

## **Guidance Note: The meaning of *50 or more shareholders* in the definition of *Code company***

### **When is an unlisted company a Code company?**

Code companies are companies that are subject to the rules of the Takeovers Code.

Listed companies with voting securities quoted on the NZSX or NZAX markets are Code companies. Unlisted companies with 50 or more shareholders are also Code companies.

The Panel has received enquiries about how to interpret the word *shareholders* when deciding whether an unlisted company falls within the definition of Code company in the Takeovers Code. This has been a more urgent question for some companies since the Takeovers Amendment Act 2006 removed the asset threshold from the definition.

The Code defines *code company*, in respect of unlisted companies, as a company that *has 50 or more shareholders*. Before the Takeovers Amendment Act 2006 was passed the words *and \$20,000,000 or more of assets* were included in that definition.

Neither the Code nor the Takeovers Act 1993 defines *shareholders*. The particular enquiry made of the Panel has been whether each individual shareholder in the company should be counted, or whether the number of share parcels that are held should be counted, as *shareholders*.

These can result in different figures because some share parcels are held jointly, for example, by family members or by the trustees of a trust. Each of the joint shareholders is required by the Companies Act 1993 to be named in the company's share register.

The Panel's view is that *shareholders* means each shareholder named in the company's share register. The Panel enforces the Code on that basis.

### ***Shareholders means shareholders***

The Takeovers Act and Companies Act were passed in the same bundle of company law reforms. Since the takeovers law does not define *shareholder* (but does define *company* as having the meaning given by the Companies Act), the Panel considers that one must look to the Companies Act for the meaning of *shareholder*.

The Companies Act defines *shareholder* as having the meaning set out in section 96 of that Act, as follows:

**“Section 96 Meaning of “shareholder”**

*In this Act, the term “shareholder”, in relation to a company, means-*

(a) *A person whose name is entered in the share register as the holder for the time being of one or more shares in the company:*

(b) *Until the person's name is entered in the share register, a person named as a shareholder in an application for the registration of a company at the time of registration of the company:*

(c) *Until the person's name is entered in the share register, a person who is entitled to have that person's name entered in the share register under a registered amalgamation proposal as a shareholder in an amalgamated company.”*

Thus, *shareholders* are the persons named in the company’s share register (or entitled to be so). Section 96 of the Companies Act makes it plain that each joint shareholder (i.e. each person named or entitled to be named in a company’s share register) must be counted when working out whether a company has 50 or more shareholders and therefore is a Code company. Joint shareholders each have their names entered in the company’s share register, so each joint shareholder must be counted when assessing how many shareholders there are.

***Shareholders does not mean share parcels***

The Panel does not accept the argument, put by some on policy grounds, that the definition *50 or more shareholders* should be interpreted to mean that a company’s voting securities must be held in 50 or more share parcels (by any number of persons) for a company to be a Code company.

The reason often given for this interpretation is that the Code is concerned with voting rights. The argument advanced is that, since each share carries only one vote, regardless of the number of joint holders of that share, *50 shareholders* must be intended to mean *the 50 shareholders that can exercise the votes attaching to the shares*.

This argument cannot be sustained. It ignores the definition in the Code for “*code company*” (which refers to 50 *shareholders* and not to anything else) and the definition provided by section 96 of the Companies Act. Also it does not take into account that there is nothing in the Companies Act, the Takeovers Act or the Code that would limit the shares referred to in section 96 of the Companies Act to *voting securities*. Indeed, sections 36 and 37 of the Companies Act establish quite clearly that a company can issue *shares* that do not confer voting rights (e.g. redeemable preference shares). The names of the holders of non-voting shares must be entered in the company’s share register.

Accordingly, unlisted companies with 50 or more shareholders who hold any type of shares will be Code companies.

### **Avoiding double counting**

In some companies share parcels are held by trustees. Sometimes one person is the trustee of several trusts for which shares are held in the same company. The trustee (or any person) who holds several separate share parcels in the same company, being the *person whose name is entered in the share register* (section 96), should be counted only once, when deciding if there are 50 or more shareholders.

A shareholder is a person who holds a share or shares. A person’s shareholder status is not impacted by the number of shares they hold, or by whether they hold several share parcels in different capacities. Therefore, a company will be a Code company if it has 50 or more different persons named in the company’s share register, regardless of the number of shares any of those persons holds and regardless of any different capacities in which they hold shares.

To illustrate this point in reverse, if the *share parcels* interpretation were adopted for the meaning of 50 or more *shareholders* (an interpretation that is rejected by the Panel), then each parcel would have to be counted, even if several of the parcels were held by the same person acting as trustee of different trusts.

Shareholders means shareholders.