

NZAI - Board Protocols (for takeover offers and schemes of arrangement)

1. Introduction

This document outlines the protocols and procedures to be followed if:

- 1.1 **Protocol A:** there is an unexpected takeover offer for NZ Automotive Investments Limited (**NZAI** or **the Company**) under the Takeovers Code; or
- 1.2 **Protocol B:** there is an approach for a potential takeover or merger (including by way of a scheme of arrangement under Part 15 of the Companies Act 1993).

It is expected that NZAI's compliance with the requirements of the Takeovers Code and the relevant provisions of the Companies Act and oversight of any takeover/merger process will be supervised by a sub-committee of independent directors (**Takeover Committee**). The appointment of the Takeover Committee will be considered at the time of offer based on any conflicts of interest.¹ In the absence of any such conflicts it is expected that the sub-committee will include the chairperson of the Board (**Chair**) and the Chair of the Audit, Finance and Risk Management Committee.

All announcements by the Company in relation to any takeover/merger offer under these protocols (including the scheduled market announcement) and all information provided by the Company to its shareholders about the offer, must in each case be sent to the Takeovers Panel as well as NZX.

2. Protocol A – Unexpected Takeover Notice Received

The Board (and senior management) will apply this Protocol A on receipt of a notice of intention to make a takeover offer pursuant to rule 41 of the Takeovers Code (**Takeover Notice**)² by the Company:

- 2.1 Immediately take the following first steps:
 - 2.1.1 Notify to NZX that the Takeover Notice has been received and send to NZX (electronically) a copy of the Takeover Notice and the documents that accompanied it.
 - 2.1.2 Call a trading halt if the Takeover Notice has been received during trading hours or if the Takeover Notice has been received within a short window before the market opens (to allow the Company to complete the steps below, and most importantly prepare the announcement described in step 2.2.4 below).
 - 2.1.3 Inform the Chair (or appointed delegate) if the Chair was not sent the Takeover Notice directly by the offeror.
- 2.2 Almost simultaneously with the first steps, take the following second steps:
 - 2.2.1 Contact the Company's lawyers to seek advice on compliance with the Takeovers Code obligations and continuous disclosure obligations under the NZX Main Board Listing Rules (**Listing Rules**).
 - 2.2.2 Notify all board members and relevant senior managers that a Takeover Notice has been received.
 - 2.2.3 Call an urgent board meeting. Have the Company's lawyers join this meeting to explain to the Board the necessary steps for the takeover process. In particular, the Board will:
 - (a) identify any conflicts of interest that any board members may have;

¹ Similarly, the appointment of a financial adviser and independent adviser referred to in these protocols will be considered at the time, taking into account the nature of the offer and any conflicts.

² The first step that an offeror must take when it proposes to make a takeover offer under the Takeovers Code is to serve on the target company, i.e. NZAI, a Takeover Notice which typically includes a draft of its takeover offer.

- (b) establish a Takeover Committee to oversee the takeover offer and to ensure compliance with all of the Company's obligations under the Takeovers Code as a target company and its continuous disclosure obligations;
- (c) consider whether it should appoint a financial adviser to advise it on the takeover offer;
- (d) consider who to appoint as independent adviser (to be approved by the Takeovers Panel) to prepare advice for the Company's shareholders on the merits of the takeover offer; and
- (e) consider who will prepare and send the "*class notice*" relating to the Company's equity securities that the Company must provide to the offeror within two working days of receipt of the Takeover Notice.

2.2.4 Prepare a market announcement based on the template **attached** as a Schedule to these protocols, for release at the end of the trading halt or otherwise before the market opens, with the approval of:

- (a) the Chair; or
- (b) if the Chair is unavailable, his/her appointed alternate; or
- (c) if both Chair and his/her appointed alternate are unavailable and the market announcement is not materially different to the scheduled template, with the approval of the CEO.

The market announcement is to advise shareholders that:

- (d) the Board has received and is considering the Takeover Notice;
- (e) the Board will be taking legal advice and (if applicable) financial advice, and will be seeking to appoint an independent adviser to report on the merits of the offer; and
- (f) before taking any action in response to the Takeover Notice, shareholders should wait to receive the *target company statement* which will include the directors' recommendation and the independent adviser's report. This is important because the shareholders may receive the takeover offer up to two weeks before the target company statement and independent adviser's report are sent to them.

2.3 Commence keeping a record of all costs incurred by the Company in response to the offer (which it can claim back from the offeror). Under the Takeovers Act 1993, NZAI and its directors are entitled to be reimbursed for "*any expenses properly incurred*" in relation to the offer or takeover notice.³

2.4 In preparing the target company statement referred to in paragraph 2.2.4(f) above:

2.4.1 It is acceptable for the Takeover Committee only to approve the contents of the target company statement.

2.4.2 Schedule 2 of the Takeovers Code sets out what the target company statement needs to contain. The target company statement covers matters including:

- (a) the number of shares held by all directors and senior officers (**D&Os**);
- (b) recent trading by the D&Os;
- (c) which of the D&Os intend to accept the offer;
- (d) any relationships between the offeror and NZAI;

³ For further guidance on what expenses are reimbursable, please see <https://www.takeovers.govt.nz/guidance/guidance-notes/costs-recovery/>.

- (e) any information that NZAI has which would correct any misleading or incorrect information in the takeover offer;
- (f) any material changes planned by NZAI in response to the takeover offer;
- (g) any material changes in NZAI's financial or trading position or prospects since its most recent annual report;
- (h) other information that could reasonably be expected to be material to a decision by shareholders whether to accept the takeover offer or not; and
- (i) a recommendation by the directors whether or not to accept the offer or if they are unable to make a recommendation, why not.

2.4.3 The target company statement needs to be prepared either:

- (a) within 10 working days of NZAI receiving the Takeover Notice (or any longer period as the offeror may allow); or
- (b) within 10 working days of NZAI receiving the *despatch notice*. The despatch notice is the notice that the offeror sends NZAI at the same time as when it sends the offer to NZAI's shareholders.

2.4.4 If possible/desired the offeror and NZAI should co-ordinate sending out the target company statement together with the independent adviser's report at the same time (and with) the formal takeover offer.

3. **Protocol B – Confidential Potential Takeover Approaches / Proposals**

The Board (and senior managers) will apply this Protocol B on receipt of an approach or correspondence regarding a potential takeover or merger, whether by way of an offer under the Takeovers Code or a scheme of arrangement under the Companies Act 1993, in either case, other than a formal takeover notice, in respect of which Protocol A applies. This could be, for example, where a potential acquirer wishes to obtain an agreement to allow due diligence in advance of issuing a takeover notice, to engage the Board's appetite or response to a potential takeover or to propose a scheme of arrangement.

3.1 If NZAI is approached by a potential offeror on the above basis, the Board must do the following:

- 3.1.1 Treat all discussions and correspondence confidentially.
- 3.1.2 Contact the Company's lawyers to seek advice on confidentiality and continuous disclosure obligations regarding the incomplete proposal.
- 3.1.3 Call a Board meeting to:
 - (a) consider any proposal;
 - (b) consider the Company's continuous disclosure obligations in relation to the proposal, including determining whether the proposal is incomplete and confidential;
 - (c) put in place confidentiality arrangements to ensure any ongoing consideration remains confidential (assuming confidentiality has been maintained to date and the board wishes to consider the proposal further);
 - (d) identify any conflicts of interest that any board members may have;
 - (e) establish a Takeover Committee to oversee the correspondence regarding the proposal to ensure compliance with all of NZAI's obligations under law and the Listing Rules;

- (f) consider appointing a financial adviser to advise it on the proposal; and
- (g) consider who it might appoint as an independent adviser in the event that the appointment of such an adviser becomes necessary.

It is advisable that the Board invite the Company's lawyers join this Board meeting.

3.2 If the potential offeror requests to conduct due diligence on NZAI:

- 3.2.1 The Takeover Committee needs to consider whether to grant the request or not and make a recommendation to the Board accordingly.
- 3.2.2 In forming a decision, the duty of the directors is to act in NZAI's best interests, which includes the interests of all shareholders. The market practice on whether or not to grant due diligence is mixed reflecting the fact that each company subject to an approach by a potential offeror has its own unique set of circumstances.
- 3.2.3 Directors should note that the Takeovers Code prohibits "*defensive tactics*" by the Board. Rule 38 provides that:

"If a code company has received a takeover notice or has reason to believe that a bona fide offer is imminent, the directors of the company must not take or permit any action, in relation to the affairs of the code company, that could effectively result in:

- (a) an offer being frustrated; or*
- (b) the holders of the equity securities of the code company being denied an opportunity to decide on the merits of the offer.*

... [This] does not prevent the directors of a code company taking steps to encourage competing bona fide offers from other persons."

The Takeovers Panel acknowledges that in general, rule 38 does not require (and cannot be used to require) target companies to provide information to an offeror, even if the offeror requests the information. If an offeror requests due diligence-type information or confirmations from a target company, or includes conditions in its offer that require the target to provide such information or confirmations, the target will generally not breach rule 38 by refusing to provide that information or those confirmations.⁴

4. Review

The board is responsible for reviewing these Takeover Protocols and any amendments to them.

Date adopted: 25 February 2021

⁴ Despite the general position set out above, the case law and the Panel's view is that refusing to provide, or unreasonably delaying the provision of, information to an offeror that the offeror cannot otherwise reasonably obtain, which is required for the offeror to assess the need for, or obtain, consent to acquire a relevant interest in "sensitive land" under the OIA may be a prohibited defensive tactic.

Schedule: Unexpected Takeover Offer Market Announcement Template

[Date]

NZX Limited
Level 1, NZX Centre
11 Cable Street
Wellington 6011

By: MAP

With a copy to:

The Takeovers Panel
Wellington 6011

By email: takeovers.panel@takeovers.govt.nz

For immediate release

Receipt of Takeover Notice from [insert offeror name]

Pursuant to rule 42 of the Takeovers Code, the directors of NZ Automotive Investments Limited (NZAI) advises that NZAI has [yesterday/today] received notice under rule 41 of the Takeovers Code (Takeover Notice) from [insert offeror name] (Offeror) of the Offeror's intention to acquire [all of the shares in NZAI that the Offeror does not already own]OR[a further [specify]% of the shares in NZAI. If successful, the offer would result in the Offeror holding or controlling no less than [specify]% of the voting rights in NZAI].

A copy of the Takeover Notice is **attached**, together with the documents that accompanied it.

The board of NZAI is not in a position to comment further at this stage. The board will meet as soon as possible and will form a sub-committee of independent directors to assess the Takeover Notice and the draft offer in detail. The board will also immediately proceed with the appointment of an independent adviser and fulfilment of its other obligations under the Takeovers Code.

The Takeover Notice is *not* a takeover offer. If the Offeror wishes to proceed to make a takeover offer, it must do so within the period beginning 10 working days, and ending 20 working days, after the Takeover Notice was sent to NZAI. If it does not do so, the Takeover Notice will lapse.

The board of NZAI strongly recommends that NZAI shareholders **do not take any action in respect of their shares** until they receive the independent sub-committee's recommendation and the independent adviser's report.

Shareholders who are considering selling their shares are recommended to seek their own professional advice.

For and on behalf of the board

[Name]

[Chair]