



# **Guidance Note on the Process for Costs Reimbursements under the Takeovers Act 1993**

21 March 2017

<b>Introduction.....</b>	<b>3</b>
<b>Cost reimbursement procedure under the Takeovers Act.....</b>	<b>3</b>
<b>Determining the amount to be reimbursed .....</b>	<b>4</b>
Costs that are “properly incurred” .....	4
Costs incurred in relation to the takeover process .....	6
<b>The Panel’s fees .....</b>	<b>7</b>

## Introduction

1. Until an amendment to the Takeovers Act 1993 was made in 2017, takeovers costs disputes were governed by rule 49 of the Takeovers Code. Reimbursement disputes under rule 49 were adjudicated by the District or High Court, although were often settled out of Court.
2. The replacement of rule 49 with new sections 48-53 of the Takeovers Act transfers to the Panel the role of primary adjudicator of reimbursement disputes.<sup>1</sup>

## Cost reimbursement procedure under the Takeovers Act

3. The Panel strongly encourages parties to deal with the question of costs through negotiation. If negotiation is successful, the amount to be reimbursed is the amount agreed to by the relevant director and the target company, or by the target company and the offeror (as the case may be) in accordance with sections 48(2)(a) and 49(2)(a) of the Takeovers Act.
4. However, at any time, before or during any negotiation, an application may be made to the Panel by any party to the reimbursement dispute for the Panel to determine the amount to be reimbursed (a “Reimbursement Application”). In accordance with section 50, if a Reimbursement Application is received, the Panel must:
  - (a) determine the amount to be reimbursed; and
  - (b) order that amount to be paid.
5. The parties entitled to be reimbursed are:
  - (a) directors of a target company, by the target company (section 48); and
  - (b) the target company, by the offeror (section 49).
6. The Panel will not usually commence processing a Reimbursement Application while a takeover is ongoing.
7. A Reimbursement Application must be made in writing and include the following:
  - (a) an overview of the transaction and the parties involved;
  - (b) a formal request for a determination under section 50(a) and for orders under section 50(b) of the Takeovers Act;
  - (c) all primary documents relating to costs for which reimbursement is sought;<sup>2</sup>
  - (d) a submission for each item of expenditure explaining how it meets the criteria provided in section 48(1) or 49(1) (as the case may be); and

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<sup>1</sup> Sections 47-53 of the Takeovers Act apply in relation to an offer or a takeover notice only if the takeover notice is received by the target company on or after 31 March 2017, the date on which the new provisions came into force.

<sup>2</sup> This includes invoices and any other primary documents necessary for identifying each expense claimed.

- (e) any other relevant information.
8. On receipt of a Reimbursement Application, the Panel will seek written submissions from the other parties to the Application.
  9. The Panel will then determine the amount to be reimbursed, and make reimbursement orders on the basis of that determination.
  10. Any of the parties identified in sections 48 or 49 may appeal to the High Court against the Panel's determination. The appeal process is set out in sections 51-53 of the Takeovers Act.

### **Determining the amount to be reimbursed**

11. In accordance with section 48(1), the director of a target company is only entitled to be reimbursed by the target company for *“any expenses properly incurred by the director on behalf, and in the interests, of holders of equity securities of the target company in relation to the offer or takeover notice.”*
12. In accordance with section 49(1), the target company is only entitled to be reimbursed by the offeror for *“any expenses properly incurred by the target company in relation to the offer or takeover notice, whether as a result of section 48 or otherwise.”*
13. If a Reimbursement Application is made to the Panel under section 48(2)(b) or 49(2)(b), then in accordance with section 50(a), the Panel will determine the amount to be reimbursed. This amount will constitute the sum of each of the costs *properly incurred in relation to the offer or takeover notice.*
14. The Panel's determination under section 50(a) will usually be made “on the papers”, meaning that it will be a factual assessment of the primary documents and other information provided to it, without holding a hearing.
15. The Panel may, if it considers that it would be beneficial, seek oral submissions from the parties to the Reimbursement Application. If the Panel hears oral submissions from one party, it will ensure that all parties have the same opportunity.
16. The Panel may exercise its powers to receive evidence on oath under section 31MA or to summon witnesses under section 31N of the Takeovers Act, if the Panel believes that it is appropriate to do so for the proper determination of the Reimbursement Application.

### Costs that are “properly incurred”

#### *Determination for the purposes of section 49(2)(b) - expenses incurred by a target company*

17. No two takeovers are alike. For that reason, it is not possible to prescribe in advance which of the expenses incurred by a target company in responding to a takeover notice or takeover offer will be recoverable under section 49. Each item of expenditure will be assessed by the Panel on a case-by-case basis, in light of the relevant facts.
18. However, the Panel considers that for an item of expense to have been properly incurred under section 49(1), the claimant must prove (to the civil standard) that the following four elements have been satisfied:

- (a) that the expenditure falls under any of the following three categories:
    - (i) expenditure incurred in complying with the Code and the law, and the directors' fiduciary obligations which touch on the target company's response to a takeover;
    - (ii) expenditure incurred for the purpose of safeguarding the offerees' interests (including the countering of propaganda). The merits of a bid (with value representing a subset thereof) should be used as a key measure of the offerees' interests; or
    - (iii) expenditure incurred in reimbursing directors for expenses properly incurred on behalf of, and in the interests of, the offerees in relation to the takeover offer or notice;
  - (b) that it was reasonable (with reference to circumstances existing when the expense was incurred) to incur the expense by engaging in that kind of activity;
  - (c) that it was reasonable (with reference to circumstances existing when the expense was incurred) to spend that amount on that kind of activity; and
  - (d) that there is a sufficient nexus between the incurring of the expenditure and the takeover offer or notice.
19. Full information on the three categories identified in paragraph 18(a) above is set out in the Schedule of this guidance.
20. In addition to the four elements described above, the Panel's consideration of whether an item of expense was properly incurred may involve an objective assessment of why the expense was considered necessary by the board of the target company.
21. Examples of items of expenditure that the Panel considers are not properly incurred for the purposes of sections 48(1) and 49(1) include:
- (a) expenses incurred by engaging in defensive tactics (the meaning of which is taken from rule 38 of the Code);
  - (b) expenses incurred by the board of a target company in investigating or seeking competing offers; and
  - (c) costs imposed by the Panel under the Takeovers (Fees) Regulations 2001 for enforcement action taken under section 32 of the Act.
22. The Panel also does not envisage that the following would necessarily be properly incurred for the purposes of sections 48(1) and 49(1):
- (a) success fees, whether explicit or implied by the structure of the terms of engagement;
  - (b) costs associated with negotiating settlement of a reimbursement dispute; and
  - (c) costs involved in making a reimbursement application to the Panel.

23. However, there may be appropriate circumstances in which the Panel could decide otherwise.

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

24. The Panel’s determination of the amount to be reimbursed under section 48(2)(b) will be made on a case-by-case basis in light of the facts and circumstances before it.
25. However, as a guideline, the Panel’s determination will constitute the sum of each of the costs that it considers to have been:
- (a) properly incurred; and
  - (b) incurred on behalf, and in the interests of holders of equity securities of the target company.
26. The Panel’s consideration of whether an item of expenditure was incurred on behalf, and in the interests, of, holders of equity securities in the target company will include an objective assessment of why the item of expenditure was considered necessary by the director.

Costs incurred in relation to the takeover process

27. Sections 48 and 49 provide an entitlement to claim costs incurred in relation to a takeover offer or takeover notice. The words “*in relation to*” have a very broad meaning. For the purposes of the Panel’s determination under section 50(a), costs which may be reimbursed according to section 48(1) or 49(1) may include those incurred prior to receipt of a takeover notice by the target company, provided that:
- (a) the costs were properly incurred; and
  - (b) the takeover notice was eventually sent.<sup>3</sup>
28. As a general guideline, the Panel will consider the takeover process to have ended on:
- (a) the date on which the offer becomes unconditional, or closes (whichever is the later);
  - (b) the date on which the offer lapses; or
  - (c) the date on which the takeover notice lapses.
29. However, the Panel reserves the discretion to include in its determination under section 50 costs incurred subsequent to the times described above, if:
- (a) the costs were properly incurred; and

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<sup>3</sup> If the takeover notice is never actually sent, costs cannot be claimed under sections 49-50. This is because these sections refer to recovery from an “offeror”, being a person who makes an “offer” under the Code. However, where a takeover notice is sent, but never followed up with a takeover offer, costs may be claimed under sections 49-50 from prospective offerors. This is because interpreting the word “offeror” to include prospective offerors is consistent with rule 41 of the Code, which sets out the requirements for the sending of a takeover notice by an “offeror.”

- (b) the costs were incurred within a reasonable time from the end of the takeover process.

**The Panel's fees**

- 30. The Panel will charge for its time relating to Reimbursement Applications in accordance with the Takeovers (Fees) Regulations 2001.
- 31. The Panel will usually bill its fees equally to each party to the Reimbursement Application, unless there is good reason to charge one party more than the other.