Guidance Note

SCHEMES OF ARRANGEMENT

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TAKEOVERS PANEL
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Contents

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This Guidance Note sets out key information relating to schemes of arrangement involving Code companies. The Guidance Note addresses the Companies Act requirements as well as the Panel's role in relation to schemes of arrangement.

1 Background

Introduction

1.1 Schemes of arrangement and amalgamations under Part 15 of the Companies Act 1993 (**schemes**) are statutory Court-approved procedures that allow the reorganisation of the rights and obligations of shareholders and companies. Schemes involving Code companies are regulated under sections 236A and 236B of the Companies Act.

1.2 The section 236A and 236B schemes provisions were introduced to better align the schemes procedure under the Companies Act with the protections for shareholders under the Takeovers Code. The schemes provisions also align New Zealand's Code company reconstruction law more closely with the Australian regime.

1.3 The key threshold question for whether sections 236A and 236B apply is whether the relevant scheme "affects the voting rights" of a Code company. Section 236A(5) provides that "affects the voting rights" of a Code company, in respect of an arrangement or amalgamation, means:

> *[A]n arrangement or amalgamation that involves a change in the relative percentage of voting rights held or controlled by 1 or more shareholders.*

1.4 Under section 236A, the Court cannot approve a scheme that affects the voting rights of a Code company unless:[1]

(a) it is satisfied that the shareholders of the Code company will not be adversely affected by the use of a scheme rather than the Code to effect the change involving the Code company; or

(b) the Court is presented with a no-objection statement from the Panel.

1.5 Under section 236A the Court is entitled to rely on the no-objection statement to approve a scheme. However, the Court does not have to approve a scheme merely because the Court has been presented with a Panel no-objection statement.

The Panel's approach

1.6 The Panel views schemes as a legitimate and valuable means for undertaking corporate transactions in New Zealand. The ability to carry out corporate transactions under a Companies Act process, rather than under the Code, provides economically sensible commercial flexibility.

1.7 The Panel encourages potential applicants for a no-objection statement to undertake early engagement with the Panel executive. The Panel will consider specific questions prior to an application for a no-objection statement. The Panel executive are happy to discuss draft proposals and review early drafts of documents on a confidential basis, in much the same way as the Panel executive review draft Code transaction documents.

Schemes which only result in immaterial changes of voting control

1.8 The Panel is conscious that some schemes may involve only immaterial changes in the holding or control of voting rights in a Code company (such schemes being **Immaterial Change in Voting Control Schemes**). Although the matter is fact dependent, Immaterial Change in Voting Control Schemes may include:

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[1] "*affects the voting rights*", in respect of an arrangement or amalgamation, means an arrangement or amalgamation that involves a change in the relative percentage of voting rights held or controlled by one or more shareholders.

(a) pro-rata returns of capital where there are minor changes in voting control (although it is possible that schemes such as this, that result in de minimis changes in relative voting control as a result of rounding, do not trigger section 236A at all – see further below); and

(b) corporate restructures where a new holding company is inserted at the top of a corporate group (such a transaction may result in a new holder of voting rights, but not involve any change in relative control amongst the ultimate controllers of voting rights).

1.9 Where the Panel is satisfied that a scheme is an Immaterial Change in Voting Control Scheme, the Panel may consider dispensing with some of the disclosure requirements which would otherwise be expected and/or the need for an independent adviser's report.

1.10 If a scheme promoter considers a scheme to be an Immaterial Change in Voting Control Scheme, the scheme proponent should engage early with the Panel (i.e., before making an application for a no-objection statement) and provide the following information:

(a) the reasons for this view;

(b) the proposed interest classes and the basis for their proposed composition;

(c) whether or not an independent adviser's report should be provided (and the reasons for this view);

(d) a statement of which of the usual disclosures the scheme promoter considers unnecessary (and the reasons for this approach); and

(e) any other relevant matters in this regard which the scheme promoter considers may assist the Panel in its consideration of the application.

1.11 There may be some schemes where the change in the holding or control of voting rights in a Code company is so immaterial that section 236A of the Companies Act does not apply. This may be the case where there is a change in voting control which arises as a result of rounding to an insignificant decimal point. An example of this was *Re Tilt Renewables Limited* [2020] NZHC 1398, where Tilt Renewables Limited (**Tilt**) sought to complete a pro-rata return of capital by cancellation of shares under a scheme under Part 15 of the Companies Act (the **Tilt Scheme**). In this case, there was no change in the relative voting control of shareholders when control percentages were rounded to the 8th decimal point. The Court decided that section 236A did not apply to the Tilt Scheme.

1.12 If a scheme promoter is unsure whether a scheme triggers section 236A, they should consult with the Panel at an early stage. The Panel may be prepared to issue a letter to the effect that it considers that section 236A of the Companies Act should not apply to a scheme, but should the Court find otherwise, the Panel would be prepared to issue a no-objection statement.

The Panel's role

1.13 The Panel's role is to assist the Court. This can be done, for example, by:

(a) reviewing scheme documents to ensure that appropriate information is placed before shareholders, that interest classes of shareholders have been adequately identified, and that other protections available to shareholders (and other equity security holders) under or in connection with the scheme are appropriate; and

(b) helping to ensure that matters that are relevant to the Court's decision are brought to the Court's attention.

No-objection statements

1.14 The Panel will consider applications for a no-objection statement on a case-by-case basis. The Panel is not required under the Companies Act to provide a no-objection statement and a scheme applicant is not required to apply for a no-objection statement. The Panel will consider providing a no-objection statement only at the request of an applicant.

1.15 When considering whether to give a no-objection statement, the Panel will consider the Code's disclosure requirements, the extent to which any separate interest classes of shareholders have been adequately identified under a scheme proposal, and the other protections available to shareholders (and other equity security holders) in the Code company under or in connection with the scheme. As with takeovers under the Code, the Panel will express no views on the merits of a scheme.

1.16 In New Zealand, unopposed schemes are often considered by the Court 'on the papers', and there is no actual hearing. The Panel is not averse to this practice provided that, for schemes that fall within section 236A of the Companies Act, the Panel has given a no-objection statement.

1.17 The Panel may make submissions to the Court in relation to a scheme proposal whether or not it intends to give a no-objection statement. However, it will be less likely that the Panel would wish to make submissions or formally intervene in the Court process if it intends to give a no-objection statement.

1.18 It is likely that the Panel would wish to appear and make submissions to the Court if it has not provided a no-objection statement.

2 Applications for a no-objection statement

Early contact with the Panel is essential

2.1 Under section 236A of the Companies Act, the applicant for final Court orders for a scheme under section 236(1) of the Companies Act must notify the Panel of the application at the same time as filing the application in Court.

2.2 However, to ensure that the Panel has had time to review the scheme documents and consider whether it will give a no-objection statement, the applicant for the scheme should provide draft scheme documents and any supporting material to the Panel well in advance of the application to the Court for initial orders under section 236(2) of the Companies Act.

2.3 When making an application to the Panel, the applicant must specify the dates by which the applications for initial Court orders and final Court orders are intended to be filed. The Panel will do its best to meet reasonable timeframes. The Panel generally requires a minimum of two weeks to review final drafts of the scheme documents and to consider whether to give a no-objection statement. This allows documents to be reviewed in parallel with the NZX (where relevant).

2.4 If the Panel has not had adequate time to consider the scheme documentation, the Panel will be unlikely to give a no-objection statement. If no application for a no-objection statement has been made, or if the Panel does not intend to issue a no-objection statement to an applicant, the Panel may seek to be heard at the initial Court proceedings. There, the Panel may object to the scheme or ask the Court to make orders on matters such as the information to be provided to shareholders or the identification of interest classes of shareholders.

Information disclosure

2.5 A scheme applicant and, if relevant, the scheme's promoter,[2] should contact the Panel executive early in the process to agree the disclosures that should be made in the scheme documents.

2.6 The first step for a scheme applicant in determining the disclosures is a clause-by-clause analysis of the extent to which the disclosures required by Schedules 1 and 2 of the Code and rule 15 or rule 16 of the Code can be made – whether exactly as set out in the Code, or modified to better match the terms of, and the parties to, the proposed scheme. An explanation should be provided to the executive of why the modification or omission of a Code clause

[2] This Guidance Note refers to both the scheme applicant, which will usually be the relevant Code company, and the "promoter" of the scheme. The promoter may be an acquirer of the Code company's voting rights (where a takeover is undertaken as a scheme), or may be a person or persons seeking a merger with the Code company. In some cases, the promoter may be the Code company itself, or some other person benefitting from the scheme. Where there is more than one promoter involved, the reference to "promoter" should be read to include all the promoters.

is necessary or desirable. Repetition and irrelevant Code-like language should be avoided. The Panel's goal is that shareholders are provided with effective disclosure, in clear and concise language.

Engage an independent adviser

2.7 In most cases, the Panel will provide a no-objection statement only for scheme proposals that are accompanied by an independent adviser's report. In terms of the types of report which are likely to be required:

(a) In most cases, it is expected that there will be an independent adviser's report which is similar to a rule 21 Code report on the merits of the proposed transaction.

(b) In addition, an independent adviser's report which is similar to a rule 22 report may be required (or those matters might be required to be addressed in the rule 21-equivalent independent adviser's report). Situations where such a report is more likely to be required include where there are multiple interest classes of shareholders who will be asked to vote on the scheme. Such a report may also be relevant where an offer is made to equity security holders (other than shareholders) which is conditional on the scheme proceeding.

2.8 The Panel may not require an independent adviser's report in some circumstances. For example, in the case of an Immaterial Change in Voting Control Scheme, the Panel may consider the effect to be so small that it would not require an independent adviser's report as a pre-requisite to providing a no-objection statement.

2.9 The independent adviser must be approved by the Panel for the purposes of providing the report. Full details of the Panel's policy and practice on approvals for independent advisers and reviewing independent adviser reports are contained in the Guidance Note on Independent Advisers.

Complex or novel issues

2.10 An application for a no-objection statement should carefully explain any complex or novel issues, or areas of uncertainty, concerning the scheme or its impact on shareholders (or any other equity security holders). Any difficult or novel questions of law, or other matters on which expert advice has been obtained, that may be relevant to the Panel's consideration of the application for a no-objection statement should also be included. The better the Panel understands the issues, the more readily it will be able to decide whether or not it objects to the scheme.

Interest classes

2.11 Under the common law, and in accordance with section 236A of the Companies Act, a scheme must be considered and voted on by each interest class affected by the scheme. The requisite voting threshold needs to be achieved in each interest class if the scheme is to succeed.

2.12 When a scheme involves separate interest classes, the Panel expects the division of classes to be clearly disclosed in the scheme documents, together with an explanation of why the divisions have been drawn.

2.13 The interest classes are to be determined in accordance with Schedule 10 of the Companies Act as a starting point.[3]

2.14 Schedule 10 provides:

> *"…an interest class may be determined in accordance with the following principles:*
>
> *(a) shareholders whose rights are so dissimilar that they cannot sensibly consult together about a common interest are in different interest classes:*
>
> *(b) shareholders whose rights are sufficiently similar that they can consult together about a common interest are in the same interest class:*

[3] In *Re New Zealand Oil & Gas Limited* [2015] NZHC 39 at [13] – [19].

> *(c) the issue is similarity and dissimilarity of shareholders' legal rights against the company (not similarity or dissimilarity of any interest not derived from legal rights against the company):*
>
> *(d) if the rights of different shareholders will be different under a proposed arrangement or amalgamation, then those shareholders are in different interest classes."*

2.15 Under Schedule 10, to determine interest classes, the parties need to look at the rights and obligations of shareholders and the effect of the scheme on them. Accordingly, if the scheme would result in a different legal effect for a group of shareholders, that group of shareholders should likely be considered as a different interest class for the purposes of voting on the scheme.

2.16 However, the common law also needs to be considered. For example, in respect of shareholders being able to sensibly consult together about a common interest, where a shareholder is, or is related to the scheme promoter, that shareholder will likely have to vote in a separate interest class from the other shareholders.[4]

2.17 The Panel will not expect different interest classes to be identified unnecessarily.

2.18 While association is not a feature of the Schedule 10 interest class determination, association will be relevant to disclosure in the scheme documents and may restrict the scheme promoter's ability to acquire voting securities outside of the scheme.

Differential consideration

2.19 Rule 20 of the Code provides that an offer must be made on the same terms and provide the same consideration for all securities belonging to the same class of equity securities under offer. Rule 20 is one of the key concepts of the Code and the Panel has historically taken a strict approach in enforcing rule 20 in the context of Code offers.

2.20 Conversely, the Panel considers that schemes can provide economically sensible commercial flexibility. As such, the Panel will consider issuing a no-objection statement in respect of a scheme which provides differential consideration to shareholders in the 'target' company and/or their associates. However, where there is differential consideration, the Panel is likely to scrutinise:

(a) the terms of the scheme to ensure that the interests of relevant shareholders are appropriately protected; and

(b) the adequacy of the disclosure of the differential consideration.

2.21 Where it is proposed that shareholders will receive different consideration, the Panel will follow the approach set out below:

(a) The Panel will look at the composition of interest classes in the first instance as a means of ensuring that the interests of shareholders are adequately protected.

(b) It may be possible for shareholders to vote in the same interest class despite having differential entitlements under a scheme if the shareholders can sensibly consult with each other in relation to the scheme. Without limitation, sensible consultation may not be precluded where:

(i) there is one shareholder (or a limited number of shareholders) which wishes to receive less consideration or less advantageous terms in respect of a scheme;

(ii) the relevant shareholder(s) is/are sufficiently sophisticated and/or professionally advised so as to enable them to assess the risks of voting as part of the main interest class;

(iii) the relevant shareholder has publicly stated its intention to vote in favour of the scheme and has agreed to vote in the main interest class;

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[4] See *Re Hellenic & General Trust Ltd* [1976] 1 WLR 123, in which a scheme was rejected by the Court as a 53% shareholder ought to have been placed in a separate class for voting purposes, as it was a wholly-owned subsidiary of the bidder. For further examples see *Advicewise People Ltd v Trends Publishing International Ltd* [2016] NZHC 2119, *Aston Resources Ltd* [2012] FCA 229 and *Re Cashcard Australia Limited* (2004) 48 ACSR 738.

(iv) the Panel forms the view that the relevant shareholder(s) voting as part of the main interest class will not disadvantage or otherwise prejudice other shareholders; and

(v) there is no other reason for the Panel to consider that sensible consultation is not possible.

(c) If sensible consultation will be impossible as a result of differential consideration, the shareholders will likely form a separate interest class.

2.22 Finally, the Panel expects that all shareholders should be provided with all material information about any differential consideration in respect of a scheme. Generally, the Panel will expect relevant particulars to be included in the scheme booklet and covered in the independent adviser's report (as applicable).

Voting

2.23 The voting requirements must be disclosed in the scheme documents, consistently with the requirements of section 236A(4) of the Companies Act.

2.24 For the purposes of section 236A(4)(a), the Code company's shareholders may only approve the scheme by a resolution approved by a majority of 75% or more of the votes of the shareholders in each interest class entitled to vote and voting on the question (the **shares voted at the meeting**).

2.25 The resolution must also be approved by a simple majority of all of the eligible voting rights. Valid votes by proxy or representative are included for counting the shares voted at the meeting. If the number of valid votes cast approving the scheme, taken together, equate to more than 50% of the Code company's total voting rights, then the voting threshold for approving the resolution has been met (if the 75% threshold has also been met by each interest class).

Voting intentions of promoter

2.26 If any promoter under the proposed scheme is a shareholder of the Code company and will be eligible to vote at the scheme shareholder meeting(s), a statement of the voting intentions of the promoter and its associates will be required by the Panel. This statement must be enforceable by the Panel by way of deed poll. A standard form deed poll is attached as Appendix B to this Guidance Note.

Voting Agreements

2.27 A scheme promoter may wish to enter into voting agreements prior to undertaking a scheme.

2.28 A voting agreement is a legal commitment by a shareholder in a Code company to vote for or against a scheme (**Voting Agreement**). They are analogous to Lock-up Agreements in respect of takeovers. Commonly, scheme promoters wishing to increase deal certainty will seek to enter into Voting Agreements. A Voting Agreement will typically:

(a) contractually bind the shareholder to vote in favour of the scheme; and

(b) contractually restrict the shareholder from selling their shares in the Code company prior to the shareholder meeting to vote on the scheme.

2.29 Accordingly, Voting Agreements confer control over voting rights on the promoter of the scheme, as the scheme promoter has indirect control over the voting rights as a matter of contract. As such, Voting Agreements can place the persons who can enforce the commitment to vote for or against the scheme (and any upstream parties of those persons) in breach of the Code.

2.30 The Code does not restrict Voting Agreements that do not result in a person increasing their voting control beyond the 20% control threshold set out in rule 6(1) of the Code. However, rule 6(1) may be breached by a scheme promoter entering into a Voting Agreement (in the absence of reliance on an exemption) if either:

(a) the scheme promoter and their associates together hold or control less than 20% of the voting rights in the Code company, but entering into the Voting Agreement increases their aggregate holding or control to more than 20% (as a result of obtaining control of voting rights under the Voting Agreement); or

(b) the scheme promoter and their associates already hold or control more than 20% in aggregate prior to entering into the Voting Agreement.

2.31 Accordingly, scheme promoters need to take care not to breach the Code's 20% threshold in rule 6(1).

Class Exemption for Voting Agreements

2.32 Voting Agreements are, however, able to be entered into in reliance on the *Takeovers Code (Voting Agreements for Schemes of Arrangement) Exemption Notice 2020* (**the Class Exemption**). The Class Exemption permits any person to enter into a Voting Agreement which would otherwise breach rule 6(1), provided that the conditions of the Class Exemption are satisfied.

2.33 The conditions of the Class Exemption, include that:

(a) the Voting Agreement must expressly provide that the person that may enforce the commitment to vote for or against the scheme (the **Specified Person**) does not become the controller of the voting rights attaching to the voting securities that are the subject of the Voting Agreement in any way other than in respect of that voting commitment;

(b) the Specified Person must, as soon as is reasonably practicable but, in any event, within 1 working day after the Voting Agreement is entered into, send certain material information about the Voting Agreement to the Panel and the Code company; and

(c) if the Specified Person becomes aware that any material information has changed, the Specified Person must, as soon as is reasonably practicable but, in any event, within 1 working day after becoming aware of the change, send a notice of the change to the Panel and the Code company.

2.34 Following disclosure of the material information, the Panel expects that the Code company will promptly disclose the material information to shareholders. An omission to do so may be misleading to shareholders.

2.35 The Panel will engage with the Code company to ensure that appropriate disclosures are made. Voting Agreements should be disclosed in the relevant scheme booklet. In addition:

(a) A listed Code company will be expected to announce any Voting Agreement (or varied material information) via the NZX MAP. Such announcement should:

(i) include all material information (or all varied material information); and

(ii) be made within 1 business day of receipt of the material information (or varied information) or earlier if required under the NZX Listing Rules.

This applies both before and after distribution of the scheme booklet.

(b) An unlisted Code company should contact the Panel executive and discuss what disclosure is appropriate in the circumstances. The appropriate disclosure will vary depending on the circumstances, but generally speaking:

(i) If the Code company issues any written communications to shareholders regarding the scheme prior to release of the scheme booklet, the Code company should disclose the material information in those communications, as at that date.

(ii) If a Voting Agreement is entered into (or varied) after the date of a scheme, the Code company should disclose the material information (or varied material information), as at that date, in a supplemental disclosure document.

2.36 Any failure by a Code company to make appropriate disclosures will be addressed when the Panel considers whether or not to issue a no-objection statement (if one is sought). If a no-objection statement is not sought, the Panel may none the less appear in Court and draw the Court's attention to this matter.

Voting Agreements and interest classes

2.37 In considering the identification of interest classes as part of an application for a no-objection statement, the Panel will assess Voting Agreements on a case-by-case basis. A Voting Agreement between the scheme promoter and a shareholder who is not, or does not become, related to the scheme promoter is unlikely to result in the Panel forming the view that the shareholder should vote in a separate interest class.[5]

2.38 A Voting Agreement for a scheme will not, on its own, result in an assumed association between parties to the agreement. The Panel will assess whether the terms of a Voting Agreement may give rise to a potential association in the context of a proposed scheme, on a case-by-case basis.

Panel consideration of the Code's protections for shareholders and other equity security holders

2.39 The Code contains a number of protections for shareholders and other equity security holders beyond information disclosure. These protections, for example, limit the types of conditions that an offeror can rely on for avoiding the transaction, require timely payment, and require a fair and reasonable offer to be made to other equity security holders in the case of a full Code offer. The Panel will expect that the 'target' company directors in a scheme have given appropriate weight to the protections that would have existed in a Code regulated offer, and to be satisfied that it is appropriate in the circumstances if some or all of those protections are not included in the scheme.

2.40 When assessing a scheme, the Panel may consider the extent to which it is reasonable, given the scheme's particular set of circumstances, for the protections normally available to shareholders under a Code regulated offer to be absent. Circumstances which may influence the Panel could include there being no independent directors on the 'target' company board, or the inclusion of conditions that depend on the judgement of a party to the scheme, or the fulfilment which is in the power, or under the control of, a party to the scheme.

Apply for a no-objection statement and send supporting documents to the Panel

2.41 The information that the Panel expects to receive in an application for a no-objection statement is listed in Appendix A to this Guidance Note.

3 Panel's procedure for giving the no-objection statement and approval process

Letter of intention

3.1 The Panel recognises that the scheme applicant may want to give an indication at the initial Court hearing of the Panel's views on the scheme. If the Panel is satisfied with the draft scheme documentation, the identification of the interest classes of shareholders, and the terms of the scheme, it will be likely to have no objection to the scheme. In these circumstances, the Panel will provide a letter prior to the initial hearing (**letter of intention**) for the applicant to produce to the Court indicating that the Panel is minded to issue a no-objection statement on the basis of the information considered by the Panel at that stage.

3.2 The letter of intention is likely to be in a form similar to that set out in Appendix C of this Guidance Note.

3.3 The Panel's position set out in the letter of intention may change if the scheme's circumstances change. The Panel's position *will* change if a person engages in misleading or deceptive conduct, or in conduct that is likely to mislead or deceive, in relation to the scheme. Rule 64 of the Code applies to conduct in relation to a proposed

[5] The inclusion of common 'deal protection' restrictions in a voting agreement, such as restrictions on the sale of shares and/or non-solicitation undertakings, will not, in itself, give rise to a separate interest class.

scheme, until such time as section 236B of the Companies Act applies (i.e., final Court orders are given), exempting the transaction from the Code.[6]

No-objection statement

3.4 The Panel will state in writing that it has no objection to a scheme if an applicant satisfies the Panel that:[7]

(a) all material information relating to the scheme proposal has been disclosed;

(b) the standard of disclosure to all shareholders has been equivalent to the standard that would be required by the Code in a Code-regulated transaction or is otherwise appropriate in all of the relevant circumstances;

(c) the interest classes of shareholders were adequately identified; and

(d) the other matters referred to in this Guidance Note have been addressed, and there are no other reasons for the Panel to object to the scheme.

3.5 The Panel will express no view on the merits of the scheme. The granting of a no-objection statement or a letter of intention does not indicate any view on the merits of the scheme by the Panel.

3.6 If the Panel provides a no-objection statement it will be issued to the applicant just prior to the filing for the second Court hearing, at which the Court makes final orders regarding the scheme (usually to approve the scheme and give effect to it). This ensures that the Panel has had an opportunity to observe the entire scheme process and satisfy itself that there have been no material changes to the circumstances of the scheme and no material changes to the information it considered in advance of the hearing for initial Court orders. A statement outlining any material changes (or if none, a statement to this effect) should be included in the application for a no-objection statement.

3.7 The Panel's no-objection statement is likely to be in a form similar to that set out in Appendix D of this Guidance Note.

Panel Court appearances

3.8 If the Panel does not give a letter of intention in relation to the scheme, and the Panel objects to the scheme, the Panel would likely seek to be heard at the initial Court hearing and possibly also the final Court hearing.

3.9 The Panel may also seek to appear before the Court, regardless of whether or not it objects to the scheme, if:

(a) there are issues that the Panel considers should be raised before, or addressed by, the Court;

(b) it has become aware of conduct that may breach rule 64 of the Code or section 44 of the Takeovers Act;[8] or

(c) it has concerns about the conduct of the scheme meetings.

3.10 The Panel will ordinarily not appear at the second hearing if it has no objection to the scheme.

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[6] *Code Word 22*, which is available on the Panel's website (www.takeovers.govt.nz), discusses how the Panel applies rule 64. Rule 64 of the Code provides that:

(1) A person must not engage in conduct that is—
(a) conduct in relation to any transaction or event that is regulated by the Code; and
(b) misleading or deceptive or likely to mislead or deceive.
(2) A person must not engage in conduct that is—
(a) incidental or preliminary to a transaction or event that is or is likely to be regulated by the Code; and
(b) misleading or deceptive or likely to mislead or deceive.

[7] The Panel will have been satisfied of these matters in respect of the draft documents and information, for the giving of the letter of intention.

[8] Section 44 of the Takeovers Act provides:

(1) A person must not—
(a) furnish information, produce a document, or give evidence to the Panel or a member, officer, or employee of the Panel knowing it to be false or misleading; or
(b) attempt to deceive or knowingly mislead the Panel or a member, officer, or employee of the Panel in relation to any matter before it.

Objection by a shareholder

3.11 Under the Companies Act, shareholders are entitled to make submissions to the Court on the scheme whether or not a no-objection statement is given.

3.12 A shareholder or other interested party may submit an objection to the Panel. The Panel may consider such an objection when determining whether to provide a no-objection statement.

3.13 The Panel will treat applications for a no-objection statement in confidence, so this situation would only be likely to arise where the scheme promoter or Code company has publicly stated that a no-objection statement is being sought, or after the initial hearing when the scheme documents have been sent to shareholders (including any letter of intention from the Panel).

3.14 The Panel may seek the scheme applicant's and/or promoter's views on any objections the Panel has received from shareholders or third parties, and the identity of the complainant may be kept confidential if that were considered appropriate or necessary in the circumstances.

4 General matters

Treatment of equity securities (other than shares) in schemes

4.1 If a Code company has existing equity securities (other than shares), the Panel considers that the scheme promoters must take into consideration those interests and outline to the Panel the proposed treatment of those equity securities.

4.2 Accordingly, the Panel will likely take into account the relevant protections afforded to equity security holders (other than shareholders) during a Code-regulated transaction. However, each application will be considered on a case by case basis.

4.3 The protections which are appropriate for equity security holders (other than shareholders) will likely vary from case to case. However, the Panel may consider whether:

(a) the information provided to those equity security holders in relation to:

(i) approving a scheme;

(ii) accepting an offer for their equity securities which is connected to the scheme; or

(iii) otherwise responding or taking any action in relation to a scheme,

is of the same standard as the information provided to shareholders; and

(b) it is appropriate to provide those equity security holders with supplemental information in addition to what is provided to shareholders, including advice from an independent adviser.

Offers of scrip

4.4 Where the scheme involves securities as consideration, shareholders should be provided with sufficient information about the securities to allow them to decide how they will vote on the resolutions put before them. The independent adviser's report will need to consider the merits of the scrip consideration, and may include a valuation, particularly if the scrip offered is not listed and frequently traded. The Panel would expect to review drafts of any disclosure documents for the scrip consideration at the time a no-objection statement was applied for.[9]

[9] In a scrip takeover undertaken as a scheme, where some shareholders receive scrip, and others the cash equivalent via a nominee process, the common law principle that separate interest classes should not be unnecessarily identified, may apply even though shareholders have different legal rights as against the company. This was the approach taken in *Michael Hill International Ltd* [2016] NZHC 1393.

Third parties

4.5 Some schemes are part of transactions that depend on the actions of third parties, for example, scheme consideration may be issued by an entity that is not otherwise a party to the scheme.

4.6 The Panel would expect that third parties in these situations should be made legally bound to fulfil their obligations. For example, the Panel may request that a third party become contractually bound to provide the relevant benefits.

4.7 Depending on the significance of the third party arrangements to the scheme, the scheme applicant or promoter may need to submit relevant documentation to the Panel for its consideration and, in certain cases, explain the arrangements in the explanatory memorandum for shareholders.

Clear, concise, and effective scheme documents

4.8 The Panel expects user-friendly scheme documents for shareholders. Drafting should follow a clear and concise style, with minimal use of jargon and repetition, and with plain English used where possible. If information is summarised, a balanced view of any advantages and disadvantages should be provided.

4.9 More specifically, scheme documents should be:

(a) Clear:

(i) use plain language;

(ii) use a font and font size that are easily readable;

(iii) be logically ordered and easy to navigate;

(iv) highlight important information; and

(v) explain complex information in plain language and include a clear explanation of any necessary jargon;

(b) Concise:

(i) use short sentences;

(ii) avoid unnecessary repetition;

(iii) highlight important information in balanced summaries;

(iv) use diagrams and graphs effectively; and

(v) minimise the use of brand information, photographs and other images;

(c) Effective:

(i) give adequate and accurate information about the scheme; and

(ii) convey an accurate and balanced impression.

Disclaimers

4.10 While appropriate disclaimers are permissible, disclaiming a party's responsibility for a scheme document has the potential to be misleading. Parties should not attempt to disclaim liability for contravention of the prohibition on misleading or deceptive conduct. The Panel suggests parties avoid the use of disclaimers that are broad and catch-all.

4.11 In addition, where a letter of intention is given, the Panel requires that the scheme documents contain, or be accompanied by, the following statement:

Role of Takeovers Panel and High Court

The fact that the Takeovers Panel has provided a letter of intention indicating that it does not intend to object to the scheme (or subsequently issues a no-objection statement in respect of the scheme), or that the High Court has ordered that a meeting be convened, does not mean that the Panel or the Court:

(a) has formed any view as to the merits of the proposed scheme or as to how shareholders should vote (on this matter shareholders must reach their own decision); or

(b) has prepared, or is responsible for the content of, the scheme documents or any other material.

Code applies until final orders made

4.12 While there is a statutory exemption from the Code in section 236B of the Companies Act, in respect of the scheme transaction, the Code continues to apply up until the Court makes its final orders, under section 236(1), that the scheme is binding on the Code company. Any non-compliance with the Code (including, for example, rule 64 in respect of statements of voting intention), up until the final orders are made, may be addressed by the Panel taking enforcement action under section 32 of the Takeovers Act 1993.[10]

Fees

4.13 Under the Takeovers Regulations 2000, the Panel is able to charge for certain aspects of its work, including the processing of no-objection statement applications.

4.14 The usual hourly rates apply for the time of the Panel executive and the Panel members for considering a no-objection statement application. Applicants will be billed monthly.

[10] Section 32(1) of the Takeovers Act provides:
The Panel may, at any time, if it considers that a person may not have acted or may not be acting or may intend not to act in compliance with the Takeovers Code, after giving that person such written notice of the meeting as the Panel considers appropriate in the circumstances, but in no case exceeding 7 days, hold a meeting for the purpose of determining whether to exercise its powers under this section.

APPENDIX A
Information Required for No-Objection Statement Application

1 General

An application for a no-objection statement should include the following information:

(a) who is applying;

(b) the anticipated filing dates for initial Court orders and final Court orders;

(c) the names of any Panel members who may be conflicted in relation to the application;

(d) the classes of shares (and any other equity securities) in the Code company and a summary of their terms;

(e) an overview of the terms of the proposed scheme and its effects on the holders and controllers of voting securities in the subject Code company;

(f) if there are any equity securities (other than shares) in the Code company, an explanation of how they will be dealt with under or in connection with the scheme;

(g) copies of relevant supporting documents, such as any voting agreements, (whether executed or in draft), company constitutions, shareholders' agreements, etc;

(h) the criteria and the date for determining:

  (i) the persons who are to participate in the scheme;

  (ii) the persons who are entitled to vote at the meeting(s) of scheme participants;

  (iii) the division of shareholders into interest classes, and the reasons for the division(s); and

  (iv) the persons who will be bound by the scheme if it is approved by the Court;

(i) a draft notice of meeting (see 2, below);

(j) a draft explanatory memorandum (see 3 below) that contains or is accompanied by:

  (i) the disclosures contained in Appendices 1 and 2 and rules 15 and 16 of the Code that would apply, whether in whole or in part, and 'modified' as necessary, to the scheme proposal;

  (ii) a report from an independent adviser who is approved by the Panel for the purpose of writing the report;

(k) if applicable, any securities law disclosure document; and

(l) a list identifying the location in the draft explanatory memorandum of the disclosures referred to in paragraph 1(j)(i), above.

2 Notice of meeting

The Panel would expect the notice of meeting sent to shareholders to fairly and clearly inform the recipients by including:

(a) the proper business of the meeting;

(b) the scheme proposed for each class of security that is subject to the scheme; and

(c) if applicable, a deed poll declaring the voting intentions of the promoter and its associates, in the form set out in Appendix B of this Guidance Note.

3 Explanatory memorandum

The Panel would expect the explanatory memorandum for shareholders to contain the following information:

(a) a clear introduction;

(b) a summary of the transaction;

(c) a proposed timetable for completion of the scheme;

(d) the reasons for the scheme being undertaken;

(e) a statement regarding whether a no-objection statement from the Panel has been applied for;

(f) identification of the independent directors, and if there are none, a statement to that effect;

(g) the information described in section 1(j) above;

(h) particulars of the key documents relating to the scheme, including any conditions that need to be met for the scheme to take effect;

(i) a clear description of the statutory voting thresholds;

(j) the rights of shareholders to object to the scheme;

(k) disclosure of any voting agreement relating to the scheme, for each shareholder party to the agreement (if entered into before finalising the scheme documents), any deed poll, and any public statements of voting intention; and

(l) the inclusion of the following statement:

Role of Takeovers Panel and High Court

The fact that the Takeovers Panel has provided a letter of intention indicating that it does not intend to object to the scheme (or subsequently issues a no-objection statement in respect of the scheme), or that the High Court has ordered that a meeting be convened, does not mean that the Panel or the Court:

(a) has formed any view as to the merits of the proposed scheme or as to how shareholders should vote (on this matter shareholders must reach their own decision); or

(b) has prepared, or is responsible for the content of, the scheme documents or any other material.

4 Final stage in application

Before giving a no-objection statement, the Panel requires:

(a) marked-up versions showing all changes to scheme documents (including to any report by an independent adviser who has been approved by the Panel in relation to the scheme) as between the draft documents, provided to the Panel at the issuing of the letter of intention, and the final documents the shareholders (and any other equity security holders) received; and

(b) assurance that all material information, including any additional, or changed, voting agreements entered into after finalising the scheme documents, has been communicated in writing to the shareholders entitled to vote on the scheme (and any other equity security holders).

APPENDIX B
Template Form of Deed Poll

[Template subject to amendment by the Panel relating to particular scheme]

This DEED POLL is made on the [DD] day of [month] 20[YY]

BY **[Promoter]** (**short name**)

[Associate of Promoter] (**short name**)

IN FAVOUR OF THE TAKEOVERS PANEL

BACKGROUND

This deed poll is made in relation to a proposed scheme of arrangement or amalgamation made under Part 15 of the Companies Act 1993 involving [description of proposed transaction] (the **proposed transaction**).

[Short name of promoter] is the promoter of the proposed transaction. [Short name of associate of promoter] is associated with [short name of promoter] for the purposes of the Takeovers Code.

The Takeovers Panel requires a statement, enforceable by the Panel by way of deed poll, of the voting intentions of [short name of promoter or associate] in relation to the proposed transaction.

BY THIS DEED POLL [Short name of promoter or associate] agrees that:

(a) it holds [X number] shares with voting rights attached in [name of the company] which is subject to the proposed scheme of arrangement or amalgamation; and

(b) it will vote in favour of the proposed transaction [X number] shares, or such greater number, being all of the shares with voting rights attached that are held in [name of the company] by [name of promoter or associate] at the record date for the meeting called to consider and approve the proposed transaction.

The provisions of this document constitute promises intended to confer benefits on the Takeovers Panel, pursuant to the Contract and Commercial Law Act 2017.

Notwithstanding any other provision of this deed poll, this deed poll may be varied or revoked by agreement between [short name of promoter or associate] and the Takeovers Panel, without the approval of any other person on whom this deed poll confers a benefit.

[Note: This provision is to be summarised in the meeting materials so as to ensure compliance with section 15 of the Contract and Commercial Law Act 2017.]

This deed is governed by and shall be construed in accordance with New Zealand law.

SIGNED AS A DEED POLL

[Short name of promoter or associate] hereby acknowledges the terms of this deed poll and agrees to be bound by them.

Signed by:

_____ Signature of Director

_____ Name of Director

_____ Signature of Director

_____ Name of Director

APPENDIX C
Template Letter of Intention

Letter of Intention

[Explanation of specific scheme]

We refer to the scheme of arrangement between [insert name of company] and its [shareholders / equity security holders / specify particular class of shareholders or other equity security holders]. [insert further details of the scheme of arrangement if necessary] (the **Scheme of Arrangement**).

The Takeovers Panel has formed an initial view, based on the information that has been provided to the Panel, that it intends at this stage to issue a no-objection statement in respect of the Scheme of Arrangement prior to the second Court hearing.

The Panel expresses no view on the merits of the Scheme of Arrangement.

This advice is given having regard to the Panel's policy on schemes of arrangement as set out in the Panel's *Guidance Note on Schemes of Arrangement*, dated [date of current version].

Yours faithfully

APPENDIX D
Template No-objection Statement

[Further explanation of specific scheme]

We refer to the [scheme of arrangement] between [insert name of company] and its [shareholders/equity security holders/specify particular class of shareholders or equity security holders] approved by shareholders on [DD Month YYYY] [Insert further details of the scheme of arrangement if necessary] (the **Scheme of Arrangement**).

Based on the information that has been provided to the Takeovers Panel, the Panel has no objection to an order being made under section 236(1) of the Companies Act 1993 in respect of the Scheme of Arrangement. This no-objection statement is provided on the condition that the Panel is informed of any material changes to the Scheme of Arrangement between the date of the shareholder meeting on [DD Month YYYY] and the date of final orders.

The Panel is satisfied that:

(a) all material information relating to the Scheme of Arrangement has been disclosed;

(b) the standard of disclosure to all shareholders has been equivalent to the standard that would be required by the Code in a Code-regulated transaction or is otherwise appropriate in all of the relevant circumstances;

(c) the interest classes of shareholders have been adequately identified; and

(d) the other matters referred to in the Guidance Note on Schemes of Arrangement have been addressed, and there are no other reasons for the Panel to object to the Scheme of Arrangement.

The Panel expresses no view on the merits of the Scheme of Arrangement.

This advice is given having regard to the Panel's policy on schemes of arrangement as set out in the *Guidance Note on Schemes of Arrangement*, dated [date of current version].

Yours faithfully