the Panel may choose to reject late submissions or submissions that do not comply with the Panel's process requirements.

~~2.112.12~~ The Panel will then determine the amount to be reimbursed⁷ 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.

~~2.122.13~~ The Panel's determination under section 50(a) of the Takeovers Act 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 receiving oral evidence or holding a hearing.

~~2.132.14~~ ~~The~~ However, 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 is likely~~ that all parties ~~have will be offered~~ the same opportunity to submit on the relevant point(s). 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.

~~2.142.15~~ As with section 32 meetings, the Panel acts as an inquisitorial body and any questioning of witnesses will be led by the Panel and its counsel. The Panel does not generally allow cross-examination of witnesses by other parties; but may allow limited additional questions to be put to a witness through the Chair of the Panel division.

~~2.152.16~~ 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.

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

³ This includes invoices, terms of engagement, services agreements and any other primary documents necessary for identifying the basis of each expense claimed, as well as any non-privileged correspondence between the parties (or their advisers) in respect of the dispute.

⁷ This includes invoices, terms of engagement, services agreements and any other primary documents necessary for identifying the basis of each expense claimed, as well as any non-privileged correspondence between the parties (or their advisers) in respect of the dispute.



~~2.162.17~~ The Panel reserves the right to publish its determination and statement of reasons.

3 Costs that are “properly incurred”

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 precisely 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~~ The Panel has sought to provide broad guidance below as to the types of expenditure which are likely to be (or not be) captured but relevant expenditures must be assessed on a case-by-case basis, in light of the relevant facts.
- 3.2 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.
- 3.4 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~~three elements have been satisfied:
- ~~(a) that the expenditure was not incurred while engaging in any activity prohibited by the Code (for example engaging in “defensive tactics” which are prohibited by rule 38 or engaging in misleading or deceptive conduct in relation to a transaction regulated by the Code (see rule 64));~~
 - ~~(b)~~ (a) 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;
 - ~~(c)~~ (b) that it was reasonable (with reference to circumstances existing when the expense was incurred) to spend that amount on that kind of activity; and
 - ~~(d)~~ (c) that there ~~is~~was a sufficient nexus between the incurring of the expenditure and the takeover offer or notice.
- 3.5 ~~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):~~
- ~~(e) costs associated with negotiating settlement of a reimbursement dispute;~~
 - ~~(f) costs involved in making a Reimbursement Application to the Panel; and~~
 - ~~(g) costs imposed by the Panel for enforcement action taken under section 32 of the Act.~~
- 3.6 ~~However, there may be appropriate circumstances in which the Panel could decide otherwise.~~
- 3.7 ~~3.5~~ 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 fulfilling legal and regulatory obligations, including~~ 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**).

Category 1 (expenses related to ~~notices and~~ fulfilling legal and regulatory obligations, including target company statement obligations)

~~3.83.6~~ In broad terms, this category is directed to the legal and regulatory obligations of target company boards in responding to takeover offers. The Panel recognises two parts to this general category:

~~3.93.7~~ Part 1 – costs incurred in complying with the procedural requirements of the Takeovers Code ~~– (the Code)~~. By way of example, such costs would include costs associated with:

- (a) preparation, verification, printing and supply of the target company statement;
- (b) preparation, review, printing and supply of the independent adviser's report;
- ~~(c)~~ preparation and supply of the class notice;
- ~~(e)(d)~~ the supply of the share register;
- ~~(d)(e)~~ 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)(f)~~ attendances with the Panel in relation to the target company statement and independent adviser's report.

~~3.103.8~~ 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 may include:

- ~~(f)~~ costs of meeting or ensuring compliance with NZX ~~requirements~~;
- ~~(g)(a)~~ costs of meeting and Financial Markets Conduct Act 2013 (**FMCA**) requirements (e.g., substantial product holder, insider trading and continuous disclosure requirements);
- ~~(h)(b)~~ the 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);
- ~~(i)(c)~~ costs of monitoring the offeror's compliance with the Code, the FMCA or other applicable law for issues which may affect target company shareholders in connection with the offer;
- ~~(j)(d)~~ 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
- ~~(k)(e)~~ 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 where the target company, which the Panel determines have caused a target's conduct was in breach of the Code) – in which case the costs are unlikely to be recoverable);⁸ and
- ~~3.11(f)~~ The line between making reasonable complaints about matters which affect target company shareholders and complaints designed to frustrate to the course of the bid can be a fine one. Offerors Panel (however, offerors should not be expected to pay for relentless target company actions regarding legal compliance which appear designed to frustrate an offer and/or do not raise bona fide issues).

~~3.123.9~~ 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.

⁸ See paragraphs 3.20 and 3.21 below.



Category 2 (expenditure incurred safeguarding offerees' interests)

General

[3.133.10](#) 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, the following broad categories of expenses:

- (a) ~~expenses~~[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 [or responding to](#) competing offers are unlikely to be sufficiently proximate to the relevant transaction to be recoverable~~;~~.
- (b) ~~expenses~~[Expenses](#) incurred in ensuring that shareholders are properly informed, [with](#) 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](#).
- (c) ~~expenses~~[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~~[of](#) doing so. Again, depending on the circumstances, this may give rise to the need to retain communications consultants.

[3.143.11](#) 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 **Category 3 (director reimbursement for expenses properly incurred in the interests of shareholders)**

[3.12](#) 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.

[3.13](#) The High Court in *Abano v HPH* considered that no reason existed to draw a distinction in relation to directors' fees, with expert evidence providing that takeovers "blow directors and their lifestyles out of the water in ways that no other transaction or dealing... can"⁹ However, the High Court considered that like other expenses under rule 49, directors' fees must be reasonable and proportionate, reflecting truly additional attendances resulting from the takeover or attempted takeover.

Potential barriers to recovery of expenses / expenses which cannot be recovered

[3.153.14](#) 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

⁹ See *Abano v Healthcare Group Ltd v Healthcare Holdings Partners Ltd* [2018] NZHC 817 at [83].



the relevant transaction. For example, general retainer fees agreed to prior to the takeover being announced may not be recoverable.

3.163.15 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.

3.173.16 Importantly, the ~~decision in~~ *Abano v HPH* decision 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~~ 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.

3.183.17 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. The Panel considers that, for an item of expense to have been properly incurred, the expenses must not be incurred in respect of engaging in an activity prohibited by the Code. For example, to the extent that a target incurs costs engaging in prohibited “defensive tactics” in relation to a Code offer, those costs are unlikely to be properly incurred. Similarly, costs incurred in engaging in misleading or deceptive conduct in relation to a Code offer (see rule 64) are unlikely to be recoverable.

3.18 ~~Category 3 (Director~~ As to whether costs have been incurred in relation to prohibited conduct, the Panel does not consider that it is necessary for there to have been a determination under the Takeovers Act that the conduct may not have complied with the Code (or similar). This would be unduly restrictive given that potential non-compliance with the Code may be resolved other than through a formal determination. Rather, if non-compliance with the Code is asserted, the Panel will consider (on the balance of probabilities) whether there was, in fact, non-compliance as part of considering the Reimbursement Application.

3.19 ~~An offeror cannot avoid an obligation to reimburse the target simply by asserting that the target acted in breach of other legislation, for example the Financial Markets Conduct Act 2013 (the FMCA) or the NZX Listing Rules. The Panel’s view is that costs are recoverable in the first instance in accordance with the Takeovers Act (noting that the Panel does not have jurisdiction to determine whether there have been breaches of other legislation). However, this does not mean the offeror does not have a remedy for a breach of the other obligation – the offeror is entitled to bring such claims in the usual manner. Any such claims, if made, do not entitle the offeror to delay the reimbursement of properly incurred expenses under the Takeovers Act pending resolution of those claims.~~

3.20 ~~In the Panel’s view, the phrase “expenses properly incurred... in relation to the offer or takeover notice” does not extend to costs incurred in seeking recovery of such expenses.¹⁰ Accordingly, the Panel considers that the following will not be properly incurred for the purposes of sections 48(1) and 49(1) of the Takeovers Act:~~

- ~~(a) costs associated with negotiating a reimbursement dispute; and~~
- ~~(b) costs involved in making a Reimbursement Application to the Panel.~~

3.21 ~~In addition, any fees charged by the Panel in relation to a meeting held under section 32 of the Takeovers Act are unlikely to be properly incurred to the extent that the Panel imposed these fees on account of an adverse determination being made against that person. Where the Panel has imposed fees on a person who requested~~

¹⁰ See paragraphs 94 and 95 of the Panel’s determination under section 49(2)(b) of the Takeovers Act concerning Vital Limited and Empire Technology Limited, available at: <https://www.takeovers.govt.nz/assets/NewsReleases/Takeovers-Panel-Determination-Orders-and-Statement-of-Reasons-Vital-Limited-13-March-2025.pdf> (the **Vital Determination**).



that a section 32 meeting be held, the recoverability of those fees under section 49 will be determined on a case-by-case basis.

~~reimbursement for expenses properly incurred in the interests of shareholders)~~

~~3.191.1—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.~~

3.20—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 under section 49(1). Whether such additional directors' remuneration is properly incurred, and therefore recoverable under section 49(1), will need to be determined on a case by case basis in the light of the relevant facts.

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

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.

3.23 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.

3.24 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:~~¹¹

~~(c) the costs were properly incurred; and~~

~~(d) the takeover notice was eventually sent.~~¹²

¹¹ See clause 5(2)(b) of the Takeovers Regulations 2000.

¹² If the takeover notice is never actually sent, costs cannot be claimed under sections 48–50. However, where a takeover notice is sent, but never followed by an actual takeover offer, costs in connection with the takeover notice may be claimed from the prospective offeror. This is because these sections refer to recovery from an “offeror” or a “target company” (as applicable). These terms bear their definitions from the Code (see section 47). In general terms,

(a) an “offeror” includes a person who gives a takeover notice as well as a person who makes an offer under the Code; and

(b)(a) 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.



- 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
 - (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) [of the Takeovers Act](#) 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~~ [Panel's view is that costs which may be reimbursed under sections 48\(1\) or 49\(1\) may include costs](#) incurred prior to ~~receiving receipt of~~ [a takeover notice, by the target company](#) 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.

[Expenses where an offer is not actually made after the issuance of a takeover notice](#)

- [4.9 Where a takeover notice is sent, but a takeover offer is never made, expenses incurred in relation to the takeover notice must still be reimbursed. Sections 48 and 49 both apply in relation to a takeover notice, not just an offer. While these sections use the terms "offeror" and "target company", those terms include, respectively, a person who gives or receives a takeover notice.](#)
- [4.10 Accordingly, target companies do not need to delay commencing their response to a takeover notice out of concern that an offer may not actually be made \(and a party issuing a takeover notice should expect to incur costs accordingly\). Takeovers proceed at a rapid pace and liability for the target's costs is one of the risks offerors incur when issuing a takeover notice.](#)



5 The Panel's fees

5.1 The Panel will charge for its time relating to [a Reimbursement Applications](#) in accordance with the Takeovers Regulations 2000.

5.2 The ~~Panel~~ [Panel's starting point is that it](#) 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.

5.3 [An even apportionment of the Panel's fees will be most likely to apply where both parties engaged meaningfully, in good faith and otherwise as described in this Guidance Note \(e.g., by paying any amounts due other than the Disputed Amount\). If the Panel considers that a party did not engage in this fashion, the Panel may charge all \(or an increased portion\) of its fees to that party. For an example of conduct which led the Panel to not allocate its fees evenly, please see the Vital Determination. Parties are reminded that the Panel is likely to charge fees to cover Panel member and executive time. Such fees are likely to be material. If Parties have concerns about the Panel's potential costs, they may contact the Panel executive.](#)



Schedule: Version control, disclaimer and copyright

Version control

This version (Panel document reference number 1011154.1) was published on 23 October 2026.

The version history of this Guidance Note is, in summary:

<u>Date of version</u>	<u>Principal changes from previous version</u>	<u>Document reference number</u>
<u>23 October 2026</u>	<u>Amended to clarify certain matters after the Panel's Vital Determination.</u>	<u>1011154.1</u>
<u>13 March 2019</u>	<u>Clarified the Panel's process on costs dispute determinations and costs recovery reimbursement applications.</u>	<u>379280.1</u>
<u>17 September 2018</u>	<u>Addressed the amendments to the Takeovers Act, the broad principles articulated in <i>Abano v HPH</i> and the process the Panel will follow in the event of a dispute.</u>	<u>364115.1</u>
<u>21 March 2017</u>	<u>N/A – This was the first version of the Guidance Note.</u>	<u>343611.1</u>

Disclaimer

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