Guidance Note

INDEPENDENT ADVISERS

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TAKEOVERS PANEL
TE PAE WHITIMANA

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1 Introduction

1.1 The purpose of this Guidance Note is to assist those who are approved as independent advisers by the Panel to prepare a report under any of rules 18, 21, 22 or 57 of the Takeovers Code (the **Code**) or under a class exemption or individual exemption granted by the Panel from the Code.

1.2 This Guidance Note is divided into the following parts:

(a) general comments that apply in all cases;

(b) reports required in relation to takeover offers (reports under rules 21 and 22 of the Code);

(c) reports required in relation to meetings of shareholders (rule 18 of the Code, exemptions from the Code and share buybacks); and

(d) reports required in relation to compulsory acquisitions under the Code (rule 57).

1.3 The Guidance Note has the following appendices:

(a) Appendix A: The Panel's policy on the approval of independent advisers;

(b) Appendix B: The information that must be provided to the Panel by a firm or individual (including subcontractors) applying to be approved to be an independent adviser; and

(c) Appendix C: The statement of independence that must be included in the independent adviser's published report.

2 General comments

2.1 The Panel considers that the role of the independent adviser is critical to the effectiveness of the Code in regulating the market for the control of Code companies.

2.2 The independent adviser helps to ensure that shareholders are well informed when a takeover offer is made or another transaction occurs that requires shareholder approval under the Code. For this reason, the Panel takes a close interest in the competence as well as the independence of any firm or individual proposed for appointment as an independent adviser.

2.3 Advisers need to fully appreciate the philosophy of the Code, the rights it creates for shareholders and the importance of the adviser's role in the process. Reports must be of a high quality and give balanced advice.

The Panel's role

2.4 A crucial piece of information for shareholders involved in Code-regulated transactions is provided by an independent adviser who reports on the merits of an offer or a proposed company transaction. Often a valuation will form part of the adviser's merits analysis. Any valuation included in an independent adviser's report (an **IAR**) is fundamentally an opinion of the adviser, formed in its capacity as an independent expert.

2.5 A key part of the Panel's role is to ensure that the process requirements and information disclosure mandated by the Code are met. The purpose of Code-mandated disclosure is to provide information which allows the Code company's shareholders to decide for themselves whether to accept a takeover offer or to approve a Code-regulated transaction.

The Panel approves the appointment of the adviser

2.6 The Panel's role is to approve the appointment of an independent adviser appointed by a Code company. The Panel must be satisfied that the adviser is independent of all parties to a takeover or company transaction and competent to write the report. If so satisfied, the Panel will approve the appointment of the adviser, but thereafter the Panel's role is limited to enforcing the Code.

The Panel is not a 'merits' regulator

2.7 One of the principles of the Code is that shareholders decide for themselves the merits of a takeover or company transaction. They make this decision with the benefit of advice from the company's directors and from an independent adviser that is appointed by the company's directors (or a committee of the independent directors) and approved by the Panel.

2.8 The Code does not set the Panel up to be a 'merits' regulator. The Panel does not stand in the shoes of the shareholders to decide what is best for them.

2.9 Accordingly, the Panel is not required to, and does not, consider the merits of an independent adviser's opinion. This means that the Panel does not review or comment on the valuation methodology used in an IAR or on the valuation conclusion reached by the independent adviser.

2.10 The Panel has an enforcement role to ensure that no person engages in conduct in respect of a takeover or other Code-regulated transaction that is misleading or deceptive, or likely to mislead or deceive. This prohibition on misleading or deceptive conduct (rule 64 of the Code) applies to every person, including to independent advisers.

2.11 The legal test that would be applied to determine whether an opinion expressed by an independent adviser or other person was misleading or deceptive is as follows:[1]

(a) was the opinion honestly held?

(b) was the opinion reasonably based? and

(c) was the opinion demonstrably wrong?

2.12 Shareholders, target company directors and advisers may complain that a valuation is flawed, for example, where the valuation methodology used is a discounted cash flow analysis and the complaint alleges that the discount rate applied is wrong or a capitalisation of earnings methodology is used and the comparatives on which the multiples have been taken are inappropriate. The Panel will not entertain complaints of this nature, which are simply an expression of opinion, unless the legal test for misleading or deceptive conduct is met.

2.13 The Panel considers that an IAR will include a valuation involving the adviser's own expert opinion. Although another expert might hold a differing opinion, in the field of valuation there may be a broad range of views amongst equally competent experts as to value.[2] Accordingly, an IAR will not breach rule 64 of the Code unless the legal test for misleading or deceptive conduct is met.

Role of the Code company's directors

2.14 The independent directors of the Code company also have important responsibilities in the transaction process.

2.15 The directors need to ensure that the appointed independent adviser is given all the information necessary to provide a comprehensive and accurate report. In the Panel's view, rule 21 requires the Code company to provide the independent adviser with such information as the independent adviser requests. In addition, the directors should, in the course of reviewing the independent adviser's draft report, satisfy themselves that it is sufficiently comprehensive, is factually accurate and covers all the relevant issues. However, the Panel expects directors to form their own view on the offer when making their recommendation (see the *Guidance Note on Target Company Statements*).

[1] For a review of how the Panel has applied this legal test to an opinion expressed by directors of a target company, see the determination of March 2010 in the matter of Horizon Energy Distribution Limited at paragraphs 134–143.
[2] Horizon Energy Distribution Limited at paragraph 142.

Review of draft reports

2.16 One of the Panel's primary responsibilities is to approve independent advisers. It is a normal condition of the Panel's approval of an independent adviser to require a draft version of the report (as well as marked-up versions showing any subsequent changes to that draft) to be sent to the Panel to review.

2.17 In any circumstance, the adviser is responsible for determining when it is appropriate to provide the draft version of the report (and any subsequent amendments) to the Panel, such that sufficient time is available for the Panel to review and, if relevant, comment. The Panel executive is available to discuss how best to manage challenging timetables, including by reviewing advance drafts. Early engagement is encouraged.

2.18 In terms of what draft the Panel should receive, the Panel appreciates there are practical reasons in favour of providing it with a draft version of the report after the report has been provided to the Code company for review. However, the Panel reserves the right to request previous versions of the report (or sections of it) from the adviser if it considers this necessary.

2.19 The Panel will continue its policy of reviewing draft reports (and subsequent amendments) and will provide comments to the advisers where it considers this is appropriate.

Clear, concise and effective independent adviser reports

2.20 The Panel expects an IAR to be user-friendly for shareholders. Drafting should follow a clear and concise style, with minimal use of jargon and repetition and plain English used where possible. If information is summarised, a balanced view of any advantages and disadvantages should be provided.

2.21 More specifically, an IAR should be:

(a) Clear:

(i) use plain language;

(ii) use a font and font size that are easily readable;

(iii) be logically ordered and easy to navigate;

(iv) highlight important information;

(v) without limiting 2.21(a)(iv), an IAR should, in all but the most basic reports, commence with an executive summary summarising the transaction and the independent adviser's advice; and

(vi) explain complex information in plain language and include a clear explanation of any necessary jargon;

(b) Concise:

(i) use short sentences;

(ii) avoid unnecessary repetition;

(iii) highlight important information in balanced summaries, including a summary of the adviser's conclusions on the merits of the transaction near the front of the report;

(iv) use diagrams and graphs effectively; and

(v) minimise the use of brand information, photographs and other images;

(c) Effective:

(i) give adequate and accurate information about the transaction; and

(ii) an accurate and balanced impression.

Disclosure of valuation framework

2.22 An IAR for a takeover offer will generally include a valuation of the target company. Where the valuation relies on prospective financial information, certain details of that information will need to be set out in the IAR. In addition to specific disclosures required under Schedule 2 of the Code, relevant requirements include the obligations to disclose:

(a) information which could reasonably be expected to be material to the decision of offerees to accept or reject an offer; and

(b) information which, if omitted, would make the target company statement misleading or deceptive.

2.23 Depending on the circumstances, the Code will require disclosure of different levels of detail in relation to a valuation. The Panel considers that it is for the independent adviser to determine the appropriate level of disclosure bearing in mind all relevant circumstances. However, an IAR for a takeover offer should generally include disclosure of the following:

(a) the valuation methodology (or methodologies) employed;

(b) an explanation as to why each relevant methodology was selected;

(c) where projected earnings have been used in a material way to derive the valuation (as determined by the independent adviser):

(i) the source of the projected earnings;

(ii) if any of the matters referred to in paragraph 3.6 below raise material concerns, a summary of those concerns;

(iii) if the adviser makes any adjustments to the projected earnings received from the target, a summary of those adjustments and the reasons for making them;

(iv) the key projected earnings figures which were used – these are likely to include (at least) the projected earnings for the remainder of the current financial year and for the following financial year;[3] and

(v) the principal assumptions for any projected earnings which are disclosed in the IAR (see further at paragraphs 2.24–2.27 below regarding disclosure of assumptions, including the possible need for a sensitivity/scenario analysis);

(d) any capitalisation ratio or multiple which was applied to any historic or projected earnings figure and how that ratio or multiple was derived; and

(e) where a discounted cash flow valuation methodology has been used, the discount rate and how that rate was derived.

2.24 Prospective financial information will usually be based on many assumptions about future conditions and events which may or may not occur. The quality of the information will be dependent largely on the appropriateness of the assumptions. Providing shareholders with these assumptions assists them to make their own informed judgement on the quality and reliability of the information.

2.25 Assumptions can range from being reasonably certain to very uncertain. In setting out assumptions in a useful and relevant way, it is likely to be helpful to address, among other things:

(a) the degree of certainty/risk associated with particular assumptions and the key factors that could cause them to be incorrect;

[3] The Panel acknowledges that if the current financial year only commenced recently, this may result in disclosure of what is, in essence, two years of projected earnings. In such cases, it may be open to the independent adviser to conclude that disclosure of projected earnings for the remainder of the current financial year is sufficient.

(b) the extent to which assumptions relate to matters within or outside the control of the entity; and

(c) source material that has been used in deriving assumptions (e.g., past performance, third party reports or research, other market data).

2.26 The Panel expects that the assumptions will directly accompany the relevant prospective financial information in the document and be set out in a way that is helpful and relevant for offerees reading the report.

2.27 For offerees to make their own informed judgement, it may also be necessary to provide information which assists them in assessing the sensitivities of the valuation or prospective financial information. For example, where there are material risks that could render assumptions invalid and therefore alter key financial information and impact the valuation, a sensitivity/scenario analysis showing different outcomes if assumptions were to change may be appropriate.

Manner of engagement between adviser and Code company

2.28 Advisers may wish to communicate with the Code company before and during the preparation of the report in order to obtain or check factual information, discuss the progress of the report and ask questions for the purposes of the adviser's own analysis. This is unlikely to compromise the adviser's independence.

2.29 However, independence may be compromised if an adviser provides information to the Code company. For example, if an adviser provides its valuation range before final terms of the transaction are agreed, there is a risk of the adviser becoming (in effect) an adviser to the board.[4]

2.30 An adviser's independence will be considered on a case-by-case basis, taking into account all of the relevant facts and surrounding circumstances. In order to minimise the risk of compromising their independence, advisers should consider the following principles:

(a) *Providing methodology:* Providing the Code company with the methodology used in the report rather than the valuation range or analysis is less likely to compromise the adviser's independence.

(b) *Providing a valuation range:* Providing a valuation range prior to the final transaction terms being agreed does not automatically compromise the adviser's independence. However, providing a valuation range before key commercial terms of the transaction have been agreed in principle may increase the risk of the adviser's independence being compromised. Accordingly, advisers should consider consulting with the Code company's independent directors to understand the status of negotiations and provide the valuation range when the adviser is confident that its independence will not be compromised.

(c) *Providing different sections of the report at different times:* Providing drafts of narrative sections of the report (e.g., a company or industry profile or description of the transaction) is less likely to compromise an adviser's independence. If appropriate, advisers may wish to provide these sections earlier and the more analytical sections at a later stage.

(d) *Only alter analysis if persuaded there was an error of fact:* An adviser should only alter its analysis at the suggestion of the Code company board if the adviser is persuaded that it should do so as a result of an error of fact.

Engagement between an adviser and the offeror

2.31 The Panel understands that there have been instances where offerors have sought:

(a) to obtain access to reports prior to the execution of a scheme implementation agreement (or pre-bid agreement) or otherwise prior to the release of the report to shareholders; and

[4] In the following paragraphs, references to providing a valuation range include providing a valuation range orally or in writing and on an indicative or other similar basis.

(b) contractual commitments from targets that the offeror will be provided with the report (or a draft report) and the opportunity to comment on that report prior to its release.

2.32 Generally, independent advisers should refuse requests by the offeror to access a report (or a draft report) prior to the following:

(a) in the case of an offer, the target company providing the report to the offeror under rule 46(1)(a)(i) or shareholders under rule 46(1)(a)(ii) (or otherwise publicly releasing the final report); or

(b) in the case of a scheme, the target company filing the draft report with the Court in an application for initial orders.

2.33 Providing the offeror with access to a report prior to the relevant time referred to in paragraph 2.32 may compromise the independence of an adviser. The adviser's key audience is the target's shareholders, whose interests will not usually align with the offeror's, making early provision of a report to the offeror inherently problematic. Parties should not enter into agreements which require (or could require) the offeror to be provided with earlier access to a report (or a draft report).

2.34 There are limited circumstances where it may be appropriate for an adviser to provide discrete parts of a draft report to an offeror earlier than the relevant time referred to in paragraph 2.32, principally to allow the offeror to verify information relating to themselves. Examples may include:

(a) the parts of the draft report that relate to the offeror or the acquisition vehicle; and

(b) in the instance of an offer with scrip consideration, the parts of the draft report which relate to the value of the scrip consideration.

Disclosure of changes to reports

2.35 Any change to the report made at the suggestion of, or in response to comments by, the Code company's board or any third party, or after the report has been presented as a final report to the Code company, and which:

(a) results in a change to the valuation range or analysis of the merits of the transaction; or

(b) otherwise materially affects the adviser's opinion, analysis or conclusions,

should be disclosed to the Panel. This disclosure should include an explanation of the change, the reasons why the adviser considered the change appropriate and the significance of the change to the adviser's opinion.

2.36 The Panel may ask the adviser to provide copies of previous drafts of the report (or sections of the report) and/or relevant correspondence or other records of discussions between the adviser and the Code company's board or third party.

3 Reports for takeover offers

3.1 The Code requires IARs to be prepared for the offerees in all takeover offers made under the Code. In every case, an IAR obtained by the directors of the target company under rule 21 of the Code is required to accompany the target company statement. In some cases, where full or partial offers have been made and there is more than one class of equity security (full offers) or more than one class of voting security (partial offers), an additional report under rule 22 of the Code (obtained by the offeror) is required to certify the fairness and reasonableness of the consideration being offered as between different classes of equity security.

3.2 Some observations about the requirements of these various reports are set out in the next section of this Guidance Note. In all cases, the adviser needs to ensure that it has a thorough knowledge of how the relevant rules of the Code work.

Rule 21 reports on the merits of a takeover offer

Full offers

3.3 The report should include a valuation exercise that compares the consideration being offered by the offeror against various measures of the value of the target company. Questions the adviser could address, among others, include:

(a) If the offer is a cash offer, is it worth more to the target company shareholder to stay in the company or to realise his or her or its investment for the price offered? What are the key valuation judgements that support this view?

(b) If the offer is a scrip offer, what is the value and the prospects of the entity whose securities are being offered, against the value and the prospects of the target company?

(c) Is it appropriate to include a premium for control? Does the offeror already have effective or legal control of the target company?

3.4 The Panel recommends that advisers should not describe offers as "fair" or "unfair". A comparison of the offer price with the adviser's valuation should probably be made, but this is only one of a number of issues that the adviser may usefully discuss in its report on the merits of the offer.

3.5 One exception to this recommendation is where the primary purpose of the report is to provide guidance to shareholders who are certain, or at least very likely, to have their shares taken under compulsory acquisition as the result of an offer. In such cases it may be appropriate for the adviser to express a view on the "fairness" of the offer price.

3.6 An important issue for the adviser in preparing valuation material would be the reliance it should place on any forecast financial information available from the target company. This in turn could have a significant bearing on the quality of its final report. Issues that the adviser may need to consider could include, among others:

(a) the extent to which the adviser should rely on forecasts of future financial performance prepared by the target company;

(b) whether the adviser should carry out its own "reasonableness tests" of prospective financial information provided by the target company before using that information in its report and any valuation it undertakes;

(c) whether the adviser should prepare its own financial forecasts for the target company based on its own analysis, but using source data from the target company; and

(d) the time period over which any forecast financial information does or should extend.

3.7 It is also important that the adviser have regard to any applicable professional standards. The Panel draws advisers' attention to Advisory Engagement Standard No 2 *Independent Business Valuation Engagements* (AES–2) issued by the Institute of Chartered Accountants of New Zealand. However, advisers should always be mindful that reports under the Code are not simply valuations, but are reports on the merits of an offer.

3.8 If there is any collateral arrangement with one or more, but not all, shareholders of the target company in conjunction with the offer this is likely to raise the issue of the offer's compliance with rule 20 of the Code. Rule 20 states that an offer must be on the same terms and provide the same consideration for all securities belonging to the same class of equity securities under offer.

3.9 The Panel expects advisers, as part of their assessment of the merits of any particular offer, to investigate and to comment in their reports on the reasonableness of the terms and conditions of any collateral arrangement. The Panel will take into account the adviser's views when considering whether the offer complies with the Code.[5]

[5] Please refer to the *Guidance Note on Rule 20 and Collateral Arrangements*.

3.10 The adviser should comment on the position of the offerees if they opt not to accept the offer. These comments could cover, among others, matters such as:

(a) whether, if the offer is conditional on the offer reaching 90%, this condition can be waived at the discretion of the offeror;

(b) the prospects of the offer consideration being increased;

(c) the position of minority shareholders if the offer falls short of 90% acceptance, and/or the offeror waives any 90% condition that may have been part of the offer. For example:

(i) Could they be left as part of a small minority of shareholders, with an illiquid stock?

(ii) How may remaining minority shareholders be affected by the offeror's plans for the target company once it has control?[6] Might these plans add value to the company in the near or longer term?

(iii) How does the offeror propose to deal with conflicts of interest if it is a competitor of the target company and could now also be the major shareholder of the target company?

3.11 The adviser may need to comment on the options available to the offeror under the Code if it reaches, or does not reach, the compulsory acquisition threshold. These comments could cover such matters, among others, as:

(a) the ability of the offeror to subsequently acquire sufficient shares through "creeping" under rule 7(e) to reach that threshold. If so, the adviser should note that "creeping" is not possible until after twelve months from the conclusion of the offer period; and

(b) the rights and obligations of the remaining minority shareholders under a compulsory acquisition (see Part 7 of the Code).

3.12 The situation of competing offers may also need to be addressed. The adviser's comments could cover such matters, among others, as:

(a) the likelihood of competing offers emerging if there are no known competing offerors;

(b) a comparison of competing offers with the offer that is the subject of the report. What is the likelihood of the offer consideration of one offer or the other being increased?

(c) statements that may have been made by the parties as to their intentions (in this regard, advisers should bear in mind the provisions of rule 64 of the Code relating to the prohibition on misleading or deceptive conduct in takeovers.);[7] and

(d) the effects of the timing rules of the Code on the competition for control of the target company. When should an offeree accept one offer or the other?

Partial takeover offers

3.13 With a partial offer, the offeror must stipulate the percentage of the securities that it does not hold for which it is bidding. This is the "specified percentage". Other than under the procedure described in the following paragraph, partial offers must have a minimum acceptance level which will result in the offeror holding or controlling more than 50% of the voting rights in the target company (the **mandatory minimum acceptance condition**) and must obtain at least that percentage in order for the offer to be able to be successful (whether or not the specified percentage is achieved). If acceptances fall short of what is required to satisfy the mandatory minimum acceptance condition, the offer will fail. If acceptances exceed the specified percentage, they will be scaled back.

[6] The offer documents for all takeover offers under the Code (except those which contain a non-waivable 90% minimum acceptance condition) must contain a statement of the offeror's intentions in respect of material changes to the target company: see clause 14, Schedule 1 of the Code.
[7] See the *Guidance Note on Misleading or Deceptive Conduct*.

In some cases, shareholders may be successful in selling all their holdings into a partial offer, but a more realistic assumption may be that current shareholders will be left with some shares in the target company.

3.14 If the offeror is seeking to acquire shares in the target company that would increase its control percentage to between 20% and 50% of the total voting rights, the offer must be approved by a majority of the shareholders of the target company not associated with the offeror that vote on the proposal.[8] This voting process takes place during the offer period.

Accepting or rejecting the offer

3.15 The merits of the partial offer are likely to include a valuation of the target company and, in the case of a scrip bid, of the offeror. The adviser would need to consider how to value a partial interest in the target company. This may depend on whether the offeror is seeking more than 50% of the voting securities or somewhere in the 20–50% range with shareholder approval.

3.16 Some of the same considerations may apply as in a full offer, but there are likely to be additional complexities with a partial offer. Comments could cover matters, among others, such as:

(a) the reasons for a partial offer as opposed to a full offer;

(b) having regard to the percentage of voting rights that the offeror is seeking to control, the benefits (and detriments) that may accrue to the company and the shareholders if that level of control (or some lesser level of control which still exceeds the required minimum acceptance percentage) is achieved by the offeror;

(c) the prospects of shareholders being able to sell all or most of their shares into the offer, having regard to the scaling rules of the Code and the likelihood of success of the offer. This discussion may have added significance if there are competing partial offers, with competing offerors starting from different voting control positions and/or seeking different control percentages; and

(d) the timing implications of accepting partial offers.

3.17 In commenting on the merits of a partial offer, advisers should reflect on whether control considerations outweigh pricing issues as far as the impact on target company shareholders is concerned.

3.18 The adviser could discuss the consequences for shareholders who choose to accept, or not to accept, the offer. The consequences of not accepting the offer might include:

(a) if sufficient shareholders respond in the same way, the offer failing, or the offeror increasing its offer price or making a (later) full offer for all the equity securities in the company;

(b) any premium that is being paid by the offeror being paid only in respect only in respect of the shares taken up by the offeror;

(c) in the event that the partial offer succeeds, the accepting and non-accepting shareholders being left as minority shareholders in a company controlled by a single shareholder; and

(d) any other implications for the control of the company and the characteristics of its share register as a result of the offer.

3.19 The adviser should give some guidance in the report on the likely effects on the holdings of accepting shareholders if the acceptances of the partial offer are subject to scaling. The relevant provisions of the Code are in rules 12 to 14. The explanation should assist offerees to understand the number of their securities that could be taken up by the offeror.

3.20 The adviser may need to comment on any plans the offeror may have for the target company. These intentions should have been disclosed in the offer document if the offeror intends to make any material changes in respect of

[8] The shareholders who are not eligible to vote are the offeror and its associates. If another shareholder is also making a takeover offer for the target at the same time it would be eligible to vote on the competing offer.

the business activities of the target company (clause 14, Schedule 1 of the Code). The adviser may comment on whether it considers the offeror will add value to the company over time. It may also be relevant to comment on how the offeror intends to deal with any conflicts of interest if it is a competitor of the target company. If the offeror will not provide the adviser with any information on these questions, the adviser may wish to comment accordingly.

3.21 Having regard to the Code, the adviser could also comment on future prospects for the remaining shareholders after a successful partial offer. These comments could cover matters, among others, such as:

(a) the controlling shareholder's "creep" rights under rule 7(e) of the Code (if it has control of over 50% of the voting rights) (see above);

(b) the likelihood of future takeover offers under the Code from the controlling shareholder, or from other offerors;

(c) having regard to the offeror's stated intentions for the target company if the offer is successful, the likelihood of enhancement to the value of target company shares for the minority shareholders as a result of increased financial or managerial support for the company from the new majority shareholder; and

(d) alternatively, the likelihood of detriment to the value of those shares in the event of diminished liquidity and a reduced possibility of future takeover activity following a successful takeover.

The right to vote for or against a partial offer

3.22 If the offeror is seeking to acquire a voting percentage between 20 and 50% of the target company, it can only do so with the approval of a majority of the votes of target company shareholders not associated with the offeror. The Panel believes it is important that shareholders are well advised of the merits of voting for or against a partial offer made in that range.

3.23 The adviser may need to comment on the merits (or otherwise) of a shareholder increasing its holding to the 20–50% range without making an offer for more than 50% of the voting rights in the target company.

3.24 In addition, as with any offer, the offerees also have to decide whether to accept the offer itself. In making this decision, a shareholder has to take into account that, regardless of whether the shareholder votes for or against the offer, or chooses not to vote, the offeror could receive sufficient votes to make the offer in the 20–50% range. This is a complex situation, and one that advisers need to explain well to target company shareholders. Advisers should note that the voting period closes on or before the fifth working day before the end of the offer period. Accordingly, the offerees have the opportunity to consider the outcome of the vote before they make a decision to accept or reject the offer.

3.25 The control outcome sought in the target company may be an important consideration in discussing the merits of the shareholders' choice whether to vote in favour of or against a partial offer for 50% or less control. Comments in the adviser's report could cover various matters, including:

(a) the effect of the offeror obtaining the sought-after percentage, for example, 35% of the voting rights, in the target. To what extent is this holding expected to give the offeror effective control of the company?

(b) the benefits that the offeror may bring to the company from an increased control percentage to justify the remaining non-associated shareholders voting to approve the percentage sought;

(c) the reasons why a shareholder might vote to approve or not approve the offeror obtaining a stake in the 20% to 50% range;

(d) the price being offered by the offeror; and

(e) the likely effects of the offer, if accepted, on the shareholder's own shareholding, given the Code's scaling rules.

Rule 22 reports – offers for multiple classes of securities

3.26 Under rule 22 of the Code, an offeror must obtain:

(a) a report from an independent adviser if rule 8(3) or 8(4) or 9(5) applies; and

(b) a report or an amended report from an independent adviser, if rule 44(3) applies.

3.27 In the report, the independent adviser must certify that, in the adviser's opinion, the offer complies with rule 8(3) or 8(4) or 9(5) as the case may be.

3.28 If an IAR is obtained, the offer is deemed to comply with rule 8(3) or 8(4) or 9(5) as the case may be.

3.29 Rule 8 of the Code states that where a person is making a full offer for all the voting securities of a company, it must also make an offer for all the other classes of equity securities of the company. That offer must be "fair and reasonable" as between the various classes of equity securities.[9] In order to ensure that the offer satisfies this requirement, an independent adviser is required to certify that this is the case. Once the adviser has given this certificate then the offer is deemed to comply with the relevant rule. (Under rule 9 of the Code, dealing with partial offers, if there is more than one class of voting securities, similar provisions apply.) Schedule 3 of the Code prescribes the basic requirements for a report under rule 22.

3.30 The Code permits an offeror to revise the terms of its offer (without the prior approval of the target company's directors) to include classes of securities, or to take into account terms of a class of securities, of which the offeror was unaware at the time it sent a takeover notice. In order to be able to rely on the procedure under the Code for this, a rule 22 report or amended rule 22 report (relating to the added or changed classes of securities) has to accompany notification by the offeror to the target company, under rule 44(3), of the offer or offers for the added or changed class(es) of securities.

3.31 A rule 22 report is probably the narrowest of all IARs in scope. It is not a report on the merits of the offer, but only on the relativity between the offers being made for each relevant class of securities. It is likely to be quite technical in nature, starting with the consideration being offered for the target company's primary securities, and then assessing the relationship between that price and the value of the consideration being offered for other relevant classes of security.

3.32 Issues that might arise in the report could include the conversion price that has to be paid to exercise any options or convertible notes in order for them to be converted into voting securities, the period the options or conversion rights have to run and the likelihood that any pre-conditions to exercise or conversion will be satisfied.

3.33 Even if options are under their terms non-transferrable or are apparently worthless, because their exercise price exceeds current market value, the offeror under a full offer must still offer to purchase such securities. An assessment of the fairness of the price offered might include an assessment of the likelihood of the options having positive value in the future.

3.34 The Panel considers that the adviser should provide background analysis and commentary in the rule 22 report. It would not be sufficient for an adviser to simply issue a bare certificate that the offer was fair and reasonable as between the different classes of securities included in the offer.

4 Reports required for shareholder meetings

4.1 Under rules 7(c) and 7(d) of the Code and also under the terms of some Panel exemptions, a report from an independent adviser on the merits of an acquisition or allotment affecting Code company voting rights must be provided to the shareholders entitled to vote on the relevant resolution. The acquisition or allotment may be of voting rights in the Code company or of securities in an upstream body corporate.

[9] The offer must be fair and reasonable as between classes of voting securities, and as between voting and non-voting securities, where applicable.

4.2 In each case, the shareholders (excluding the acquirer/allottee and its associates) are given the right by the Code to approve or reject proposals for another entity to increase its control percentage of the Code company. This right to approve should be exercised by the relevant shareholders with care and on the basis of good advice.

4.3 It is an important part of the adviser's role to ensure that shareholders are properly advised of their rights under the Code. Shareholders should be made aware of the positive and negative aspects of a proposal, which should be presented in a balanced manner. Shareholders can vote against a proposal in order to allow the status quo to continue having taken into account reasons for and against that course of action.

4.4 Rule 18 of the Code requires the directors of the Code company to obtain a report from an independent adviser on the merits of any proposed acquisition under rule 7(c) or an allotment under rule 7(d) having regard to the interests of those persons who may vote to approve or disapprove the acquisition or allotment. Some of the main reports prepared for shareholder meetings conducted under the Code are discussed below.

Rule 18 reports – acquisitions (rule 7(c))

4.5 A rule 7(c) acquisition is one where the acquirer (together with any of its associates) will become the holder or controller of more than 20% of the voting rights in a Code company, (or, if the acquirer already holds or controls more than 20%, a higher percentage) from another party or parties. The acquisition may be of a Code company's shares, or it may be of the securities of another body corporate upstream of the Code company that controls voting rights in the Code company.

4.6 The independent adviser is not advising the parties to the transaction, but instead those who have the right to vote to approve or disapprove the acquisition. As such, valuation may or may not be the key issue.

4.7 The consideration for the transaction may be an issue if the acquirer is obtaining a controlling parcel of shares without making an offer to remaining shareholders. The price being paid could impact on the market value of the holdings of existing shareholders if the parcel is large enough. The adviser may address the question of whether the value of the voting shareholders' shares is likely to be affected by the level of consideration.

4.8 The shareholders of the Code company, other than the buyer(s) and the seller(s), must approve any changes in holdings of shares that increase the acquirer's holding or control[10] above 20%[11] unless the acquiring shareholder makes either a full or a partial offer for the target company in which all shareholders would have the right to participate.

4.9 Factors covered in a report might include, among others:

(a) the prospects of the acquirer making a full or partial offer for the company if the shareholders vote against the acquisition;

(b) the benefits the acquiring shareholder is expected to bring to the company;

(c) the effect on control of the company, including the shareholding blocks after the acquisition, and who might have effective control; and

(d) the implication for the pricing of possible subsequent control transactions, given the effective control that might flow from the acquisition under consideration.

4.10 The Panel would prefer not to see advisers refer to transactions as being "fair" or "not fair" to shareholders. See paragraphs 3.4 and 3.5 above for the Panel's views on discussions about the "fairness" of transactions.

[10] The acquirer's holding or control is aggregated with those of all its associates when determining whether the 20% threshold is going to be exceeded.
[11] If the acquirer already holds or controls more than 50% of the voting rights it may be able to "creep" by 5% under rule 7(e) without needing shareholder approval.

Rule 18 report – allotments (rule 7(d))

4.11 A rule 7(d) allotment is one where the allotting company allots shares to the allottee which results in the allottee (together with any of its associates) holding or controlling more than 20% of voting rights in the Code company (or, if the allottee already holds or controls more than 20% of the voting rights, a higher percentage of voting rights).

4.12 Given that the adviser must have regard to the interests of the persons who may vote on the allotment, the nature of the report will vary depending on whether the allotment is one in which all shareholders participate (such as a pro-rata rights issue underwritten by a major shareholder) or not.

4.13 If the allotment being made is one where all shareholders have the right to participate, then the merits of the allotment could include, among others:

(a) how the allotment price relates to a number of different reference points, including, but not limited to:

(i) the recent market values of the allotting company's shares;

(ii) a valuation of the whole company;

(iii) discounts observed in other allotments or placements in the market;

(iv) the likely value of any rights to acquire shares that shareholders may receive, whether they are tradeable and the impact on a shareholder's existing holding if the rights are not exercised (and an underwriting shareholder increases its control); and

(v) the purpose or purposes to which the proceeds of the allotment are intended to be put;

(b) if there is a major shareholder underwriter of the issue:

(i) the process the Code company followed before deciding to enter into an underwriting agreement with the major shareholder;

(ii) the basis on which the underwriting terms were agreed with the underwriting shareholder and whether they reflect arm's length terms;

(iii) the likelihood of the underwriter being called upon; and

(iv) the ongoing effect on the control and direction of the company if there is a significant shortfall in subscriptions to the issue, with the unsubscribed shares to be taken up by the underwriter;

(c) the effect on control of the company if the non-associated shareholders (i.e., those for whom the report is being written and who will have the opportunity to vote on the allotment) participate, or do not participate, in the offer; and

(d) the consequences for the non-associated shareholders and the Code company if the shareholders vote against the allotment.

4.14 Again, the Panel expects the allotment to be described and considered in terms more sophisticated than simply "fairness" or "unfairness".

4.15 If the allotment is one in which the non-associated shareholders will not have the right to participate, but is one where the principal allottee is intended to obtain a significant stake, or increase an existing stake, in the allotting company, the only issue for the non-associated shareholders to decide is whether to vote for or against the proposed allotment. The independent adviser's role is to advise the voting shareholders on the merits of voting for or against the proposed allotment. Those entitled to vote are the Code company's shareholders, excluding the allottee and its associates. As such the voting shareholders are likely to be minority shareholders whose interest in the Code company is being diluted.

4.16 Factors that the adviser could consider in such a report may include, among others:

(a) the purposes to which the consideration for the allotment (if cash) will be put;

(b) if the allottee is contributing business assets rather than cash, how these will change the existing business of the Code company. Comment on the value of the assets may be appropriate. Are there other benefits of a strategic or marketing nature?

(c) the effect on the control position of non-associated shareholders in the Code company if the allotment proceeds;

(d) a comparison of the issue price with recent market prices for the shares of the issuer and the value of the company, and its likely effect on the future market value of the non-associated shareholders' shareholdings (diluting effect). A full valuation of the Code company may not be necessary. However, the adviser should consider:

(i) whether there is any likelihood of value transfer to the allottee as a result of the proposed allotment;

(ii) the assumptions underlying the issue price for the shares to be allotted; and

(iii) the solvency risk for the Code company if the proposed allotment is not approved by the shareholders; and

(e) the consequences for the company and the non-associated shareholders if the allotment is not approved. Could the company fail? Could the company be foregoing a valuable opportunity to obtain new capital that may not arise again?

Reports for share buybacks

4.17 Clause 3(g) of Schedule 1 of the *Takeovers Code (Class Exemptions Notice (No 2) 2001)* (the **Class Exemptions Notice**) relating to buybacks approved by shareholders, provides, as a condition of the exemption, that the notice of meeting containing the proposed resolution to approve the buyback must contain, or be accompanied by a report from an independent adviser, in relation to the buyback, that complies with rule 18 of the Code as if:

(a) references in that rule to an acquisition under rule 7(c) of the Code were references to the buyback by the company made in accordance with the buyback exemption; and

(b) the references to a notice of meeting were references to the notice of meeting referred to in this clause.

4.18 Existing shareholders may increase their control percentage through a buyback undertaken by a Code company in which they do not participate (the **increasing shareholders**), either because the offer is not made to them (selective buy-back) or they opt not to accept the offer.

4.19 If shareholders not associated with the increasing shareholders approve the buyback for the purposes of the Code, under clause 4 of the Class Exemptions Notice the increasing shareholders may retain their resultant increased control percentages.

4.20 If the non-associated shareholders do not approve the buyback for the purposes of the Code, then the increasing shareholders must, within 12 months of increasing their control percentage, eliminate the increase to their shareholdings so that their control percentages revert to pre-buyback levels (see clause 5 of the Class Exemptions Notice). The increasing shareholder is prohibited from exercising voting rights from the increased control percentage during the 12-month period.

4.21 A buyback may take several forms, including:

(a) an offer in which all shareholders have the potential to participate and that is achieved through on-market transactions at then-current market prices over a period of time;

(b) a discrete offer at a fixed price made to all shareholders; or

(c) a discrete offer at a fixed price made to a selected group of shareholders.

4.22 It may be helpful for the adviser to distinguish between:

(a) the buyback itself, which may not require shareholder approval for the purposes of the Companies Act 1993 (the **Companies Act**) and the Exchange's Listing Rules (the **Listing Rules**); and

(b) the potential for an increase in the control percentage of one or more shareholders if the acquisition (buyback) proceeds, necessitating approval of the buyback by the non-associated shareholders for the purposes of the Code.

4.23 If the buyback is one for a fixed price over a short period of time, with the offer made to all shareholders, or one or a selected group of shareholders, off-market, the adviser may need to consider, among other matters:

(a) the merits of the buyback transaction itself from the point of view of the shareholders who will have to consider whether or not to accept the offer; and

(b) the merits of the buyback transaction as concerns its impact on the control of the company from the point of view of the shareholders who have to decide whether or not to approve the buyback and thus allow the increasing shareholder(s) to increase their control percentage in the Code company.

4.24 From the perspective of the shareholders as recipients of the offer the issues could include, among others:

(a) a comparison between the price being offered for each share compared with the value of each share pre-buyback offer. The likely impact on the value of shares after the buyback. Comparison of relevant useful financial ratios for each share remaining in the company after the buyback relative to the ratios before the buyback. For example, where net tangible asset backing per share (**NTA**) is a useful measure, comparison of the NTA of the shares remaining in the company after the buyback against the NTA of the shares before the buyback?

(b) the effect of the buyback on the liquidity of the shares. Whether the buyback provides an opportunity for shareholders to cash-up some or all of their shareholding without impacting the market value of the shares, but possibly at the cost of reduced liquidity after the buyback (when the pool of available shares is likely to be also reduced); and

(c) the company's capacity to fund the buyback. Is this a way of utilising otherwise surplus cash? Will the company have to borrow to fund the buyback? If so, what impact might this have on debt/equity ratios?

4.25 From the point of view of the shareholders who have the opportunity to vote to approve or reject the buyback for Code purposes, the issues could include, among others:

(a) whether this is a means by which the increasing shareholder(s) can obtain an increased control percentage without having to pay a premium for the level of control to be achieved; and

(b) the likely outcome if the shareholders vote against the proposal. For example, will the buyback still go ahead, but without the increasing shareholders being able to retain and vote their increased control percentages? What are the prospects of the increasing shareholders making a Code offer to all shareholders?

4.26 If the buyback is one where shareholder consent is not required under the Companies Act or the Listing Rules, and where acquisitions can take place at market prices at any time over a future period, the issues may be slightly different. The buyback transactions will occur at prevailing market prices when the directors consider it is in the best interests of the shareholders and the company for the company to buy its own shares. There is thus no fixed reference point against which to assess value. In this case, comments could cover matters, among others, such as:

(a) a comparison between current market prices and the assessed value or NTA value, if relevant. What would be the effects on the assessed value or the NTA of remaining shares if the buyback proceeds at current market value?

(b) the benefits for shareholders if the buyback proceeds;

(c) the likelihood of the buyback proceeding anyway if the shareholders vote against the buyback for the purposes of the Code;[12]

(d) the prospects of all shareholders being able to participate in the buyback. Not all shareholders are likely to want to take the opportunity to sell into the buyback;

(e) the implications for control of the company if the buyback is approved; and

(f) the options available to the increasing shareholders if the shareholders vote against the buyback. Is an increasing shareholder able to "creep" under rule 7(e)? Might an increasing shareholder make a full or partial takeover offer for the company?

4.27 As with other Code transactions, the Panel prefers that the buyback offer not be described in terms of its "fairness" or "unfairness" to the voting shareholders.

4.28 In all buybacks, the fundamental reason for the meeting under clause 4 of the Class Exemptions Notice is for the non-associated shareholders to effectively approve (by their approval of the buyback) the increasing shareholders obtaining an increased level of control of the company.

5 Reports for compulsory acquisitions

Background

5.1 The Code's compulsory acquisition provisions apply when a person becomes a dominant owner (i.e., becomes the holder or controller of 90% or more of the voting rights in a Code company). After becoming a dominant owner, an acquisition notice must be sent to shareholders. This notice must set out the amount payable in respect of the outstanding equity securities.

5.2 Independent advisers may be engaged in several circumstances in connection with compulsory acquisition processes. These are discussed below.

Rule 57(1)(a) Certificates

5.3 There are instances where the consideration (the **Acquisition Consideration**) specified in an acquisition notice must be a cash sum certified as fair and reasonable by an independent adviser (a **Rule 57(1)(a) Certificate**). These circumstances are as follows:

(a) Dominant ownership was not reached through a takeover offer (e.g., dominant ownership was reached in reliance on the Code's creep provisions).

(b) Where:

(i) dominant ownership was reached through acceptances of a takeover offer;

(ii) the offer consideration was not cash (and there was no cash alternative); and

(iii) acceptances were received in respect of 50% or less of the equity securities in the relevant class.[13]

5.4 In certifying a cash sum as fair and reasonable the independent adviser must:[14]

(a) first assess the value of all the equity securities in the class of equity securities of which the equity security forms part; and

(b) then allocate that value pro rata among all the securities of that class.

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[12] If this occurs the increasing shareholders would have to reduce their increased control percentage back to pre-buyback levels within 12 months and could not exercise those increased voting rights in the 12-month period.
[13] Acceptances of securities controlled by the dominant owner (or held or controlled by their associates) are disregarded. See rule 56(3) of the Code.
[14] See rule 57(4) of the Code.

5.5 The Rule 57(1)(a) Certificate should include a valuation of the Code company. This is important because outstanding security holders can object to the Acquisition Consideration in certain circumstances. Accordingly, in order to exercise their objection rights in a considered manner, the outstanding security holders should have access to the financial analysis undertaken by the independent adviser.

5.6 The other matters to be considered by an independent adviser who is preparing a Rule 57(1)(a) Certificate are likely to be quite limited. However, there are matters which could be relevant and/or otherwise merit comment. For example, it may be appropriate for an independent adviser to consider and/or comment on the amount paid by the dominant owner in any recent acquisitions of securities in the Code company and the relationship of such amounts to the Acquisition Consideration.

5.7 The Panel considers that it is best practice for dominant owners to send the Rule 57(1)(a) Certificate together with the acquisition notice to the outstanding security holders.[15] This may assist the outstanding security holders in deciding whether to object to the Acquisition Consideration.

Determination of Acquisition Consideration by an independent expert

5.8 Challenge rights to the Acquisition Consideration exist for outstanding security holders in the following circumstances:

(a) Where dominant ownership was not reached through a takeover offer (including in the circumstances referred to in paragraph 5.3(a)).

(b) Where:

(i) dominant ownership was reached through acceptances of a takeover offer; and

(ii) acceptances were received in respect of 50% or less of the equity securities in the relevant class (irrespective of whether or not the offer was for a cash sum or included a cash alternative).

5.9 In order for these challenge rights to be exercised, the dominant owner must have received, within 10 working days of sending the acquisition notice, written objections to the Acquisition Consideration from outstanding security holders who hold the lesser of:[16]

(a) 2% or more of the equity securities in the relevant class; or

(b) 10% or more of the outstanding securities in the relevant class.

5.10 If this occurs, the dominant owner must immediately refer the determination of the Acquisition Consideration to be provided to the outstanding security holders to an expert. The Acquisition Consideration must be determined to be a cash sum equal to the fair and reasonable value for those securities (see 5.4 above for how this must be calculated).[17]

5.11 See section 6 of the Panel's *Guidance Note on Compulsory Acquisition* for further information on the Expert Determination process.

[15] The Code does not expressly require the Rule 57(1)(a) Certificate to accompany the acquisition notice that is sent to the outstanding security holders. However, the dominant owner must send a copy of the certificate free of charge on request to any person (including outstanding security holders) within one working day after receipt of the request. See rule 57(5) of the Code.
[16] See rule 57(2) of the Code.
[17] See rule 57(3) of the Code.

Schedule: Version control, disclaimer and copyright

Version control

This version (Panel document reference number #1012503.1) was published on 23 October 2026.

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

Date of version	Principal changes from previous version	Document reference number
23 October 2026	Revised to provide more specific guidance of disclosures regarding valuations.	#1012503.1
7 April 2026	Simplified the guidance on the determination of compulsory acquisition consideration by an independent expert by inserting a cross-reference to the more detailed explanation in the Compulsory Acquisition Guidance Note.	#1006710.1
1 November 2023	Revised the Panel's interpretation of appropriate engagement between independent advisers and both the Code company and the offeror.	#450434.1
11 March 2021	Incorporated the Panel's interpretation of independent advisers' actions that preserve independence and appropriate engagement between independent advisers and the Code company.	#404090.1

Disclaimer

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APPENDIX A - The Panel's Policy on the Approval of Independent Advisers

1 General information

1.1 Under the Takeovers Code, reports from independent advisers are required in various circumstances:

(a) Rules 15 and 16 require such a report where a person seeks to acquire or have allotted to it voting securities in a Code company (or in some circumstances in another body corporate) with shareholder approval.

(b) Rule 21 requires the directors of a Code company to obtain a report from an independent adviser on the merits of an offer.

(c) Rule 22 requires the offeror to obtain a report from an independent adviser where an offer is made for different classes of securities.

(d) Rule 57(1) requires an independent adviser to certify in some circumstances that the cash sum proposed as consideration for a compulsory acquisition of equity securities under the Code is fair and reasonable.

(e) Some exemptions granted by the Panel include a condition that a report from an independent adviser be prepared in relation to the transaction the subject of the exemptions.

1.2 In addition, as contemplated by the Panel's *Guidance Note on Schemes of Arrangement*, in most cases the Panel will provide a no-objection statement for a scheme of arrangement in respect of a Code company only where shareholders will receive an independent adviser's report.

1.3 An "independent adviser" means "an adviser whom the Panel considers is independent and who is approved by the Panel for the purposes of the Takeovers Code".

1.4 The independent adviser's role is to advise shareholders about a transaction or other Code-related circumstance.

1.5 Independent advisers' reports play an important role in the context of the Code and, in most cases, the context of schemes of arrangement in respect of Code companies. The Panel takes its responsibilities for approving the appointment of independent advisers very seriously. The paragraphs below set out the Panel's criteria for approval of an adviser.

2 The Panel's criteria for approval

2.1 The current policy of the Panel is to consider each application for approval on a case-by-case basis so that the Panel can be satisfied, on each occasion, that the adviser is:

(a) appropriately qualified and experienced; and

(b) independent.

2.2 In considering an application, the Panel may also take into account any other factors that it considers relevant in relation to the appointment for which the adviser seeks approval.

2.3 The Panel is open to approving the appointment of an independent adviser in advance of a proposed transaction provided that:[18]

(a) the identities of all the parties to the proposed transaction are ascertainable and the Panel is satisfied that the proposed adviser does not have any conflicts of interest with those parties which could compromise its independence; and

[18] Also, please see paragraphs 3.4 to 3.12 regarding maintaining independence.

(b) there is a reasonable possibility that the proposed transaction will proceed.

2.4 If the proposed transaction is delayed for a significant period of time from the date that the Panel approved the appointment of the adviser, the Panel will need to be satisfied that the adviser is still independent.

2.5 The Panel will keep this policy under review and is not bound by prior decisions.

3 Conflicts of interest

Relationships that can give rise to a conflict of interest

3.1 Every prior or existing relationship between the adviser (including any principals or employees of the adviser who are responsible for preparing the report) and any relevant entity must be disclosed to the Panel but it will not automatically disqualify the adviser from being approved. The Panel will consider the nature and extent of any prior or existing relationships before an approval can be given.

3.2 The following types of relationship may lead the Panel to conclude that the proposed adviser is **not** independent:

(a) if the proposed adviser has been involved in giving strategic advice on the relevant transaction to any relevant party;

(b) if the proposed adviser is likely to financially benefit from the success or failure of the relevant transaction;

(c) if the proposed adviser has an ongoing corporate advisory role for any party to the relevant transaction; and

(d) if the proposed adviser has an interest in any party to the relevant transaction.

3.3 A proposed adviser that has some form of relationship with a party to the transaction will not automatically be precluded from being approved. The Panel will look at the facts and circumstances of each case.

Acting in a manner that preserves independence

3.4 The requirement for independence is ongoing. It is the adviser's responsibility to ensure that it remains independent during the course of a transaction. Accordingly, advisers should:

(a) exercise their professional judgment in determining what information to include in the IAR (and whether any information should be withheld);[19]

(b) not commence relationships during the course of a transaction which could compromise their independence; and

(c) prepare and give advice in a manner such that they avoid becoming advisers to the Code company's board (as opposed to its shareholders).

3.5 This is reflected in the standard conditions of the Panel's approval of an adviser, which include:

(a) that the adviser remains independent until completion of the transaction; and

(b) that the adviser restates its declaration of independence to the Panel on the day on which the final version of the adviser's report is delivered to the Code company.

3.6 If the adviser fails to meet the Panel's conditions of approval, a new adviser (which meets the Panel's appointment criteria) may need to be appointed.

[19] The Panel does not consider it problematic for advisers to receive communications from the Code company about what information should be withheld (for commercial confidentiality or otherwise), but the decision as to what is included in the report is a matter for the adviser.

No rule against early appointment

3.7 The Panel understands that advisers may be appointed before the terms of a transaction are set or agreed (as applicable). It is acknowledged that this may have the benefit of giving the adviser additional time to prepare their report. However, advisers should take care to avoid taking actions or accepting instructions which may, in effect, result in them ceasing to be independent. The key issue in this regard is how the engagement between the adviser and the Code company is managed and, in particular, what information is provided by the adviser to the Code company and when it is provided. These issues can arise in any context, but, as a general rule, the earlier an adviser is appointed, the greater the risk of independence issues arising. The Panel is unlikely to approve an appointment which is proposed before sufficiently clear transaction parameters are agreed.

4 Repeated engagements of an independent adviser

4.1 If an applicant for approval has previously provided a report (or other services) for the Code company in question (whether or not related to a Code-regulated transaction or scheme of arrangement), the Panel will need to be satisfied that the adviser's independence will not be compromised by its previous work. Accordingly, the Panel will need to be satisfied that:

(a) the adviser would not be constrained by any methodology or views expressed in its earlier report or other work;

(b) there is not a degree of familiarity between personnel at the adviser firm and personnel at the Code company which would compromise the adviser's independence; and

(c) the amount of work being provided to the adviser firm does not compromise the adviser's independence. Factors to consider in this regard will include:

(i) the proximity in time of the earlier report(s) or other work;

(ii) the nature and significance of the reports or other work, including their relevance to the proposed transaction;

(iii) the promise of future work; and

(iv) the fees received in respect of the reports or other engagements.

4.2 In some cases, a Code company that is subject to successive Code-regulated transactions (for example, follow-on takeover offers) or proposed schemes of arrangement may wish to appoint the same adviser from an earlier transaction to prepare the new report. The Panel will consider whether the shareholders are likely to benefit from having an independent adviser's report prepared by a different advisory firm from that which prepared the earlier report(s), and may consider the following factors (in addition to the matters set out in paragraph 4.1):

(a) whether the currently required report is likely to be the last independent adviser's report to be provided to shareholders before compulsory acquisition is initiated;

(b) whether the business, circumstances or prospects of the Code company have changed since the earlier report(s); and

(c) the relationship between the value given in the adviser's earlier report(s) and the offer price(s) under the successive offer(s).

5 Use of sub-contractors

5.1 In some cases, the firm putting itself forward for approval as an independent adviser for a particular Code transaction or scheme of arrangement will not have the necessary expertise to deal with all aspects of the assignment. In these cases, the firm may engage the specialist services of a subcontractor to assist with the report.

5.2 The Panel expects to consider the appointment of the proposed subcontractor at the same time as it considers the application by the primary adviser. The Panel must be satisfied that:

(a) the subcontractor has the necessary expertise and independence (and will continue to retain such independence) to undertake the assignment;

(b) the subcontractor has been chosen by the primary adviser and not, for example, by the Code company or offeror; and

(c) the work of the subcontractor will be managed by the primary adviser.

6 Advice in advance of making an application

6.1 If a proposed adviser (or appointor) has any reservations about making an application to the Panel for approval, whether due to a relationship with a party to the relevant transaction or some other concern, the Panel encourages the adviser (or appointer) to contact the Panel executive for guidance. The Panel executive welcomes any queries and can be contacted at the numbers listed on the website or on (04) 815 8420.

7 Conditions of approval

7.1 When the Panel approves an independent adviser, it will typically give its approval subject to conditions.

7.2 The conditions which the Panel attaches to its approval will be set on a case-by-case basis. However, the conditions will typically include the following:

(a) [name of independent adviser firm] must:

(i) remain independent until completion of the transaction; and

(ii) restate their declaration of independence to the Panel on the day on which the final version of [name of independent adviser firm's] Report is delivered to [Code company];

(b) [name(s) of individuals] prepare the Report [with [name of reviewer] providing a peer review];

(c) [name of independent adviser firm] provides the Panel with:

(i) a draft version of the Report in sufficient time for the Panel to review and, if relevant, comment on the Report as well as any substantive changes to the draft Report;

(ii) such marked-up versions of the Report as the Panel requests in order to show any changes made to the Report (or any sections of it) after it was (or they were) first provided to [Code company]; and

(iii) copies of any correspondence, and/or other records of discussions, between [name of independent adviser firm] and [Code company] or any third party that are relevant to any changes to the Report (or any sections of it) that the Panel requests; and

(d) a statement of independence is displayed on the cover page of the Report.

APPENDIX B - Information Required in an Application for Approval as Independent Adviser

1 Information from applicant

1.1 Applications should be submitted to the Panel (see the contact details at the end of this Schedule) by the proposed independent adviser and must include the information set out below. This will ensure that all necessary information is provided and delays caused by an incomplete application are avoided.

1.2 Each application should include:

(a) **Transaction background information:**

(i) a brief outline of the Code transaction or series of transactions to which the appointment relates;

(ii) the relevant rule in the Code for the report (i.e., 18, 21, 22, 57) or the relevant exemption;

(iii) the names of the persons instructing the applicant and any other key parties in the relevant transaction or series of transactions; and

(iv) the directors and substantial security holders of each of those parties.

(b) **Applicant's details:**

(i) the applicant's legal name, address, place of business and contact details; and

(ii) details of the directors and shareholders of the applicant (if applicable).

(c) **Qualifications and experience:**

(i) a statement of the qualifications and expertise of the applicant, in the form the applicant expects it to appear in its report;

(ii) names and curricula vitae of the individuals who will be involved in preparing the report;

(iii) evidence of previous relevant experience demonstrating the applicant's suitability for approval;

(iv) if the applicant is a sole practitioner, the Panel may require confirmation from the applicant that, if the applicant is approved, someone of appropriate standing would undertake a peer review of the report. The details of the peer reviewer should also be provided; and

(v) if the Panel is unfamiliar with the applicant's work, the applicant should submit examples of previous work undertaken, as evidence of the applicant's expertise.

(d) **Independence:**

(i) a statement that the applicant has no conflict of interest that could affect the applicant's ability to provide an unbiased report. It is a requirement of the Takeovers Code that the independent adviser include this statement in their report. Accordingly, the Panel will not accept any qualification to this statement; and

(ii) the applicant must disclose:

(A) all past and present relationships (whether financial, economic, professional or otherwise) between the applicant (including any individuals responsible for preparing the report) and the persons instructing the applicant or any other party to the transaction or series of transactions (including the directors and the substantial shareholders (i.e., those shareholders with a relevant interest of 5% or more of the securities) of any such parties). This disclosure should give the nature, extent and duration of the relationship, including the fees earned, the timeframe of the assignments and whether there has been any past, or is any present, involvement with any of the parties as auditor. If there are no such relationships, a statement to this effect;

(B) any advisory activities which the applicant is, or will be, undertaking in relation to this transaction, including details of the basis of remuneration for such activity. Such activities might include, for example, the provision of an independent appraisal report under the Listing Rules. If there are no such activities, a statement to that effect;

(C) any direct or indirect pecuniary or other interest, including any success or contingency fee or remuneration, other than the applicant's fee for providing the report. If there are no such interests, a statement to that effect;

(D) any prior involvement in the transaction (particularly in the formulation of it). If there was no prior involvement in the transaction, a statement to that effect;

(E) if the applicant is preparing an appraisal report under the NZX Listing Rules, this should be stated;

(F) the date on which the applicant was first approached by the person instructing the applicant (the appointor) about the work to which the application relates;

(G) to the best of the applicant's knowledge, whether the appointor utilised a competitive process in choosing the applicant for the work to which the application relates;

(H) whether the applicant and the appointor discussed the valuation methodology to be used in the proposed engagement; and

(I) whether the applicant and the appointor discussed the price and/or any parameters of the valuation.

1.3 The application must also contain the following statements:

(a) a statement certifying that the applicant's professional liability insurance cover is adequate in relation to the size of the transaction;

(b) a statement that the applicant has adequate resources to complete the assignment within the required timeframe;

(c) a statement as to the timeframe within which the applicant would like the Panel to respond; and

(d) if appropriate, the names of any Panel members the applicant considers might be conflicted from making a decision in respect of the matter and why the applicant considers this to be the case.

2 Information from person instructing the applicant (the appointor)

2.1 The appointor must provide the following information in support of the application:

(a) a request in writing that the applicant be approved. The Panel executive will not process the application until it has received this request; and

(b) a statement in writing of the process undertaken to select the applicant. The statement must include, but is not limited to, the following information:

(i) the date on which the appointor approached the applicant in respect of the proposed engagement;

(ii) whether the appointor utilised a competitive process to choose the applicant;

(iii) how many firms were considered by the appointor for the proposed engagement;

(iv) the factors that were taken into account by the appointor in determining whether to appoint the applicant;

(v) whether the appointor and the applicant discussed the valuation methodology to be used in the proposed engagement; and

(vi) whether the applicant and the appointor discussed the price and/or any parameters of the valuation.

3 Use of subcontractors

3.1 If the adviser wishes to engage the services of a subcontractor to prepare some aspect of the report (e.g., an asset valuation), the application must also contain:

(a) the proposed subcontractor's background information, qualifications, experience and independence (see above for the information required); and

(b) a statement from the principal adviser that:

(i) the subcontractor has the necessary expertise and independence to undertake the assignment;

(ii) the subcontractor has been chosen by the primary adviser and not, for example, by the target company or offeror; and

(iii) the work of the subcontractor will be managed by the primary adviser; and

(c) a statement from the proposed sub-contractor that it has no conflict of interest that could affects its ability to provide an unbiased report.

4 Applications

4.1 Applications may be sent to the Panel at the contact details listed at the end of this Schedule.

4.2 The application fee for an approval application is $100 (plus GST), as prescribed under the Takeovers Regulations 2000. These regulations also prescribe the hourly rates chargeable for time spent on the application by Members of the Panel and by professional staff. Applicants will be sent an account at the conclusion of the Panel's work or on a monthly basis.

4.3 The Panel is aware that applications often need to be dealt with expeditiously and will endeavour to meet the applicant's timeframe. Processing time depends on the nature and quality of the application and the resources available within the Panel at the time the application is sent. The Panel's decision will be notified to the applicant as soon as possible after it is made.

4.4 The Panel endeavours to make a decision on an application for approval to act as an independent adviser within three working days of the date on which the Panel receives all the information required for an application. The Panel executive has a delegated authority to approve independent adviser applications in some cases. This will usually reduce the costs and processing times for applications.

4.5 The Panel reserves the right to amend this policy.

APPENDIX C - Statement of Independence

The Panel requires independent advisers to display a Statement of Independence on the front cover of their report.

STATEMENT OF INDEPENDENCE

[Name of adviser] confirms that it:

- has no conflict of interest that could affect its ability to provide an unbiased report; and
- has no direct or indirect pecuniary or other interest in the proposed transaction considered in the report, including any success or contingency fee or remuneration, other than to receive the cash fee for providing this report.

[For a Code-regulated transaction]

[Name of adviser] has satisfied the Takeovers Panel, on the basis of the material provided to the Panel, that it is independent under the Takeovers Code for the purposes of preparing this report.

[For a Scheme of arrangement]

[Name of adviser] has satisfied the Takeovers Panel, on the basis of the material provided to the Panel, that it is independent under the Panel's Guidance Note on Independent Advisers and the Takeovers Code for the purposes of preparing this report.