

Guidance Note

LOCK-UP AGREEMENTS

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**TAKEOVERS
PANEL**
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A lock-up agreement is a legal commitment by a shareholder in a Code company to accept a takeover offer. Entering a lock-up agreement may have Code implications for the parties to that agreement. This Guidance Note discusses the Code issues which commonly arise in relation to lock-up agreements and the Panel's approach to them.

1 The Takeovers Code permits lock-up agreements

- 1.1 A lock-up agreement is a legal commitment by a shareholder in a Code company to accept a takeover offer. Lock-up agreements are usually entered into prior to the public announcement of a takeover offer (a **pre-bid agreement**). However, a lock up agreement may also be a commitment from a shareholder to accept a current offer if the offer price were to be increased (an **intra-bid agreement**).
- 1.2 Lock-up agreements encourage takeover activity by promoting deal certainty for the offeror by putting the offeror in a stronger position to achieve a successful conclusion of the offer. While the Code constrains the content of lock-up agreements in several ways as discussed below, it does not prevent their use.

2 The Code's rules relating to lock-up agreements

- 2.1 The key provisions of the Code that relate to lock-up agreements are rule 6(1), rule 20, rule 28, rule 64 and clause 8 of Schedule 1.

Rule 6(1)

- 2.2 Subject to the exceptions contained in rule 7 of the Code, rule 6(1) prohibits increases over the 20% threshold in the holding or controlling of voting rights in a Code company. A breach of the Code may occur if a lock-up agreement does not clearly exclude the offeror from becoming the controller of the voting rights attaching to the shares that are subject to the lock-up agreement, pending the offer becoming unconditional.

Rule 20

- 2.3 Rule 20 of the Code requires that an offer must be made on the same terms and provide the same consideration for all securities of the same class. In other words, shareholders who enter into lock-up agreements cannot obtain terms or consideration from the offeror which differ from those offered to other shareholders in the Code company. This has the effect of preventing collateral arrangements intended to enhance the effective price or other terms received by a shareholder who is party to a lock-up agreement. Rule 20 also prevents the lock-up parties from agreeing to pricing or terms less favourable than will be offered to all other shareholders under the offer.
- 2.4 The effect of rule 20 is that the share price and terms of the offer agreed to by the seller who is party to the lock-up agreement flow on to all other shareholders. Generally, parties to lock-up agreements will have negotiated the best possible price and terms in the circumstances.
- 2.5 The Panel acknowledges that lock-up agreements usually (but need not) bind the locked-up shareholders to accept the takeover offer within a short timeframe. This means that if a competing bidder makes a better offer the locked-up shareholders will not be able to accept it. The Panel does not view this as being unacceptable under rule 20 because any other shareholder who has already accepted the offer will likewise be unable to retract their acceptance in order to be able to accept the new offer.



Rule 28

- 2.6 Rule 28 of the Code requires that a notice of variation of an offer must immediately be sent to the persons listed in that rule (the offerees, the target company, the Panel and, if the target company is listed, the registered exchange).

Panel comment in Otago Power

- 2.7 The Panel also commented more generally in its statement of reasons for the [Otago Power Limited determination](#)¹ that a requirement in the *intra-bid* agreement for acceptance of the takeover offer within one day of the variation of the offer increasing the offer price (rather than allowing acceptance at any time before the end of the offer period) was discriminatory and contrary to the Code.
- 2.8 The Panel has recently re-considered the general comment referred to in paragraph 2.7, above, which appears to treat *intra-bid* agreements differently from pre-bid agreements. The Panel has decided that from a policy point of view, there is no justification for this different treatment.
- 2.9 Accordingly, the Panel sees no reason to prevent the offeree shareholder who is party to the *intra-bid* agreement from agreeing to accept the offer on a date earlier than the latest time allowed under the terms of the offer. However, in the case of an *intra-bid* agreement that relates to the offer price, the agreement should bind the shareholder parties to accept the offer only if the offeror were to increase the offer price. A variation to increase the offer price can only be made by way of a rule 28 variation notice. Care needs to be taken so that an *intra-bid* agreement does not purport to vary the offer itself.
- 2.10 To the extent that pre-bid agreements are lawful under the Code, so are *intra-bid* agreements.

Clause 8 of Schedule 1 and rule 64

- 2.11 Clause 8 of Schedule 1 of the Code requires that the offeror to disclose in the offer document the names of any person that has agreed conditionally or unconditionally to accept the offer, and the material terms of the agreement. This ensures that the market is fully informed of arrangements which go to the core of a takeover offer and which may have a significant impact on the response of other shareholders to the takeover offer. *Pre-bid* agreements must always be disclosed under this requirement.
- 2.12 The entering into of *intra-bid* agreements, by definition, occurs after the offer has been made. Therefore, information about *intra-bid* agreements cannot be disclosed in the offer document. However, disclosure about *intra-bid* agreements must still be made.
- 2.13 In the Panel's view, a failure to disclose *intra-bid* agreements would be likely to constitute an omission, in breach of rule 64 of the Code. Under that rule, an omission to disclose information may be misleading where, in the circumstances, there would have been a reasonable expectation that the material information known to the holder would be disclosed.²
- 2.14 In the circumstances of a takeover that is in progress, the Panel considers that shareholders would have a reasonable expectation that the material information (i.e., the fact that an *intra-bid* agreement has been made, the names of the lock-up parties, the affected voting rights in terms of numbers and percentages, and other material terms of the agreements) known to the offeror would be disclosed by the offeror.
- 2.15 Disclosure about an *intra-bid* agreement should be made in a manner that ensures shareholders in the target company are fully informed on a timely basis and are not misled by the terms of the disclosed *intra-bid* arrangement. The Panel would expect the offeror to notify the target company immediately on execution of the agreement. Where the *intra-bid* agreement would have a material impact on the decision of offerees to accept or

¹ Takeovers Panel, Section 32 Determination *Otago Power Limited* (31 May 2002).

² See the Panel's determination of 10 May 2010 in the matter of *Horizon Energy Distribution Limited*, under the heading "Rule 64 and Relevant Jurisprudence".



reject the offer, the Panel would ordinarily expect prompt disclosure to be made in writing to offerees that had not already accepted the offer, the Panel, and, if the target company is a listed company, the licensed market operator.

3 Conclusion

- 3.1 The Panel accepts that lock-up agreements are a common feature of takeovers in New Zealand which deliver benefits to takeover activity. The rules of the Code that govern pre-bid agreements also apply to *intra-bid* agreements.
- 3.2 Extra care needs to be taken with an *intra-bid* agreement to ensure that the agreement itself does not amount to a non-permissible variation to the offer, and that prompt disclosure is made, of a nature consistent with the disclosure requirements of clause 8 of Schedule 1 of the Code.

4 Voting agreements for schemes of arrangement

- 4.1 Where a transaction is structured as a scheme of arrangement, a voting agreement is the functional equivalent of a lock-up agreement.
- 4.2 Voting agreements can breach rule 6(1) of the Code. To facilitate the use of voting agreements, the Panel has granted the [Takeovers Code \(Voting Agreements for Schemes of Arrangement\) Exemption Notice 2020](#). For more information, see the [Guidance Note on Schemes of Arrangement](#).