

Guidance Note

CONTROL AND ASSOCIATION

7 April 2026



**TAKEOVERS
PANEL**
TE PAE WHITIMANA



Contents

1	Introduction	3
2	The fundamental rule	3
3	Control	4
4	Association	5
5	Lock up agreements and voting agreements	9
6	What does this mean for parties that are not associates?	10
7	Shareholders' agreements	11
8	Application of the Anti-avoidance rules in “live” examples	12
	Kerifresh Limited – Control and Association	12
	Bridgecorp Capital Limited - Association	16
	Kiwi Income Property Trust/Sovereign Assurance Limited - Association	17
	Calgary Petroleum Limited - Association	17
	NZME	17
	Schedule: Version control, disclaimer and copyright	19



1 Introduction

- 1.1 This Guidance Note sets out the Panel's approach to control and association, which are key concepts for the operation of the Takeovers Code (the **Code**), including from an anti-avoidance perspective.
- 1.2 In addition to a summary of how these concepts operate and how the Panel interprets them, this Guidance Note also:
- (a) sets out the Panel's views on how these concepts relate to lock up agreements and shareholders' agreements; and
 - (b) provides case studies showing the application of these concepts and related rules.
- 1.3 In addition, examples of exemption applications which have been declined on the basis that they do not infringe the deeming rules in rule 6(2) of the Code are set out in the Panel's *Guidance Note on Upstream Acquisitions*. This Guidance Note should also be read alongside *CodeWord 7* which provides worked examples of a number of the matters covered in this Guidance Note.

2 The fundamental rule

- 2.1 The Code is concerned with transactions that cause a person to become the holder or controller of an increased percentage of voting rights in a Code company.
- 2.2 The fundamental rule contained in rule 6(1) of the Code provides that:
- Except as provided in rule 7, a person who holds or controls—*
- (a) *no voting rights, or less than 20% of the voting rights, in a code company may not become the holder or controller of an increased percentage of the voting rights in the code company unless, after that event, that person and that person's associates hold or control in total not more than 20% of the voting rights in the code company;*
 - (b) *20% or more of the voting rights in a code company may not become the holder or controller of an increased percentage of the voting rights in the code company.*
- 2.3 As a preliminary point, the Code relates to increases in the control of "voting rights". A voting right is defined as:
- a currently exercisable right to cast a vote at meetings of shareholders of a company or financial product holders of another body corporate, not being a right to vote that is exercisable only in 1 or more of [specified circumstances].¹*
- 2.4 Accordingly, the Code's focus is solely on voting power at company meetings. In contrast, the Code does not restrict aggregation of economic interests in Code companies. This differs from overseas jurisdictions such as Australia where the analogous restrictions are on aggregation of "relevant interests".
- 2.5 The first trigger in rule 6(1) is a person becoming the "holder" of an increased percentage of voting rights. This is a straightforward concept – the "holder" of a voting right attaching to a share will be the registered holder of the relevant share.
- 2.6 However, the Code would be ineffective if it regulated only voting rights held by a particular company or individual. If the fundamental rule were triggered solely by changes in a person's holding, it could be easily avoided by property-based arrangements (e.g., by using nominees) or contractual ones (e.g., by voting agreements). Accordingly, the Code contains two key anti-avoidance mechanisms to prevent its application being circumvented by transaction structuring techniques:
- (a) the concept of "control" of voting rights; and

¹ See rule 3(1) of the Code.



(b) the concept of “association”.

3 Control

3.1 In very general terms, the concept of control contained in rule 6(1) ensures that the Code will apply to changes in control of a Code company which are effected through corporate structures or via contractual arrangements.

3.2 The Code defines “control” as follows:

control, in relation to a voting right, means having, directly or indirectly, effective control of the voting right.

3.3 There are several related concepts within the definition of control, being that:

(a) control may be either direct or indirect; and

(b) the requisite degree of control which a person must have is “effective” control.

3.4 Each of these concepts is discussed below.

Control (direct and indirect)

3.5 Because the Code applies to direct and indirect control, the Code is largely agnostic as to the basis on which voting rights are controlled. Accordingly, a person would generally be regarded as controlling the relevant voting rights for the purposes of the Code where:

(a) the person is appointed as a proxy for another shareholder;²

(b) the person is the holding company of another company (where that other company holds the relevant voting rights);

(c) the person is the beneficiary of a bare trust under which another person holds the shares to which the voting rights are attached where, under the terms of the trust, the holder of the shares will only exercise the voting rights in accordance with the directions of the beneficiary (i.e., a nominee arrangement); or

(d) the person is the beneficiary of a voting agreement under which the holder of the voting rights (or the controller of that person) has agreed that the voting rights will be exercised in a certain way.

Effective control

3.6 Importantly, the Code requires that control be “effective”. Accordingly, there may be situations where a person has less than full control, but the control is nonetheless effective, and therefore sufficient to constitute “control” for Code purposes.

3.7 The Panel’s general approach is that if a person controls the majority of the voting rights in a company (including through intermediate holding companies), that person will typically have effective control of any voting rights held by the subsidiary (such control being via the ability to control the composition of the relevant subsidiary boards). However, there may, in the relevant circumstances, be exceptions to this general approach.

3.8 Examples of how effective control may operate include:

(a) *Control in corporate groups* – The holding company of a group will often be the controller of voting rights attached to shares which are held by members of that group. However, the control which the holding company exercises will be through its control over the operations of its subsidiaries in the group which are technically separate legal entities with their own boards.

(b) *Control via contractual arrangements* – While a contractual arrangement may provide an obligation to vote in a certain way, a Court order to act in accordance with a contractual obligation is a discretionary remedy (the

² Note that clauses 13 and 14 of the Takeovers Code (Class Exemptions) Notice (No 2) 2001 provides exemptive relief to proxies and their associates (subject to certain conditions).



usual contractual remedy being monetary damages). However, the Panel considers that the existence of a legal obligation to exercise a voting right in a certain way is sufficient in itself to convey control for the purposes of the Code.

- 3.9 Conversely, the Panel also considers that the concept of effective control means that some entities may not have control over voting rights for the purposes of the Code. For example, an intermediate holding company may not have any control over voting rights which its subsidiary holds if that intermediate holding company will only ever act in accordance with the directions of its holding company. Therefore, in a situation where voting rights are held by Company A, which is 100% owned by Company B, which is in turn 100% owned by Company C, it may be that Company B (i.e., the intermediate holding company) has no effective control over the relevant voting rights.
- 3.10 The analysis may vary depending on the circumstances. It is possible that a holding company may not always control the voting rights of its subsidiary. For example, it may be that, because of the relevant arrangements, the holding company does not have effective control over the voting rights of its subsidiary. The relevant circumstances may mean that the subsidiary company is able to operate as a result of an autonomous board.³ Similarly, the subsidiary company may not have a provision in its constitution allowing the subsidiary's directors to act in what they believe to be the best interests of the subsidiary's holding company (even though the action may not be in the best interests of the subsidiary).⁴

4 Association

Introduction

- 4.1 While the definition of control ensures that the Code captures certain arrangements to which it might otherwise not apply, the Code would be ineffectual if it concentrated only on voting rights held or controlled by a particular person. Association serves to address this issue.
- 4.2 At a high level, association ensures that aggregation of voting control cannot occur through dispersed ownership structures or similar. Accordingly, when determining whether a person who holds or controls less than 20% of the voting rights in a Code company may increase their voting control, rule 6(1)(a) aggregates that person's voting control with that of their associates in determining whether the increase is permissible. As such, association, as it is used in rule 6, is an anti-avoidance concept.
- 4.3 Association may restrict the acquisition of further voting control, but merely forming an association does not breach rule 6. A group of shareholders who together hold more than 20% of the voting rights in a Code company may become associated for Code purposes without breaching the Code. A breach of the Code would only occur if one of those associated shareholders:
- (a) acquired control over another's voting rights (or joined them in sharing in the control of those voting rights); or
 - (b) became the holder or controller of an increased percentage of voting rights,
- and, in either case, the aggregate percentage of voting rights held or controlled by the associates after the acquisition exceeded 20%.
- 4.4 Rule 4(1) of the Code defines "associate" as follows (with the definition comprising five limbs which are referred to in this Guidance Note as **Limbs (a) – (e)**):

³ For clarity, where a company controls voting rights, the Panel does not see a distinction between the board and the company – i.e., there will generally only be one controller, the company. The board will ultimately be the mechanism through which the company will determine how the voting rights are exercised but will not exercise any control separate from that of the Company. The key point is that if the board is able to operate the company in a manner which is independent of the company's holding company, that holding company may not control the voting rights.

⁴ See sections 131(2) and (3) of the Companies Act 1993 – absent such a provision, the subsidiary's directors would have to act in the subsidiary's best interests.



For the purposes of this code, a person is an associate of another person if—

- (a) the persons are acting jointly or in concert; or*
- (b) the first person acts, or is accustomed to act, in accordance with the wishes of the other person; or*
- (c) the persons are related companies; or*
- (d) the persons have a business relationship, personal relationship, or an ownership relationship such that they should, under the circumstances, be regarded as associates; or*
- (e) the first person is an associate of a third person who is an associate of the other person (in both cases under any of paragraphs (a) to (d)) and the nature of the relationships between the first person, the third person, and the other person (or any of them) is such that, under the circumstances, the first person should be regarded as an associate of the other person.*

4.5 The Panel is conscious that several of the limbs of the definition of “associate” are drafted in broad terms. While the Panel’s determinations provide the best analysis of relationships which do (or do not) result in association, association is an extremely fact sensitive matter, and subtle distinctions can lead to different results. As such, while precedents may provide guidance, they may also be of limited value in their application to alternative fact sets. To help ensure that the market understands the Panel’s approach to these matters, the remainder of this section sets out the Panel’s views as to how it considers the five limbs interact with each other and the types of relationships which it believes they are seeking to cover.

General approach to interpretation of association

- 4.6 The Panel’s starting points in interpretation (which informs the Panel’s approach to all of the limbs other than Limb (c)) are:
- (a) A finding that parties are associates has consequences in that it may limit those parties’ ability to acquire further voting control in a Code company. Accordingly, for parties to be associates, the relationship should be sufficiently close such that one party’s voting control should limit increases in the other party’s voting control (and vice versa).
 - (b) Indirect effective control over voting rights is already captured through the definition of control – accordingly, association captures a wider category of relationships. In particular, enforceable legal obligations are not required for an association to be formed.
 - (c) Shareholders are entitled to discuss matters relating to the company in which they are invested without effectively aggregating their voting control. Association shall not be interpreted in a way which unduly restricts the free and frank exchange of views amongst shareholders.
 - (d) However, there is the potential for discussions between shareholders to merge into something more – particularly where they begin to work in a collaborative fashion towards a shared goal. This is discussed further below.
 - (e) Association is, as already noted, a highly fact sensitive question and the specific circumstances must always be carefully considered.
 - (f) International precedents may provide a degree of guidance as to whether parties should be considered to be associates or not. However, international precedents are invariably decided based on different definitions of “associate” or “concert party” and should not be taken to apply directly in New Zealand.
- 4.7 The remainder of this section discusses each of Limbs (a)–(e) in detail.



Limb (a) – jointly or in concert

- 4.8 Limb (a) is a key limb in the definition of associate. Limb (a) captures parties who are acting “jointly or in concert”. It will be indicative of association under Limb (a) if parties are engaging in a co-operative or co-ordinated fashion to achieve a common purpose in relation to the control of voting rights in the relevant Code company.
- 4.9 As to the level of co-operation or co-ordination, the parties need not co-operate on all matters, although it is likely that there will be input from both parties. Such input need not be equal. There may be one party which is providing more input than the other, but all parties may be taking some steps towards the relevant goal.
- 4.10 As to the common purpose, there will generally need to be some shared objective. However, the objective need not be precisely defined and the details of the objective may change with time. If the parties were to agree on all of the details of a proposed objective, this could indicate that each party had control over the others’ voting rights. Association centres around relationships and will commonly involve informal or unwritten arrangements.
- 4.11 The Panel’s determination in relation to NZME Limited⁵ provided a helpful example of how the control and association concepts may operate in practice. There, the Panel found that there was an association between Mr Grenon and one shareholder (Caniwi Capital Partners Limited (**Caniwi**)) but not with another shareholder (Spheria Asset Management Pty Limited (**Spheria**)). Market participants should read the determination in full, but a brief summary is set out at paragraphs 8.50 to 8.54.
- 4.12 In addition, the NZME determination sets out factors which may indicate that there is an association in the context of a board spill.⁶

Limb (b) – acting in accordance with wishes

- 4.13 In the Panel’s view, Limb (b) is something of an expansion on the concept of effective control – i.e., it captures arrangements where there is, via custom or habit, one party which acts as instructed by the other. The critical difference is that there is no need to show an actual legal basis or mechanism for the other person exercising control under Limb (b). Put differently, Limb (b) covers relationships which approximate control, but lack the legal formality of a contractual obligation.
- 4.14 Examples of such relationships may include some familial relationships. However, the Panel is unlikely to presume that connections between siblings (or further afield) will result in an association (although this might be the case in the relevant circumstances). The Panel is conscious that families can vary significantly in how members may (or may not) defer to each other.

Limb (c) – related companies

- 4.15 Limb (c) is the most straightforward limb – it captures related companies. This is a defined term, with the Code applying the definition of “related company” from the Companies Act 1993.⁷
- 4.16 For completeness, the Panel notes that Limb (c) will only apply to companies which are incorporated under the Companies Act 1993. It will not apply to any company or body corporate incorporated outside of New Zealand. Association with foreign bodies corporate may, however, be caught through Limb (d).

Limb (d) – other relationships

- 4.17 There are two elements to Limb (d):
- (a) there must be a business, personal, or ownership relationship; and
 - (b) the relationship must be such that the persons should, under the circumstances, be considered associates.

⁵ See <https://www.takeovers.govt.nz/transactions/panel-determinations/nzme-limited-james-grenon>.

⁶ See paragraphs 68 and 69 of the NZME determination.

⁷ See the definition of “related company” in section 2(3) of the Companies Act 1993 which only refers to “companies” being companies incorporated under that Act, not under an overseas act or which are another form of body corporate.



- 4.18 The Panel considers that this limb must be read in the context of the other limbs. This is instructive, as a business or personal relationship might be taken to correspond to either Limb (a) or Limb (b) and an ownership relationship might be taken to correspond to Limb (c). Essentially, the Panel sees Limb (d) as expanding on each of the types of relationships which may be captured under Limbs (a)–(c).
- 4.19 Critically, the second part of Limb (d) clarifies that not all relationships are sufficient – the relationship must be such that the persons should, under the circumstances, be considered associates. This makes the general considerations discussed above relevant: whether the relationship is such that the parties should have their voting control aggregated in order to determine whether either may acquire further voting rights.
- 4.20 As to how Limb (d) serves a purpose independent of Limbs (a)–(c), the Panel’s view is that:
- (a) Limb (d) may capture relationships which are analogous to those captured by Limbs (a)–(c), but for some reason do not quite fall squarely under those limbs. An example of this is corporate groups where there are overseas companies or other bodies corporate which would be “related companies” but for one of the companies being incorporated overseas or being another type of body corporate.
 - (b) Limb (d) covers pre-existing relationships where it may be presumed that a relationship exists which is analogous to a relationship covered by Limb (a) or (b). For example, there might be longstanding business partners who have an extensive history of working together in relation to investments. It might be that proving the existence of such a relationship is sufficient to establish that the parties are associates, without the need to establish that they are acting jointly or in concert in relation to a particular Code company.
- 4.21 One implication of the approach described above is that the Panel expects that relationships which are caught by Limb (d) are more likely to be of a longer duration. However, the Panel does not rule out the possibility of relationships which are caught by Limb (d) being formed in short periods in the relevant circumstances.

Limb (e) – triangulation

- 4.22 Limb (e) allows for parties to be associates via “triangulation” of their relationships with a common associate. This Limb addresses the situation where Party A is an associate of each of Party B and of Party C, but it is also necessary to establish whether Parties B and C are associates.
- 4.23 In determining whether parties are associates under Limb (e), all of the relevant relationships must be considered, with the ultimate question being whether Parties B and C should be considered to be associates. For example, it may be that:
- (a) the relationship between Party B and Party C is close to being an association when considered on its own⁸, but on a full view of the relevant relationships, the relationships that each of Parties B and C has with Party A means that Parties B and C should be considered associates; and
 - (b) conversely, there might be a lack of evidence as to a close relationship between Parties B and C, but their respective relationships with Party A might be sufficiently close that they should be considered associates.
- 4.24 Again, this is a highly fact sensitive test, but the core question is whether it is appropriate to aggregate the relevant parties’ voting control to determine whether any of them may acquire further voting rights taking into account the objectives of the Code.

Approach to assessing whether association exists

- 4.25 While the Australian definition of association is not the same as the New Zealand standard, the Panel considers that the Australian approach to analysing relationships, first set out in *Mount Gibson Iron Limited* [2008] ATP 4 (the

⁸ For clarity, it is not a pre-requisite for an association under limb (e) that this relationship is close to being an association (or that a relationship exists at all). Rather, any such relationship is one of the factors which may be considered in determining whether an association exists under limb (e).



Mount Gibson Framework) is a helpful tool in analysing relationships in an orderly fashion to determine whether the parties are associated. The factors in the Mount Gibson Framework are:

- (a) the existence of a shared goal or purpose;
- (b) a lack of commercial rationale or uncommercial acts;
- (c) prior collaborative conduct;
- (d) structural links between the relevant parties;
- (e) common investments and dealings; and
- (f) common knowledge of relevant facts.

4.26 The Panel notes that not all these factors need to be present, nor should any particular weighting be applied. Instead, the test is highly fact sensitive and while the Australian Panel's approach in applying these factors can be illustrative, it is not determinative.

Evidential and investigative matters

4.27 By its nature, association is often difficult to prove. Commonly, parties will not acknowledge that they are associates, much less so in writing. As such, it is often necessary to draw inferences, which the Panel is permitted to do. For example, the Panel may infer that relationships which are otherwise not readily commercially explicable may indicate the existence of some other relationship.

4.28 For clarity, the Australian Panel's "hurdle test" (i.e., that the applicant must present sufficient evidence of association to convince the Panel as to association, albeit with proper inferences being drawn) does not apply in New Zealand. However, this does not mean that the New Zealand Panel will investigate (or fully investigate) any assertion of association. A range of options is available to the Panel, including:

- (a) taking no further action;
- (b) informal enquiries;
- (c) compelling information; and
- (d) convening section 32 meetings.

4.29 If parties wish the Panel to proceed with an alleged association matter, they are encouraged to:

- (a) provide all the evidence which they have, both indicating an association or lack thereof;
- (b) explain how such material indicates the existence of an association; and
- (c) refrain from providing extraneous material – as a general guide, if the complainant cannot point to an item of evidence indicating an association (or lack thereof) it should not be provided, at least at first instance.

4.30 As to how the Panel will approach any allegations of association, these will be dealt with in the manner described in the Panel's *Guidance Note on Section 32 of the Takeovers Act 1993*.

5 Lock up agreements and voting agreements

5.1 Parties to lock-up agreements in relation to Code offers and voting agreements in relation to schemes of arrangement need to take care to ensure that they adhere to the fundamental rule of the Code (i.e., no person, together with their associates, increases their shareholding over 20% other than in accordance with the Code or an exemption). A lock-up agreement is a legal commitment by a shareholder in a Code company to accept a takeover offer. A voting agreement is a legal commitment by a shareholder in a Code company to vote in favour of a scheme of arrangement.

5.2 Parties to a lock-up agreement or a voting agreement may be associates of each other for the purposes of the Code, but the terms and nature of those agreements and the surrounding circumstances need to be considered on



a case by case basis.⁹ The Panel considers that an associate relationship may not exist, merely by virtue of a lock-up agreement or voting agreement, if:

- (a) the agreement is a commercial arm's length commitment (i.e., a straightforward agreement to make and accept a takeover offer or vote in favour of a scheme of arrangement (as applicable) and the parties are not acting jointly or in concert, but rather on opposite sides of the contract);
- (b) the agreement does not go beyond making and accepting a takeover offer or voting in favour of the scheme (as applicable), and does not include ongoing covenants;
- (c) there is no other ongoing relationship of the parties (i.e., the relationship ends when the shares are transferred in accordance with the takeover offer or scheme (as applicable));
- (d) the agreement expressly precludes control of voting rights passing to the offeror prior to the takeover offer becoming unconditional or the scheme becoming effective (as applicable); and
- (e) the agreement is short-term, lasting no longer than the settlement or lapsing of the takeover offer or the scheme is put to shareholders (as applicable).

5.3 The above list is not an exhaustive list of the terms that may be included in lock-up agreements or voting agreements without creating an associate relationship under the circumstances. Generally, in a lock-up agreement the seller will wish to approve the terms on which the offer is made and any variations to the terms. The Panel accepts that (within reason) it is a necessary incident of a lock-up agreement, but it will be a question of degree in each case as to whether the extent of the approval rights is such as to make the lock-up parties associates.

5.4 The Panel accepts that the seller will wish to have certainty as to the essential terms on which the offer will be made, such as price, timetabling and material conditions. Provisions which seek to do no more than this are unlikely of themselves to make the parties associates under the circumstances; and nor are terms which secure a proportionate commercial benefit for all shareholders, such as making acceptance of the offer contingent on the target company paying a dividend or making a taxable bonus issue.

5.5 However, the more control an offeror seeks to exert, particularly with terms or other arrangements which seek to exert influence over the behaviour of a shareholder once an offer has been made, the more likely it is that the Panel may conclude that, in the circumstances, the parties are associates.

5.6 In schemes of arrangement, concerns with the shareholder exerting influence over the offeror may not arise as, if the voting agreement relates to more than 20% of the voting rights in the Code company, the voting agreement can only relate to a scheme entered into on or before the date of the voting agreement.¹⁰ To the extent that a voting agreement does not rely on the class exemption and/or otherwise presents issues of this type, the Panel is likely to take a similar approach to that described in relation to lock-up agreements.

5.7 As a broad proposition, however, lock-up agreements and voting agreements should generally not result in an assumed association between the parties.

5.8 For examples of both lock-up agreements that would likely not, and lock-up agreements that likely would, result in the lock-up parties being associates merely by virtue of the lock-up agreements, see *CodeWord 39*.

6 What does this mean for parties that are not associates?

6.1 If the lock-up parties are not associates merely by virtue of entering into a lock-up agreement, prospective takeover offerors could acquire up to 20% of the voting rights after entering into the lock-up agreement and in

⁹ Other issues arise in relation to voting agreements as, unlike lock-up agreements, they necessarily convey voting control. Please see the Panel's *Guidance Note on Schemes of Arrangement* for more information.

¹⁰ See clause 5(aa) of the Takeovers Code (Voting Agreements for Schemes of Arrangement) Exemption Notice 2020.



advance of actually making the takeover offer. The non-associated lock-up parties' voting rights would not need to be considered at this point in terms of the fundamental rule.

- 6.2 Rule 36 of the Code provides that, during the offer period, the offeror must not acquire any equity securities in the target company other than under the offer unless, among other things, the acquisition will not result in the offeror and the offeror's associates holding or controlling in total more than 20% of the voting rights in the target company (excluding acceptances under the offer), unless the offer has become unconditional. If the lock-up parties are not associates then any acquisitions made by the offeror under rule 36 do not need to take into account the percentage of the locked-in parties' voting rights for the purposes of the 20% threshold.
- 6.3 When determining compulsory acquisition consideration when an offeror has become a dominant owner by reason of acceptances of an offer, rule 56 provides that if more than 50% of the equity securities under offer are accepted into the offer then the consideration price will be the offer price (and there is no provision for objecting to the consideration). However, the equity securities held or controlled by the offeror and its associates are excluded from this calculation, as are acquisitions made under rule 36. The remaining acceptances are termed the 'free float'.
- 6.4 If the lock-up parties are not associates of the offeror, then their voting rights are included for the purposes of determining whether more than 50% of the free-float is accepted into the offer.
- 6.5 If 50% or less of the free-float is accepted into the offer (and the offeror becomes the dominant owner) then rule 57 provides that shareholders may object to the compulsory acquisition consideration.
- 6.6 These are just some examples of the Code provisions that relate to association and affect lock-up parties.

7 Shareholders' agreements

- 7.1 The Panel's view on shareholders' agreements is that the parties to those agreements may be associates for the purposes of the Code. Whether or not those parties are in fact associates will depend on the nature of the shareholders' agreement and the surrounding circumstances.
- 7.2 The Panel will consider the following matters in order to help determine whether or not an associate relationship may exist between the parties to a shareholders' agreement:
 - (a) an agreement that merely contains terms relating to pre-emptive or drag/tag along rights and obligations is unlikely on its own to give rise to an associate relationship;
 - (b) an agreement that contains terms relating to voting requirements or that gives certain shareholders specific rights, such as for appointment as directors, may give rise to an associate relationship;
 - (c) whether the agreement applies to all or a select group of shareholders may also be relevant (with agreements for select groups or individuals increasing the likelihood of their being associates of each other); and
 - (d) collateral arrangements or ongoing relationships outside of the shareholders' agreement should be considered together with the shareholders' agreement and together these may give rise to an associate relationship.
- 7.3 The terms of shareholders' agreements can vary significantly and may relate to a period of time when the company had a small number of shareholders. It is difficult to identify specific principles to determine whether the parties to a shareholders' agreement may be associates. The above guidance is therefore very general and the Panel considers questions of association for these types of agreements on a case-by-case basis.
- 7.4 The Panel has, in the past, granted an exemption to allow the parties to unwind an agreement in order to "dis-associate" themselves.¹¹ If the parties to an agreement are likely to be associates of one another merely by virtue

¹¹ [Takeovers Code \(Ormiston Surgical & Endoscopy Limited\) Exemption Notice 2011](#)



of their being party to a shareholders' agreement, an exemption may be granted to aid transition to full Code-compliance.

8 Application of the Anti-avoidance rules in “live” examples

- 8.1 This section sets out examples of cases which the Panel has examined in relation to the application of the anti-avoidance rules.

Kerifresh Limited – Control and Association

- 8.2 Kerifresh Limited (**Kerifresh**) was a Northland-based citrus producer and exporter founded by Alan Thompson and Peter Hendl. At the time the relevant matters were considered, Kerifresh was an unlisted Code company.¹²

The warehousing agreement

- 8.3 In early 2002 Peter Hendl decided to sell his 17.84% shareholding in Kerifresh. Hamish McHardy and his son Jonathan McHardy wished to take up Hendl's shares. However, Hamish McHardy required, as a condition of his investment in Kerifresh, managing director Alan Thompson (who already had 18.49%) to take up 361,000 of Peter Hendl's shares (which represented 5.08%).
- 8.4 Alan Thompson did not want it known that he was a purchaser of Hendl's shares. He and Hamish McHardy therefore entered into an agreement (characterised by the Panel as a “warehousing agreement”) under which Hamish McHardy, using Alan Thompson's money, would buy the 361,000 shares and hold them for Alan Thompson's economic benefit. No provision was made as to who controlled the voting rights attaching to those shares.

2002 - Hamish McHardy and Jonathan McHardy's acquisitions

- 8.5 As a result of the acquisition of Hendl's shares, Hamish McHardy increased his shareholding to 9.57%, of which 5.08% was subject to the warehousing agreement. Jonathan McHardy, through the Murrayfield Trust (his family trust, of which Hamish was also a trustee), increased the percentage of shares that he controlled in Kerifresh to 8.69%.

McHardys considered associates – Rule 4(1)(d)

- 8.6 The Panel found the McHardys to be associates under rule 4(1)(d) of the Code on the basis of their personal relationship as father and son, their business relationship as co-investors in Kerifresh and other ventures, and their ownership relationship as co-trustees of the Murrayfield Trust.

Hamish McHardy and Alan Thompson considered associates – Rule 4(1)(d)

- 8.7 The Panel considered that Hamish McHardy and Alan Thompson were associates also under rule 4(1)(d) as a consequence of the business and ownership relationships stemming from the warehousing agreement.
- 8.8 Hamish McHardy's acquisition therefore breached rule 6 because his increase in the percentage of Kerifresh voting rights that he held to 9.57%, when added to the percentage of voting rights held or controlled by his associates Jonathan McHardy (8.69%) and Alan Thompson (18.49%), exceeded 20%. The same was true of certain subsequent acquisitions Hamish McHardy made through an investment vehicle.

¹² See [CodeWord 23](#) for a fuller description of the Kerifresh facts and findings (including explanations regarding the changes to the shareholder percentages referred to in this summary of the case).



Jonathan McHardy and Alan Thompson considered associates – Rule 4(1)(e)

- 8.9 The Panel also considered that the nature of the relationships between Jonathan McHardy, Hamish McHardy and Alan Thompson were such that, under the circumstances of Jonathan McHardy's acquisitions, Jonathan McHardy and Alan Thompson were associates under rule 4(1)(e).
- 8.10 Whilst there was no evidence that Jonathan McHardy was directly involved in the negotiation of, or participated in, the warehousing agreement, the Panel considered that Jonathan McHardy and Alan Thompson were associates under rule 4(1)(e) because Jonathan McHardy was aware at least in general terms of that arrangement, which was a material factor in the Murrayfield Trust's decision to buy shares from Hendl.
- 8.11 This is one of the few occasions on which the Panel has found persons to be associates under rule 4(1)(e).
- 8.12 Jonathan McHardy's acquisition breached rule 6 because the increase in the percentage of Kerifresh voting rights that he held, to 8.69%, when added to the percentage of voting rights held or controlled by his associates Hamish McHardy (9.79%) and Alan Thompson (18.49%), exceeded 20%.

2004 – GMS acquisitions and warehousing agreement unwind

- 8.13 In early 2004, Hamish McHardy wanted to increase his Kerifresh shareholding. However, he had become aware that the Code applied to Kerifresh and that he and his son were probably associates. With an aggregate shareholding at that time of about just under 20%, he would be prohibited from acquiring much more of Kerifresh. He therefore sought to unwind the warehousing agreement.
- 8.14 For various reasons, the way this unwind was structured was that a company called GMS Fulfilment NZ Limited (**GMS**) would buy Kerifresh shares with Hamish McHardy's money and hold those shares for Alan Thompson's economic benefit pending transfer to Alan Thompson. The shares acquired by GMS would replace the shares which were subject to the warehousing agreement, which could then be released back to Hamish McHardy. This would unwind the warehousing agreement while simultaneously increasing Hamish McHardy's economic interest in Kerifresh. Between July 2004 and June 2005 GMS acquired 245,000 shares, representing 3.45% of Kerifresh, pursuant to this strategy. Accordingly, only 116,000 of the original 361,000 shares remained subject to the warehousing agreement.

GMS acquisition causes Alan Thompson to be in breach of Code

- 8.15 The Panel found that Alan Thompson controlled the shares acquired by GMS. The Panel considered that GMS and Alan Thompson, and GMS and Hamish McHardy, were associates under rule 4(1)(d) of the Code, in view of the business relationships they had with each other, directed at unwinding the warehousing agreement.
- 8.16 GMS' acquisitions caused Alan Thompson and GMS to breach rule 6. Alan Thompson increased his control of the percentage of voting rights in Kerifresh from 18.49% to 21.94%.

GMS found to be in breach of Code

- 8.17 GMS increased the percentage of voting rights in Kerifresh it controlled to 3.45%, which, when added to the percentage of voting rights held or controlled by GMS' associates Alan Thompson (18.49%) and Hamish McHardy (10.75%), exceeded 20%.

2005 – Anbran transfer and acquisition

- 8.18 In late 2005 GMS told Alan Thompson and Hamish McHardy it wanted to exit the GMS arrangement. Alan Thompson therefore settled the Anbran Trust to receive 245,000 Kerifresh shares acquired by GMS. Anbran Trustee Company Limited (**Anbran**) was trustee of the Trust. Its sole director and shareholder was Alan Thompson's niece, Emma Eastwood. The beneficiaries were Alan Thompson's children.
- 8.19 Anbran later acquired a further 116,000 shares to increase its shareholding to 361,000. These acquisitions were made from minority shareholders, funded by Hamish McHardy, thereby unwinding the balance of the



warehousing agreement. The Panel considered that, at the time the warehousing agreement was unwound, Hamish McHardy and Alan Thompson ceased to be associates.

- 8.20 The Panel found that Emma Eastwood, as sole shareholder and director of Anbran, and appointer of the Anbran trust, controlled the Kerifresh shares acquired by Anbran.

Anbran an associate of Alan and Helen Thompson – Rule 4(1)(d)

- 8.21 The Panel considered that the personal, business and ownership relationships between Alan and Helen Thompson, Emma Eastwood and Anbran (including the fact that Alan Thompson made all the decisions regarding the Anbran Trust's investment in Kerifresh) were such that, under the circumstances of Anbran's acquisitions and holding of Kerifresh shares, they should be regarded as associates under rule 4(1)(d).
- 8.22 Anbran's acquisitions caused Anbran and Emma Eastwood to breach rule 6 of the Code. It increased the percentage of voting rights in Kerifresh held by Anbran and controlled by Emma Eastwood to 5.30% which, when added to the percentage of voting rights held or controlled by their associate Alan Thompson (19.26%), exceeded 20%.

2007– Lawrence Fletcher's proposed acquisition

- 8.23 Lawrence Fletcher was an acquaintance of Jonathan McHardy. In early 2007 he had money on deposit with the Murrayfield Trust as a result of a previous business venture with the McHardys. Jonathan McHardy suggested reinvesting those funds in Kerifresh. Law firm Grove Darlow & Partners acted for Lawrence Fletcher in the purchase of Kerifresh shares. In August 2007 Grove Darlow's trustee company GDP Trustee Limited acquired 10,000 Kerifresh shares on Lawrence Fletcher's behalf. Hamish McHardy initially funded that purchase. Lawrence Fletcher repaid him from some of the funds deposited with the Murrayfield Trust.
- 8.24 Lawrence Fletcher wished to purchase a further 500,000 Kerifresh shares. Alan Thompson had become aware that there may have been a breach of the Code in respect of the Anbran transactions, and that he should sell down shares to reduce his and Anbran's combined shareholding to less than 20%. Through Hamish McHardy, Lawrence Fletcher became aware of this and agreed to purchase 165,000 of Alan Thompson's shares. Grove Darlow then sent out a letter to shareholders offering to purchase the balance of 335,000 shares. Neither acquisition was completed because of restraining orders issued by the Panel.

Fletcher and McHardys considered associates

- 8.25 The Panel considered that Lawrence Fletcher, Hamish McHardy and Jonathan McHardy were associates under rules 4(1)(a) and 4(1)(d).
- 8.26 The Panel found that those persons were acting "in concert" in relation to Lawrence Fletcher's intended acquisitions and were associates under rule 4(1)(a). The evidence showed a clear understanding and purpose between the three of them that Lawrence Fletcher would increase his holding of Kerifresh shares by up to 500,000.
- 8.27 The Panel also found that they had personal or business relationships, such that, under the circumstances of Lawrence Fletcher's proposed acquisitions, they should be considered associates. Factors included previous business dealings and the common strategy to assist Lawrence Fletcher to acquire up to 500,000 shares in Kerifresh.
- 8.28 Lawrence Fletcher's proposed acquisition would have breached rule 6. It would have increased the percentage of voting rights in Kerifresh he held to 6.73% which, when taken together with the percentage of voting rights in Kerifresh held or controlled by his associates Hamish McHardy (10.72%) and Jonathan McHardy (8.41%), would exceed 20%.

Designer Textiles (NZ) Limited – Gould Holdings Limited - Control and Association

- 8.29 Designer Textiles (NZ) Limited (**DTL**) was a Code company. Its major shareholder was Gould Holdings Limited (**GHL**), an investment company controlled by Mr George Gould, with a 24.69% stake. Mr Gould had a long



association with the Rutherford family. In the latter part of 2002, the members of the Rutherford family sold their investment company, Amuri Securities Limited (**ASL**) to GHL in exchange for shares and convertible notes in GHL. After Mr Gould had subscribed some additional capital in GHL the Rutherford family held 21.24% of GHL while Mr Gould, through a separate company Gould Investments Limited (**GIL**), held 78.76%.

8.30 The Panel was concerned that the Rutherford family interests may have joined Mr Gould in “holding or controlling” GHL’s 24.69% stake in DTL in breach of the Code. The issue was the effect of rule 6(2)(b) which states that if:

...

(b) *a person or persons together hold or control voting rights and another person joins that person or all or any of those persons in the holding or controlling of those voting rights as associates, the other person is deemed to have become the holder or controller of those voting rights:*

...

8.31 To come within rule 6(2)(b) the Rutherfords first had to have joined Mr Gould/GIL in the control of GHL and therefore the control of GHL’s shareholding in DTL.

8.32 The Panel examined the relationship between the Rutherford family and Mr Gould to decide whether the Rutherfords may have joined Mr Gould/GIL in controlling GHL. Of particular note to the Panel were:

(a) the Rutherfords had no board representation on GHL;

(b) the Rutherfords acquired their interest in GHL accepting that they had no right to influence Mr Gould’s control of that company; and

(c) there was no shareholder agreement to provide the Rutherfords with any control in the decision-making process of GHL.

8.33 The Panel accepted that the Rutherford family had not joined Mr Gould/GIL in the controlling of GHL’s 24.69% holding in DTL. The Panel noted that it would be unusual for an investment of 21.24% to be made in a closely-held company on an entirely “sleeping partner” basis with no checks and balances on the conduct of that company.

8.34 However, in this case the evidence indicated that:

(a) Mr Gould was intent on retaining control of GHL; and

(b) the Rutherford family bought their shares in GHL accepting that they had no rights to influence GHL’s governance, either in controlling the votes in DTL, or otherwise.

8.35 The second part of rule 6(2)(b) requires that parties are joined in the holding or controlling of the voting rights as associates. As the Panel determined the requirements of the first part of rule 6(2)(b) had not been met, there was no need to consider whether the Rutherfords and Mr Gould/GIL were associates.

8.36 The question of association between the Rutherford family and Mr Gould also arose in connection with various acquisitions of shares in DTL itself by members of the family.

8.37 Several family members had acquired direct investments in DTL and by February 2003 these holdings amounted to some 8.8% of the total voting rights in DTL. They were in addition to the 24.69% held by GHL. The issue was that if the Rutherford family were associates of Mr Gould or GIL at the time they had acquired these parcels of shares then the acquisitions would have been in breach of the Code.

8.38 The Panel considered a number of factors, including:

(a) the historical business relationship through companies in which both the Rutherfords and Mr Gould had an involvement;

(b) the Rutherfords had previously contracted Mr Gould to manage certain investments in ASL on their behalf;



- (c) the Rutherford investment in GHL was very informal with minimum documentation and was characterised by a high degree of trust on the part of the Rutherford family;
- (d) the Rutherford family agreed not to take part in the governance of GHL; and
- (e) the relevant investment monies of the Rutherfords were kept together over many years, and they adopted a common approach to the investment in GHL.

- 8.39 The Panel was satisfied that the strands of all three elements (business, personal and ownership relationships) of the extended definition of “associate” in rule 4(1)(d) satisfied the requirements for association between Mr Gould and the Rutherford family. The rule 4(1)(d) relationships did not need to exhibit any agreement over control or any particular form of undertaking relating to the voting rights attached to shareholdings in the company. In particular, the expression “in the circumstances” enabled all factors to be considered in assessing the relationship, taking into account the importance of the associate status.
- 8.40 The Panel determined that the associate status crystallized on 11 September 2002 and that consequently all acquisitions of DTL securities by Rutherford family members after that date were in breach of rule 6(1)(a). The parties at fault were required to divest those holdings that had been acquired in breach of the Code. The family members gave enforceable undertakings that the relevant shares would be sold within six months of the Panel’s decision and subsequently confirmed that this had been done.
- 8.41 Even the smallest acquisitions of voting rights in a Code company can be in breach of the Code if an associate of the person acquiring the voting rights already holds more than 20% of the voting rights in the company. The provision is designed to ensure that controlling shareholders cannot increase their level of control in a Code company through associates when they would be unable to acquire the additional voting rights themselves.

Bridgecorp Capital Limited - Association

- 8.42 In late 2004 Bridgecorp Capital Limited (**Bridgecorp**) acquired 19.99% of the voting rights in Dorchester Pacific Limited (**Dorchester**) from Mr Brent King, the managing director of Dorchester, and from other interests. Mr King retained 5.05% of Dorchester and subsequently purchased a further 0.9% of Dorchester. Consequently Mr King and Bridgecorp held 25.94% of Dorchester between them. At the same time that Mr King and Bridgecorp entered into the sale and purchase agreement in respect of 19.99% of Bridgecorp, they also entered into an agreement described as a “lock-up deed” which was in substance an option deed.
- 8.43 To decide whether Bridgecorp and Mr King were associates, the Panel considered the facts around the entering into of each agreement and the expectation of the parties after the agreements. The sale and purchase agreement between Bridgecorp and Mr King provided for a number of ongoing relationships such as:
- (a) an employment commitment by Mr King to remain as CEO of Dorchester for a period;
 - (b) a restraint of trade for Mr King, preventing any competition with Dorchester’s business within 6 months of his leaving Dorchester’s employment, should he do so; and
 - (c) a restraint on Mr King buying any more shares in Dorchester for 12 months.
- 8.44 The option deed provided for:
- (a) the payment of \$600,000 by Bridgecorp to Mr King for an option;
 - (b) a standstill on Mr King’s shares (preventing him from selling his remaining Dorchester shares);
 - (c) an option (for 10 months) for Bridgecorp to purchase the remainder (5.05% of Dorchester’s voting rights) of Mr King’s Dorchester shares at a fixed price; and
 - (d) a commitment by Mr King to accept a possible future takeover offer by Bridgecorp (although Bridgecorp did not commit to making such an offer).



8.45 The Panel considered that as a result of these ongoing contractual provisions relating to the future control of voting rights in Dorchester and other commitments the parties were associates under the Code. Their combined holding of voting rights after the transactions exceeded the 20% threshold and consequently the acquisition of voting rights was in breach of the Code. After making its determination the Panel accepted enforceable undertakings from Bridgecorp to sell down approximately 5% of the voting shares of Dorchester and from Mr King to sell down approximately 0.9% of the voting shares in Dorchester. These sales put Bridgecorp and Mr King back in the position they would have been in had their acquisitions as associates complied with the Code. The two parties also undertook to unwind the option deed and elements of the sale and purchase agreement, thus removing contractual elements of their association.

Kiwi Income Property Trust/Sovereign Assurance Limited - Association

- 8.46 In November 2004 Kiwi Income Property Trust (**Kiwi**) acquired 19.9% of the voting rights in Capital Properties Limited (**Capital Properties**), a Code company, by way of a stand in the market.
- 8.47 Subsequently Sovereign Assurance Company Limited (**Sovereign**) (which was related to, and therefore associated with, Kiwi through common upstream ownership of Kiwi's management company) bought more Capital Properties shares on market, which increased the aggregate holdings of Kiwi and Sovereign to just over 20%. When notified of these acquisitions the Panel immediately contacted Sovereign seeking an explanation. Sovereign recognised its error and immediately sold down sufficient shares to reduce the combined holding of Kiwi and Sovereign in Capital Properties to below 20%.

Calgary Petroleum Limited - Association

- 8.48 A number of shareholders increased their voting rights in Calgary Petroleum Limited (**Calgary**) by taking up an over acceptance facility of a pro rata offer. Another shareholder complained to the Panel that these shareholders were associates because they had personal and business relationships, and had voted the same way on a resolution to remove a director of the company.
- 8.49 The Panel decided that a number of shareholders agreeing to exercise their votes in a particular way does not necessarily make them associates. The Panel considered the nature of the relationship between the shareholders and determined that they were not associated. Although many of the shareholders had personal and business relationships, in contrast to the Dorchester case, their relationships did not involve the control of voting rights in Calgary.

NZME

Background

- 8.50 NZME Limited (**NZME**) was a Code company. James Grenon was a shareholder in NZME. In early 2025, Mr Grenon initiated a proposal to replace the board of NZME (the **Proposed Spill**), which became public on 6 March via a letter to NZME (the **6 March Letter**).
- 8.51 Prior to the release of the 6 March Letter, Mr Grenon acquired further NZME shares (having previously acquired a shareholding of just below 5%):
- (a) through transactions which settled on or around 4 March 2025, Mr Grenon increased his control percentage to 9.321%; and
 - (b) through transactions which settled on or around 6 March 2025, Mr Grenon increased his control percentage to 9.966%.
- 8.52 The 6 March Letter stated that Mr Grenon had discussed the Proposed Spill with major shareholders who, together with him, controlled around 37% of NZME's voting rights, and intended to support the Proposed Spill. The Panel made enquiries as to whether Mr Grenon was associated with any of the parties referred to in the 6 March Letter.



Following these initial enquiries, the Panel held a meeting under section 32 of the Takeovers Act 1993 to investigate the matter further.

Section 32 Meeting Determination

- 8.53 Of the relevant shareholders, the Panel concluded that there was an association with Caniwi. Amongst other factors, Mr Bowker, Caniwi's Executive Chair, was involved in the Proposed Spill, including by – collaborating with Mr Grenon, participating in strategy meetings with potential directors, and liaising with the key shareholder (including seeking indications of their voting intentions). Additionally, Mr Des Gittings, Chief Executive of Caniwi, was proposed by Mr Grenon as a candidate for the NZME board, and a role at NZME for Mr Bowker was also contemplated by Mr Grenon and Caniwi. The Panel found that these factors were material to establishing a relationship of association between Mr Grenon and Caniwi.
- 8.54 In contrast, Mr Grenon and Spheria were found to not be associates. Although there was a degree of engagement between Mr Grenon and Spheria in respect of the Proposed Spill, the Spheria executive was cautious and circumspect in his communication with Mr Grenon and Caniwi. The Panel concluded that these steps did not go beyond legitimate engagement between shareholders. Whilst Spheria's support for the Proposed Spill was portrayed in absolute terms by Mr Grenon to others, the Panel found that Spheria was focusing on pursuing what it perceived to be necessary changes at NZME for the benefit of Spheria's clients, rather than solely support for Mr Grenon. Spheria viewed the Proposed Spill as merely one of a number of potential pathways that may result in the change that Spheria desired. Spheria remained open to (and actively pursued) alternatives.
- 8.55 The Panel's determination is available [here](#).



Schedule: Version control, disclaimer and copyright

Version Control

This version (Panel document reference number 1004267.1) was published on 7 April 2026.

The version history of this Guidance Note is, in summary:

Date of version	Principal changes from previous version	Document reference number
7 April 2026	Incorporated new guidance on the interpretation of control, the key limbs of association, and a summary of the Panel's determination in relation to NZME Limited.	#1004267.1
15 August 2016	n/a – This was the first version of the Guidance Note.	#379901.1

Disclaimer

All reasonable measures have been taken to ensure the information in this Guidance Note is accurate and current. The Takeovers Panel may replace or update this Guidance Note at any time and you should ensure that you have the most recent version of this Guidance Note by checking www.takeovers.govt.nz.

The information is not legal advice. It is not intended to take the place of specific legal advice from a qualified professional. The information does not replace or alter the laws of New Zealand and other official guidelines or requirements. As with all matters that come before the Panel, any examples referred to in this Guidance Note are illustrative only, may not state all relevant facts which are material when contrasted to future matters and the Panel is not bound by its own precedents.

Copyright

Copyright material in this Guidance Note is protected by copyright owned by the Takeovers Panel on behalf of the Crown. Unless indicated otherwise for specific items or collections of content (either below or within specific items or collections), this copyright material is licensed for re-use under a [Creative Commons Attribution 4.0 International Licence](https://creativecommons.org/licenses/by/4.0/).

In essence, you are free to copy, distribute and adapt the material, as long as you attribute it to the Takeovers Panel and abide by other licence terms. Please note that this licence does not apply to any logos, emblems and trademarks or to this Guidance Note's design elements or to any photography and imagery. Those specific items may not be re-used without express permission.

For convenience and informational purposes only, this Guidance Note may provide links to other websites. These other sites may contain information that is the copyright of third parties and subject to restrictions on reuse. Permission to use copyrighted materials from other web sites must be obtained from the copyright owner and cannot be obtained from the Takeovers Panel.