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THE TAKEOVERS PANEL'S INTERPRETATION OF MISLEADING OR DECEPTIVE CONDUCT WITHIN THE WIDER LEGAL CONTEXT

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Contents

Abstract

The purpose of this research is to look at how the Takeovers Panel in New Zealand has construed the meaning of "misleading or deceptive conduct", as set out in r 64 of the Takeovers Code Approval Order 2000. This will involve looking at how consumer protection jurisprudence has been used to interpret this rule, and how the law in this area has its roots in the theory of asymmetric information. In addition, the wider legal context of laws prohibiting similarly dishonest conduct in trade, both in New Zealand and in other jurisdictions, will be examined. This will involve looking at other market manipulation provisions in New Zealand and how these are enforced by the Financial Markets Authority. In addition, the approach to regulating dishonest conduct in takeover transactions in Australia and the UK will be examined, with particular reference to situations where bidders depart from last and final statements. Discussions on each of these topics will lead to the conclusion that the Takeovers Panel's approach to interpreting this rule is appropriate.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 14,987 words.

Subjects and Topics

Company Law-Takeovers Act 1993
Company Law-Takeovers Code Approval Order 2000
Company Law-Financial Markets Conduct Act 2013
Consumer Law-Fair Trading Act 1986

I Introduction

Rule 64 of the Takeovers Code Approval Order 2000 ("the Code") prohibits misleading or deceptive conduct in the course of a takeover transaction. Since the rule came into force, the Takeovers Panel ("the Panel") has relied on the jurisprudence established under s 9 of the Fair Trading Act 1986 ("FT Act") to interpret r 64. There are also several provisions which aim to prohibit making "false" or "misleading" statements in takeovers, such as sections 44B and 44C of the Takeovers Act 1993 ("the Act"). Liability is imposed for various forms of dishonest conduct in much of New Zealand's commercial law, such as market manipulation and consumer protection statutes. These statutes, as well as the laws regulating dishonest trade practices in other jurisdictions, will be analysed, to provide context to the Panel's interpretation of r 64.

Section II will begin by explaining the economic theory of asymmetric information, and how this underpins many laws which aim to ensure the accuracy of information available to market participants. This explanation will involve an analysis of the rationale behind market manipulation and consumer protection legislation, as well as commercial disclosure laws more generally. Section III will look at the Panel's three decisions to date involving alleged breaches of r 64. The relevant consumer protection case law, including the leading New Zealand ("NZ") cases on s 9 of the FT Act, will then be summarised in Section IV to show how the Panel has come to understand the meaning of "misleading or deceptive conduct".

As there have only been three decisions where the Panel has had to consider alleged breaches of r 64, it is difficult to make judgments as to whether the Panel has been accurate and consistent in interpreting this rule. It will therefore be helpful to examine the wider legal context in which the Panel's decisions have been made. The first step in this examination will be to look at references to false, misleading or deceptive conduct in other NZ market manipulation legislation in Section V. The most relevant statute will be the Financial Markets Conduct Act 2013 ("FMC Act") since it covers similar conduct to the Takeovers Act. This will involve a brief overview of the prohibitions on dishonest conduct in the FMC Act, along with examples of cases the Financial Markets Authority ("FMA") has taken against this sort of conduct.

The final step in this analysis of the wider legal context for misleading conduct in takeovers will be to look at comparable legislation in other jurisdictions in Section VI. The focus will be on departures from last and final statement in Australia and the United Kingdom ("UK"). Several decisions in these jurisdictions will be summarised in order to highlight the different approaches to regulating dishonest conduct in takeovers. The main legal concepts that will be analysed will be Australia's truth in takeover's policy, and the UK's notion of wholly unacceptable circumstances. Section VII will then draw conclusions on the preceding discussion and show that the Panel's approach to interpreting r 64 is appropriate.

II Asymmetric information and disclosure laws

The Panel recognises the importance of maintaining the "integrity of the market" by ensuring statements made during a takeover can be relied upon by market participants.[1] Part of the Panel's role is to prohibit misleading and deceptive conduct, which is partly caused by the underlying economic problem of asymmetric information. One of the main premises of laws prohibiting dishonest conduct in trade is to prevent or mitigate this market failure, as there can be inequalities in the levels of information held by consumers and traders when participating in an economic transaction. In these situations, "there is often little incentive for traders to provide the relevant information about the defects or drawbacks of their product".[2] Asymmetric information can cause shares in corporations to be overvalued, since "managers may have more inside information of which neither the market nor the shareholders are aware".[3] Adverse selection, one of the problems caused by asymmetric information, can manifest itself as misleading or deceptive conduct, in that a market participant or agent has incentives to give erroneous information.[4] Mechanisms for ameliorating this problem in equity markets, such as disclosure laws and regulation of misleading conduct, can enhance the efficiency of the market for corporate control.

Participants in many kinds of transactions rely on the accurate supply of information, from those who purchase a household good, to financial investors trading in publicly listed companies. When consumers are misled, there is a mismatch of information held by each party to the transaction, which can lead to a situation where a consumer's willingness to pay does not equate with the value they gain from purchasing the product. If a trader knows it will be difficult for the customer to prove their statement is false, because the consumer lacks the means to inquire further to disprove the claim, the trader may be incentivised to mislead or deceive that customer. Kate Tokeley discusses this notion of asymmetric information and unequal bargain power between consumers and traders. She argues that while these problems do not always justify government intervention in the free market, there will be cases where the market is too slow to correct problems for consumers. Consumers may also lack the "ability to resolve any complaints they may have"[5] due to their lack of power in relation to large, intimidating suppliers and manufacturing companies. She goes on to make the point

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1 Takeovers Panel "Guidance Note on Rule 64 of the Takeovers Code" (1 September 2016) <http://www.takeovers.govt.nz/guidance/guidance-notes/misleading-or-deceptive-conduct/> at [17].

2 Kate Tokeley (ed) *Consumer Law in New Zealand* (2nd ed, LexisNexis NZ Limited, Wellington, 2014) at 21.

3 E.C. Lashbroke "Asymmetric Information in Mergers and the Profits of Deceit" (1995) 28 Loyola of Los Angeles Law Review 507 at 507.

4 Jung-Chin Shen and Laurence Capron "Acquiring Intangible Resources through M&As: Exploring Differences between Public and Private Targets" (20 June 2003) INSEAD <https://flora.insead.edu/fichiersti_wp/inseadwp2003/2003-50.pdf>.

5 Tokeley, above n 2, at 23.

that "without equal bargaining power it cannot be said with confidence that the consumer always makes a free and informed choice".[6]

Shareholders who are misled in the course of a takeover bid, or other financial market transactions, are also sometimes unable to make a free and informed choice because they hold insufficient levels of information and bargaining power. Another example of the problem caused by asymmetric information could be when one party to a takeover transaction omits certain information when making announcements to the market because they know that information would not be looked upon favourably by stakeholders. In this situation, the maker of a statement may be incentivised to only disclose information that makes their offer, or their company, look attractive. They may perceive there to be little risk of regulatory action for misleading or deceptive conduct. Paul Milgrom elaborates further on this idea, explaining that where it is difficult for sellers to persuade potential buyers that their goods are of a high quality, the problem of asymmetric information will mean that low quality goods dominate the market.[7] This is because the sellers offering goods of a relatively high standard are not compensated for doing so, and are therefore not incentivised to participate in this market. The opposite is also true; those with only low quality goods to offer will want to sell those goods in a market where consumers are unable to easily grasp the true value, or lack thereof, of the products they purchase.

It has been argued by several academics that “if verifiable disclosure is costless, an informed party will disclose all of his information”.[8] This is because if the informed party fails to be totally upfront, for example about the quality of the product they are selling, this “induces an uninformed party to believe that the withheld information is unfavourable”.[9] When buyers are informed or sophisticated enough to realise detailed information is missing, Milgrom argues, they must decide what the explanation for this is. It could be that the seller is uninformed themselves, or that they are intentionally trying to mislead by withholding certain information that portrays their product or company in a bad light. Milgrom goes on to state that these effects may lead sophisticated buyers to reduce their purchases, “but not to the extent they would if they were to learn actual bad news about the product”.[10]

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6 Shen and Capron, above n 4, at 23.

7 Paul R. Milgrom “What the Seller Won't Tell You: Persuasion and Disclosure in Markets” (2008) 22 Journal of Economic Perspectives 115.

8 Sanford J. Grossman “The Informational Role of Warranties and Private Disclosure about Product Quality” (1981) 24 Journal of Law and Economics 461; Sanford J. Grossman and Oliver D. Hart “Disclosure Laws and Takeover Bids” (1980) 35 Journal of Finance 323; Paul R. Milgron “Good News and Bad News: Representation Theorems and Applications” (1981) 12 Bell Journal of Economics 380; Paul R. Milgrom and John Roberts “Relying on the Information of Interested Parties” (1986) 17 Rand Journal of Economics 18; as cited in Michael J. Fishman and Kathleen M. Hagerty “The Optimal Amount of Discretion to Allow in Disclosure” (1990) 105 The Quarterly Journal of Economics 427 at 427.

9 Fishman and Hagerty at 427.

10 “What the Seller Won't Tell You”, above n 7, at 117.

Milgrom also claims that the solution to these problems could be a "rule that holds the firm accountable for any unreported information if it should have known that information". One way of preventing or correcting the market failure caused by information asymmetries is to mandate that market participants must disclose certain information. For example, laws may stipulate that the nutritional information on food products must be disclosed, or the country of origin of certain products, such as clothing. Similarly, other laws state that "publicly traded corporations must disclose detailed financial data when they issue securities and on a continuing basis thereafter".[11] Participants in takeover bids and other financial transactions must not only ensure their statements are not misleading, but there is also a positive onus on companies to disclose certain information. The idea of this is to help ensure market participants are able to do due diligence on their purchases, ensuring all participants are on an equal footing. Milgrom emphasises the importance of public sector institutions in enforcing rules, and that "liability rules and laws against fraud help to ensure that reported information is accurate".[12]

While one of the objectives of the Takeovers Act is to encourage the efficient allocation of resources,[13] and it has generally been accepted that takeover bids help to bring about that aim,[14] this can be jeopardised by the presence of information asymmetries. Because of this, it is necessary for there to be laws in place that help to prevent or remedy this form of market failure, such as r 64 of the Code, in a similar way to other market manipulation and consumer protection laws. Part of the task for agencies such as the Panel is to decide whether the maker of a statement in the marketplace did so in a way that created information asymmetries, such as by not reporting certain information, or by reporting it in a misleading way. There will also be instances where information that is disclosed to the market is technically accurate, but creates a misleading impression. Asymmetric information is likely to cause problems in a situation such as this, especially when some members of the target audience do not have enough insight into the industry to verify information contained in a market announcement.

III Misleading or deceptive conduct in takeovers

The Panel has several specific tools at its disposal to help achieve its goal of upholding the integrity of the market. One of these is r 64 of the Code, which came into force in February 2008 upon enactment of the Securities Legislation Bill 2004. The Panel has made it clear that part of its purpose, as set out in the Code and the Act, is to "maintain the framework for transparent and equitable processes for share transactions in Code companies".[15] However,

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11 Michael J. Fishman and Kathleen M. Hagerty "Mandatory Versus Voluntary Disclosure in Markets with Informed and Uninformed Customers" (2003) 19 Journal of Law, Economics, and Organisation 45 at 45.

12 "What the Seller Won't Tell You" above n 7, at 116.

13 Takeovers Act 1993, s 20(a)

14 Sanford J. Grossman and Oliver D. Hart "The Allocational Role of Takeover Bids in Situations of Asymmetric Information" (1981) 36 The Journal of Finance 253.

15 Takeovers Panel *Statement of Intent 2014/2015 – 2018* (23 May 2014) at [35].

along with aiming to uphold the integrity of the market, the Panel must also strive to achieve the statutory purposes of the Code, as set out in s 20 of the Act. In particular, the Panel must encourage "the efficient allocation of resources"[16] and "competition for the control of code companies"[17]. It must also assist "in ensuring that the holders of financial products in a takeover are treated fairly"[18] and recognise "that the holders of financial products must ultimately decide for themselves the merits of a takeover offer".[19] In particular, the Panel's assessment of whether conduct in question is misleading or deceptive involves applying the purposes set out in ss 20(c) and (e). Rule 64 helps achieve the s 20(c) purpose by ensuring shareholders are treated fairly and not deceived. It also achieves the s 20(e) purpose by encouraging the provision of accurate information that market participants need to make an informed decision. However, it is also important to recognise that in regulating conduct governed by the Code, the Panel must balance all statutory purposes, among which there may be some inherent tension.

Sections 44B and 44C of the Act also aim to prevent dishonest conduct from taking place in the course of a takeover transaction. Section 44B prohibits the making or dissemination of materially false or misleading statements or information in relation to a takeover. S 44C establishes criminal liability for a contravention of s 44B "…if the person has actual knowledge that the statement or information is false in a material aspect or is materially misleading." In this respect, the threshold for liability under s 44C is much higher than that for r 64, since the r 64 test does not require elements of knowledge or materiality. The prohibitions on false and misleading conduct set out in the Takeovers Act have not been enforced by the Courts to date. Section 44E of the Act states that the FT Act does not apply in relation to transactions related to those regulated under the Code. This means that "misleading or deceptive conduct", as well as "false and misleading statements" made during a takeover bid will fall outside the jurisdiction of the Commerce Commission ("the Commission"), and that such cases cannot be brought before the courts under the FT Act.

Rule 64 prohibits participants in takeover transactions from engaging in conduct related to a transaction regulated by the Code that is misleading or deceptive, or likely to mislead or deceive. The first limb of the r 64 test is an inquiry of whether someone has "engaged in conduct" pursuant to r 2(2). The Code's interpretation section makes it clear that "engaging in conduct" includes acts as well as omissions, as well as "making it known that an act will or will not be done".[20] The second limb of the test involves looking at whether the conduct relates to a transaction or event regulated by the Code, or whether such conduct that is "incidental or preliminary to a transaction or event that is or is likely to be regulated by this

16 Takeovers Act 1993, s 20(a).
17 S 20(b).
18 S 20(c).
19 S 20(e).
20 Takeovers Code Approval Order 2000, r 3.

code".[21] The Panel has made it clear that "both limbs of the test are broadly drafted and the scope of the rule is wide".[22] When discussing the interpretation of r 64, the Panel has noted that it its underlying purpose is to encourage "commercial probity".[23] The Panel has made it clear that, in considering the context in which the allegedly misleading or deceptive conduct took place, it will look at the "person or persons likely to be affected by it".[24] This means asking whether a reasonable person in the position of the target audience member would have likely been misled or deceived, or "led to an erroneous assumption or misconception as a result of the conduct".[25]

The wording of r 64 is based on that of s 9 of the FT Act, which prohibits misleading or deceptive conduct in trade. The Panel has made several statements about how it is likely to interpret r 64, drawing extensively from FT Act jurisprudence. For example, it has stated that silence may amount to a breach if there is a "reasonable expectation of disclosure",[26] whether this expectation is objective or from the perspective of the target audience. Importantly, it has made it clear that intention is not required for a breach of r 64; it is possible to "unintentionally lead persons into error".[27] As such, the Panel has stressed that those making public statements need to think carefully about how others may perceive their words. It has also stated that conduct with "no actual or direct adverse consequences"[28] may still fall foul of r 64. In addition, the notions of "absence of fault" and "reasonable care"[29] are not factors for the Panel to consider in relation to r 64 liability. This is because these concepts are better suited to an evaluation of the statutory defence of total absence of fault, such as that set out in s 44 of the FT Act.[30] The Panel noted that these defences "do not have the effect of re-characterising the conduct as other than misleading but, rather, are defences which recognise that misleading conduct may be excused in some instances".[31]

In the ten years since it came into force, there have been three matters in which the Panel has assessed whether parties have complied with r 64: Rubicon Limited ("Rubicon"),[32] Marlborough Lines Limited and Horizon Energy Distribution Limited ("Horizon"),[33] and

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21 Rule 64.

22 Takeovers Panel *Marlborough Lines Limited and Horizon Energy Distribution Limited: Determination and Statement of Reasons* (March 2010) at [87].

23 Takeovers Panel *Rubicon Limited: Determination and Statement of Reasons* (June 2009) at [132].

24 *Idem Red Eagle; Goldsboro v Walker* [1993] 1 NZLR 394 at 401; as cited in Takeovers Panel *Radius Properties Limited and Montagu Investment Holdings Limited: Determination and Statement of Reasons* (March 2013) at [53].

25 *Radius,* above n 24, at [53].

26 *Rubicon,* above n 23, at [36].

27 Guidance Note, above n 1, at [8.2].

28 *Rubicon,* at [36].

29 At [36].

30 *Parkdale Custom Built Furniture v Puxu* Ltd (1982) ATPR 40-307, 43,782 (1982) 42 ALR 1, 5 as cited in *Rubicon* above n 23.

31 *Rubicon,* above n 23, at [129].

32 *Rubicon.*

33 *Horizon,* above n 22.

Radius Properties Limited and Montagu Investment Holdings Limited ("Radius").[34] These decisions help illustrate how the Panel views misleading or deceptive conduct, and the extent to which this interpretation is based on the tests set out in FT Act case law.

A Rubicon

In April 2009, a group of investment funds known as "Knott" made a partial offer under rule 7(b) of the Code for 10.83% of the shares of code company Rubicon. Successful completion of this offer would have increased Knott's voting rights in Rubicon from 18.5% to 27.33%. Because the resulting voting control would equate to 50% or less of the target company, r 10 approval was required. What was crucial in this matter was that the "voting rights held by the offeror and its associates"[35] for r 10 approval should have been disregarded, but due to a series of errors, Knott's votes were not disregarded. These errors occurred because of an error "at a very administrative level",[36] involving confusion over a series of emails received by an administrative assistant at Dorset Management Corporation ("Dorset"), who provided management services to Knott.

As Knott advised the Panel, it had not intended to cast the vote, and its senior executives were unaware of what had happened. On the question of how Knott's shares came to be voted, the Panel concluded that "the existence of the rule 10 approval requirement and the instruction to abstain Knott's shares on that vote were not communicated to Ms Chiappone, Dorset's primary contact with RiskMetrics, in a manner that she understood and would therefore follow".[37] This administrative error resulted in RiskMetrics, who provided corporate governance services to Dorset, generating the voting instructions as it usually would, since Dorset never instructed it not to do so. RiskMetrics acted as a proxy advisor for Dorset, with whom it had "implied consent arrangements".[38] The assumption was that RiskMetrics would vote if it did not receive instructions to the contrary; Dorset needed to countermand the vote in order to prevent it happening. The upshot of this arrangement was that voting instructions could be generated via an automated process which proved to be fallible in this case.

In terms of whether the parties had "engaged in conduct", the Panel found that Dorset had by omitting to "explicitly instruct RiskMetrics to abstain from voting Knott's shares",[39] or to prevent the voting instruction from going ahead. Panel considered the major issue in terms of conduct in this case was that Dorset failed to inform Rubicon before the offer closed that its votes had been cast in relation to the rule 10 approval. However, a more significant issue for the Panel to determine in relation to r 64 liability was whether the conduct was "misleading

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34 *Radius,* above n 24.
35 *Rubicon,* above n 23, at [5].
36 At [14].
37 At [102].
38 At [55].
39 At [114]

or deceptive or likely to mislead or deceive".[40] Dorset's omission to properly instruct RiskMetrics resulted in incorrect instructions passing down the custodial chain. This chain of events caused Rubicon to erroneously assume that Knott had complied with its obligation not to vote, and other facts known to Rubicon were consistent with this assumption being correct. Because of this, 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 that it actually had".[41] In reaching its conclusion, the Panel imported the idea from FT Act case law that Dorset's omissions were capable of misleading Rubicon, and that it was reasonable for Rubicon to have been misled.

Counsel for Dorset relied on *AMP Finance v Heaven*[42] insofar as it set out the essential elements of misleading conduct. Specifically, they drew the Panel's attention to the fact that a plaintiff needed to show that it was misled by conduct. The Panel noted in response to the submissions from Dorset that in the context of *AMP Finance v Heaven* the plaintiff needed to show it was misled in order to obtain damages. However, the Panel noted that the position under the Code is different in that "it would not always be necessary to consider whether a particular entity or complainant had been misled…the focus is on the nature of the conduct itself".[43] Counsel for Dorset also submitted that it had no intention to mislead, and this submission was factored in to the Panel's determination. While the Dorset's conduct was found to have been misleading or deceptive and therefore in contravention of r 64 of the Code, the Panel took into account the fact that the conduct was inadvertent, i.e. there was no intent to mislead, and that no harm resulted. Once again relying on consumer protection jurisprudence, the Panel noted that the s 9 FT Act test does not require intention or harm, but that "…their existence will go towards the seriousness of the breach and therefore have a bearing on the appropriate remedy".[44] Because of this, the Panel decided not to seek any remedies against Dorset.

B Horizon

This matter before the Panel involved Marlborough Lines Limited ("Marlborough Lines") announcing its intention to make an offer for shares in Horizon.[45] Marlborough Lines and Horizon are both electricity distribution businesses, with Marlborough Lines owning electricity infrastructure in Marlborough, and Horizon owning and operating electricity infrastructure in the Eastern Bay of Plenty. Eastern Bay Energy Trust ("EBET"), an electricity consumer trust, owned 77.29% of Horizon's shares, and therefore needed to accept at least some of its shares into Marlborough's offer. After its intention was announced, on 28

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40 *Rubicon*, above n 23, at [116]
41 At [119].
42 *AMP Finance v Heaven* (1997) 8 TCLR 144, as cited in *Rubicon*, above n 23, at [122].
43 *Rubicon* at [123].
44 *Neumegan v Neumegan and Co* [1998] 3 NZLR 310 as cited in *Rubicon* at [36].
45 *Horizon*, above n 22.

September 2009 – the day before the offer opened – Horizon made a market announcement regarding a "revised profit outlook". This forecasted an increased after tax profit of $6 million, up from $4.5 million. On 6 October 2009, counsel for Marlborough Lines wrote a letter to the Panel complaining that this revised profit outlook amounted to misleading conduct.

After examining the documentary evidence, it became clear to the Panel that one of the key drivers for this increase in profit "…was the result of a change in the application of an accounting treatment relating to the capitalisation of costs for capital works undertaken for Horizon".[46] Before the change in accounting treatment took place, labour and material costs were the only capital costs treated as expenses, because these were the only costs that Horizon considered could be directly attributed "to the construction of the resulting capital assets".[47] Upon discussion with their auditors, Horizon decided to capitalise a higher proportion of the cost of assets, not because the accounting treatment had been incorrect, but because it was a conservative approach and not standard industry practice. Horizon's management had been conducting enquiries into how other electricity companies treated the costs of internally constructed assets and found that most of these costs were capitalised "so as to approximate what would have been paid for the asset from a third party".[48] After the change, additional costs were included as capital expenditure, which reduced forecast expenditure and therefore increased Horizon's profit forecast. Horizon failed to mention the change in accounting treatment in its announcement.

The Panel's examination of the allegedly misleading conduct with regard to the revised profit outlook was twofold. It looked at whether Horizon breached r 64 by issuing a revised profit outlook when they had no reasonable basis to do so, and by failing to mention the change in accounting treatment. The evidence suggested that staff members at Horizon were aware of the fact that one of the key drivers of the increased profit forecast was the change in accounting treatment. An explanation of this was included in an early draft of the forecast announcement, but Horizon's CFO asked for these details removed because it would open them up to scrutiny as to why their accounting practices had changed given the takeover process they were involved in. When questioned by the Panel, Horizon contended that "there was a need for a simple, clear, uncomplicated announcement", and that the change in accounting policy was just "a correction of something that was wrong".[49] Because of this view, they decided only to draw attention to other explanatory factors in the forecast announcement, such as the "market gains on derivatives" and "the gain from the unusually cold winter".[50]

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46 *Horizon*, above n 22, at [28].
47 At [56].
48 At [58].
49 At [83].
50 At [83].

Horizon submitted that the revised profit outlook was just "an expression of opinion…as to future performance",[51] and that it was subject to change before the end of the financial year. On the issue of whether the issuance of revised profit guidance in the course of a takeover offer was misleading or deceptive, Horizon relied on the findings in the Australian case of *Bell Resources Ltd v BHP*.[52] In this case, the Court found that the forecast was "honest and reasonably based",[53] and that any forecast should be realistic, rather than overly optimistic. Upon consideration of these arguments, the Panel concluded that Horizon's revised profit outlook announcement was not misleading, since their view of the change in financial situation was an opinion they honestly held, and there was a reasonable basis to hold that opinion. Because of this, the Panel determined that Horizon's directors had not breached r 64 with the revised profit forecast.

The next issue for the Panel to determine was whether or not it was misleading or deceptive for Horizon to fail to disclose the change in accounting treatment. Marlborough Lines submitted that it was because "none of Horizon's communications to the market, to Marlborough Lines or to the Panel during the period under consideration, identified that the dominant source of the "cost savings" was a change in accounting policy which would not affect the long term earnings of the business".[54] Marlborough Lines further submitted that this accounting change made up around 30% of the increased profit, so it was misleading to imply efficiency improvements had driven the cost savings. They argued that Marlborough Lines was unable to discern the true reason for the increased profit forecast, and that they were harmed by the misinformation because it "may have affected its response to the change in the profit guidance and the resultant failure of its bid".[55] In response to this, Horizon argued that the revised profit outlook was not misleading because it was only an update to their previous statement, and was not intended to be comprehensive or to offer a detailed breakdown in the changes in financial factors. The Panel agreed that the change in accounting treatment "accounted for a material portion…of the uplift in forecast profit".[56]

The Panel considered each member of the target audience for the profit forecast, including unsophisticated investors such as Horizon's retail shareholders, sophisticated investors like Horizon's institutional shareholders (e.g. EBET), Marlborough lines, independent advisors and investment analysts and commentators. The Panel concluded that Horizon's omission caused some members of the target audience to erroneously believe that reduced spending and efficiency improvements were the main explanations for the "cost savings" mentioned in the revised outlook, therefore they could reasonably have been misled. Furthermore, the Panel found that EBET, as well as some market commentators and investors, could have been

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51 *Horizon*, above n 22, at [94].
52 *Bell Resources Ltd v BHP* (1986) ATPR 40 – 702, as cited in *Horizon*, at [96].
53 *Horizon* at [97].
54 At [104].
55 At [105].
56 At [112].

lead to the "erroneous belief that the "cost savings" referred to in the revised profit outlook announcement were wholly comprised of efficiency gains or spending reductions".[57] These audience members would have had a reasonable expectation of disclosure that the accounting treatment change was the main explanation for the revised profit forecast. The Panel found that it would have been too much to expect Horizon's shareholders to understand "the increased capitalisation of costs for internally constructed assets"[58] without this having been explained to them.

However, the Panel's conclusions on the more sophisticated members of the audience were different. For example, it found that "a competent expert adviser with access to that information would place little or no reliance on a brief market announcement when forming its own valuation opinions".[59] The Panel stated that such an advisor would not have had a reasonable expectation as to the disclosure of the change in accounting treatment, and would not have relied on such a disclosure. The Panel also considered that Marlborough Lines would not have been misled, since they had more information about the industry at their disposal. Marlborough Lines had already made clear that they considered the revised profit outlook to be "unconvincing",[60] therefore they were not led to an erroneous assumption about the cost savings. Having said that, the Panel found that Marlborough still would have expected Horizon to disclose the change in accounting treatment for internally constructed assets, as it would have helped them understand the ongoing-profitability of Horizon and was highly relevant to the takeover offer. The Panel was therefore not satisfied that Horizon's failure to disclose the change in accounting policy complied with r 64. In terms of a remedy, the Panel found that the misleading non-disclosure was remedied by the determination itself, since it made the change in accounting treatment public knowledge.

C Radius

In this decision, the Panel examined whether a director's failure to disclose information to shareholders about a potential bid amounted to misleading or deceptive conduct. The takeover involved Radius Properties Limited ("Radius Properties"), an investment company owning many assets in the aged care sector; Montagu Investment Holdings Limited ("Montagu"), a shareholding vehicle of Radius Properties; and Radius Residential Care Limited ("Radius Care"), a rest home operator leasing properties from Radius Properties. It is important to note that Radius Care and Radius Properties were not actually related companies, they just had similar names. A key fact considered by the Panel in this matter was a meeting which took place in December 2012 ("the December meeting") between Mr Cree – the chief executive, director and majority shareholder of Radius Care – and Mr Glenn, an owner of the company which managed Radius Properties. A few days after this meeting,

57 *Horizon*, above n 22, at [113]
58 At [115].
59 At [110].
60 At [117].

Montagu gave notice of its intention to purchase voting securities in Radius Properties. When it made the offer, the offer document contained the phrase “Last Opportunity to sell shares for some time?”[61] which was allegedly misleading, since certain individuals involved in the takeover may have had knowledge to the contrary; that in fact there would be another potential takeover bid that did not involve Montagu.

Complainants from Radius Care alleged that at the December meeting Mr Cree imparted Mr Glenn with important information that should have been passed on to Radius Properties' shareholders. The information related to a potential offer by Radius Care to buy shares in Radius Properties. The complainants argued that if Mr Glenn knew that Radius Care was making a bid for the assets of Radius Properties, he should have disclosed this to shareholders, and that his failure to disclose amounted to a breach of r 64. However, Mr Glenn declared that the understanding he took away from the meeting was that Radius Care's business model focused on operating rest homes, rather than owning them. After comparing Mr Glenn’s and Mr Cree’s declarations as to how each of them recalled what was said at the December meeting, it became apparent that there was some confusion as to whether any “bid” by Radius Care that was mentioned by Mr Cree was a bid for shares or a bid for assets.

Counsel for Radius properties submitted that from Mr Glenn’s point of view, he had no knowledge of Radius Care’s potential offer for Radius Properties before the offer was actually made, and that the messages he took from the December meeting did not need to be conveyed to shareholders. Counsel went on to rely on the fact that, in *Horizon*, The Panel found that "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".[62] They went on to argue that Mr Cree made statements which were imprecise and vague, so Mr Glenn could not be accused of having been told any concrete information about the bid. Because of this, Radius Properties shareholders could not have had a reasonable expectation that the statements be disclosed to them, especially because of the informal nature of the communication.

Counsel for Radius Care, however, claimed that “Mr Glenn left the December meeting aware that Radius Care was seriously considering making an offer and that such an offer would allow shareholders an alternative to the Montagu takeover offer”.[63] They submitted that Mr Glenn’s non-disclosure was misleading in terms of r 64. However, in the statement of reasons, the Panel concluded that Mr Glenn did not have enough information from the December meeting for there to be a duty for him to disclose such information to shareholders. He had declared that the understanding he took away from the meeting was that Radius Care’s business model was to operate rest homes, not own property. The Panel went on to

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61 *Radius*, above n 24, at [10].
62 At [54].
63 At [40].

state "a very general comment was made which fell short of putting Mr Glenn on notice of the potential offer".[64] The Panel came to this conclusion despite the fact that Mr Cree declared that Mr Glenn could not have had any doubt that Radius Care was contemplating making a bid for Radius Properties, and that he could not have been surprised that a bid for assets was made. Part of the reason Mr Cree's statement was described as vague, general and inconclusive was because, by his own admission, he was not certain the bank would grant Radius Care the funding required for the purchase of Radius Properties' assets. Because the Panel did not believe Mr Glenn had any material knowledge of the potential bid, it determined that Mr Glenn's omission fell short of satisfying the first limb of the legal test, i.e. he was not found to have "engaged in conduct". Furthermore, the Panel found that had Mr Glenn known Radius Care might make a bid, he would have discussed this with the board of Radius Properties.

It was also alleged that if Mr Glenn had known about Radius Care's potential bid, he would have told Mr Priscott, with whom he had a close business relationship. Mr Glenn and Mr Priscott both owned the company which managed Radius Properties' business, and both held shares in the holding company that was a majority shareholder of Montagu. The claimants alleged that if Mr Priscott was privy to this information, then the statements made to Radius Properties shareholders by Montague about there being limited liquidity opportunities were misleading per r 64. However, since Mr Glenn was found to not have sufficient knowledge about Radius Care's bid, he could not have shared such information with Mr Priscott, meaning that Montagu's conduct was also not found to be misleading or deceptive. Mr Priscott also corroborated Mr Glenn's evidence, telling the Panel that when the Montagu offer was made, he was not aware of Radius Care's impending offer for Radius Properties' assets, and that Mr Glenn had in fact told him Radius Care was not going to make a bid. For these reasons, and the reasons outlined above, the Panel's determined that neither Radius Properties, nor Montagu, had breached r 64 of the Code.

IV Misleading or deceptive conduct in consumer protection

While FT Act jurisprudence has assisted the Panel in assessing misleading conduct in Code transactions, this statute is more general in its application than takeovers regulation. The purpose of the FT Act is to protect consumers, ensure businesses compete effectively, and that consumers and businesses are able to trade with confidence.[65] The FT Act contains provisions based on the premise that businesses must provide accurate information, and not withhold important information, so that consumers can make informed decisions in the marketplace. For example, s 13 of the FT Act prohibits making false or misleading representations in connection with the supply of goods or services, such as false advertising. As mentioned, r 64 of the Code is based on s 9 of the FT Act, which prohibits misleading or

64 *Radius,* above n 24, at [98].
65 Fair Trading Act 1986, s 1A.

deceptive conduct in trade. The scope of s 9 is relatively wide;[66] and only requires that there be some relevant conduct by the person accused.[67] To prove liability under s 9, it must be shown that conduct falls within the definition of "misleading or deceptive". This definition has been the subject of extensive litigation over the years, and courts have generally been reluctant "to place glosses on the wording of the statute", preferring instead to apply "the words of the statute to the particular facts of any case".[68]

While it is an offence to contravene s 13, no such criminal offence exists in relation to misleading or deceptive conduct under s 9; only civil remedies are available. The FT Act allows courts to grant an injunction, or to order certain information be disclosed or corrective advertising be published. The court can also make other orders under s 43, including ordering refunds or return of property, or for an amount of loss or damage to be paid. The Commission has brought a select few cases before the courts to seek a declaration that s 9 has been breached. One example of this was the case of *Commerce Commission v New Zealand Nutritionals (2004*).[69] This case involved a Christchurch-based company making misleading claims about the country of origin of the imported goats' milk powder it used to make nutritional supplements and other products. It claimed the products were NZ made, when really the only transformation that took place in NZ was the encapsulation of the products. The Commission took the case to the High Court, where it was declared that New Zealand Nutritionals had contravened sections 9, 10 and 13(j) of the FT Act. The Court noted that there is no statutory definition of "misleading" or "deceptive",[70] and that s 9 is very wide in scope. It also noted that it is not necessary to prove any person has actually been misled by the conduct.[71] The Court also referenced *Godfrey Hirst*, in which it was noted that consumers are "all the consumers in the class targeted except the outliers. The "outliers" encompass consumers who are unusually stupid or ill equipped, or those whose reactions are extreme or fanciful". [72] This is relevant to the Panel's assessment of the levels of sophistication amongst market participants. Members of the target audience for statements made in the course of a takeover transaction are perhaps unlikely to be "stupid" or "ill equipped"; they are often sophisticated investors.

In enforcing r 64, the Panel has made it clear that it uses the same principles of interpretation applied by the courts in consumer protection cases. This means giving the words

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66 D Wilson "Misleading and Deceptive Conduct in Trade" in Henry Holderness (ed) *Commercial Law in New Zealand* (online looseleaf ed, Lexis Nexis) at [9.3.4].

67 *Unilever NZ Ltd v Cerebos Greggs Ltd* (1994) 6 TCLR 187 at 192; *Premium Real Estate Ltd v Stevens* [2009] 1 NZLR 148 as cited by Wilson, above n 66.

68 Wilson, at [9.3.5].

69 *Commerce Commission v New Zealand Nutritionals (2004) Limited* [2016] NZHC 832 at [67]. See also *Commerce Commission v ANZ Bank New Zealand Limited* CIV-2014-404-003181 [2015] NZHC 1168 at [20].

70 *NZ Nutritionals* at [22].

71 *Taylor Bros Ltd v Taylors Textile Services (Auckland) Ltd* [1988] 2 NZLR 1 (HC).

72 *Godfrey Hirst NZ Limited v Cavalier Bremworth Ltd* [2014] NZCA 418, [2014] 3 NZLR 611 at 20; as cited in *NZ Nutritionals*, above n 69, at [34].

"misleading" and "deceptive" their "natural and ordinary meaning of "to lead into error"".[73] The Panel has noted that "The term 'misleading or deceptive' has been subject to wide judicial consideration over many years in many cases in NZ and Australia. It appears frequently in consumer protection legislation…The term also occurs in the market manipulation provisions of the Australian Corporations Act 2001".[74] One important Australian case on misleading and deceptive conduct which is referred to in Panel decisions is *Taco Bell*,[75] in which the Court emphasised the importance of considering the target audience who might have been misled or deceived. Where the conduct is directed at a wide audience, members of this audience are going to have different attributes and varying degrees of knowledge. In this way, it is necessary to consider "…the astute and the gullible, the intelligent and the not so intelligent".[76] However, the NZ approach to this issue tends to be slightly different, in that people are required to "show a reasonable level of common sense".[77]

In NZ, arguably two of the most important cases on misleading and deceptive conduct are *Red Eagle*[78] and *Heaven.*[79] *Red Eagle* involved an aquaculture venture, where it was alleged that statements Red Eagle made to Mr Ellis about assets offered as security for a loan were misleading or deceptive. The Supreme Court emphasised the importance of looking at the particular circumstances, including the characteristics of the people who were allegedly affected by the conduct. The Court also made the point that no one needs to have actually been misled for s 9 to have been breached. Rather, all that is required is that "…if the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9. If it is likely to do so, it has the capacity to do so".[80] This notion has been adopted by the Panel in its interpretation of r 64, with it reiterating on several occasions that no one needs to have been misled, but that "this may be evidence that the conduct was misleading or deceptive".[81]

The *Heaven* case involved Mr and Mrs Heaven buying a property north of Auckland with the intention of developing it. They borrowed finance from AMP, and were under the impression that more funding would be forthcoming if required. However, AMP never intended to provide more than a single advance of funds. After the development project was unsuccessful, and they were unable to get further financing, Mr and Mrs Heaven lost around $750,000. They claimed that the loan agreement was misleading and deceptive in leading

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73 Guidance Note, above n 1, at [12].

74 Takeovers Panel "Code Word 22" (December 2007) <http://www.takeovers.govt.nz/guidance/codeword/issue-22/new-rule-64-misleading-or-deceptive-conduct/> at 1.

75 *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177.

76 *Taco Bell* at 202.

77 *Unilever NZ Ltd v Cerebos Greggs Ltd* (1994) 6 TCLR 187 at 197 as cited in *Tokeley*, above n 2, at 138.

78 *Red Eagle Corporation Ltd v Richard Ellis* [2010] NZSC 20.

79 *Heaven*, above n 42.

80 *Red Eagle*, above n 78, at [28].

81 Appendix A in *Guidance Note*, above n 1, at [7].

them to believe that they would be able to borrow more funds. In the decision, Tipping J set out a 3 step test for assessing liability under s 9, by looking at whether the conduct was capable of being misleading, whether the Heavens were misled, and whether it was reasonable for them to have been misled. He found that "all three of these steps were satisfied: the company's conduct was capable of being misleading, the Heavens were in fact misled by it and it was not unreasonable in the circumstances for them to have been misled".[82] As noted above, Counsel in the matter of *Rubicon* submitted to the Panel that a plaintiff needed to show that it was misled by conduct. However, the Panel rightly responded that this was more relevant to an assessment of damages under the FT Act, and that the nature of the conduct itself was more pertinent.

The Panel's response in *Rubicon* reflects the most up to date thinking on the issue of misleading or deceptive conduct, as set out in *Red Eagle.*[83] The *Red Eagle* decision has widely been viewed as having effectively overturned the Court of Appeal's approach *Heaven.*[84] The *Heaven* test has been criticised for focusing too much on the conduct of the claimant, since the Court considered the amount of care the claimants took to avoid being misled.[85] In contrast, the *Red Eagle* test has been described as being more objective and better aligned with the wording of s 9 than the *Heaven* test. Lindsay Trotman explains that that the Court reduced the award of damages to Red Eagle by half because of the plaintiff's "own lack of care"[86] in failing the property register to verify who the owner was. *Red Eagle* therefore established the current position in NZ, i.e. that it is more appropriate for courts to look at the amount of care taken by the claimant to avoid being misled when deciding a remedy s 43, rather than when assessing s 9 liability.

V Misleading or deceptive conduct in other market manipulation laws

One way of providing context to the Panel's approach to regulating misleading or deceptive conduct is to compare the ways in which the Panel and the FMA have enforced similar provisions relating to "misleading or deceptive conduct". The Panel and the FMA are similar in many ways in that each agency has been empowered by legislation to regulate particular types of transactions, whereas the FT Act covers unfair trade practices generally. The FMC Act is also similar to the FT Act in that it contains specific misleading conduct prohibitions, along with a general misconduct provision, and dishonest conduct can often be captured by several of these provisions.[87] This is similar to the FT Act, where s 9 is a general prohibition

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82 Lindsay Trotman "Misleading or deceptive conduct after Red Eagle - clearing up the confusion" (2014) 13 Otago LR 333.

83 *Red Eagle*, above n 78, at [28].

84 *Heaven*, above n 42.

85 Trotman, above n 82.

86 At 335.

87 Roger Wallis "Stock Market Manipulation Law in New Zealand" (July 2016) Chapman Tripp <http://www.chapmantripp.com/publication%20pdfs/2016%20PUB%20Stock%20market%20manipulation%20law%20in%20New%20Zealand%20-%20July.pdf>.

on misleading or deceptive conduct, and provisions such as s 13 cover more specific misrepresentations. The parallels between the FMC Act and the FT Act are in many ways similar to the parallels between takeovers regulation and the FT Act, with the FMA and Takeovers Panel both looking to consumer protection jurisprudence for guidance. The specialist nature of the two agencies means that various Panel and FMA decisions are analogous, and each agency enforces legislation based on the wording of the FT Act.

In 2002, the Ministry of Economic Development ("MED") undertook a review of NZ securities law. A Cabinet Paper released as part of this review noted that market manipulation creates a false impression and "undermines market efficiency through distorting prices and results in an inefficient allocation of resources".[88] MED had noted that misleading conduct in securities transactions could be covered by s 9 of the FT Act at the time. They noted that the FT Act protects consumers and "is designed to ensure that consumers receive accurate information in order to make rational choices in the marketplace".[89] In this way, the FT Act helped to rectify the problem caused by asymmetric information in financial markets. However, the possibility of a trader being liable under s 9 for misleading statements about securities depended on whether those securities fell within the definitions of goods or services. This caused uncertainty as to whether shares could be classed as goods, since goods were "generally considered to be tangible property".[90] In addition, MED made the point that s 9 breaches result in civil liability, and due to the "complex nature of manipulative practices and the costs involved in taking civil action, the provision is not likely to be a deterrent to market manipulation".[91]

MED also observed that Australia had undertaken a reform resulting in a new regulatory framework for financial services, giving the Australian Securities and Investments Commission ("ASIC") "new consumer protection responsibilities for financial services".[92] They noted that the legislative vehicle giving ASIC this power was the Corporations Act 2001 ("Corporations Act"). The Trade Practices Act 1974 – Australia's equivalent of the FT Act at the time – was amended to specifically "exclude conduct in relation to financial services".[93] MED's review resulted in NZ securities law largely aligning with the Australian approach. Tokeley also notes that the FMC Act "represents a significant shift towards the Australian legislative model",[94] and is part of an initiative to co-ordinate business law in order to strengthen trans-Tasman economic ties. This policy has resulted in NZ borrowing the wording of various consumer protection provisions from Australia, with this wording flowing through to market manipulation provisions in both securities and takeovers regulation. This

88 Office of the Minister of Commerce *Review of Securities Trading Law: Market Manipulation* (July 2003) at [8].
89 Ministry of Economic Development *Market Manipulation Law* (31 May 2002) at [118].
90 At [121].
91 At [121].
92 At [122].
93 At [123].
94 Tokeley, above n 2, at 446.

has meant "our courts are thus fortunate in being able to profit from Australian judicial authority and experience in applying the New Zealand [Fair Trading] Act".[95] This is one benefit of the Panel's approach to assessing liability under r 64; it is able to draw on a wealth of jurisprudence from both NZ and Australia in interpreting the meaning of "misleading or deceptive conduct".

There are clear similarities between the objectives of the FMC Act and those of the Takeovers Act, and the history of these two statutes is intertwined. The Securities Legislation Bill 2004 ("the Bill") amended both pieces of legislation, and created offences for market manipulation under both securities and takeovers regulation. The purpose of this Bill was to "increase the effectiveness and efficient operation of NZ's securities and takeover laws".[96]At the time the prohibition on misleading or deceptive conduct in relation to takeovers was inserted, it was noted that the prohibition "…mirrors the new prohibition inserted by the Bill in relation to trading in securities".[97] The FMC Act states that its aim is to "promote the confident and informed participation of businesses, investors, and consumers in the financial markets" and to "promote and facilitate the development of fair, efficient, and transparent financial markets".[98] As with takeovers regulation and consumer protection legislation, the FMA aims to deter and denounce conduct that threatens the integrity of the market. They have stated that market manipulation provisions "seek to ensure that the market reflects the forces of genuine supply and demand".[99] As such, it is sometimes necessary for agencies like the FMA and the Panel to ensure there is not asymmetric information held by parties to a transaction, so that the market is able to reach efficient outcomes.

Part 2 of the FMC Act aims to promote fair dealing in relation to financial products and services by prohibiting misleading or deceptive conduct and false or misleading representations.[100] It also prohibits an offeror from making a regulated offer of financial products if there is a statement in the product disclosure statement or register entry that is false or misleading. These sections "largely replicate sections 9, 10, 11 and 13"[101] of the FT Act, meaning consumer protection jurisprudence can also guide the courts in interpreting the FMC Act. Subpart 3 in Part 5 of the FMC Act also deals with market manipulation in a similar way to the Takeovers Act. Section 262 is very similar in wording to ss 44B-C of the Takeovers Act, and prohibits people from knowingly making false or misleading statements in a way that is materially misleading.

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95 *Taylor Bros Ltd v Taylors Group Ltd* [1988] 2 NZLR 1 at [39] as cited in Tokeley, above n 2, at 450.

96 NZ Parliamentary Library *Securities Legislation Bill 2004: Bills Digest 1201* at 1.

97 At 10.

98 Financial Markets Conduct Act 2013, s 3.

99 Financial Markets Authority "Notification of Warning: individual trader – market manipulation" (23 January 2015) https://fma.govt.nz/news-and-resources/enforcement-and-court-decisions/orders/notification-of-warning-individual-trader-market-manipulation/.

100 Financial Markets Conduct Act 2013, ss 19-22.

101 "Misleading or deceptive conduct, false or misleading representations, and unsubstantiated representations" (ss 19–33) in *Morison's Securities Law (NZ)* at [19.01].

Since the rules came into force, the FMA has shown that it is willing to take action against those who seek to mislead market participants. May 2016, the FMA ordered a foreign exchange educator and trader Cambrian Corporation Limited ("Cambrian") to change its marketing materials because they were misleading or deceptive.[102] Cambrian had made claims about the profitability of foreign exchange trading without properly balancing these by stating the risks involved, and the effort required to manage trading positions.[103] The FMA ordered Cambrian to amend the advertisements so that they conveyed the message that trading in foreign currency "cannot be relied upon to provide substantial profits quickly and consistently",[104] and that it is a high risk and volatile practice.

In another case, the FMA alleged that portfolio manager at Milford Asset Management ("Milford") named Mr Warminger used his position to engage in market manipulation. It was alleged that he placed trades in a certain way to create a false or misleading impression. The FMA in this case opted to take civil action against Milford, rather than criminal proceedings, and Milford agreed to pay the FMA $1.5 million. Because the FMA chosen the option of civil proceedings, rather than criminal, it was not required to "prove that Mr Warminger knew that his actions might mislead the market, only that he ought reasonably to have known this".[105] These cases show that the FMA is willing to send clear signals to market participants that misleading conduct will not be tolerated, and that its enforcement approach imports much of the thinking from fair trading jurisprudence.

There are also provisions under the Companies Act 1993 ("Companies Act") which aim to deter dishonest conduct, such as rules requiring the accurate disclosure of certain information, or prohibiting false or misleading statements. One example of this is s 377, which creates an offence for making, or authorising the making of, a statement or omission "that is false or misleading in a material particular knowing it to be false or misleading". Many other jurisdictions set out similar disclosure laws, requiring directors to be careful when making disclosures publically. In Australia, ASIC has at times been embroiled in litigation relating to companies engaging in misleading or deceptive conduct by contravening continuous disclosure provisions.[106] In NZ, the FMA has also made it clear that those who issue investment statement and prospectuses must comply with the law in their disclosure documents. These documents "must not be misleading and in relation to investment

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102 Financial Markets Authority "The Financial Markets Authority publishes its first Conduct Outcomes Report" (media release number 2017 – 05, 20 February 2017) <https://fma.govt.nz/news-and-resources/media-releases/the-financial-markets-authority-publishes-its-first-conduct-outcomes-report/>.

103 Financial Markets Authority "160520 Cambrian Corporation Ltd Direction Order" <https://fma.govt.nz/assets/Orders-and-outcomes/160520-Cambrian-Corporation-Ltd-Direction-Order.pdf> at [1].

104 At [3].

105 Roger Wallis, above n 87, at 1.

106 Gill North "Companies Take Heed: The Misleading or Deceptive Conduct Provisions Are Gaining Prominence" (2012) 30 Company and Securities Law Journal 342.

statements, that they are not likely to deceive or confuse",[107] and the overall impression they create must be an accurate representation of the investment offer, while balancing the risks and benefits associated with that offer.

VI Misleading conduct in takeovers in other jurisdictions

The final step in examining the wider legal context is to discuss some of the rules and decisions in other jurisdictions. This will give perspective to the Panel's application of r 64 by contrasting it with the experiences regulating misleading conduct in takeovers overseas. The focus for this comparison will largely be on Australia and the UK since NZ's takeovers regime is similar to that in other Commonwealth jurisdictions. It makes sense to look to Australian law as a starting point, since NZ commercial law has tended to follow the developments in Australia over the years. In addition, when discussing the meaning of "misleading or deceptive conduct" the Panel has explicitly referred to Australian legislation, such as the Australian Competition and Consumer Act 2010 and the Corporations Act.[108] The Panel has also observed the ways in which Australian courts have applied consumer protection tests when looking at market manipulation, and that it would be reasonable to expect NZ courts to employ similar reasoning. It will also be useful to look at the approach in the UK, given its legal system was largely adopted by NZ, yet its takeovers regime is different enough to serve as a useful comparison.

However, it is important to acknowledge that the economic and political thinking of each jurisdiction influences its particular stance on truth in takeovers, and that "every approach emerges from its own unique circumstance".[109] Each jurisdiction will have its own regulatory framework for commercial law, based on certain market characteristics, business ethics, economic issues, types of investors and target audiences that are unique to that country. While it is useful to compare how misleading conduct in takeovers is regulated in NZ with similar experiences overseas, this can only go part of the way towards an understanding of the Panel's interpretation of r 64. Each of the three cases that have come before the Panel have been coloured by the economic conditions and ways of doing business in New Zealand. While the interpretation of "misleading or deceptive conduct" in Australia has affected many areas of the law in New Zealand, and takeovers regulation in New Zealand is largely based on the UK Code, the Panel has not tended to reference decisions from these jurisdictions extensively in applying r 64. Instead, it has tended to draw on precedent from FT Act cases.

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107 Financial Markets Authority "Guidance Note: Effective Disclosure" (June 2012) <https://fma.govt.nz/assets/Guidance/120601-Guidance-Note-Effective-Disclosure.pdf> at [20].

108 Guidance Note, above n 1.

109 Say-Kit Soo "Truth in Takeovers: A Discussion on the Policy and its Application in Australia" (2013) UNSWLJ Student Series No 13-05 at 14.

A Australia

Takeovers regulation in Australia is underpinned by several principles that are largely similar to those which underpin the takeovers regime in NZ, e.g. those set out in s 20 of Act. In Australia, s 602 of the Corporations Act stipulates that the purposes are to ensure that the acquisition of control "takes place in an efficient, competitive and informed market",[110] and that shareholders "are given enough information to enable them to assess the merits of the proposal"[111] and "have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal".[112]

ASIC considers the issue of "truth in takeovers" in relation to statements made in the course of takeover bid, and is mainly concerned with last and final statements.[113] Last and final statements involve a market participant stating "that they will or will not do something in the course of the bid".[114] Like the Panel in NZ, ASIC is able to take regulatory action against market participants who engage in misleading or deceptive conduct. ASIC's regulatory guide on truth in takeovers explains those who qualify last and final statements must do so clearly, and that they will be held to such statements as they are promises. This is so that shareholders of the target company can rely on market participants to act consistently with the promises they have made, so that they are not coerced into accepting an offer early, or otherwise led into error. This approach to last and final statements is similar to the view in NZ, where the Panel has indicated that "last and final statements must be adhered to as to a promise",[115] unless they are clearly and unequivocally qualified. Further, the NZ Panel has made it clear that any misleading information in the market, such as a departure from a last and final statement, will need to be corrected promptly.

The Australian Takeovers Panel ("Australian Panel") plays a complementary role to ASIC by resolving takeover disputes,[116] and ensuring that "persons are held to statements that they have made in the context of a takeover bid".[117] The Australian Panel can declare circumstances to be unacceptable where the Corporations Act has been breached.[118] For example, circumstances may be deemed unacceptable if someone has departed from a last

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110 Corporations Act 2001 (Cth), s 602(a).
111 Section 602(b).
112 Section 602(c).
113 Australian Securities and Investments Commission "ASIC Updates 'Truth in Takeovers' Policy'" (media release 02/305, 22 August 2002) as cited in Soo above n 109.
114 Australian Securities and Investments Commission "Regulatory Guide 25, Takeovers: False and misleading statements" (22 August 2002). <http://www.asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-25-takeoversfalse-and-misleading-statements/> at 2.
115 Guidance Note, above n 1, at [5.3].
116 See "Memorandum of Understanding between the Australian Securities and Investments Commission and the Executive of the Takeovers Panel" (27 March 2017) <https://asic.gov.au/about-asic/what-we-do/our-role/other-regulators-and-organisations#takeovers>.
117 Emma Armsom "Certainty in decision-making: An assessment of the Australian Takeovers Panel" (2016) 38 Sydney Law Review 369 at 375.
118 Regulatory Guide 25, above n 114.

and final statement, has made a misleading or deceptive statement in a document, or has otherwise misled market participants. As in NZ, the question of whether or not conduct is misleading or deceptive is "viewed in light of the type of person who is likely to be exposed to that conduct…what the statement conveys to the ordinary investor".[119] On the issue of departures from no increase statements, ASIC and the Australian Panel have both noted that this sort of behaviour is prohibited because otherwise the maker of the statement could entice shareholders into accepting a deal early, and then compensate the shareholder later by improving the consideration "only if necessary for the bid to succeed".[120] ASIC make the point that offering compensation would not sufficiently address the regulatory concerns, and that this strict approach to no increase statements accords with that contained in the UK Code.

Say-Kit Soo notes that Australia's "truth in takeovers" policy originated in 1992, when a statement was made during a takeover bid asserting that there would be no price increase or time extension to the bid. This assertion was later departed from and the shares were purchased at a higher price,[121] leading ASIC's predecessor agency to accuse the maker of that statement of having "little regard for the spirit of the Corporations Law",[122] and then releasing a strict truth in takeovers policy.[123] The truth in takeovers policy is based on the two notions of market efficiency and market confidence; where an efficient market is characterised by information and competition, and information and investor protection support market confidence.[124] The policy has been described as balancing free market forces against fairness and economic equality,[125] which reflects the need to rectify situations where market participants have asymmetric information about a proposed transaction. The importance of information being transparent, truthful and accurate is evident in several Australian decisions.

Soo summarises several of the Australian Panel's decisions in which the truth in takeovers policy has been applied to illustrate the consistency of its approach, and how this approach has evolved over time. For example, in *Taipan Resources* the Panel reiterated the fact that statements about present intention must be explicit, and that offering compensation for

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119 *Annand & Thompson Pty Ltd v TPC* (1979) 25 ALR 91, 102; *Siddons Pty Ltd v Stanley Works Pty Ltd* (1991) 99 ALR 497, 501; as cited in Regulatory Guide 25, above n 114, at 7.

120 Regulatory Guide 25, at 8.

121 Braddon Jolley and Jaclyn Riley-Smith, "Truth in Takeovers – 'No; ifs; no buts'" in Jennifer G Hill and RP Austin (eds*) The Takeovers Panel After 10 Years* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2011) as cited in Soo, above n 109.

122 Australian Securities Commission "Rossington Holdings Pty Ltd Takeover Bid for ACIL" (media release 92/86, 21 May 1992) as cited in Soo, at 2.

123 Australian Securities Commission "Superseded Policy Statement 25 – Takeovers: false and misleading statements" (4 June 1992) as cited in Soo.

124 Soo, above n 109.

125 Leigh Masel "The National Companies and Securities Commission and the Capital Markets" (presented at Australian Finance Conference, Canberra, 2 June 1981) as cited in Chris Maxwell "The New Takeover Code and the NCSC: Policy Objectives and Legislative Strategies for Business Regulation" (1982) 5 University of New South Wales Law Journal 93 as cited in Soo.

departing from statements did not "make coercive or misleading conduct acceptable".[126] At the same time, the Australian Panel in this decision did note that the truth in takeovers policy was not an "absolute rule",[127] and that there could be instances where it would be unreasonable to hold a party to a last and final statement. The Australian Panel also set out what it would consider when deciding whether unacceptable circumstances should be declared, including whether clear qualifications were made, how precise the statement was, any new circumstances, the actions of other people, and later statements made by the bidder. Lastly, Soo states that this appeal upheld ASIC's decision that "in the interests of an informed market it should be held to its statement".[128]

In *Australian Leisure*, Soo argues, despite endorsing the truth in takeovers policy, the Australian Panel failed to apply it.[129] In this matter, Bruandwo announced that it was making a bid that would expire at 7 pm that day unless it had acquired a 20% relevant interest in the target company. It also stated that if it did manage to reach a 20% interest by the cut-off time, it would raise the bidding price, and that it would raise the price even further should it attain a 50% relevant interest. However, Bruandwo then applied for and was granted a one week extension by the Panel, meaning there were new dates for the end of the offer period. Soo explains that on the day after the announcement, "Bruandwo made a similar announcement that updated the market of the new dates, but also stated that it could raise the price regardless of whether the relevant interest had been reached, as long as Bruandwo was satisfied it would be reached".[130] Essentially, this meant that Bruandwo was departing from its original statement. A rival bidder tried to argue that the Panel should declare these circumstances to be unacceptable, since Bruandwo had departed from its last and final statement. While acknowledging the importance of market participants not departing from last and final statements, the Panel found because of the new dates, the landscape in which Bruandwo made the original statement had "fundamentally changed",[131] therefore it was warranted in departing from that statement.

Soo goes on to discuss the *Summit Resources* decision, in which the Australian Panel declared unacceptable circumstances after one party to the transaction, Paladin, departed from a statement. Summit Resources had announced that it was transferring shares to Areva, and at the same time Paladin's board rejected a takeover bid for Summit Resources. Paladin announced that it would vote its shares in favour of Areva, but subsequently "informed Summit it would not vote in favour of the Areva transaction".[132] Soo explains that in this decision the Australian Panel endorsed the truth in takeovers policy, describing it as a

126 *Taipan Resources NL 06* [2000] ATP 15 at [35-36] as cited in Soo, above n 109, at 7.
127 *Taipan Resources* at [38].
128 At [46].
129 *Australian Leisure & Hospitality Group Ltd 03* [2004] ATP 25 as cited in Soo, at 8.
130 *Australian Leisure* at [24]-[25].
131 At [51].
132 Soo, above n 109, at 9.

"fundamental tenet of the Australian takeovers regime" and that it would take a strict approach to "unwarranted departures".[133] However, it is slightly mystifying why the Australian Panel described the policy using such strong terms and declared the circumstances in this case to be unacceptable, yet failed to make any orders holding Paladin to its previous statements "as the policy requires".[134] The reasons given were that there was no evidence to prove any shareholders would "actually avail themselves" of an order of withdrawal rights,[135] which Soo describes as a weak argument. Soo then compares the *Summit Resources* decision to that of *Rinker*, which came before both ASIC and the Australian Panel, arguing that the truth in takeovers policy was again endorsed but not properly applied. Soo makes the argument that in *Rinker*, neither agency applied the policy of not recognising compensation as remedying regulatory concerns about departures from last and final statements, and that they instead looked favourably upon the bidder for increasing its consideration for the takeover bid. This is described by Soo as a clear example of the tension between the need to uphold the integrity of the market while also ensuring the market is competitive and informed.

B United Kingdom

In the UK, the City Code on Takeovers and Mergers ("UK Code") forms the basis of takeover regulation. It was developed in 1968 "to reflect the collective opinion of those professionally involved in the field of takeovers as to appropriate business standards and as to how fairness to shareholders and an orderly framework for takeovers can be achieved".[136] The central objectives are similar to those set out in s 20 of the Takeovers Act in NZ, with the UK Code aiming "to ensure that shareholders are treated fairly, are not denied an opportunity to decide on the merits of a takeover".[137] These objectives form the basis of the Code, along with six General Principles which govern the conduct of participants in takeover transactions.

The UK Code deals with "unacceptable statements" in rule 19.3, which stipulates that parties to an offer "must take care not to make statements which, while not factually inaccurate, may be misleading or may create uncertainty".[138] It refers to statements about the level of support an offer has from shareholders, and stresses the importance of such statements being verified. A practice statement on rule 19.3 also mentions the consequences of inaccurate suggestions about offers, as these could create a false market for securities.[139] Rule 19.1 of the UK Code also sets out general rules relating to the accuracy of information, reiterating that any

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133 *Australian Leisure* at [22] as cited in Soo, above n 109, at 9.
134 *Australian Leisure* at [5].
135 At [38].
136 The Panel on Takeovers and Mergers (UK) "The Takeover Code" (2008-2018) <http://www.thetakeoverpanel.org.uk/the-code/download-code>.
137 "The Takeover Code".
138 The Panel on Takeovers and Mergers (UK) *The City Code on Takeovers and Mergers* (12th ed, 2011), r 19.3.
139 *The City Code* at "Practice Statement No 19".

"language used must clearly and concisely reflect the position being described and the information given must be adequately and fairly presented". These rules send a clear signal to those engaging in takeovers that misleading or deceptive conduct will not be tolerated. The UK approach to no increase statements is strict in that it holds bidders to unqualified statements unless "wholly exceptional circumstances" are present.[140]

An example of how strict the UK Code is can be found in the case of China General Nuclear Power Group Uranium Resources Co. Ltd ("CGNPC-URC") and Kalahari Minerals PLC ("Kalahari"),[141] in which the massive earthquake in Japan on 11 March 2011 affected a takeover bid. The boards of CGNPC-URC and Kalahari had made an announcement about a possible offer on 7 March 2011. However, following the earthquake, the parties to the transaction agreed to revise the share price – 270 pence per share, down from the original 290 pence per share. They asked for the UK Takeovers Panel ("UK Panel') to consent to this new share price because of the effect the earthquake had had on uranium production companies in Japan like Kalahari. Initially, the Panel Executive ("the Executive") ruled that CGNPC-URC was not permitted to announce an offer at this price because the impact of the earthquake did not constitute "wholly exceptional circumstances".[142] While it was not disputed that an earthquake of this magnitude, along with the devastating effect it had on the Fukushima nuclear power plant, constituted "exceptional and unforeseeable events",[143] it did not follow that the Executive considered these events to be "wholly exceptional circumstances".

The Executive refuted the argument that because Kalahari's board consented to the lower price this could be seen as an acknowledgement of the significant degree to which the circumstances surrounding the takeover offer had changed. Rather, it considered that because the parties negotiated to reach an agreement on such a small reduction in price – 20 pence per share, or around a 7% discount – this "was compelling evidence to demonstrate that the relevant circumstances were not wholly exceptional".[144] Had the events truly been exceptional, a more substantial discount would have been agreed. The Executive also discussed the importance of the fact that CGNPC-URC had not reserved the right to change the price in their announcement, i.e. they had not qualified their statement when they announced their intention to takeover Kalahari at 290 pence per share. Had such a qualification been made, the Executive stated that the 270 pence offer would have been permitted. However, no such reservation was made "because the Kalahari board wished to send a clear public message that it would not contemplate any further price reduction", therefore both parties must have known "they were limiting their flexibility in the event of

140 Regulatory Guide 25, above n 114, at 8.
141 The Panel on Takeovers and Mergers (UK) Hearings Committee *Possible Offer by CGNPC Uranium Resources Co. Ltd for Kalahari Minerals plc* (2011/11).
142 At [10].
143 At [30].
144 At [30].

any unforeseen events".[145] The change in price was therefore rejected by the Executive, and the parties appealed this decision.

Upon examination of this case on appeal, the Code Committee ("the Committee") looked at the fact that CGNPC-URC had not reserved the right to change their initial offer. On the subject of qualifying statements, the Committee made it clear that when making an announcement about a potential offer, a company should be able to reserve the right to change the price of an offer in particular circumstances. These circumstances need to be clearly specified in the qualification when the announcement is made, in order to address any concerns about lack of certainty in the market. However, an offeror is not "free to specify any matter whatsoever"[146] in these qualifications, since this would clearly jeopardise the principle of certainty. Rather, the Committee has stressed the importance of any reservation being "clear and unambiguous"[147] and that "the fulfilment of the reservation should not depend on the subjective judgement of the offeror or be otherwise within the offeror's control".[148] There needs to be certainty about the situations in which the initial value of the offer could be set aside for the statement to reach the Committee's standards. In *Kalahari*, no such clear or unequivocal reservation statement was made about the circumstances in which the offer price might change.

The Committee in *Kalahari* considered the arguments for and against allowing a party to a takeover transaction to make a lower offer for the target company than what was originally intended. This involved striking a balance between letting shareholders make their own decisions as to the merit of a proposal, whilst also ensuring they are able to rely on statements made in the marketplace being accurate. Arguments in favour are based on the notion that shareholders in the target company should have the possibility of at least considering the offer, since the higher offer price is no longer on the table. However, it can also be argued that in situations such as these a bidder could just announce at a higher price to "derive some benefit from doing so",[149] which goes against the principle of maintaining "fair and orderly markets".[150] The Committee went on to state that this principle is crucial to the proper functioning of takeover bids, and that the UK Code should prevent "the market being prejudiced by misleading statements or a lack of certainty",[151] such as instances where an offeror changes their offer to a lower value. To ignore this principle, or to allow it to be outweighed by competing principles, would be to do a disservice to shareholders by undermining the integrity of the market.

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145 *Kalahari,* above n 141, at [30].
146 *The City Code* at [4.1.6] as cited in *Kalahari,* at 7.
147 At [4.1.6].
148 At [4.1.6].
149 At [4.1.3].
150 At [4.1.3].
151 At [4.1.4].

After weighing up the argument for and against allowing a bidding company to change their offer, the Committee in *Kalahari* decided that certainty in takeovers was more important than any benefits that might arise from the offer changing. It also noted that "it is of the first importance to the maintenance of market integrity, itself one of the key objectives of the Code, that the market can rely upon public statements made in bid situations".[152] This rationale underpins many rules contained in the UK Code. CPNPC-URC and Kalahari had opted to include the price of 290 per share in the announcement, and failed to expressly reserve the right that this might be reduced following negotiation between the boards of the two companies. The Committee found this to be "a deliberate decision of the parties to announce the proposed price and to provide no mechanism for dealing with circumstances in which agreement might be made to reduce it".[153] It was also noted that the impact the earthquake had on Kalahari's share value was uncertain since some time had passed since the events, but that the parties themselves had not assessed the impact as material since only a slight reduction in price was agreed. For these reasons the Committee unanimously dismissed the appeal.

The *Kalahari* determination has also been analysed by comparing it to the likely outcome that would have resulted in an equivalent situation in Australia. Karen Evans-Cullen and Adam Foreman make the point that "While Australia's takeover rules could similarly prevent a prospective bidder from changing its offer price following an unqualified statement as to price, we do not have anything equivalent to the UK's … 12 months quarantine period".[154] This comment is alluding to the fact that after CGNPC had made its "firm" offer, it was prevented from making a lower bid for the next 12 months. The authors compare the UK approach to the Australian approach, explaining that ASIC's truth in takeovers policy regards departures from unqualified last and final statements as being misleading or deceptive, as noted above. This approach has the benefit of encouraging shareholders in the target company from accepting the current bidding price. This is because the regulatory framework gives them some assurance that the offeror cannot renege on their initial bid unless they have expressly reserved the right to do so. However, the authors criticise the Australian approach at the time, accusing ASIC of not saying enough about what would happen in the case of "an unforeseen material change"[155] such as the earthquake in the Kalahari example. They claim that there is confusion about when a bidder is allowed to respond to such an unanticipated and dramatic change in circumstances by altering its offer price.

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152 *Kalahari,* above n 141, at [34].

153 At [35].

154 Karen Evans-Cullen and Adam Foreman "Truth in takeovers: walking a wobbly line" Lexology (14 November 2011) <https://www.lexology.com/library/detail.aspx?g=5940eeea-7a35-493e-b9e7-7a112199d0ab>.

155 Evans-Cullen and Foreman.

Another UK example where a party made controversial statements involved an offer for LASMO plc ("LASMO") made by Enterprise Oil plc ("Enterprise").[156] After considering previous acquisitions Enterprise had made, LASMO issued a document claiming that the accounting treatment Enterprise had used breached UK Accounting Standards. LASMO claimed that the contravention had arisen because of the way these past acquisitions were accounted for, in that Enterprise had failed to record the asset purchases at the prices paid for them. The Executive made the point that it would not be appropriate for it to comment on whether the relevant accounting standards had been breached, but that parties to a takeover were perfectly within their rights to raise questions about accounting treatment. Moreover, the issue before the Executive was whether LASMO breached the former General Principles 5 and 6 of the UK Code. Enterprise contended that the accounting analysis in the document was not prepared to this standard, causing LASMO to "mislead shareholders or the market".[157] The Executive went on to stress that when a takeover offer is contested, there will inevitably be a debate involving the implications of any analysis, but that any such debate should not involve claims or allegations that are provocative, excessive or emotive. In order to avoid making such a claim, LASMO should have put forward "the possibility of alternative views" and "presented a more fair and balanced view to shareholders."[158] The Executive asked LASMO not to repeat its allegations in such strong terms, but on the whole was not satisfied that LASMO breached the Code by making misleading statements.

At the time the *Enterprise* matter came before the Executive, General Principles 5 and 6 were two of the principles underpinning the UK Code. General Principle 5 stipulated that any document released by an offeror advising or informing shareholders must be "prepared with the highest standards of care and accuracy". General Principle 6 stressed the importance of parties to an offer using "every endeavour to prevent the creation of a false market in the securities of an offeror or the offeree company" and ensuring "statements are not made which may mislead shareholders or the market".[159] This rule aimed to afford protection to those with a vested interest in takeover transactions, such as shareholders, by upholding market transparency. The UK Code has subsequently been amended and the General Principles have been redrafted, but rules 19.1 and 19.3 mentioned above deal with misleading conduct and inaccurate statements in a similar way.

Another UK Panel decision that looked at alleged non-compliance with General Principles 5 and 6 was the Great Universal Stores plc ("Great Universal") and Argos plc ("Argos") in 1999.[160] In this matter, Argos had allegedly engaged in misleading conduct by stating "Argos will be rolling out nationally a full home delivery service in 1999".[161] Great Universal

156 The Panel on Takeovers and Mergers (UK) *Enterprise Oil plc offer for LASMO plc* (1994/4).
157 *Enterprise*, above n 156, at 2.
158 At 3.
159 At 4.
160 The Panel on Takeovers and Mergers (UK) *The Great Universal Stores plc Argos plc* (1999/4).
161 At [4.2].

claimed that this statement was misleading or factually inaccurate since "no binding agreement existed"[162] between Argos and the home delivery service company. The Panel, however, took a wider view of the conduct, and considered the fact that Argos' business plans did include a home delivery service. There was evidence that Argos had conducted research into the feasibility of this venture, had discussed the plans with its Board, and had long-standing commercial relationship with the delivery company. On the whole, the Panel considered the use of the word "will" to be over-confident if considered in isolation, but that there was "no doubt that, as a matter of commercial reality, the Directors of Argos fully believed that…the planned Home Delivery service would be rolled out during 1999".[163] The Panel therefore concluded that Argos' statement was not misleading nor factually inaccurate, since they genuinely believed the rollout would take place as promised. For this reason, the appeal was unanimously dismissed.

C Comparison with New Zealand takeovers regulation

Like the rules in NZ, Australia's policy is based on the premise that investors should be able to trade with confidence, have access to full and accurate information, and that those who make statements should assume the risk for doing so. However, the Australian Panel has not been entirely consistent in its approach to applying the truth in takeovers policy, and it is unclear exactly what its approach is. To solve the problem regarding the lack of certainty around how ASIC and the Australian Panel would approach the *Kalahari* scenario, Evans-Cullen and Foreman recommend either guidance from the courts or law reform. They claim that it is highly unlikely that the Australian Parliament would narrow "the scope of the misleading and deceptive conduct provisions in our corporations and financial services legislation".[164] In the absence of such a reform, the authors argue that if ASIC were to take a test case that would help to promote certainty.

It could be argued that there is a similar problem in NZ, in that Parliament has been unwilling to define what "misleading" means in our market manipulation statutes. This has meant that regulatory bodies such as the Panel are forced to rely on consumer protection jurisprudence to guide their interpretation. However, there have only been three alleged breaches of r 64 before the Panel, and none before the courts under ss 44B-C of the Takeovers Act, so there is not nearly as much precedent to examine as there is in Australia. While a degree of uncertainty remains as to the definition of "misleading or deceptive conduct", it could not be said that the NZ Panel is as inconsistent in its application of r 64 as the Australian Panel or ASIC; it has simply not had much of a chance to demonstrate its approach. The NZ regulatory framework is at least simpler than that of Australia, where these two agencies share jurisdiction for regulating misleading conduct in takeovers. The framework in NZ is

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162 *Great Universal*, above n 160, at [1.2].
163 At [4.3].
164 Evans-Cullen and Foreman, above n 154.

likely to provide market participants with more certainty as to the possible regulatory approach, and is less likely to result in inconsistencies between agencies.

Furthermore, on the topic of last and final statements, the NZ Panel has emphasised that these can be departed from if they are qualified, but that such a qualification "must be clear and unequivocal".[165] Again, this could be described as being consistent with the UK Panel's approach in *Kalahari.* The Panel has also noted that if the party fails to qualify a last and final statement, the Panel will ask whether the intention was for that statement to be unqualified.[166] The aim of this is to put the party on notice that they must either adhere to the unqualified statement, or qualify it in a timely fashion. If the Panel becomes aware of a departure from a last and final statement, it may issue restraining or compliance orders, or perhaps request the Court to order unwinding of the transaction.[167] The justification for such a strict approach in holding parties to a takeover transaction to last and final statements is that "the integrity of information in the market must be upheld, so that market participants can rely on that information".[168] Again, similarities can be drawn between this approach and that taken by the UK Panel in maintaining the integrity of markets, as noted above with reference to *Kalahari*.

Situations such as that of *Kalahari* would be dealt with by r 64 of the Code in NZ, which aims to ensure parties who make last and final statements do not depart from those statements. While there have not been any cases before the Panel in NZ that are directly analogous to that of *Kalahari*, the Panel has discussed the issue to a limited extent. One example of this was the Panel's consideration of the matter which involved Olam International Limited ("Olam") making an offer for all the shares it did not already control in NZ Farming Systems Uruguay Limited in July 2010.[169] In this example, Olam stated that should the offer be made unconditional, a higher offer would not be made until after 31 March 2011. Olam then made a follow-on offer after this statement, therefore there was no inconsistency with its statement. The Panel has made it clear that under r 64, "an offeror cannot undertake a follow-on offer if it has previously made an unqualified public statement that it had no intention of doing so". This is because this behaviour is inconsistent, and "would indicate that the offeror had misled the market when it issued its public statement".[170] However, as the Executive and Committee noted in *Kalahari*, in the UK an offer can be departed from if the offeror expressly reserves the right to do so. This is also true in NZ, where an offeror is able to publicly state "that it will, or will not, make a follow-on offer",[171] and would then only be allowed to engage in conduct consistent with this statement.

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165 Code Word, above n 74, at 2.
166 At 2.
167 At 3.
168 At 3.
169 Takeovers Panel "Further Technical Issues with Takeovers Code: a Consultation Paper Issued by the Takeovers Panel" (July 2011) at [68].
170 At [68].
171 At [72].

The Panel has explained that follow-on offers made soon after an earlier offer, as in *Kalahari* and other examples from abroad, have so far been relatively rare in NZ. One example of this in NZ was when Rank Group Investments Limited ("Rank") made an offer to takeover Carter Holt Harvey Limited ("CHH") in February 2006. Rank initially offered to pay $2.50 per CHH share, but later revised that to $2.75 per share. In this matter, the Panel could not apply r 64, since it was not yet enacted. Instead, it looked at whether shareholders had "sufficient information on which to decide for themselves the merits of a takeover offer",[172] and whether a reasonable amount of time is allowed for this process. On its general approach to dealing with situations such as this, the Panel has made several statements that would tend to indicate that it would take a similar approach to the UK Panel. For example, it has noted that follow-on offers, where a different price to the original offer is included in a later offer, can mean that the "remaining shareholders may consider the follow-on offer to be unfair if the earlier offer had had a higher price. Conversely, those former shareholders in the target company who had accepted an earlier offer may consider themselves disadvantaged if the offeror makes a subsequent offer at a higher price."[173]

It is apparent from the examples above that approaches to misleading or deceptive statements, such as unqualified departures from last and final statements, differ slightly from one jurisdiction to the other. However, the UK and Australian approaches to regulating such conduct are not too dissimilar from one another, nor from the NZ approach. Soo describes the UK approach as strict, in that it "binds bidders to last and final statements unless "wholly exceptional circumstances' are present",[174] as illustrated above. The Australian policy is described as being not so extreme, with Soo criticising its ambiguity and suggesting that at least the UK's strict approach gives market participants a degree of certainty. The NZ approach is probably more aligned with the Australian approach than that of the UK, since the Panel's interpretation of misleading or deceptive conduct is largely similar to methods used in Australia. However, the NZ regulatory framework is perhaps better equipped than that of Australia to provide certainty as to how misleading conduct will be regulated, as mentioned above.

The exploration of the different methods to regulating dishonest trade practices in other jurisdictions, such as Australia and the UK, has helped put the NZ Panel's approach into perspective. The examples of how the Australian Panel has dealt with departures from last and final statements show that it has at times deviated from a strict application of the truth in takeovers policy, or has endorsed the policy but not applied it. The main lesson that can be taken from this comparison is that it is a difficult task for takeovers regulators to stick to a consistent approach. While this analysis has not shed much light on whether the Panel places

172 "Further Technical Issues", above n 169, at [26].

173 At [73].

174 The Panel on Takeovers and Mergers (UK) *The City Code on Takeovers and Mergers* (10th ed, 2011), rules 2.4(c), 31.5, 32.2 as cited in Soo, above n 109, at 13.

much weight on consumer protection jurisprudence in applying r 64, it has shown that regulators in other jurisdictions are pursuing similar goals to the NZ Panel. In particular, the equivalent agencies in Australia and the UK seek to promote fairness, competition, transparency, and shareholder autonomy. In this way, the regulation of dishonest conduct in these jurisdictions also aims to rectify the problem caused by asymmetric information.

VII Conclusions

As can be seen from the discussion above, many laws in NZ and abroad prohibit dishonest conduct in trade. This includes sanctions on statements or omissions that are false, misleading, deceptive or inaccurate; lead market participants into error; or otherwise impinge on the integrity of the market. Rule 64 of the Code aims to prevent such conduct, and shares many similarities with the wording of s 9 of the FT Act, as well as other market manipulation laws. The crossover in the wording of these provisions has meant that agencies with a relatively narrow regulatory remit, such as the Panel and the FMA, have been able to draw on FT Act case law to guide their interpretation of "misleading or deceptive conduct". However, there is a question as to whether agencies such as this should rely so extensively on the jurisprudence set out under a different statute.

The arguments as to whether the Panel's interpretation of r 64 is adequate can be framed as two sides of a debate regarding the appropriateness of transplanting the jurisprudence from one area of the law to another. On one hand, it could be argued that the Panel is correct in strictly applying FT Act case law to its decisions on potential breaches of r 64. This is because the premise of market manipulation laws, such as the prohibition on misleading conduct in takeovers, financial markets and ordinary consumer transactions, is the same. That premise is the need to solve the problem caused by the asymmetric nature of information held by partiers to a transaction. Such asymmetries bring about an inefficient allocation of resources, since they affect a purchaser's willingness to pay. An imbalance in the amount of information held by each party is problematic in cases where inaccurate, misleading or deceptive statements or omissions are made. This is because misleading conduct brings about a false market for whatever good, service, share or asset is being traded. It therefore makes sense that the Panel, as well as the FMA, have interpreted market manipulation laws in line with the approach employed by the courts under equivalent sections of the FT Act.

However, there is also a compelling counter-argument. Proponents of this side of the debate would criticise the Panel's stance on misleading conduct as being too reliant on the interpretation of a similar provision in a very different statute. Such an argument would be based on the fact that the FT Act and takeovers regulation have markedly different purposes and protect different classes of market participants. As mentioned, the purpose of the FT Act is simply to protect consumers and to strengthen confidence in the market. On the other hand, the purpose of the Takeovers Act is far more complex, with multiple limbs requiring the

Panel to balance competing objectives. This means providing shareholders with the opportunity to assess the merits of a proposal and ensuring the fair treatment of shareholders, whilst also encouraging competition for control of Code companies and the efficient allocation of resources, among other objectives.

Takeovers regulators in Australia and the UK enforce similar laws, in which concepts of promoting competition, shareholder decision-making and informed market participation underpin legislation. Striking a balance between these competing objectives can prove difficult, especially in cases with complicated facts, as illustrated when the Panel considered the matters of *Rubicon, Horizon* and *Radius*. However, expert agencies like the Panel and FMA, and agencies such as ASIC, the Australian Panel and the UK Panel overseas, were created in order to regulate conduct in very specific markets. The NZ Parliament made a conscious choice to transplant the wording of the FT Act into the Takeovers Code and Act, and the Panel has shown that it respects that choice by following the guidance set out in consumer protection jurisprudence.

It could also be claimed that those engaging in misleading or deceptive conduct in the course of a takeover bid should be held to a lower standard than traders who mislead consumers. This is because those who take part in takeover transactions are likely to be more sophisticated market participants, therefore less in need of protection by regulatory bodies. Market participants who have been allegedly misled will often have more insight into the industry and will be better resourced, thus will be in a better position to assess for themselves the validity of any statements made. In this way, asymmetric information is more likely to be a problem in consumer transactions than takeover transactions, since consumers are often ill-equipped to undertake market research or analysis. However, this argument proves more difficult in cases involving omissions or silence, given the difficulty of verifying a statement when information is missing.

The Panel has also demonstrated that it is willing to interpret the "target audience" limb of the test as encompassing all members of that audience, and their varying degrees of sophistication and knowledge. It has taken into account the degree of information asymmetries between various investors and traders, and has responded appropriately where some members of the target audience have needed more protection from misleading conduct. In this way, the approach taken from s 9 cases has served the Panel well, since it is able to tailor its enforcement response depending on the target audience in question. As such, it has been able to reach the right outcome in each case, and send a clear signal to market participants that they must think about how the information broadcast to the market will be construed. The argument in favour of transplanting the FT Act jurisprudence to the interpretation of r 64 and other market manipulation provisions is much more compelling than arguments to the contrary. As the Panel is given more opportunities to enforce misleading or deceptive conduct, it is likely that it will move towards a clearer position.

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