Guidance Note

MISLEADING OR DECEPTIVE CONDUCT

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TAKEOVERS PANEL
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Contents

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This Guidance Note sets out the Panel's approach to misleading or deceptive conduct. This includes guidance on last and final statements. There are several case studies in this Guidance Note that illustrate the Panel's approach to analysing issues under rule 64.

1 Introduction

1.1 Rule 64 of the Takeovers Code (the **Code**) prohibits misleading or deceptive conduct in relation to Code-regulated transactions. Market participants need to be aware that when this conduct occurs the Panel will respond in an appropriate manner to protect the interests of the market.

1.2 The prohibition in rule 64 of the Code against misleading or deceptive conduct during Code-regulated transactions came into force on 29 February 2008. Sections 44B, 44C and 44E of the Takeovers Act 1993 (which also relate to misleading conduct) were added at the same time.

1.3 Rule 64 provides:

> *(1) A person must not engage in conduct that is –*
>
> *(a) conduct in relation to any transaction or event that is regulated by [the Code]; and*
>
> *(b) misleading or deceptive or likely to mislead or deceive.*
>
> *(2) A person must not engage in conduct that is –*
>
> *(a) incidental or preliminary to a transaction or event that is or is likely to be regulated by [the Code]; and*
>
> *(b) misleading or deceptive or likely to mislead or deceive.*

1.4 Section 44B of the Takeovers Act provides:

> *A person must not make a statement or disseminate information, in relation to any transaction or event regulated by the [Code] or incidental or preliminary to a transaction or event that is likely to be regulated by the [Code], if –*
>
> *(a) a material aspect of the statement or information is false or the statement or information is materially misleading; and*
>
> *(b) the statement or information is likely to –*
>
> *(i) induce a person to trade, or hold, the financial products of a code company; or*
>
> *(ii) have the effect of increasing, reducing, maintaining, or stabilising the price for trading in those financial products; or*
>
> *(iii) induce a person to vote for, or to vote against, a transaction that is or is likely to be regulated by the [Code], or to abstain from voting in respect of that transaction.*
>
> *(c) In this section, trade means to acquire or dispose of financial products.*

2 General Comments

2.1 Rule 64 enables the Panel to exercise its enforcement powers for any misleading or deceptive conduct relating to Code-regulated transactions or events. Misleading or deceptive conduct that is incidental or preliminary to transactions or events that are, or are likely to be, regulated by the Code, are also subject to the Panel's enforcement powers.

2.2 Rule 64 applies to any person – not just to bidders or target companies or major shareholders. Any person who engages in misleading or deceptive conduct relating to a Code-regulated transaction or event is caught by the prohibition.

2.3 As well as the rule 64 prohibition, it is also a criminal offence under section 44C of the Takeovers Act to make or disseminate materially false or misleading statements or information relating to Code-regulated transactions or events. The penalties for this offence are, for an individual, imprisonment for up to five years or a fine of up to $300,000 or both. For a body corporate, a fine of up to $1 million can be imposed.

3 Meaning of misleading or deceptive conduct

3.1 Rule 64 has broad application. It is based on section 9 of the Fair Trading Act 1986 which prohibits misleading and deceptive conduct in trade.

3.2 The term 'misleading or deceptive' has been subject to wide judicial consideration over many years in many cases in New Zealand and Australia. It appears frequently in consumer protection legislation such as the Fair Trading Act and the Australian Competition and Consumer Act 2010 (previously the Trade Practices Act 1974). The term also occurs in the market manipulation provisions of the Australian Corporations Act 2001.

3.3 An analysis of Australian case law indicates that the courts in Australia apply the consumer protection tests and reasoning to market manipulation cases. It is reasonable to believe that the same would occur in New Zealand courts.

3.4 The Panel construes the words 'misleading' and 'deceptive' in the same way as the New Zealand and Australian Courts. They are given their natural and ordinary meaning of 'to lead into error'. Accordingly, the Panel considers Code-related conduct to be misleading or deceptive if it leads, or would be likely to lead, persons into error. A more detailed description of the Panel's approach to breach of rule 64 is set out below.

3.5 The Fair Trading Act no longer applies to conduct regulated by the Code and the Takeovers Act. This enhances the Panel's role as the primary regulator of changes of control in Code companies.

4 Panel will take enforcement action against misleading or deceptive conduct

4.1 Market participants involved in a takeover or other Code-related transaction should always take care if they make any representations to the media or to the market. When misleading or deceptive conduct takes place during a Code-related transaction or event, the Panel will respond in an appropriate manner to protect the interests of the market.

5 'Last and final statements'

5.1 Parties involved in a takeover often make announcements about their intentions for the takeover. These statements are made to influence other parties to the takeover and, whether they refer to the price or other matters, are described generically by takeover regulators as 'last and final statements'.

5.2 Statements by an offeror, such as "[Offeror] will not increase the offer price", or "[Offeror] will not extend the offer period" are last and final statements.

5.3 At times, major shareholders in a target company will make announcements about their intentions, such as "[Shareholder] does not intend to accept the offer". Any later inconsistent action or statement risks breaching rule 64. An equivalent statement in a scheme might be that "[Shareholder] intends to cast all of the votes it holds or controls against the scheme". Any later inconsistent action or statement risks being misleading or deceptive. Inconsistent actions include both directly contradictory actions (e.g., accepting an offer which the shareholder said it would not accept) and indirectly contradictory actions (e.g., a shareholder selling its shares to a third party after it made an unqualified statement that it will accept an offer).

5.4 The integrity of the market requires that statements made in relation to takeovers can be relied on. For that reason, last and final statements must be adhered to as to a promise. The Panel enforces those promises.

Last and final statements must be qualified or adhered to strictly

5.5 Last and final statements may be qualified when they are made, preserving the right to depart from the statement. However, such qualifications must be clear and unequivocal. For example:

(a) "At present [Offeror] does not intend to increase the offer price, but it reserves the right to do so" is a clearly qualified statement. A subsequent increase of the offer price by the offeror in this example would be unlikely to be misleading or deceptive.

(b) "Currently, [Shareholder] intends to cast all of the votes attached to the [xx]% of shares in [Target] that [Shareholder] controls in favour of [the scheme], but it reserves the right to sell any such shares in its sole discretion". Again, a subsequent sale of the shareholder's shares prior to the scheme meeting would be unlikely to be misleading or deceptive.

5.6 For the avoidance of doubt, the Panel considers that simply including a qualifier through language such as "present" or "current" (e.g., "[Offeror] does not presently intend to increase the offer price") is not, in itself, a clear and unequivocal qualification.

5.7 Where it has come to the Panel's attention that a party has made a last and final statement which is not clearly qualified, the Panel will endeavour to write to the party:

(a) If the statement is unqualified, the Panel will typically ask whether an unqualified statement was really intended, and:

(i) if the unqualified statement was intended, the person will be put on notice that unqualified statements must be adhered to; or

(ii) if an unqualified statement was not intended, invite the person to promptly publish a qualification to the statement.

(b) If the statement is equivocally qualified, the Panel will typically invite the person to clarify their position to the market and to the Panel immediately.

5.8 For the avoidance of doubt, the Panel may take regulatory action (or work with other regulators to do so) whether or not it engages with a party who has made a last and final statement.

5.9 Where rule 64 applies, if clearly misleading conduct occurs, such as departing from the terms of an unqualified last and final statement, and the parties involved are not prepared or are not able to correct that conduct, the Panel is likely to call a meeting under section 32 of the Takeovers Act (which gives the Panel its principal enforcement powers). In these circumstances the Panel may give just 24 or 48 hours' notice of the meeting. The Panel's intention for calling these meetings with short periods of notice is to ensure that any information in the market which is misleading or deceptive, or is likely to mislead or deceive, is corrected promptly.

5.10 If the Panel calls a section 32 meeting, restraining orders and compliance orders are likely to be made by the Panel where there has been a departure from a last and final statement. Court orders may be sought if any transactions require unwinding. The Panel believes that the integrity of information in the market must be upheld, so that market participants can rely on that information. Those who make last and final statements should be held to the terms of those statements.

5.11 If there is a failure to act in accordance with a last and final statement in relation to a scheme, the Panel may decline to issue a no-objection statement and/or otherwise ensure the matter is appropriately brought to the Court's attention. The Panel may also look to work with other regulators to ensure a corrective statement is issued and/or punitive sanctions are imposed.

Specific types of last and final statements

5.12 Where a statement is made regarding a shareholder's voting intentions in relation to a scheme or whether it will accept or reject an offer, the statement should be accompanied by a statement of the number of shares to which the statement relates and the percentage of total voting rights in the company which that number represents.

5.13 A statement as to the intentions of a shareholder should not be made unless the shareholder has given their prior consent. Where a statement relates to the intentions of more than one shareholder, each shareholder and their individual holdings should be separately identified in the statement.

5.14 For clarity, the Panel notes that in some schemes, targets have released proxy returns ahead of votes in relation to schemes. As proxy instructions can change or be revoked, the Panel's general view is that the release of proxy returns does not engage the last and final statements policy. However, companies releasing proxy returns should note (when releasing such returns) that the proxy returns are not determinative of the actual voting and proxy votes can be changed up to the time of the vote.

5.15 The Panel's view is that if a shareholder states (without further qualification) that they will not vote in favour of a scheme or accept an offer, that statement applies for the duration of that scheme or offer, including where the consideration is subsequently increased. Accordingly, a shareholder who has made an unqualified 'intention to reject' statement would be likely to engage in misleading or deceptive conduct by subsequently accepting the offeror (or voting in favour of the scheme) at a greater (or otherwise different) price.

5.16 Despite the position set out in paragraph 5.15 above, a shareholder may preserve its ability to accept an offer (or vote in favour of a scheme) if the price changes by expressly reserving the right to do so in clear and unequivocal terms.

6 Remedies for misleading or deceptive conduct

6.1 When the Panel determines that a breach of rule 64 has occurred, any remedy the Panel orders will be balanced between providing certainty for the market and achieving the appropriate commercial outcome. The Panel is likely to require those who make last and final statements to act in accordance with those statements and to promptly correct any misinformation.

6.2 Keeping a takeover bid on track is likely to be at the forefront of the Panel's reasoning for the remedies put in place. However, in some cases it may be more appropriate to stop a bid from proceeding. The Panel will consider every case on its merits.

6.3 The Panel has powers to require corrective statements to be published, without having to obtain Court orders. The Panel can also prohibit people from making statements or distributing documents (see section 33AA of the Act). The remedies and penalties that were added to the Takeovers Act in 2006 are described in *CodeWord 17*.

6.4 The Panel may seek pecuniary penalties against company directors who knowingly are involved in a company's misleading conduct. A director who incurs a pecuniary penalty is also automatically banned for five years from managing a New Zealand company.

7 The Panel does not want its resources wasted

7.1 In a contest for control of a Code company, or where a takeover is opposed, parties often look for an opportunity to complain to regulators. Because of the likelihood of tactical complaints being made in these circumstances, and also to manage its enforcement resources efficiently and responsibly, the Panel may apply threshold tests to decide whether to act on a complaint about misleading or deceptive conduct.

7.2 A departure from an unqualified last and final statement is likely to be seen as misleading or deceptive conduct, and the Panel will take prompt action on such departures. However, the question as to whether other Code-related conduct is misleading or deceptive or is likely to mislead or deceive may be less clear.

7.3 To enable the Panel to use its enforcement resources most effectively complainants may have to do more than merely complain to the Panel.

7.4 The Panel does not wish to be drawn into a takeover contest through tit-for-tat complaints. Protagonists in a contested or hostile takeover must convince the Panel that its resources would be properly used if it acts on their complaint. For example, the complainant may be required to show that it has a prima facie case, or that the complaint is not vexatious, or to establish that there would be merit in the Panel's acting on the complaint.

7.5 A complainant's formal request that the Panel convene a section 32 meeting to determine whether there has been a breach of the Code is always taken very seriously by the Panel. However, complainants should be aware that they may have to pay the Panel's expenses if, as a result of a section 32 meeting, the Panel determines that the Code has not been breached.

8 Take care when making public statements

8.1 A note of caution for anyone making public statements about Code-related transactions or events: under rule 64, no element of intention to mislead or deceive is required. Think carefully about words and actions and how others may perceive them.

8.2 Conduct may be found to be misleading or deceptive even if it was not intended to mislead or deceive. It still may unintentionally lead persons into error. However, if a person is found to have deliberately misled or deceived market participants, the remedies sought by the Panel are more likely to include pecuniary penalties.

9 Rule 64 Case Studies

9.1 In sections 10 to 12 below, we set out summaries of the following section 32 determinations:

(a) Rubicon Limited (June 2009);

(b) Horizon Energy Distribution Limited (March 2010); and

(c) Radius Properties Limited (March 2013)

9.2 Rule 64 of the Code is similar in wording to the civil prohibition against misleading or deceptive conduct in section 9 of the Fair Trading Act 1986. Accordingly, the jurisprudence surrounding section 9 of the Fair Trading Act is relevant to rule 64 of the Code.

9.3 Below is an outline of the comments that the Panel made in these determinations in relation to the Panel's approach to analysing issues under rule 64.

9.4 To determine whether or not there has been a breach of rule 64, the Panel considers the following:

(a) has a person "engaged in conduct"?

(b) does the conduct relate to a transaction or event regulated by the Code or is the conduct incidental or preliminary to a transaction or event regulated by the Code?

(c) is the conduct misleading or deceptive, or likely to mislead or deceive?

Has a person "engaged in conduct"?

9.5 "Conduct" includes omissions as well as acts.

9.6 Where conduct includes silence, it may fall foul of rule 64 if there is a reasonable expectation of disclosure, either objectively or from the point of view of the person allegedly misled.

Is the conduct misleading or deceptive, or likely to mislead or deceive?

9.7 To mislead or deceive means to cause a person to labour under some "erroneous assumption" or misconception. There is no requirement that any person is actually misled, although this may be evidence that the conduct was

misleading or deceptive or likely to mislead or deceive. Rather, the relevant test is whether it would be reasonable for a representative member of the target audience of the conduct to be misled by the conduct.

9.8 This test involves an inquiry into whether the alleged conduct "was misleading or deceptive or likely to mislead or deceive." The question must be examined objectively, and in the particular circumstances of the matter. This depends on the context, including the characteristics of the person or persons said to be affected.

9.9 This requires consideration of the following:

(a) Definition of the target audience(s) of the conduct at issue:

(i) there may be more than one distinct target audience for the impugned conduct;

(ii) for the conduct to be misleading, the nature of the members of the target audience is relevant. Conduct towards a sophisticated businessperson may be less likely to be objectively regarded as being capable of misleading or deceiving than similar conduct directed towards, for example, a consumer.

(b) An assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it. Would a reasonable person in the claimant's, or in the target audience members', situation be likely to have been misled or deceived? This involves taking the hypothetical reasonable member of each target audience and asking whether it would be reasonable for that person to be led to an erroneous assumption or misconception as a result of the conduct.

9.10 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. The reasonable expectation is the expectation of the reasonable target audience member, viewed objectively.

9.11 Where the impugned conduct involves expressions of opinion, the opinion must, at the time that it was expressed or relied on, be:

(a) honestly held; and

(b) reasonably based; and

(c) not demonstrably wrong.

9.12 An intention to mislead or deceive is not an element of the test. Unintentional or inadvertent acts or omissions can fall within the scope of the prohibition. Although intention and harm are not necessary elements of the test, their existence will go towards the seriousness of the breach and therefore have a bearing on the appropriate remedy.

9.13 An absence of fault, or the fact that all reasonable care had been taken, will not generally prevent conduct from being misleading or deceptive, accepting that a defence similar to the statutory defence under section 44 of the Fair Trading Act or a defence of total absence of fault may be available.

10 Rubicon Limited – June 2009

10.1 This information is taken from the Panel's section 32 determination and statement of reasons dated 10 June 2009.

Parties

10.2 Rubicon Limited (**Rubicon**) was an NZX-listed biotechnology company.

10.3 Knott Partners, L.P., Knott Partners Offshore Master Fund, L.P., Commonfund Hedged Equity Company, Good Steward Trading Company SPC, Mulsanne Partners L.P., Shoshone Partners L.P., and Focus 300 were a group of investment funds (collectively, Knott). As at 29 April 2009 the funds controlled by Knott were the beneficial owners of 46,098,150 shares in Rubicon, representing 18.50% of the total number on issue in the company

10.4 Dorset Management Corporation (**Dorset**) was the provider of management services to Knott.

10.5 RiskMetrics was a provider of risk management and corporate governance products and services. RiskMetrics administered and documented the voting of securities held by Knott under an "implied consent" arrangement with Dorset.

10.6 Goldman Sachs & Co (**Goldman Sachs**) was a company that acted as a global custodian for both Knott and Dorset. Rubicon shares were held under “sub-custody arrangements” as nominee/bare trustee for and on account of Knott.

Background

10.7 On 27 April 2009, Knott made a partial offer for Rubicon under rule 7(b) of the Code. Dorset acted in concert with Knott for the purposes of that offer. The offer was for 10.83% of the shares in Rubicon not already held or controlled by Knott. Successful completion of the offer would result in Knott and its associates increasing their aggregate voting control in Rubicon to 28.31%. Consequently, shareholder approval for the offer was required under rule 10 of the Code, in accordance with the voting process set out in that rule.

10.8 Under rule 10, voting rights held by the offeror and its associates must be disregarded for the purposes of the approval of the offer. Approval is obtained if the offerees approving hold more voting rights than the offerees who object.

10.9 The Panel found that the rule was not abided by due to an arrangement that saw instructions misinterpreted between Dorset and RiskMetrics. The arrangement was an implied consent from Dorset (acting for Knott) that RiskMetrics would arrange voting instructions to be passed down to the custodian in accordance with the recommendation contained in its research report, unless Dorset gave explicit instruction to countermand the recommended voting position.

10.10 Dorset had access to the research reports prepared by RiskMetrics’ research division on voting matters in respect of securities held by Knott. There was no question of fault on behalf of RiskMetrics in this decision.

10.11 The misinterpretation here was to the effect that Dorset omitted to explicitly instruct RiskMetrics to abstain or to countermand RiskMetrics' voting instructions with Goldman Sachs, that resulted in Goldman Sachs executing RiskMetrics' instruction to vote in favour of the rule 10 approval in respect of the Rubicon shares beneficially owned by Knott (excluding those owned by one of the funds associated with Knott). This instruction was passed down the custodial chain to Computershare, Rubicon's share registrar.

10.12 45,460,950 of the 46,098,150 shares beneficially owned by Knott were voted to approve the offer for the purposes of rule 10.

10.13 On 3 June 2009, the Panel received a letter from Chapman Tripp, acting for Knott. It advised that enquiries had revealed that 45,460,950 of Knott's 46,098,150 shares had in fact been voted in favour of the rule 10 approval.

10.14 The Panel considered that the voting of Knott's shares had not invalidated the rule 10 approval process. The recounting of the votes, disregarding those cast on Knott's shares, still resulted in the rule 10 approval being passed, by 81,187,872 votes in favour to 37,001,493 against. The Panel considered that the immediate matter was resolved and allowed the offer to settle.

10.15 However, the Panel considered that, in the circumstances, the voting of Knott's shares may have constituted conduct that was misleading or deceptive, or likely to mislead or deceive, in terms of rule 64 of the Code. The Panel decided to explore this issue.

The Panel’s analysis of Dorset’s conduct in terms of rule 64 of the Code

10.16 The Panel decided that Dorset had "engaged in conduct" in terms of rule 64. The conduct in question was a combination of the following:

(a) Dorset's omission to explicitly instruct RiskMetrics to abstain from voting Knott's shares on the rule 10 approval vote or to countermand RiskMetrics' voting instruction with Goldman Sachs; and

(b) Dorset's omission to notify Rubicon prior to the close of the offer that Knott's shares had been voted on the rule 10 approval.

10.17 The Panel found that Rubicon was brought to labour under the misapprehension that Knott's shares had not been voted and that the rule 10 approval had been obtained by a higher margin than it actually had. This misconception was communicated to the market by Rubicon's 28 May 2009 market announcement declaring the results of the rule 10 approval.

10.18 The Panel found that although Rubicon was actually misled by Dorset's conduct, it did not follow that Dorset's conduct contravened rule 64, but it may be evidence of that fact.

10.19 The test was whether it would be reasonable for the representative target company to be misled by Dorset's conduct in the circumstances of this case.

Determination and findings

10.20 The Panel decided that there had been a breach of rule 64 of the Code by Dorset, in that it voted Knott's shares on the rule 10 approval. This conduct was misleading and it was reasonable for Rubicon as a target company to be misled.

10.21 The Panel also made the following observations:

(a) If the offeror or an associate votes its shares on a rule 10 approval then one of two things will happen, either:

(i) the target company, as the person who usually takes on the responsibility of determining the rule 10 approval, would be aware from the fact that the offeror was a registered shareholder that its shares have been voted and that those votes should have been disregarded; or

(ii) the offeror or its associate would be put under an obligation to notify the target company that its shares had been voted so that those votes could be disregarded; and

(b) those who were subject to this effective prohibition should have had adequate processes in place to ensure that their shares were not voted on the rule 10 approval or that if, by some inadvertent error, those shares were voted, the target company (or other person determining the rule 10 voting question) was immediately notified so that the votes could be disregarded; and

(c) it may be best practice for the target company to seek confirmation from the offeror that no votes had been cast on the rule 10 approval in respect of shares owned by the offeror and its associates.

10.22 The Panel was not aware of any direct harm or adverse effect resulting from Dorset's conduct. Accordingly, the Panel decided not to seek any remedies against Dorset.

11 Marlborough Lines Limited and Horizon Energy Distribution Limited – March 2010

11.1 This information is taken from the Panel's section 32 determination and statement of reasons dated 12 and 22 March 2010.

Parties

11.2 Horizon Energy Distribution Limited (**Horizon**) was an electricity company based in the Bay of Plenty. Horizon's shares were listed on the NZX Main Board.

11.3 Marlborough Lines Limited (**Marlborough**) was an electricity lines company based in Marlborough.

11.4 The Eastern Bay Energy Trust (**EBET**) was a trust for the purpose of benefiting electricity consumers in the Eastern Bay of Plenty. EBET held 77% of Horizon's shares.

Background

11.5 On 14 September 2009, Marlborough gave notice that it would make a partial offer for 51% of the ordinary shares in Horizon.

11.6 On 28 September, Horizon issued a revised profit outlook, which forecast that Horizon's after-tax profit for the 2009/2010 financial year would increase from $4.5 million to about $6 million (the **revised profit outlook**). The company gave a number of reasons for the change in forecast, including references to various "cost savings" and "efficiency gains".

11.7 Under the Code, Horizon was required to issue a target company statement in response to Marlborough's offer. Horizon did this on 13 October 2009.

11.8 In the target company statement, the directors of Horizon recommended that the shareholders reject Marlborough's offer. The directors stated, among other things, that the offer did not adequately reflect the board's view of the full value of Horizon (the undervalue statement).

11.9 The target company statement included a report from an independent adviser, Simmons Corporate Finance Limited (**Simmons**), on the merits of the Marlborough offer. Simmons gave a valuation range for Horizon of $3.96 to $4.68 per share. The Marlborough offer was for $3.96 per share.

11.10 EBET subsequently did not support the offer. It made an announcement to this effect on 19 October. Marlborough's offer could not succeed without EBET's support given the size of EBET's shareholding in Horizon. Accordingly, Marlborough's offer failed when the offer period expired on 30 October.

Section 32 Panel meeting

11.11 Marlborough requested the Panel to hold a meeting under section 32 of the Takeovers Act 1993 to consider a number of allegations relating to various parties involved in Marlborough's takeover offer. The Panel gave notice that it would hold a section 32 meeting to consider two issues:

(a) whether Horizon and/or the directors of Horizon had acted in compliance with rule 64 of the Code by issuing the revised profit outlook, if there was no reasonable basis for issuing that revised profit outlook; and

(b) whether the directors of Horizon had acted in compliance with rule 64 of the Code by making the undervalue statement, if they had no reasonable basis for making that statement.

11.12 Upon reviewing documents summonsed from the various parties, that Panel added (with the consent of Horizon) a further issue for consideration at the section 32 meeting: whether Horizon and/or the directors of Horizon had acted in compliance with rule 64 of the Code by issuing the revised profit outlook that omitted to include information regarding a change in the application of an accounting treatment, including the impact of that change on the revised profit outlook.

11.13 The meeting was held on 22 March 2010 in Wellington. The Panel engaged the services of an expert in the electricity industry to assist it to understand the issue regarding the undervalue statement made by the directors of Horizon.

Findings on misleading or deceptive conduct by omission

11.14 The Panel delivered its determination on 22 March 2010 and its statement of reasons on 10 May 2010. Of the three issues considered, the Panel determined that Horizon had not acted in compliance with rule 64 in respect of the third issue (the omission from the revised profit outlook of any mention of the change in accounting treatment).

11.15 The Panel considered that the non-disclosure was an omission to do an act. To determine whether the non-disclosure breached rule 64 of the Code, the Panel looked at whether:

(a) the hypothetical reasonable member of each target audience of the conduct would reasonably expect the information to be disclosed to them; and

(b) the information was material to that reasonable audience member.

11.16 The Panel considered that the target audiences of the revised profit outlook included unsophisticated investors in Horizon, sophisticated investors (including institutional investors such as EBET), Marlborough (as the offeror), Simmons (as the independent adviser) and market commentators and analysts.

11.17 The Panel noted that a competent independent adviser – who would have access to detailed information about a target company's business – would place little or no reliance on a brief market announcement when the adviser was forming its own valuation opinion. The Panel considered that a reasonable adviser in the shoes of Simmons would have reasonably expected the change in accounting treatment to be disclosed to it, but would not have relied on its disclosure.

11.18 However, the Panel noted that the other persons in the target audience would not have had access to the same information as the independent adviser. Instead, their primary source of information about the profitability and value of Horizon was, prior to the release of the target company statement and independent adviser's report, market announcements by the company itself.

11.19 The Panel noted that neither the revised profit outlook, nor any other publicly available documents, explicitly disclosed the change in the application of the accounting treatment, which accounted for a material portion, some one third, of the uplift in the forecast profit.

11.20 The Panel considered that the revised profit outlook could reasonably have led the sophisticated investor target audience (including EBET), market commentators and potentially the more astute of the unsophisticated investors in Horizon to the erroneous belief that the "cost savings" referred to in the revised profit outlook were wholly comprised of efficiency gains or spending reductions and therefore that the performance of Horizon's businesses had improved to the extent of those gains.

11.21 The Panel noted that, in fact, a material portion of the uplift resulted from the change in accounting treatment. Accordingly, the Panel considered that reasonable members of the sophisticated investor target audience, market commentators and analysts and potentially members of the unsophisticated investor target audience would have been led to the erroneous conclusion that the component of the uplift attributable to the change was attributable to efficiency gains and therefore improved performance in Horizon's business.

11.22 The Panel considered that Marlborough was in a different position from that of Horizon shareholders. The submissions made on behalf of Marlborough to the Panel indicated that Marlborough, as an industry player, did not believe that the revised profit outlook was feasible on the basis of cost savings. Marlborough had complained that the revised profit outlook was unconvincing and that its announcement on the day before the takeover offer opened was a defensive tactic by Horizon. Accordingly, the Panel considered that Marlborough did not form an erroneous assumption that the "cost savings" were wholly comprised of efficiency gains. However, the Panel considered that had Marlborough known that a significant proportion of the uplift in profitability was due to a change in accounting treatment, it may have had a different understanding of the on-going profitability of Horizon. It was reasonable for Marlborough, having issued a takeover notice, to have expected the omitted information to have been disclosed. The Panel considered that that information was material to Marlborough in the circumstances of its takeover offer.

11.23 The Panel found no other breaches of the Code by Horizon. The Panel also considered that any mischief arising from the breach of the Code by Horizon was remedied by the disclosure about the change in accounting treatment, contained in the determination. The Panel decided that, given that Marlborough's offer had closed, the Panel would not pursue any further remedies.

12 Radius Properties Limited – March 2013

12.1 These facts are taken from the Panel's section 32 determination and statement of reasons dated 1 March 2013.

Parties

12.2 Radius Properties Limited (**Radius Properties**) was an investment company focused on the ownership and leasing of real estate assets in the aged care sector in New Zealand. Mr Glenn was a director of this company.

12.3 Montagu Investment Holdings Limited (**Montagu**) was a vehicle that was formed for holding shares in Radius Properties. Mr Priscott was the director of Montagu. At the time of the takeover offer (which is described below), Montagu held 19.99% of the voting rights in Radius Properties, which it had acquired in November 2012 at $0.42 per share (the **earlier offer**).

12.4 Radius Care Limited (**Radius Care**) was a rest home operator that leased all of Radius Properties' properties. Despite having a commonality of name, Radius Care was unrelated to Radius Properties. Mr Brien Cree was the Chief Executive, a director and the majority shareholder of Radius Care.

Background

12.5 On 19 December 2012, Mr Cree (the Chief Executive of Radius Care) and Mr Glenn (a director of Radius Properties) met at a restaurant in Auckland to discuss various matters (the **December meeting**), which is discussed in more detail below.

12.6 On 24 December, Montagu gave notice of its intention to make a partial takeover offer for 50.001% of the voting securities in Radius Properties (being 37.508% of the fully paid ordinary shares in Radius Properties not already held or controlled by Montagu) (the **takeover offer**). Radius Properties dispatched to its shareholders a notice of receipt of a takeover offer that same day. The notice stated that:

> *shareholders may wish to wait until they receive a copy of the target company statement (including the independent adviser's report) before taking any further action in relation to the Intended Offer.*

12.7 On 5 January 2013, Montagu made its takeover offer to shareholders, with an offer price of $0.42 per share. The offer document contained the following statements:

> *"… [the Montagu partial takeover offer will] give all shareholders a second chance"*
>
> *"... I urge you to accept this Offer as soon as possible"*
>
> *"Last Opportunity to sell shares for some time?"*

12.8 In the letter to shareholders from the Radius Properties board that accompanied the earlier offer, the Board stated that it:

> *has no current intention to seek a liquidity event … Consequently, this may be the last chance investors have to sell their Radius [Properties] shares for some time.*

12.9 On 16 January 2013, Radius Properties received a written offer from Radius Care to purchase all of Radius Properties' assets for $23.76 million (the equivalent to $0.59 per share) (the asset offer).

12.10 After successive increases in the offer prices by both Montagu and Radius Care, a complaint was made to the Panel. This complaint related to Radius Properties and focused on the information allegedly imparted by Mr Cree to Mr Glenn at the December meeting.

Complaints

12.11 The complainants alleged that Mr Cree had told Mr Glenn of Radius Care's intention to make an asset offer for Radius Properties' properties. The complainants asserted that if Mr Glenn did have this knowledge:

(a) it should have been disclosed to shareholders when Radius Properties received Montagu's notice of its intention to make a partial takeover offer for Radius Properties; and

(b) failure to disclose this information to shareholders was a breach of rule 64 of the Code by omission.

12.12 It was further alleged that if Mr Glenn knew of Radius Care's intention to make an asset offer, then he must have imparted this information to Mr Priscott due to their close business relationship. The complainants asserted that if Mr Priscott, as Montagu's sole director, was aware of Radius Care's intention to make an asset offer for Radius Properties, then statements made by Montagu to shareholders under the earlier offer relating to limited liquidity opportunities for Radius Properties, were likely to be misleading or deceptive under rule 64 of the Code as Montagu (through Mr Priscott) was aware of a full liquidity opportunity by Radius Care.

Conveyed information was not material information due to inconclusiveness

12.13 The Panel held a meeting under section 32. The Panel obtained evidence from a number of parties, including Messrs Cree, Priscott and Glenn.

12.14 The Panel found that the nature of the information conveyed by Mr Cree to Mr Glenn at the December meeting relating to any potential Radius Care offer was too inconclusive to be considered material information for Radius Properties' shareholders.

12.15 As the Panel determined that there was not sufficient information imparted to Mr Glenn that Radius Care would make an asset offer for Radius Properties, it followed that regardless of Mr Glenn and Mr Priscott's relationship, there was no evidence that Montagu and its director had information about the Radius Care asset offer that would have affected its disclosure obligations to Radius Properties' shareholders.

12.16 Accordingly, the Panel determined that neither Mr Glenn, Mr Priscott, Radius Properties and its directors, nor Montagu and its directors had contravened rule 64.