

BRIEFING

for the incoming
Minister of Commerce and Consumer Affairs

▶ 14 December 2020



**TAKEOVERS
PANEL**
TE PAE WHITIMANA

www.takeovers.govt.nz



1 Introduction

- 1.1 The purpose of the Takeovers Code (the **Code**) is to provide for transparent and equitable processes for mergers and acquisitions of New Zealand's largest and most widely held companies (**Code companies**).¹ These transactions, which we refer to as 'control-change transactions', include:
- (a) takeover offers made to all shareholders for all or some of the equity securities that they own in a Code company;
 - (b) acquisitions of shares in a Code company from a shareholder;
 - (c) allotments of new shares by a Code company; and
 - (d) schemes of arrangement under the Companies Act 1993 that affect the voting rights of a Code company (**Code company schemes**).²
- 1.2 The Takeovers Panel (the **Panel**) is responsible for enforcing the Code. The Panel's services are intended to contribute to the outcomes of an efficient takeovers market, reduce transaction costs for investors and increase confidence in the integrity of New Zealand's capital markets. The Panel's role in schemes of arrangement is to ensure that schemes are transparent (in terms of the disclosures made for shareholders) and are conducted with equitable voting processes for shareholders.

2 Organisation

- 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**).

Panel members

- 2.2 The Panel consists of 11 members³ who 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.⁴ The members of the Panel are the Board for the purposes of the Crown Entities Act 2004 and can act as divisions in respect of certain matters. The Panel's members must include a Chair and a Deputy Chair.
- 2.3 Panel members are closely attuned to market practices and concerns as they are all currently, or have recently been, active market participants. This helps to ensure that, to the extent legally appropriate and in accordance with best practice, the Panel can utilise its enforcement and exemption powers to promote the efficient application of the Code and confidence in the takeovers market.⁵
- 2.4 One Panel member is a member of the Australian Takeovers Panel and is appointed to the New Zealand Panel under reciprocal arrangements between New Zealand and Australia. The Chair of the New Zealand Panel is also a member of the Australian Panel under these arrangements. Both Panels benefit from the cross-appointee's contribution at their respective Board meetings.

¹ The Code applies to New Zealand-registered companies that are either listed on the NZX Main Board or are unlisted but widely held and meet prescribed financial thresholds.

² A scheme of arrangement is a statutory Court-approved procedure under the Companies Act 1993 that allows for the reorganisation of the rights and obligations of shareholders and companies. A takeover of a company can be conducted via a scheme of arrangement.

³ This is the maximum number provided for by the Takeovers Act.

⁴ At least one member of the Panel must be a lawyer with at least seven years' experience.

⁵ 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.



- 2.5 The composition of the Panel 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.
- 2.6 Members are appointed for terms of up to five years and may be reappointed when a term expires. Members' terms are extended for an undefined period until reappointed or replaced, so it is not essential that reappointments or new appointments are made before those term expiry dates.
- 2.7 The current Panel members and the expiry of their terms are set out in the table below. The Panel members whose terms have expired or will expire in 2021 are highlighted.

Panel member	Expertise	Term expiry
Andy Coupe (Chair)	Professional company director (former investment banker)	30 March 2022
Carl Blanchard (Deputy Chair)	Corporate finance professional	28 August 2021
Anna Buchly	Corporate lawyer	31 January 2023
Megan Glen	Investment banker	19 May 2024
Simon Horner	Corporate lawyer	31 January 2021
Richard Hunt (Australian Takeovers Panel representative)	Investment banker	29 April 2021
Sacha Judd	Corporate adviser	12 October 2020
Tony Pigou	Corporate adviser and consultant (former investment banker)	2 September 2022
Silvana Schenone	Corporate lawyer	30 September 2021
Nathanael Starrenburg	Corporate lawyer	24 October 2021
Martin Stearne	Corporate consultant (former investment banker)	31 January 2023

- 2.8 MBIE will brief you when a reappointment or new appointment needs to be made.

The Panel executive

- 2.9 The Panel's staff consist of a team of specialist lawyers and administrative support, totalling 7.8 FTE. The Panel's staff are based in Wellington and led by Chief Executive, Andrew Hudson.
- 2.10 The Panel utilises a conventional management structure, with the Panel responsible for the performance management, remuneration and succession planning of the Chief Executive, and the Chief Executive responsible to the Board for the performance of the executive.



3 The Panel's responsibilities

The Panel's role

- 3.1 The Panel's core function is the regulation of takeovers and other control-change transactions in Code companies. To perform this function effectively, the Panel has robust investigation and enforcement 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.
- 3.2 The Panel does not regulate the 'merits' of a proposed control-change transaction or decide whether a transaction should be accepted or approved by shareholders.
- 3.3 The Panel's role is to ensure that the process of a proposed transaction is transparent for shareholders and that shareholders have all the information that they need (and adequate time to consider that information) in order to decide for themselves whether to accept or approve a transaction. The Code sets out the process that allows shareholders to decide for themselves the merits of a transaction, and the Panel's role is to ensure that this process is followed.

Core functions and powers of the Panel

- 3.4 The core functions and powers of the Panel are contained in the Takeovers Act and the Code. These include the following:

- (a) Regulation of changes of control of Code companies through the enforcement of the Code:

The Code requires that shareholders have adequate disclosure to enable them to decide how to respond to a transaction and have sufficient time to make that decision. To promote compliance with Code disclosure rules, Panel staff review and comment on draft transaction documents.⁶ This allows potential disclosure or other compliance issues to be resolved before documents are provided to shareholders. In turn, this reduces the number of formal enforcement matters considered by the Panel. Panel staff actively monitor transactions as they proceed in order to ensure that the integrity of disclosure for shareholders and compliance with the Code's timing rules are maintained.

Where enforcement matters arise, the Panel can, and does when necessary, swiftly exercise its statutory enforcement powers for the protection of the rights of shareholders and other interested parties.

- (b) Considering no-objection statement applications for Code company schemes:

The Panel monitors Code company schemes under the Companies Act to ensure that shareholders will not be adversely affected by the use of a scheme of arrangement rather than the Code to effect a transaction.⁷ The Panel's role is to ensure that disclosure to shareholders is equivalent to disclosure mandated by the Code and that shareholder 'interest classes' for the purposes of voting to approve or decline the scheme of arrangement are comprised fairly.⁸

⁶ This practice was endorsed by the High Court in 2010 and recognised as a legitimate exercise of the Panel's enforcement jurisdiction (*Marlborough Lines Ltd v Takeovers Panel & Anor* CIV-2010-485-001150, paras [5], [47] – [49]).

⁷ The Panel's jurisdiction to issue a no-objection statement in relation to Code company schemes is contained in section 236A of the Companies Act 1993.

⁸ The Panel may object to a scheme proposal that failed to meet the Panel's criteria set out in the Panel's [Guidance Note on Schemes of Arrangement](#).



(c) Giving approvals for the appointment of independent advisers, and other approvals:

Independent advice on the merits of any proposed control-change transaction is a fundamental part of the disclosure required for shareholders. The Panel approves the adviser for each transaction on the basis of independence and competence.

(d) Granting of exemptions from compliance with the Code:

The Panel has the power to grant exemptions to ensure that the Code applies effectively and appropriately to any particular transaction. Exemptions may also be granted to modify the application of the Code to classes of persons or transactions.⁹ The Panel can grant exemptions only if they are appropriate and consistent with the objectives of the Code.¹⁰

(e) Reviewing takeovers law and takeovers practice, and recommending to the Minister of Commerce and Consumer Affairs any law changes that the Panel considers necessary:

As an expert body comprised of experienced takeovers practitioners and company directors, the Panel is well placed to understand problems with takeovers law that need to be resolved. This enables the Panel to recommend law changes to deal with changing market behaviours and to facilitate innovations in the market.

(f) Promoting public understanding of takeovers law and practice:

The Panel is committed to educating investors, directors and practitioners to improve their understanding of the obligations, rights and protections under the Code and under the Companies Act for Code company schemes. This contributes to increased confidence and participation in New Zealand's capital markets.

4 Control-change transactions

Overview of the Code

- 4.1 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.
- 4.2 The Code sets the control-change threshold at 20% of the company's voting rights. If a shareholder owns more than 20% of a Code company's shares, then any increase in that shareholder's ownership of voting rights must be carried out in compliance with the Code.¹¹ The Code prescribes rules that provide all shareholders with the opportunity to participate in that transaction on equitable terms.

Takeover offer

- 4.3 A takeover offer can be made by any person for all or some of the shares in the Code company. The Code requires that the offer must be made to all shareholders and on the same terms. To enable shareholders to make their decision on whether to accept the offer, adequate disclosure, including advice from the company's directors and an assessment of the merits of the transaction from an independent adviser, must be provided. In addition, the

⁹ Referred to as "class exemptions". Unlike individual exemptions, which can be approved by a division of the Panel, class exemptions must be approved by the full Panel.

¹⁰ Section 45(6) of the Takeovers Act.

¹¹ For some transactions, an exemption from the Code may provide relief from some of the Code's requirements. This relief may be subject to conditions. In addition, shareholders who hold or control more than 50% and less than 90% of a company's voting rights may acquire up to 5% of the company's voting rights over any 12-month period under a Code-permitted exception.



Code also mandates the timing for each step of an offer to ensure that shareholders have adequate time to make their decision.

- 4.4 If the person making the 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 efficient outcomes for the acquirer.

Acquisition or allotment approved by shareholders

- 4.5 If an acquisition of some or all of an existing shareholder’s shares or an allotment of new shares results in a person holding more than 20% of the voting rights in a Code company, the Code requires shareholders who are not involved in the acquisition or allotment to approve the transaction by a majority vote. The Code prescribes the disclosure that must be provided to shareholders, including advice from an independent adviser on the merits of the transaction.

Scheme of arrangement under the Companies Act

- 4.6 A scheme of arrangement is a statutory Court-approved procedure that allows for the reorganisation of the rights and obligations of shareholders and companies. Takeovers and other control-change transactions can be conducted via a scheme of arrangement. Code company schemes are schemes of arrangement that affect the voting rights of a Code company. Unlike a takeover offer under the Code, where shareholders decide whether to accept or reject the offer, a takeover via a scheme requires shareholders to vote whether to approve the scheme.
- 4.7 The High Court has the ultimate authority over the conduct and approval of a scheme of arrangement. The Panel’s role is to assist the High Court by reviewing scheme documents to ensure that:
- (a) appropriate information is given to shareholders (including advice from an independent adviser);
 - (b) classes of shareholders with similar interests have been adequately identified; and
 - (c) other protections available to shareholders under the scheme are appropriate.
- 4.8 The Panel also helps to ensure that other matters that are relevant to the Court’s decision are properly brought to the Court’s attention.
- 4.9 If the Panel is satisfied with these matters, it can issue a “no objection statement”.¹² 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.

5 Policy Work

Public understanding

- 5.1 A key function of the Panel’s policy work is to promote public understanding about takeovers law and practice. The Panel does this by:
- (a) maintaining a comprehensive website to promote access to information about the Panel and the Code, including the Panel’s guidance to assist practitioners in complying with their obligations under the Code, advice for directors and shareholders, and a database of historical transactions;
 - (b) encouraging and responding promptly to public enquiries; and

¹² Section 236A(2)(b)(ii) of the Companies Act 1993 provides the Panel’s jurisdiction to issue a no-objection statement in respect of a Code company scheme.



- (c) engaging with stakeholders, including shareholders, directors, lawyers, independent advisers and the media, by way of guidance, meetings and presentations to help them better understand the Code.

Law reform

- 5.2 As noted, a key function of the Panel's role is to review takeovers law and make recommendations to you, the Minister of Commerce and Consumer Affairs, of any changes that the Panel considers necessary.
- 5.3 The Panel last made recommendations for law reform in March 2017. Many of the Panel's recommended reforms came into force in October 2018 through regulations made to amend the Code. Amendments to the Takeovers Act came into force in January 2020. Among the amendments to the Act were changes to the definition of 'Code company' to include a financial threshold in the definition of unlisted Code company. Unlisted Code companies, in addition to having 50 or more shareholders and share parcels, must now also have either annual revenue of at least \$15 million in the most recently completed accounting period or total assets of at least \$30 million as at the last day of the most recent accounting period. This means that unlisted companies that do not meet either the asset or revenue threshold are not subject to the Code. This amendment reduced compliance costs for those companies.
- 5.4 There are two final recommendations yet to be implemented. The first is for legislative amendments to give the Panel the power to publish Code-regulated documents on its website. This will facilitate electronic access to information about Code transactions by the public. The second recommendation is for a further amendment to the definition of unlisted Code company to remove the term 'share parcels' in order to align with section 199 of the Companies Act. The Panel understands that these two recommendations have been approved for inclusion in the next Regulatory Systems Bill.

6 Pending decisions

- 6.1 As noted in paragraph 2.7, there are five Panel members whose terms are set to expire in 2021 and one whose term recently expired. MBIE will brief you early next year on the reappointments or new appointments that need to be made. Apart from this, there are no pending decisions being sought by the Panel.