

TAKEOVERS PANEL

BRIEFING FOR THE INCOMING MINISTER

MINISTER OF COMMERCE AND CONSUMER AFFAIRS

DECEMBER 2017

1. INTRODUCTION

1.1 The Takeovers Panel (the **Panel**) is the regulator of corporate takeovers and control-change transactions in New Zealand.¹ There are four key types of control-change transactions:

- a takeover offer made to all shareholders,
- an acquisition of an existing parcel of shares;
- an allotment of new shares in the company; and
- a Code company scheme of arrangement.²

1.2 The Panel's jurisdiction covers companies that are subject to the Takeovers Code and schemes governed by Part 15 of the Companies Act 1993 (**Code companies**). Code companies are New Zealand-registered companies that are listed on the NZX or other licensed market or, if unlisted, have 50 or more shareholders (with voting rights)³ and 50 or more share parcels.

1.3 The Code and the Panel's role as a market regulator contribute to the integrity of New Zealand's capital markets. Investors in Code companies enjoy the benefit of Code-protected rights to participate in control-change transactions on a level playing field.

2. ORGANISATION AND RESPONSIBILITIES OF THE TAKEOVERS PANEL

Independent Crown entity

2.1 The Panel is an independent Crown entity established under the Takeovers Act 1993. Its monitoring department is the Ministry of Business, Innovation and Employment (**MBIE**).

2.2 The Panel has a board of 11 members drawn from the investment banking, legal, accounting and business community. The Chairman is Andy Coupe, former investment banker and now professional company director, and the Deputy Chairman is Carl Blanchard, investment manager.

2.3 The Panel's staff of 7.8 FTEs is located in Wellington, headed by Chief Executive Andrew Hudson.

¹ "Control-change transaction" in this context means an increase in an investor's ownership of a Code company's shares to any level above 20%, or if the investor already holds more than 20% of the company's shares, any further increase.

² These are provided for under the Companies Act 1996.

³ 'Voting right' in this context is the right to vote that is attached to a share. Shareholders with voting rights can vote at meetings of the company on important issues that affect the company and their investment in it.

The Panel's responsibilities

What is the role of the Panel?

- 2.4 The Panel's core function is the regulation of takeovers and other control-change transactions in Code companies. It does this by enforcing the Takeovers Code and by engaging with applicants under the Companies Act who wish to undertake a scheme of arrangement involving a Code company (**Code company scheme**).
- 2.5 To perform this function effectively, the Panel has robust investigatory powers and the ability to make temporary restraining orders and some limited permanent orders. When exercising its enforcement powers, the Panel acts judicially as a tribunal.
- 2.6 The Panel also may facilitate transactions by granting exemptions from compliance with the Takeovers Code. The Panel may only grant exemptions that are appropriate and consistent with the objectives of the Code.
- 2.7 An independent adviser must be appointed by a Code company that is involved in any transaction regulated by the Code, as well as for Code company schemes. The independent adviser gives advice to the company's shareholders on the merits of the transaction. The Panel must approve the adviser as being independent and competent.

How does the Code work?

- 2.8 The Takeovers Code ensures that a Code company's shareholders have the opportunity to participate in control-change transactions on an equitable basis. The Code specifies the processes that must be followed in a control-change transaction, and sets out the information that must be provided to shareholders to assist their decision-making.
- 2.9 If, for example, a Code company has one large shareholder, owning more than 20% of the company's shares, then that shareholder has a high level of control over the company because that shareholder controls a significant proportion of the company's voting rights.
- 2.10 Any increase in the major shareholder's ownership of voting rights would likely be a control-change transaction which must be carried out in compliance with the Code.⁴
- 2.11 This means that all of the other shareholders have the opportunity to participate in the transaction on equitable terms. The way the other shareholders participate would depend on the type of transaction that the major shareholder intended to undertake.

Takeover offer

- 2.12 If the transaction was to be a takeover of the company (whether by the major shareholder or by another person), the person undertaking the takeover would have to

⁴ For some transactions, an exemption from compliance with the Code is available for investors to rely on. In these cases, provided the conditions of the exemption are met, compliance with the Code is not required. Another situation where Code compliance is not required is where a shareholder owns more than 50% of a Code company's voting rights. Such a large shareholder can acquire up to 5% more of the company's voting rights over any 12-month period without having to comply with the Code.

make an offer to all of the shareholders and the offer would have to be made on the same terms to all of the shareholders.

- 2.13 In a takeover, the Code provides that shareholders receive adequate information about the proposed transaction, including advice from the company's directors and independent advice from an independent adviser. The Code also mandates the timing for each step of a takeover offer, to ensure that shareholders have adequate time to make their decision about whether to accept or reject the offer for their shares.
- 2.14 If the person making the takeover offer receives enough acceptances of the offer to reach 90% ownership of the company, the Code provides for the compulsory acquisition of the rest of the shares. This ensures a fair 'exit' for the minority shareholders and economic efficiency for the company.

Acquisition or allotment approved by shareholders

- 2.15 If the transaction was to be an acquisition of another shareholder's parcel of shares, or if it was to be an allotment of new shares by the company to the major shareholder, then all of the shareholders who were not involved in the acquisition or allotment would have the opportunity to vote on whether the transaction should be allowed to occur. They would vote at a meeting of the shareholders, and the transaction could only proceed if the shareholders, who were entitled to vote, passed the resolution approving the transaction.

Scheme of arrangement under the Companies Act

- 2.16 If the control-change transaction was a Code company scheme, the Panel would be involved to make sure that the shareholders received adequate information about the proposed scheme and independent advice.
- 2.17 The Panel's role in a Code company scheme is to assist the Court by:
- reviewing scheme documents to ensure that appropriate information is placed before shareholders, that classes of shareholders with similar interests (**interest classes**) have been adequately identified, and that other protections available to shareholders under the scheme are appropriate; and
 - helping to ensure that matters that are relevant to the Court's decision are properly brought to the Court's attention.
- 2.18 If the Panel is satisfied with the identification of interest classes, information disclosure and available shareholder protections, it can issue a "no objection statement". However, the Court has the power to approve a scheme without the Panel having provided a no objection statement, if the Court is satisfied that the shareholders of the Code company will not be adversely affected by the use of a scheme rather than a takeover under the Code.
- 2.19 In addition to either a no objection statement from the Panel or Court approval, Code company schemes have to be approved by each interest class of shareholders in order to succeed.

What do transactions regulated by the Code ‘look like’?

- 2.20 Four flowcharts are appended to this briefing. The first three flowcharts depict the basic steps in Code-regulated transactions. They are taken from the Panel’s publication *A Basic Guide for Directors about the Takeovers Code* (available on the Panel’s website www.takeovers.govt.nz). The fourth flowchart depicts the steps for a Code company scheme.
- 2.21 For takeovers and compulsory acquisitions of Code companies, the Code sets out the rules for the timing of each step of the transaction and the information requirements.
- 2.22 For transactions where the Code requires that shareholders give their approval before the transaction can proceed, the Companies Act sets out the timing rules for the holding of the shareholders’ meeting and the Code stipulates the information that the shareholders must be given.

What about transactions that are not regulated by the Code?

- 2.23 Transactions that are not regulated by the Code (e.g., because they are not control-change transactions or because they are transactions in an entity that is not a Code company) can be undertaken without involving all of the shareholders, without providing independent advice to the shareholders, and offers can be made on better terms for some shareholders than others.⁵
- 2.24 Small investors and international investors can potentially be the most disadvantaged in unregulated offers, as acquirers can ‘cherry pick’ share parcels, and make offers on a first come-first served basis, etc.

What do the Panel and the Code NOT do?

- 2.25 Neither the Takeovers Code nor the Takeovers Panel has any role in deciding whether a takeover offer or any other kind of transaction is to be approved or accepted. Shareholders always decide for themselves whether to accept a takeover offer or not, or whether to vote for or against a resolution about a transaction at a shareholders’ meeting.
- 2.26 For example, the Panel does not have a role in determining what price should be offered by a person wanting to buy a parcel of shares or wanting to make a takeover offer.
- 2.27 The Takeovers Panel does not take sides. It is impartial and it acts only to ensure compliance with the Takeovers Code.

⁵ However, for listed companies and other listed entities, the NZX Listing Rules set certain standards that have to be met. Companies also must hold shareholders’ meetings under the Companies Act for some transactions not regulated by the Code.

Law reform and public understanding

Law reform

- 2.28 Reviewing takeovers law and recommending to you, the Minister of Commerce and Consumer Affairs, any changes that the Panel considers necessary, is another significant Panel role.
- 2.29 The Panel is an expert body comprised of experienced practitioners involved in the commercial and corporate takeovers arena. The Panel engages regularly with market participants and representative bodies in order to understand issues impacting on the effectiveness and efficiency of takeovers law, and considers this feedback when undertaking policy work.

Public understanding

- 2.30 When the Panel undertakes its function of promoting public understanding about takeovers law and practice, it assists:
- small and large investors to help them understand their rights and obligations under the Code or for a Code company scheme;
 - directors of Code companies to better understand their obligations under the Code or for a Code company scheme;
 - legal and financial advisers to improve their understanding of takeovers law and the way the Panel enforces it, so they will give sound advice to their clients; and
 - journalists and market commentators to help them communicate and opine effectively about the Code's and the Panel's roles in relation to transactions that fall within the Panel's jurisdiction.
- 2.31 The Panel employs a number of means to promote public understanding, including maintaining a comprehensive website, publishing the Panel's periodic newsletter, *CodeWord*, and Guidance Notes on specific issues. The Panel also makes presentations to various representative groups and other stakeholders.

3. MAJOR POLICY AND IMPLEMENTATION ISSUES

- 3.1 As noted, the Panel has a function to keep takeovers law under review and to recommend any changes to you that the Panel thinks necessary.
- 3.2 The Panel periodically carries out a review of the Code to address matters which leave the Code less efficient and effective than it could be. Following such a review, the Panel made recommendations to the Minister of Commerce and Consumer Affairs for amendments to the Code and the Takeovers Act in March 2017. Cabinet gave policy approval to the recommendations in June 2017.
- 3.3 Three key proposals were included in the recommendations. The first was to raise the threshold at which *non-listed* companies are required to comply with the Code. The aim of this recommendation is to improve the efficiency of the Code, and to mitigate the

cost of Code compliance for widely-held, but low-value Code companies. The recommended change would mean that *non-listed* companies with less than \$30 million of total assets and with less than \$15 million of annual revenue would no longer be subject to the Code. This amendment would mean that companies that are not listed and do not meet the asset or revenue threshold do not need to comply with the Code.

- 3.4 The second key proposal was to simplify the Code's timing rules. The Code's timing requirements set out timeframes within which actions or events must or must not occur during takeovers and compulsory acquisitions. For instance, in respect of a takeover, under rule 24, the offer period "must not be shorter than 30 days and not longer than 90 days." Similarly, under rule 29(1) "an offer may not be varied, and a variation notice may not be sent, later than 14 days before the end of the offer period."
- 3.5 Difficulties can arise when takeovers occur over holiday periods because timing requirements in the Code are stated and defined as "days" – meaning calendar days and not working days. The Panel recommended that all timing rules in the Code be set by reference to 'working days', rather than 'days'.
- 3.6 The third key proposal was changes to the Code to facilitate electronic communication with shareholders by offerors and target companies under a takeover, and by Code companies with shareholders for other Code-regulated transactions. The Panel also recommended amendments to facilitate the Panel's publication of Code-regulated documents on its website. This recommendation is intended to aid accessibility of Code documents for shareholders of Code companies in the context of reduced speed of postal services and limited use of electronic communication by target companies and offerors during takeovers.
- 3.7 The balance of the proposed amendments is of 'low policy content' and mostly address technical anomalies.

4. PENDING DECISIONS

- 4.1 MBIE officials, in consultation with the Panel, are preparing the Takeovers Code Approval Amendment Regulations to implement the Panel's March 2017 recommendations. Progressing the Amendment Regulations is likely to require input from you within the first six months of your term.
- 4.2 In addition, amending the definition of 'Code company' to raise the threshold at which non-listed companies are required to comply with the Code will require an amendment to the Takeovers Act. The amendment of the Act is included in the Regulatory Systems Bill (No.2). [REDACTED]

5. APPOINTMENT OF PANEL MEMBERS AND TERMS OF OFFICE

- 5.1 Members are appointed by the Governor-General on the recommendation of the Minister of Commerce and Consumer Affairs and must, in the opinion of the Minister, be qualified or experienced in business, accounting or law.
- 5.2 At least one member of the Panel must be a lawyer with at least seven years' practice. There are currently four members that fill this requirement.

- 5.3 The Panel's statutory membership requirements ensure that the Panel constitutes an expert body of takeovers practitioners. Because they are all currently or have recently been active market participants, Panel members are closely attuned to market practices and concerns. This helps to ensure that, to the extent legally appropriate and in accordance with best practice, the Panel can utilise its exemption and enforcement powers to facilitate innovations within the takeovers market.⁶
- 5.4 One Panel member is appointed to the Panel on the recommendation of the Australian Government. This position is currently filled by Mr Richard Hunt. He is a member of the Australian Takeovers Panel. The Chairman of the New Zealand Panel is also a member of the Australian Panel. This reciprocal arrangement keeps the regulators in both jurisdictions abreast of trans-Tasman takeovers developments.
- 5.5 The composition of the Panel, drawn from market participants, and the retention of the Panel's institutional knowledge, are critical to the Panel's role in New Zealand's capital markets. The Panel's succession plan for members is built around these concerns. Due to the highly specialised nature of the Panel's work, finding suitable candidates for the role is essential.
- 5.6 Members are appointed for terms of up to five years and may be reappointed when a term expires. The term of office of Richard Hunt expires in April 2018. Other Panel members' terms of office expire from January 2018 onwards. The positions that will require your early attention, in terms of the appointment process are, in time-critical order, as follows:
- Tony Pigou – appointed 7 January 2013, **expires 6 January 2018**;
 - Tina Symmans – appointed 3 April 2013, **expires 2 April 2018**;
 - Richard Hunt (Australian member) – appointed 1 May 2014, **expires 30 April 2018**;
 - Roger Wallis – appointed 1 February 2011, **expires 31 July 2018**;
 - Murdo Beattie – appointed 25 September 2008, **expires 24 September 2018**.
- 5.7 Members' terms can be extended for an undefined period if required, so that it is not essential that reappointments or new appointments are made by those term expiry dates.
- 5.8 The Chair and MBIE will brief you fully on these matters at the time they require your attention.

⁶ Having a Panel of active market practitioners means that conflicts of interest have to be carefully managed. The Panel operates under a robust Conflicts of Interest Policy to ensure that only non-conflicted members act in relation to any matter that comes before the Panel.