BEFORE THE TAKEOVERS PANEL

IN THE MATTER OF	the Takeovers Act 1993 the Takeovers Regulations and the Takeovers Code
AND	
IN THE MATTER OF	a determination under section 49(2)(b) of the Takeovers Act 1993 concerning Vital Limited and Empire Technology Limited
MEETING	18 February 2025 at Auckland and 12 March 2025 by videoconference
MEMBERS	C G Blanchard (Chair) A E Buchly D M Goatley M W Stearne
IN ATTENDANCE	A J Hudson, M E Cunliffe, W J Bloomfield, R L Budd and A D Dunn (Panel executive) F Cuncannon (Cuncannon Partners)

DETERMINATION, ORDERS AND STATEMENT OF REASONS

13 MARCH 2025

BACKGROUND

1 On 26 November 2024, the Panel received an application from Vital Limited (**Vital**) under section 49(2)(b) of the Takeovers Act 1993 (the **Act**) requesting that the Panel determine the amount to be reimbursed to Vital by Empire Technology Limited (**Empire**) for any expenses properly incurred by Vital in relation to two takeover notices sent to it by Empire on 19 and 26 August 2024 (the **Takeover Notices** and the **Application**, respectively).

2 The Panel received submissions and evidence from both Vital and Empire.

3 A division of the Panel met on 18 February 2025 at Auckland and on 12 March 2025 by videoconference to consider the Application.

4 The Panel now gives its determination, orders and the reasons for its decision.

5 The Panel considered all materials received, but these orders, determination and statement of reasons specifically address only the materials which the Panel considers necessary to explain its reasoning.

DETERMINATION AND ORDERS

6 The Panel has determined that the amount to be reimbursed to Vital by Empire for the purposes of section 49(2)(b) of the Act is $247,036.58.

7 Under section 50(b)(ii) of the Act, the Panel hereby orders that Empire pay $247,036.58 to Vital.

STATEMENT OF REASONS

8 The Panel considers that the line items of expenses in this statement of reasons are commercially sensitive, and that public disclosure of such details may unreasonably and disproportionately prejudice the interests of third-party service providers and risk such information not being provided in the future. Accordingly, these details have been redacted from the public version of this statement of reasons.

Introduction

9 Vital is a telecommunications company that is listed on the NZX. Its market capitalisation on 26 February 2025 is approximately $10,400,000, making it a relatively small Code company.

10 Empire is a New Zealand-registered investment company.

<u>The Proposed Offer</u>

11 On 10 August 2024, Sean Joyce, a principal at CM Partners Limited advising interests associated with Empire, contacted Vital to discuss a potential partial takeover offer.

12 On 12 August 2024 (and following calls between Mr Joyce and John McMahon, the Chair of Vital), interests associated with Empire provided Vital with a non-binding indicative offer for 50.01% of the fully paid ordinary shares in Vital by interests associated with Empire on 12 August 2024 (the **NBIO**)[1]. Amongst other matters, the NBIO stated that Vital should regard delivery of a formal takeover notice as being "imminent".

[1] The NBIO was initially provided to Vital by Empire Capital Limited as trustee of the Empire Capital Trust. However, shortly afterwards, the underlying offeror parties decided the offer would be made via Empire instead.

13 The existence of the NBIO became public on 14 August 2024 when Empire issued a press release in relation to the NBIO. Vital provided further detail regarding the NBIO via an announcement released via the NZX on 16 August 2024.

14 On 19 August 2024:

(a) Empire gave notice of its intention to make a partial offer under the Code broadly reflecting the terms indicated in the NBIO (the **First Takeover Notice** and the **Proposed Offer**); and

(b) Vital engaged:

(i) Harmos Horton Lusk Limited (**HHL**) to provide legal advice to the Board on its response to the First Takeover Notice and any matters connected to it; and

(ii) Grant Samuel & Associates Limited (**Grant Samuel**) to prepare the independent adviser's report required under rule 21 of the Code. Grant Samuel's appointment was approved by the Panel three days later.

15 On 21 August 2024, Vital also engaged Cameron Partners Limited (**Cameron Partners**) to provide it with financial advice with respect to its takeover response.

16 Empire and Vital each raised various issues with the Panel regarding the Proposed Offer. A division of the Panel met to consider the Proposed Offer on 23 August 2024. The Panel concluded that:

(a) It appeared that Empire may have acted otherwise than in compliance with the Code and/or intend to act other than in compliance with the Code. Specifically:

(i) A condition of the offer terms attached to the First Takeover Notice, the "Consent Condition" might not be in compliance with rule 25(1) of the Code as it required, when read with a footnote, Empire to confirm certain matters on the basis of due diligence which was in the power, or under the control, of Empire.

(ii) Another of the offer terms attached to the First Takeover Notice, the "Due Diligence Condition" might not be in compliance with rule 25(1) of the Code as, by requiring due diligence to "Empire's satisfaction", the Due Diligence Condition depended on Empire's judgment and/or the fulfilment of the Due Diligence Condition was in the power, or under the control, of Empire (notwithstanding that Empire's judgment or control might be restricted by a reasonableness criterion).

(iii) The existence of the Consent Condition and the Due Diligence Condition in the terms attached to the First Takeover Notice and the references to the Consent Condition and Due Diligence Condition in the First Takeover Notice itself might not be in compliance with rule 64 of the Code by being misleading or deceptive (or likely to mislead or deceive) by conveying the impression that Vital was required to provide due diligence to Empire notwithstanding that the offer terms expressly provided that Empire could waive the relevant conditions, the offer had not been made, and Empire was not obliged to make the offer.

(Such matters being the **Potential Empire Code Compliance Matters**).

(b) As a result of the Potential Empire Code Compliance Matters, the "Threshold Test" for calling a meeting of the Panel under section 32 of the Act had been met (for a description of the Threshold Test, see the Panel's *Guidance Note on Section 32 of the Takeovers Act 1993*).

17 The Panel invited Empire to address the Potential Empire Code Compliance Matters by providing Undertakings, and thus avoid the need for the Panel to call a meeting under section 32 of the Act.

18 Empire denied that it was in non-compliance with the Code or intended to act in non-compliance with the Code but, on 26 August 2024, provided Undertakings that:

(a) Empire would not issue the takeover offer referred to in the First Takeover Notice.

(b) Empire would ensure that any takeover notice issued by it (or any of its associates) in relation to Vital shall not include or refer to any condition which may not comply with rule 25(1) of the Code.

19 On 26 August 2024, Empire issued a further takeover notice (the **Second Takeover Notice**).

20 On 27 August 2024, Vital released its annual report for the year ended 30 June 2024 (the **FY24 Annual Report**).

21 On 15 September 2024, Empire informed Vital that it had decided it would not make the Proposed Offer. Empire's decision to not make the Proposed Offer was announced on the NZX the next day.

Vital's costs

22 Vital asserts that it incurred expenses of $247,036.58 in response to the Takeover Notices (the **First Order Costs**).

23 Vital contends that Empire is liable to pay the First Order Costs under section 49(1) of the Act. Empire's position is that none of these expenses were properly incurred and Vital is not entitled to reimbursement for any of them.

24 Vital also seeks reimbursement of the costs it has incurred in seeking expenses reimbursement, including in connection with the Application itself (the **Second Order Costs**) as part of the expenses it has properly incurred in relation to the Takeover Notices. Empire contends that Vital is not entitled to be reimbursed for these expenses under section 49(1).

Vital seeks reimbursement of the First Order Costs

25 Following Empire's decision not to make the Proposed Offer, Vital and Empire communicated about reimbursement of the First Order Costs:

(a) *24 September* – Vital sent an invoice to Empire for the First Order Costs (including supporting information) and requested payment within fourteen days.

(b) *11 October* – Empire wrote back to Vital to say that it considered some of the items invoiced to it were not properly incurred for the purposes of section 49 of the Act, though it did not identify which items. It also stated that it had a number of concerns regarding Vital's market announcements and the way the Proposed Offer had unfolded and expected to be in a position to commence discussions once it had considered advice from senior counsel.

(c) *24 October* – Vital wrote to Empire requiring payment of its invoice by 5:00 p.m. the following day. Empire responded via email stating that a unilateral demand was premature.

(d) *5 November* – Vital wrote to Empire requiring payment of its invoice or a substantive response explaining why payment had not been made by 8 November and that absent a response, it intended to seek a Panel determination of expenses.

(e) *7 November* – Empire responded stating that the information Vital had provided to date was inadequate to demonstrate that costs were properly incurred for the purposes of section 49, and accordingly it requested certain further information from Vital and a chance to consider that information before the matter was referred to the Panel. Empire added that it was considering Empire's options in relation to whether Vital had not complied with its continuous disclosure obligations and whether any such breaches affected Vital's rights under section 49.

(f) *18 November* – Vital provided certain of the requested information to Empire and requested payment or explanation by 25 November. It raised concerns about the lack of substantive engagement by Empire since its 24 September invoice.

26 Vital then provided the Application to the Panel on 29 November.

27 On 2 December 2024, Empire brought a proceeding against Vital in the High Court seeking various declarations and orders in relation to the Proposed Offer (the **Proceeding**). The Panel understands that the Proceeding is ongoing at the time of its determination.

28 At the date of this determination, the Panel understands the parties have not agreed the amount to be reimbursed to Vital between themselves under rule 49(2)(a).

Legal background

Relevant provisions of the Act

29 Section 49 of the Act states:

> ***49 Reimbursement of target company***
>
> *(1) A target company is entitled to be reimbursed by the offeror for any expenses properly incurred by the target company in relation to the offer or takeover notice, whether as a result of section 48[2] or otherwise.*
>
> *(2) The amount to be reimbursed to the target company is the amount—*
>
> *(a) agreed between the target company and the offeror; or*
>
> *(b) determined by the Panel on an application made by the target company or the offeror (*see *section 50).*

30 As to the Panel's determination of the amount to be reimbursed, section 50 states:

> ***50 Determinations by Panel of amount to be reimbursed***
>
> *If the Panel receives an application under section…49(2)(b), the Panel must (unless an agreement is reached beforehand under section…49(2)(a))—*
>
> *(a) determine the amount to be reimbursed for the purposes of section…49(2)(b); and*
>
> *(b) order that amount to be paid, as the case may be,—*
>
> *(i) by the target company to the director; or*
>
> *(ii) by the offeror to the target company.*

[2] Section 48 of the Act entitles target company directors to be reimbursed by the target for the director's properly incurred expenses in relation to the offer or takeover notice.

31 The Application is the first to be considered by the Panel under section 49 following amendments to the Act in 2017 (the **2017 Amendments**) which were made to establish that the Panel would determine Code company takeovers expenses reimbursement matters in the first instance (should the parties not agree expenses between themselves).

32 The stated purposes of the 2017 Amendments were:

(a) "to ensure that timely and cost-effective decisions are made in relation to takeovers code company takeover expense-related disputes";[3] and

(b) "to discourage vexatious or ill-conceived bids, particularly because of the disruptive effect that a hostile takeover offer can have on the target company."[4]

Abano and the Costs Guidance Note

33 In *Abano Healthcare Group Limited v Healthcare Partners Holdings Limited* [2018] NZHC 817 (***Abano***), the High Court considered a claim by a target, Abano Healthcare Group Limited (**Abano**), for recovery from an offeror of $429,007.55 in expenses that it had incurred in relation to a failed takeover attempt.

34 Abano made its claim under the rule applicable prior to the introduction of section 49 (i.e., shortly prior to the 2017 Amendments), being rule 49(2) of the Code. Rule 49(2) stated that (emphasis added):

> *[the] target company may recover from the offeror, as a debt due to the target company,* ***any expenses properly incurred by the target company in relation to an offer or a takeover notice****…*

35 Accordingly, the standard considered by the Court in *Abano* is the same as that which is now set out in section 49.

36 Downs J found the offeror liable for all costs sought by Abano. Downs J also offered guidance on when an expense was allowable.

37 Given the similarity between rule 49(2) and section 49 of the Act, the Panel incorporated the Court's guidance into its *Guidance Note on Costs Recovery* dated 13 March 2019 (the **Costs Guidance Note**). *Abano* is also the key case referred to by Vital and Empire in their submissions under the Application.

38 The Costs Guidance Note outlines the Panel's anticipated application and determination process and expectations, and the broad principles the Panel expects to apply in its substantive determination of a section 49 application.

39 As to process, the Panel "strongly encourages parties to negotiate and agree costs reimbursements themselves", in accordance with the purpose of the 2017 Amendments.[5]

[3] Regulatory Systems (Commercial Matters) Amendment Bill 2016 (183-1), Explanatory Note.
[4] Hon Craig Foss, Minister of Commerce *Regulatory impact statement: Regulatory Systems Bill – Commerce and Consumer Affairs Portfolio Matters* (2016) at [23].
[5] Costs Guidance Note at [2.5].

40 The Costs Guidance Note breaks the Panel's substantive determination into the following two key questions and associated guidance, as relevant to the Application (with additional relevant commentary from *Abano* footnoted):

(a) *Was the expense incurred "in relation to" the offer or takeover notice?*

(i) The words "in relation to" have a broad meaning and may include costs incurred prior to the receipt of a takeover notice by the target, provided that the costs were properly incurred, and the takeover notice was eventually sent.

(ii) As a general guideline, the Panel will consider the takeover process to have ended on (as relevant to the Proposed Offer) the date on which the takeover notice lapses. However, the Panel reserves a discretion to include costs incurred subsequent to this time if properly incurred and incurred "within a reasonable time from the end of the takeover process".[6]

(iii) Regardless of whether the expenses were incurred prior to, or after, the receipt of the takeover notice, such expenditure will only be recoverable if there is a sufficient nexus between the expenditure being incurred and the takeover notice. Such nexus can only be determined on a case-by-case basis.

(b) *Was the expense "properly incurred"?*

(i) As no two takeovers are alike, each item of expenditure must be assessed on a case-by-case basis, in light of the relevant facts.

(ii) In interpreting section 49(1), the Panel will apply the following broad principles articulated in *Abano* (as relevant to this question):[7]

(A) use of the term "any" implies full recovery of properly incurred expenditure;[8]

(B) expenses must be reasonable and proportionate, and reasonableness and proportionality should be assessed with reference to circumstances at the time, not with the comfort of hindsight; and

(C) properly incurred expenditure in relation to a takeover notice is not a normal incident of the target's business and hence is not an expense the target should bear.

(iii) The Panel considers that a claimant must prove to the civil standard (i.e., on the balance of probabilities) that:[9]

(A) the expenditure was not incurred while engaging in any activity prohibited by the Code;

(B) 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) it was reasonable (with reference to circumstances existing when the expense was incurred) to spend that amount on that kind of activity; and

[6] Costs Guidance Note, [4.3].
[7] Costs Guidance Note, [3.3].
[8] *Abano* describes full recovery as the "animating premise" of the expenses reimbursement rules (at [53]).
[9] Costs Guidance Note, [3.4].

(D) there is a sufficient nexus between the incurring of the expenditure and the takeover notice.

(iv) The Panel does not envisage that costs associated with negotiating settlement of a reimbursement dispute or making a reimbursement application to the Panel would necessarily be properly incurred for the purposes of section 49(1). However, there may be circumstances in which the Panel could decide otherwise.[10]

(v) The Panel considers that properly incurred expenses will generally fall into the following categories (as relevant to the Application),[11] although they are not exhaustive:

(A) *Category 1 – Expenses related to notices and target company statement obligations.*

Principally, this covers meeting the regulatory obligations of target boards in responding to takeover offers. The Costs Guidance Note divides Category 1 expenses into two parts, which may overlap:

(a) *Part 1* – Costs incurred in complying with the procedural requirements of the Code (such as the preparation of the target company statement and independent adviser's report (the **IAR**), in accordance with the Code's timeframes).[12]

(b) *Part 2* – Costs incurred in complying with the law and directors' fiduciary obligations which touch on a target's response to a takeover, such as meeting NZX Listing Rules and Financial Markets Conduct Act 2013 (the **FMCA**) requirements; legal advice regarding what activity is considered defensive tactics under the Code; monitoring the offeror's Code compliance; making non-vexatious complaints to the Panel about offeror actions which may affect offerees;[13] and responding to complaints to the Panel by the offeror except where the Panel determines the target may have breached the Code.

Expenses incidental to the above should also be recoverable.[14]

(B) *Category 2 – Expenditure incurred safeguarding offerees' interests.*

The Panel considers a broad view should be taken of offerees' interests, consistent with the Code's focus on merits. This category includes expenses incurred in (as relevant to the Application):[15]

(a) ensuring offerees are properly informed (including ensuring the target board is in a position to give advice to offerees on the merits of the bid – whether via financial, legal, strategic or other advice, bearing in mind that takeovers are rare events in the life of a company and directors may have limited

[10] Costs Guidance Note, [3.5]-[3.6].
[11] "Category 3" relates to director reimbursements. Vital has not claimed any Category 3 expenses.
[12] In *Abano*, Downs J considered that "[the] boundary of properly incurred expenditure should…be determined with reference to the Code" (at [63]). This boundary lay "with articulated behaviours expressly prohibited by the Code: defensive tactics and misleading or deceptive conduct" (at [65]).
[13] The Costs Guidance Note states that there can be a fine line between complaints about matters affecting offerees and complaints designed to frustrate the course of a bid, and "[offerors] should not be expected to pay for relentless target company actions regarding legal compliance" (at [3.11]). *Abano* suggests that expenses from "meritless" complaints to the Panel would be unreasonable (at [98]), while also noting that a target is entitled to insist that Code transaction communications are Code-compliant (at [97]).
[14] Costs Guidance Note, [3.12].
[15] Costs Guidance Note, [3.13].

experience responding to them – and communicating that advice effectively and appropriately, which may include with the assistance of communication consultants); and

(b) countering communications from the offeror calculated to influence the choice offerees make (which might also require the engagement of communication consultants).

Target boards are entitled to seek the advice that they consider necessary for the discharge of their legal or fiduciary obligations.[16]

(vi) As the recoverability of an expense will also depend on its reasonableness, the Panel will consider the reasonableness of an expense by reference to both:[17]

(A) the nature of the expense or fee (noting that *Abano* does not preclude fixed fees from being recovered); and

(B) the quantum of the expense or fee.

41 As to the Panel's assessment approach to determine the Application, the Panel considers it appropriate to follow Wilson J's guidance in an earlier costs recovery case, *Canterbury Frozen Meat Co Ltd v Waitaki Farmers' Freezing Co Ltd* [1972] NZLR 806, in which he stated that the Court was not to be "an auditor or a taxing master" and it would allow proper expenses "on broad lines rather than by scrutinising every dollar and cent expended".[18] This aligns with the timely and cost-effective purposes of the 2017 Amendments.

Application and evidence provided by Vital and Empire

42 On 29 November 2024 the Panel received the Application from HHL on behalf of Vital. In support of the Application, Vital has provided affidavits from Mr McMahon confirming the factual matters set out in its submissions and attaching bundles of evidentiary documents.

43 Vital sought to have the following First Order Costs reimbursed under the Application:

First Order Costs sought by Vital		
Service provider	**Amount (including GST)**	**Services provided**
Grant Samuel	[redacted]	Independent adviser approved by the Panel to prepare a rule 21 IAR
HHL	[redacted]	Legal advice
Cameron Partners	[redacted]	Financial advice
Shanahan Group Limited (**Shanahan**)	[redacted]	Communications advice
Link Market Services Limited (**Link**)[19]	[redacted]	Share registrar

[16] Costs Guidance Note, [3.18].
[17] Costs Guidance Note, [3.16].
[18] *Canterbury Frozen Meat Co Ltd v Waitaki Farmers' Freezing Co Ltd* [1972] NZLR 806 (HC) at 815.
[19] Now renamed MUFG Pension & Market Services (NZ) Limited.

First Order Costs sought by Vital		
Service provider	**Amount (including GST)**	**Services provided**
Total	**$247,036.58**[20]	

44 Vital also sought a determination by the Panel that it should be reimbursed for the Second Order Costs, which it had incurred since October 2024, relating to legal advice Vital obtained in seeking reimbursement of its expenses.[21]

45 Empire also provided the Panel with submissions regarding the Application, which were supported by an affidavit from Mr Joyce containing a bundle of evidentiary documents and confirming that the factual information set out in Empire's submissions was accurate.

Issue One: First Order Costs

Submissions for Vital and Empire

46 Before addressing the constituent parts of the First Order Costs, the Panel sets out below its approach to the issues raised by the parties in relation to the First Order Costs.

Empire's submission that none of the First Order Costs were properly incurred by Vital because Empire was induced to issue the Takeover Notices by Vital's misleading and inadequate market disclosures

47 Empire submitted that, in summary:

(a) Vital had made misleading and inadequate market disclosures prior to the dates on which Empire issued the Takeover Notices, in breach of its continuous disclosure obligations under the NZX Listing Rules and the FMCA the Fair Trading Act 1986 (the **FTA**) and the Code;

(b) Empire had been induced to issue the Takeover Notices by these misleading and inadequate disclosures; and

(c) as a result of this inducement, none of Vital's First Order Costs had been "properly incurred" for the purposes of section 49 of the Act.

48 Specifically, Empire submitted that:

(a) Vital's description of the status and renewal rights of its radio network contract with Hato Hone St John (**St John**) was misleading; and

(b) Vital should have notified the market of a downgrade to Vital's adjusted NPAT at an earlier stage than it did.

49 For its understanding of Vital's position in relation to those two matters, Empire submitted that it had relied on an NZX announcement by Vital on 27 February 2024 (the **27 February Announcement**) and on the fact that no updates had been made to this information prior to it issuing the Takeover Notices.

[20] The Panel notes that inconsistent approaches were taken to GST rounding which may have reduced this amount by $0.02, but the Panel considers this to be the correct figure.
[21] The Panel notes that not all of the evidence in relation to the Second Order Costs was provided by way of affidavit. However, because the Panel does not consider that the Second Order Costs were sufficiently connected to the Takeover Notices (see below) the Panel did not consider it necessary to receive this evidence by way of affidavit.

50 The Panel considers that it is most helpful to consider first whether there was any breach of rule 64, given that this falls under the Panel's usual jurisdiction. The Panel found no indication that rule 64 was breached in a manner which induced Empire to issue the Takeover Notices.

51 The first element of the Panel's reasoning is that it does not consider that rule 64 applies to the 27 February Announcement. Specifically:

(a) Rule 64 only applies to conduct that is:

(i) conduct in relation to any transaction or event that is regulated by the Code; or

(ii) incidental or preliminary to a transaction or event that is or is likely to be regulated by the Code.

(b) The 27 February Announcement was issued almost six months prior to the First Takeover Notice. While rule 64 can apply before a takeover notice is issued, the Panel does not consider Vital's release of that announcement to amount to conduct that is in relation to, incidental or preliminary to a transaction or event that is or is likely to be regulated by the Code. There was a significant time between the 27 February Announcement and issuance of the Takeover Notices. While it is difficult to define the precise amount of time which rule 64 may 'look back' to conduct prior to issuance of a takeover notice or concrete steps being taken towards issuing one, the Panel considers that the amount of time elapsed here separated the 27 February Announcement from the Takeover Notices such that the 27 February Announcement was not incidental or preliminary to any transaction regulated by the Code.

52 Secondly, even if rule 64 had applied, the argument is that Vital failed to disclose information in relation to the matters outlined at paragraph 48 above so as to breach rule 64.[22] While rule 64 can be breached by omission, the Panel does not consider that there was any need for Vital to mention the details pointed to by Empire in the 27 February Announcement.

53 More generally, Empire chose to issue the Takeover Notices knowing that, given Vital's reporting requirements, Vital would release its FY24 Annual Report in reasonably short order. There were some discrepancies in the evidence as to whether this was expressly conveyed to Empire, but a reasonable party in Empire's position should have been aware that the FY24 Annual Report would be released shortly and that it might contain relevant information.

54 As to the argument that there were breaches of the NZX Listing Rules, the FMCA and/or the FTA:

(a) The Panel does not have jurisdiction to determine whether there have been breaches of these obligations. The Panel declines to conclude that there may have been breaches of these requirements.

(b) NZX Regulation Limited (**NZ RegCo**) has confirmed to the Panel that NZ RegCo has made enquiries into Empire's claims of breaches of continuous disclosure but, based on the information available to NZ RegCo, would not be taking any further investigative actions in relation to the matter at this time.

(c) If there were in fact breaches of these obligations, Empire can seek separate relief for them and any costs Empire is required to pay to Vital can be factored into the amount recovered in relation to those breaches.

[22] *Guidance Note on Misleading or Deceptive Conduct* (1 November 2023), [9.5].

55 Further, Empire's argument rests on the proposition that Empire was somehow "induced" into issuing the takeover notices:

(a) Nowhere in the evidence was there anything that the Panel considered amounted to an inducement. Notably, the affidavit provided in support of Empire's submissions was from Mr Joyce, an adviser to Empire, rather than from a director or principal of Empire itself.

(b) Vital was clear that the proposed consideration was below what Vital considered appropriate. Essentially, the NBIO was rebuffed. While Vital did not refuse to engage entirely, this is unsurprising given how directors' duties operate in such a circumstance. The Panel sees a stark distinction between not closing off future negotiations and inviting a takeover notice. This is particularly the case where the proposed structure is a Code offer (rather than a scheme of arrangement) where the transaction can proceed without the target board's support.

Empire submits that a portion of the First Order Costs were not properly incurred because Vital's announcement that Empire's offer undervalued Vital was misleading and in breach of rule 64 of the Code

56 Empire submitted that certain of Vital's costs (covering legal and communications advice and share registrar services) were incurred in furtherance of activity prohibited by rule 64, because Empire considers certain Vital market communications regarding the Takeover Notices were misleading. Accordingly, it considers these expenses were not properly incurred.

57 Empire's contention relates to an announcement on 16 August 2024 (prior to the First Takeover Notice but after Empire had publicly announced its NBIO) in which Vital stated "[the] Board's position is that the proposed price materially undervalues Vital". Vital repeated this view in its 26 August 2024 announcement regarding its receipt of the second takeover notice.

58 The Panel does not consider this statement breached rule 64:

(a) This statement was an expression of opinion.

(b) Expressions of opinion will not fall foul of rule 64 if they are honestly held, reasonably based and not demonstrably wrong.[23]

(c) Empire did not provide any evidence that suggested that the Vital Board's view about Vital's value was not honestly held, reasonably based and not demonstrably wrong.

(d) Empire has had the opportunity to make a complaint to the Panel requesting a section 32 meeting for the Panel to make a determination in relation to this purported rule 64 breach, but has not done so.

59 Accordingly, the Panel does not agree with Empire that the costs related to these statements were not properly incurred because of a potential breach of rule 64.

60 For completeness, the Panel notes that Vital argued that the Panel must make a determination under section 32 that it is not satisfied that a target has acted in compliance with the Code before it can conclude that expenses were not "properly incurred" under section 49 because they were incurred while engaging in activity prohibited by the Code.[24] The Panel disagrees:

(a) There may have been a breach of a rule of the Code which was resolved without the need for calling a section 32 meeting. Making an adverse determination a pre-requisite to limiting costs recovery ignores the realities of how Code breaches may be addressed.

[23] *Guidance Note on Misleading or Deceptive Conduct* (1 November 2023), [9.11].
[24] Vital Second Submissions at paragraphs 32-33.

(b) If Parliament had intended an adverse determination at a section 32 meeting to be a pre-requisite to limiting costs recovery, it would have included that in the drafting of section 49. Such an approach would encourage parties to seek section 32 meetings and likely work against Parliament's intention of providing timely and cost-effective decision-making.

The expenses

General comments on the amounts of expenses

61 The Panel reviewed the hourly rates, hours worked and seniority of personnel involved in providing the services to which the expenses relate.

62 The following sections set out specific points in relation to the assessment of the different expenses Vital seeks to recover. In addition, there were several principles which applied across all of the expenses which Vital sought to recover:

(a) Notwithstanding Vital's relatively small market capitalisation, responding to a takeover notice is an intensive matter, requiring skilled and experienced professionals where there are fixed timeframes within which significant amounts of work must be completed.

(b) In a takeover, it is expected that professional advice will be weighted more towards senior personnel such as partners whose time is charged at higher hourly rates. The Panel notes that the Court in *Abano* accepted Mr Peter Hinton's expert testimony (as a senior corporate lawyer and company director) that the nature of a takeover is such that it typically requires advice by senior lawyers communicating with the target board at least daily (at least during the busiest periods of the takeover) and, accordingly, fees will be weighted towards senior personnel.[25] The Panel considers that the same (or similar) is true in relation to other advisers.

(c) It is to be expected that, on receipt of a takeover notice, a target company will promptly commence work on the assumption that an offer will be made. The Panel rejects any suggestion that a target should seek to delay work in response to a takeover notice until an offer is made, and section 49 of the Act should not be interpreted in a way that encourages any such delay.

Grant Samuel

63 As to whether Grant Samuel's fees in relation to preparing the IAR were incurred in relation to the Takeover Notices:

(a) The preparation of an IAR is a key "Category 1" expense.

(b) Grant Samuel's engagement letter was signed by Vital on 21 August 2024 (i.e., following the First Takeover Notice) and the Panel approved Grant Samuel to prepare the IAR on 22 August 2024. Grant Samuel billed 80% of its fixed fee to Vital on 16 September 2024, following Empire's communication to Vital that it had decided not to make the offer on 15 September 2024.

64 The Panel considers that Grant Samuel's proposed fee for the IAR was reasonable and proportionate in the context of the market for this kind of report.

65 Accordingly, the Panel considers the Grant Samuel expenses were properly incurred in relation to the Takeover Notices for the purposes of section 49 of the Act.

[25] *Abano* at [93].

HHL

66 In the Panel's view, the description of services in HHL's engagement letter dated 19 August 2024 and all of the expense items on HHL's invoices have a sufficient nexus with the Takeover Notices.

67 The Panel considers that the expenses Vital incurred from HHL under the First Order Costs were properly incurred for the following reasons:

(a) It was reasonable for Vital to seek legal advice in relation to the Takeover Notices, and HHL's fees relate to both "Category 1" and "Category 2" activities.

(b) In terms of the time spent, some time was spent dealing with Code issues which were considered by the Panel, in which Vital's principal complaints were borne out and Empire's complaints were dismissed. While the Panel does not consider that the time or costs were excessive, it seems that at least some costs were incurred as a result of Empire's own actions. It would not be appropriate for such costs to not be recovered.

68 Accordingly, the Panel considers that all of the HHL expenses in the First Order Costs were properly incurred in relation to the Takeover Notices for the purposes of section 49.

Cameron Partners

69 As to whether Cameron Partners' charges for financial advice were expenses incurred in relation to the Takeover Notices:

(a) The Costs Guidance Note and *Abano* envisage financial advice expenses being recoverable.

(b) Cameron Partners' engagement letter is dated 21 August 2024 and was signed by Vital on 28 August (i.e., after the First Takeover Notice of 19 August) and indicates its engagement relates to the Proposed Offer.

(c) The services (including valuation advice and preparation of the Chair's letter for the target company statement) and date indicated on its invoices suggest a sufficient nexus with the Takeover Notices and the timing of the Takeover Notices.

70 The Panel considers that it was reasonable in the circumstances for Vital to engage Cameron Partners in this kind of activity.

71 Cameron Partners' advice appears to principally relate to "Category 2" (including preparation of valuation advice for the Board) alongside some time on the "Category 1" expense of preparing the target company statement.

72 Accordingly, the Panel considers that all of the Cameron Partners expenses sought in the First Order Costs were properly incurred in relation to the Takeover Notices for the purposes of section 49.

Shanahan

73 Vital submitted that:

(a) A small portion of the expenses for which Vital seeks reimbursement relate to fees for pre-takeover notice advice. For example, Shanahan Partners' invoice INV-0474 includes fees for communications advice relating to Empire's public disclosure, on 14 August 2024, of its non-binding indicative offer to make a partial takeover offer and Vital's resulting NZX announcement on 16 August 2024.

(b) In the circumstances, as contemplated by paragraph 4.5 of the Costs Guidance Note, those pre-takeover notice costs were properly incurred and should be reimbursed to Vital because:

(i) they are chronologically proximate to the First Takeover Notice – i.e., there was one week between Empire providing the NBIO on 12 August 2024 and the First Takeover Notice on 19 August 2024; and

(ii) the nature of the advice is directly relevant and related to the First Takeover Notice, in that the NBIO was announced by Empire on 14 August 2024 and responded to by Vital on 16 August 2024 and related to a takeover offer under the Code.

74 The Panel agrees with Vital's submissions. In addition, the Panel notes that the NBIO stated that Vital should consider a takeover notice was imminent (conceivably triggering the defensive tactics restrictions under rule 38 of the Code). This supports the existence of a nexus with the First Takeover Notice. If a prospective bidder advises a prospective target a takeover notice is imminent and thereby potentially triggers defensive tactics restrictions (limiting the manner in which the prospective target may conduct its business), the legal costs incurred in responding to the approach bear a sufficient nexus to the subsequent takeover notice (assuming one is issued in short order, as was the case here).

75 The Panel noted that one item on Shanahan's invoice was recorded as "FY24 messaging discussion". The Panel queried whether this time was incurred in relation to the Takeover Notices, and received a copy of an email from Shanahan stating:

(a) The task "related directly to the Empire approach and consideration of their wider operating environment ahead of their pending FY24 results release".

(b) Shanahan's task was to consider draft messages prepared by Vital "in the context of Empire's interest in [Vital]".

76 The Panel is satisfied that this activity was also conducted "in relation to" the Takeover Notices rather than as part of Shanahan's business-as-usual communications services for Vital.

77 The Panel additionally considers that these expenses were incurred in relation to the Takeover Notices, given that:

(a) the Costs Guidance Note and *Abano* envisage communications expenses being recoverable; and

(b) while the Panel was not supplied with an engagement letter between Vital and Shanahan,[26] in the Panel's view, all of the expense items on Shanahan's invoice have a sufficient nexus with the Takeover Notices (the invoice for August 2024 notes the fees are "in relation to the takeover" and the invoiced activities occurred in August and September 2024).

78 As to whether the expenses were properly incurred in relation to section 49 he Costs Guidance Note and *Abano* consider that it may be reasonable for a target to incur takeover expenses on communications advice. In the Panel's view, Shanahan's work relates to both "Category 1" and "Category 2" expenses.

79 Accordingly, the Panel considers that all of the Shanahan expenses sought by Vital were properly incurred in relation to the Takeover Notices for the purposes of section 49.

[26] The Panel understands the work was undertaken under a longstanding engagement between Vital and Shanahan.

Link Market Services

80 While there is no engagement letter between Vital and Link Market Services, the timing of the relevant activities (being August 2024) and the activities detailed (relating to an email broadcast for a "Proposed Partial Takeover Update") indicate a sufficient nexus with the Takeover Notices.

81 It was reasonable for Vital to request its share registrar prepare an email broadcast to shareholders in relation to the Proposed Offer (a "Category 2" expense to keep offerees informed), and the low level of expenses incurred on this activity was a reasonable amount to spend on that activity.

82 Accordingly, the Panel considers that all of the Link Market Services expenses sought were properly incurred in relation to the Takeover Notices for the purposes of section 49.

Conclusion as to First Order Costs

83 Overall, the fees Vital has sought to have reimbursed for its First Order Costs are, in the Panel's view, reasonable in the context of a corporate transaction involving a listed target and given the time and complexity of the matters dealt with by Vital and the nature of the activities undertaken. In the Panel's view, none of the expenses incurred involve Vital accepting a disproportionately or unreasonably large fee "in the knowledge that another person would pick up the tab".[27] The types of work undertaken are consistent with what the Panel would anticipate within this context.

84 The Panel therefore considers that all of the First Order Costs sought by Vital have been properly incurred in relation to the Takeover Notices for the purposes of section 49 of the Act.

Issue Two: Second Order Costs

85 As noted above, the Panel stated in the Costs Guidance Note that it does not envisage Second Order Costs would necessarily be properly incurred for the purposes of section 49(1), though the Panel considered that there may be appropriate circumstances in which the Panel could decide otherwise.[28]

Submissions for Vital and Empire

86 Vital has requested that the Panel order its Second Order Costs be paid by Empire to Vital. In summary, it argues that these expenses were properly incurred for the purposes of section 49 for the following reasons:

(a) There is a causal and chronological proximity between the Takeover Notices and the Second Order Costs – costs recovery is itself part of the takeover process arising as a direct consequence of the Takeover Notices, and there is no logical basis on which to treat these costs differently to the First Order Costs. Like the takeover process itself, recovery of costs is regulated by the Act under the jurisdiction of the Panel.

(b) Vital would not have incurred the Second Order Costs if Empire had met its obligation under section 49(1) to reimburse Vital.

(c) An order for payment of the Second Order Costs (and associated broad interpretation of section 49) would align with the purpose and policy of section 49 that targets and their shareholders should not be exposed to costs properly incurred in responding to the unilateral actions of an

[27] *Abano* at [73].
[28] Costs Guidance Note, [3.5]-[3.6].

offeror providing a takeover notice. Relatedly, the Costs Guidance Note states, by reference to the principles set out in *Abano*, that:[29]

> *properly incurred expenditure in relation to a takeover notice is not a normal incident of the target company's business, and hence is not an expense the target company should bear.*

(d) Further to the above, it was noted in *Abano* that:

(i) the use of the term "any" in section 49(1) "implies full recovery of properly incurred expenditure";[30] and

(ii) the phrase "in relation to" is "broad and compendious",[31] and the Panel similarly considers the term should be read widely.[32]

If the Panel was to take the view that Second Order Costs were not recoverable under section 49, this would adopt an artificially narrow interpretation of the words and purposes of that section.

(e) For Code companies like Vital with smaller market capitalisation, Second Order Costs are disproportionately large relative to the target's financial resources and transaction value.[33] An inability to obtain Second Order Costs risks imposing undue costs on a target and therefore further undermines section 49's purpose.

(f) A Second Order Costs order would negate the current commercial incentive of an offeror to not pay or accept a target's invoiced expenses.

(g) Vital has acted in good faith, whereas Empire has been unwilling to engage constructively in relation to the First Order Costs. For instance, Empire has:

(i) engaged in long delays between communications;

(ii) made potentially tactical and unsupported claims to the Panel, later abandoned:

(A) that Vital engaged in defensive tactics; and

(B) regarding matters outside the Panel's jurisdiction,

to argue that Vital was not entitled to expenses reimbursement; and

(iii) not provided appropriately evidenced or particularised concerns regarding the First Order Costs (i.e., by providing an affidavit from Empire's adviser Mr Joyce, rather than from its board), where such concerns were, in most cases, also factually incorrect.

(h) Accordingly, in these circumstances, it is reasonable for the Panel to order Empire reimburse the Second Order Costs, and such an order would set a beneficial precedent as to the Panel's expectations of parties' conduct in these matters.

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[29] Costs Guidance Note, [3.3(d)].
[30] *Abano*, [50].
[31] *Abano*, [55].
[32] Costs Guidance Note, [3.3(b)].
[33] It was also argued that companies with smaller market capitalisation are now the typical targets in Code offers, with schemes of arrangement being the more commonly used transaction structure for takeovers of larger Code companies.

87 Empire submits that section 49 does not enable the Panel to make an order for recovery of the Second Order Costs, and it is intended to allow for the recovery of first order costs only:

(a) Empire argued that costs on statutory dispute resolution processes are typically provided for separately in empowering legislation, so that if this has not been specifically provided for in the Act (or any other legislation), the Panel can infer that Parliament did not intend for section 49 to create a costs regime.

(b) Empire additionally noted that it would be unusual for the Act to create a regime whereby a target could recover second order costs from an offeror, but an offeror could not recover its own second order costs from a target (for instance, where a target's reimbursement application is not successful).

88 In response to this final submission by Empire, Vital argued:

(a) Sections 49 and 50 always operate asymmetrically, reflecting the policy bases of these provisions recognised in *Abano*, both as quoted at paragraph 86(c) above and that:[34]

(i) takeover costs can be disproportionate to the size or assets of the target;

(ii) such costs are not a normal incident of the target's business; and

(iii) it is fair that extraordinary cost is better placed on the party seeking to obtain corporate control.

(b) In practice, it is difficult to envisage a situation where an offeror would seek a Panel determination of expenses. If the parties cannot agree on expenses, there is no incentive for the offeror to seek a Panel determination because absent a determination or agreement with the target, the offeror has no enforceable payment obligation (whereas a target might only be able to recover expenses via a Panel determination). Sections 49 and 50 operating asymmetrically as to second order costs reflected these commercial incentives.

<u>The Panel's conclusions regarding the Second Order Costs</u>

89 The evidence presented to the Panel to date suggests that there has been a lack of constructive engagement in negotiations by Empire. The Panel also understands the wider policy concerns raised in Vital's submissions.

90 However, as a matter of statutory interpretation, the Panel considers there is no jurisdiction for it to order that Empire reimburse Vital for the Second Order Costs under the Act.

91 The Panel has considered two different bases on which it might have jurisdiction. The Panel's analysis is summarised below.

Implied power?

92 There is no express power under the Act for the Panel to award second order costs. An implied power is one which arises by necessary implication as being ancillary to the performance of functions, powers,

[34] *Abano*, [57]-[58].

and duties conferred by statute. It is generally accepted, however, that in the absence of express statutory authority a tribunal has no powers to award costs.[35]

93 The Panel has considered whether there is any function, power, or duty in the Act to which a power to award second order costs would be ancillary. It does not consider that there is any such function, power, or duty.

Were the Second Order Costs properly incurred in relation to the Takeover Notices?

94 The Panel has considered whether the Second Order Costs were incurred in relation to the Takeover Notices, that is they are in fact properly considered to be first order costs.

95 The Panel's view is that this is not correct. The Second Order Costs were not incurred in response to the Takeover Notices themselves but rather in response to Empire's refusal to pay the First Order Costs. The Panel acknowledges that paragraph 3.6 of the Costs Guidance Note could be read as suggesting that there may be jurisdiction to award costs of this type in some circumstances. However, the Panel has considered this situation carefully and considers that the Second Order Costs do not have a sufficient nexus to the Takeover Notices.

Conclusion

96 The Panel has therefore determined that the amount to be reimbursed by Empire under sections 49 and 50 of the Act will not include any Second Order Costs.

Panel's Fees

97 The Panel will deal with the fees payable to it in respect of the Application separately in accordance with the Takeovers Regulations 2000 (the **Regulations**).

98 The Panel's preliminary view, based on the information available to at the date of this determination and statement of reasons, is that it should require payment to it as follows in accordance with regulation 4 of the Regulations:

(a) Vital to pay a fee of $100 for the Application; and

(b) Empire to pay:

(i) a fee calculated at the Panel's standard hourly rates for work carried out in respect of the Application; and

(ii) the costs incurred by the Panel in respect of the Application in obtaining expert advice or expert assistance.

99 The Panel's reasoning for its preliminary view as to fees and costs apportionment is as follows:

(a) The Panel considers that Empire's objections in respect of the First Order Costs lacked merit.

(b) In the Panel's guidance, it strongly encourages parties to negotiate and agree costs reimbursements themselves.[36] On the evidence available to the Panel, Empire does not appear to have genuinely attempted in good faith to negotiate and agree First Order Costs with Vital. The Panel notes negotiation with Vital would not have precluded Empire from simultaneously

[35] Law Commission *Tribunals in New Zealand* (NZLC IP6, 2008) at [7.37].
[36] Costs Guidance Note, [2.5].

bringing the Proceeding, and it could have sought the return of any payment to Vital in the course of the Proceeding.

(c) If Empire has objected to paying any of the First Order Costs without a principled basis for doing so, then it has:

(i) refused to pay costs which the Act specifies Vital is entitled to and which are a natural incident of issuing two takeover notices; and

(ii) led the Panel to expend unnecessary time and expense in relation to the Application.

(d) While the Panel's guidance indicates that it will usually charge its fees equally to each party to a reimbursement application,[37] the Panel considers that Empire's conduct is such that Empire should pay the Panel's costs other than the application fee.

100 The Panel has directed the Panel executive to prepare a statement of the Panel's costs. Once this is available, the Panel will provide it to Vital and Empire. Empire will then have two working days to make any submissions. Following receipt of Empire's submissions, Vital will have two working days to respond. Submissions should be limited to five pages (excluding copies of any relevant correspondence) and address only the question of the allocation of the Panel's costs.

Dated: 13 March 2025

Signed for and on behalf of the Panel by the Chair:

C G Blanchard

[37] Costs Guidance Note, [5.2].