



TAKEOVERS PANEL
TE PAE WHITIMANA

Enforceable Undertakings Given by Empire Technology Limited Under Section 31T of the Takeovers Act 1993

Empire Technology Limited (**Empire**) hereby undertakes to the Takeovers Panel (the **Panel**) as set out below (the **Undertakings**). The Panel in turn accepts the Undertakings.

These Undertakings are given under section 31T of the Takeovers Act 1993 (the **Act**).

Background

- A** On 19 August 2024, Empire gave notice (the **19 August Takeover Notice**) pursuant to rule 41 of the Takeovers Code (the **Code**) of its intention to make a partial takeover offer for 50.01% of the fully paid ordinary shares in Vital Limited (**Vital**).
- B** As required by the Code, the 19 August Takeover Notice attached the terms and conditions of the offer (the **Offer Terms**). The Offer Terms included conditions at clauses 5.2 and 5.3(a) which provided as follows:

5.2 Consent: *The Offer, and any contract arising from acceptance of it, is conditional on the consent of the various counterparties with whom Vital has contracted with prior to the Notice Date⁵, to the acquisition by Empire of up to 50.01% of the Shares, becoming unconditional in all respects.*

5.3 Further conditions of the Offer: *This Offer, and any contract arising from acceptance of it, are subject to the conditions that, except as otherwise agreed in writing by Empire, during the period from the Notice Date until the time that the Offer is declared unconditional by Empire:*

- (a) *Completion to Empire's satisfaction, acting reasonably, of targeted confirmatory due diligence investigations on Vital by Empire and its advisers;⁶*

...

[Footnote 5:] Empire will confirm through its targeted confirmatory due diligence which contracts, if any, that require a counterparty consent to a change of control in Vital that would be triggered by the Offer and seek that those consents are obtained.

[Footnote 6:] Empire reserves the right to rely on Empire's [sic] published discoveries and make the offer in the absence of co-operation from Vital should it decide to do so.

(The **Consent Condition** and the **Due Diligence Condition**, respectively.)

- C** In addition, the 19 August Takeover Notice itself referred to the Consent Condition and the Due Diligence Condition, stating:

To assist Empire in determining whether to proceed with the proposed offer upon the terms of the proposed offer, Empire Capital Limited (Empire’s affiliated entity) requested on 12 August 2024 that Vital permit Empire to undertake targeted confirmatory due diligence of selected Vital information. Empire’s decision as to whether or not it makes the offer remains conditional on receipt, and satisfactory completion, of the due diligence.¹ Empire Capital has provided Vital with a usual form confidentiality agreement and expects that the requested due diligence information would be provided under reasonable confidentiality arrangements with Vital.

...

[Footnote 1] Empire reserves the right to rely on Vital’s published disclosures and make the offer in the absence of co-operation from Vital should it decide to do so. Empire will confirm through its targeted confirmatory due diligence which contracts, if any, that require a counterparty consent to a change of control in Vital that would be triggered by the Offer and seek that those consents are obtained. Empire may waive this requirement at its discretion, should consents sought not be forthcoming.

- D** Rule 25(1) of the Code provides that:

An offer may be subject to any conditions, except those that depend on the judgement of the offeror or any associate of the offeror, or the fulfilment of which is in the power, or under the control, of the offeror or any associate of the offeror.

- E** Rule 64(1) of the Code provides that:

A person must not engage in conduct that is—

- (a) conduct in relation to any transaction or event that is regulated by this code; and*
- (b) misleading or deceptive or likely to mislead or deceive.*

- F** A division of the Panel met to consider the matter on 23 August 2024. The Panel concluded that:

- I** It appeared that Empire may have acted otherwise than in compliance with the Code and/or intend to act other than in compliance with the Code. Specifically:
 - 1** The Consent Condition may not be in compliance with rule 25(1) of the Code as it requires, when read with the footnote, Empire to confirm certain matters on the basis of due diligence which is in the power, or under the control, of Empire.
 - 2** The Due Diligence Condition may not be in compliance with rule 25(1) of the Code as, by requiring due diligence to “Empire’s satisfaction”, the Due Diligence Condition depends on Empire’s judgment and/or the fulfilment of the Due Diligence Condition is in the power, or under the control, of Empire. This conclusion was not affected by the addition of the requirement for Empire to act reasonably – the satisfaction of the Due Diligence Condition would still be a matter which was within Empire’s judgment or control, notwithstanding that Empire’s judgment or control might be restricted by a reasonableness criterion.

- 3** The existence of the Consent Condition and the Due Diligence Condition in the Offer Terms and the references to the Consent Condition and Due Diligence Condition in the 19 August Takeover Notice itself may not be in compliance with rule 64 of the Code by being misleading or deceptive (or likely to be mislead or deceive) by conveying the impression that Vital is required to provide due diligence to Empire notwithstanding that the Offer Terms expressly provided that Empire may waive the relevant conditions, the offer had not been made, and Empire was not obliged to make the offer.

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

- II** As a result of the Potential Empire Code Compliance Matters, the “Threshold Test” for calling a meeting of the Panel under section 32 of the Act had been met (for a description of the Threshold Test, see the Panel’s *Guidance Note on Section 32 of the Takeovers Act 1993*).
- G** The Panel invited Empire to address the Potential Empire Code Compliance Matters by providing these Undertakings so as to avoid, at this stage, the need for the Panel to call a section 32 meeting.
- H** The Panel understands that Empire denies that it is in non-compliance with the Code or intends to act in non-compliance with the Code, but has agreed to provide these Undertakings.

Undertakings

1 Definitions

Unless the context otherwise requires:

- (a) any term or expression that is defined in the Act or the Code and used, but not defined, in these Undertakings has the same meaning as in the Act or the Code; and
- (b) any capitalised term defined in these Undertakings (including in the Background) has that meaning throughout these Undertakings.

2 Undertakings

Empire undertakes as follows:

- (a) Empire shall not issue the takeover offer referred to in the 19 August Takeover Notice.
- (b) Empire shall ensure that any takeover notice issued by it (or any of its associates) in relation to Vital shall not include or refer to any condition which may not comply with rule 25(1) of the Code.
- (c) Empire will not allow the offer to lapse contrary to rule 25(1A) of the Code, nor contravene rule 23(2) of the Code.
- (d) Empire shall, promptly and without delay, deliver a copy of the executed Undertaking to NZX for release to the market once it has received a copy signed by the Panel.

3 Withdrawal and variation

These Undertakings may only be varied or withdrawn with the prior written consent of the Panel.

Execution

Signed for and on behalf of **Empire Technology Limited** by Simon Herbert, Director:



Signature

26 August 2024

Date

Signed for and on behalf of the **Takeovers Panel** by Andrew Hudson, Chief Executive:



Signature

26 August 2024

Date