

Guidance Note

SECTION 32 OF THE TAKEOVERS ACT 1993

▶ 7 April 2026



**TAKEOVERS
PANEL**
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1 Introduction

- 1.1 “Section 32 meetings” are meetings of inquiry held by the Takeovers Panel (the **Panel**) under section 32 of the Takeovers Act 1993 (the **Takeovers Act**) to determine whether the Panel should exercise certain of its powers under the Takeovers Act in relation to potential non-compliance.
- 1.2 Section 32 of the Takeovers Act empowers the Panel to hold a meeting of inquiry to determine whether a person is acting, has acted, or intends to act otherwise than in compliance with the Takeovers Code (the **Code**).
- 1.3 Section 32(1) of the Takeovers Act states that:
- 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.*
- 1.4 This guide sets out an overview of the Panel’s process before, during and after a section 32 meeting.

2 Background considerations

Inquisitorial process

- 2.1 A section 32 meeting is a judicial function and is inquisitorial in nature.
- 2.2 The inquisitorial nature of a section 32 meeting influences how section 32 meetings are conducted. For example, it informs how the principles of natural justice apply and the Panel’s approach to gathering evidence.

Natural justice

- 2.3 Section 8(2) of the Takeovers Act provides:
- In the exercise of its functions and powers under Parts 3 and 4 of the takeovers code, the Panel shall comply with the principles of natural justice.*
- 2.4 Accordingly, the Panel must comply with the principles of natural justice in conducting a section 32 meeting. However, the requirements of the principles of natural justice vary depending on the circumstances, and the Panel must consider the wider circumstances of the matter before it.
- 2.5 This Guidance Note seeks to indicate how the Panel is likely to give effect to section 8(2) while balancing what can be competing considerations.

Complaints / requests to hold section 32 meetings

- 2.6 The Panel may call a section 32 meeting on its own volition or following a formal request that the Panel do so.
- 2.7 It is important to note that there is a distinction between a complaint and a request to hold a section 32 meeting:
- (a) Making a request to hold a section 32 meeting has legal implications as it:
- (i) may trigger rights of persons other than the Panel to take action under the Takeovers Act (see section 35(3) of the Takeovers Act); and
 - (ii) allows the Panel to charge fees to the person who made the request (see clause 5(2)(b) of the Takeovers Regulations 2000 (the **Regulations**)).
- (b) A complaint does not trigger any legal rights, but the Panel generally treats complaints seriously. A complaint is a factor that the Panel considers when deciding whether to convene a section 32 meeting on its own volition.



- 2.8 A decision to call a section 32 meeting is a decision for the Panel to be exercised in its discretion. Neither a request for a meeting nor a complaint is a pre-requisite for calling a section 32 meeting. In addition to responding to complaints, the Panel actively monitors market developments and may enquire into potential issues which it identifies. However potential enforcement matters are identified, a section 32 meeting is the means through which the Panel can exercise its enforcement powers (and allows the Panel to seek further enforcement orders from the Court).

3 Procedure leading up to a section 32 meeting

Initial Division Meeting

Introduction

- 3.1 Upon becoming aware of possible non-compliance with the Code, the Panel may convene an initial division meeting (an **Initial Division Meeting**). At an Initial Division Meeting, the Panel will typically:
- (a) consider whether to hold a section 32 meeting in respect of the relevant conduct; and
 - (b) if applicable, determine the scope of the matters it expects to be considered at such a meeting.
- 3.2 An Initial Division Meeting is not a formal inquiry, and the Panel will not make a determination of compliance or non-compliance at this stage. Compliance or non-compliance will be determined at or following the section 32 meeting, if convened.
- 3.3 This process applies in all circumstances, irrespective of whether the Panel became aware of the possible non-compliance through its market monitoring activities or following a complaint or a request that the Panel convene a section 32 meeting.

Approach to determining whether to call a section 32 meeting

- 3.4 At an Initial Division Meeting, the Panel will consider:
- (a) whether the threshold for holding a section 32 meeting has been met; and
 - (b) if the threshold has been met, whether the Panel should exercise its discretion to call a section 32 meeting.
- 3.5 The Panel's first step is to consider whether there is a reasonable possibility that a person may not have acted, may not be acting, or may intend not to act in compliance with the Code (the **Threshold Test**). To satisfy the Threshold Test, the Panel need only conclude that there is a reasonable possibility of non-compliance with the Code. This reflects the inquisitorial nature of a section 32 meeting itself – at the Initial Division Meeting stage, the Panel is only considering whether it should conduct an inquiry into the matter, which may include gathering further documentary evidence and examining witnesses.
- 3.6 If the Threshold Test has been satisfied, the Panel may, but is not required to, call a section 32 meeting. The factors the Panel will consider in exercising its discretion to call (or not call) a section 32 meeting will vary depending on the circumstances. However, some factors which the Panel has considered in the past in deciding whether to call a section 32 meeting include the following:
- (a) *Severity of the breach*: If the breach was minor or technical in nature, that may weigh against calling a section 32 meeting. If the breach is of a more substantive nature, that will likely weigh in favour of calling a section 32 meeting. The effect of the breach on any relevant party will likely be relevant, so an identifiable loss or gain as a result of the potential breach of the Code will weigh in favour of calling a meeting.
 - (b) *Remedies*: If there is a breach, are appropriate remedies available? If the Panel (or any other relevant party) would be unable to impose or seek any effective remedies, for example, because of limitation issues, this may weigh against calling a section 32 meeting.



- (c) *Potential for an inconclusive outcome:* If it is apparent that it will be difficult for the Panel to reach any definitive views on the matter due to a lack of, or difficulties in obtaining, evidence, this may weigh against calling a section 32 meeting.
- (d) *Public interest:* If there is an important or novel point of law or issue which may benefit from a determination, or if a determination is otherwise in the public interest, that may weigh in favour of calling a section 32 meeting.
- (e) *Tactical complaints:* The Panel does not wish to be drawn into a takeover contest unnecessarily by responding to tactical complaints which lack substance or do not require regulatory intervention. Similarly, the Panel does not wish to be drawn into disputes which have ancillary issues relating to control interests. Complainants may have to convince the Panel that its resources would be properly used if it were to act on the complaint. To the extent a complaint is tactical, it may weigh against the Panel calling a section 32 meeting. The Panel may take account of any delay in bringing a complaint.
- (f) *Availability of other options:* In some circumstances, a matter may be able to be resolved without the need for a section 32 meeting. For example, in appropriate circumstances the Panel might not call a section 32 meeting if the Panel receives an acceptable enforceable undertaking which will ensure that any potential breach of the Code is appropriately addressed or it would be appropriate for the Panel to grant an exemption which is conditional on shareholders voting to ratify a potential breach (and such shareholder approval is subsequently obtained).
- (g) *Whether the breach was historic:* In addition to limitation issues, historic breaches can present greater difficulties in obtaining evidence. Documents may not be available and witnesses' recollections may not be as sharp. However, a breach being historic will not prevent the Panel from calling a section 32 meeting.
- (h) *Whether a section 32 meeting is an effective use of the Panel's resources:* This will depend on a range of factors including other activities of the Panel and its priorities.
- (i) *Whether a complaint was received:* Receipt of a complaint may weigh in favour of calling a section 32 meeting as this tends to indicate public interest in the matter.
- (j) *Whether a section 32 meeting was requested:* As noted above, under the Regulations, the Panel may order costs against a person who requests a section 32 meeting. This raises a presumption that a party requesting a section 32 meeting considers the matter to be serious. Therefore, a request to call a section 32 meeting generally supports calling a section 32 meeting.
- (k) *Whether the Panel should obtain further information before reaching a view:* In some circumstances, it may be appropriate for further investigation to be carried out before the Panel reaches a view on whether to call a section 32 meeting.

Active market monitoring / engagement

- 3.7 As market participants will be aware, the Panel executive actively monitors transactions, including by reviewing draft documents and discussing novel or uncertain points of law. The Panel executive can also make informal enquiries (e.g., ask for information without relying on the Panel's investigative powers under the Takeovers Act). This engagement often results in transaction, documentation and/or disclosure changes to address compliance matters, negating the need for more formal engagement or enforcement mechanisms.
- 3.8 The benefit of this informal process is that potential Code compliance issues, particularly by targets and bidders, can be identified and resolved expeditiously and without the time and expense which can be incurred in a more formal process. The majority of compliance issues are generally resolved in this way.
- 3.9 However, it may be that a matter cannot be adequately resolved through such informal means. For example, the Panel executive may not be sufficiently convinced by the material put forward by the relevant party. Relatedly, the matter may be sufficiently novel or important such that it would be appropriate for it to be considered by a division of the Panel.



- 3.10 Parties should be aware that if there is a complaint or it is apparent that the Code may have been (or might be) breached, the Panel may make informal enquiries of this type before proceeding to an Initial Division Meeting. Critically, if such enquiries yield adequate explanations, the need for an Initial Division Meeting may be obviated. Accordingly, parties are encouraged to engage constructively with the Panel. Parties who do not engage constructively with the Panel should not later complain that more formal enforcement measures were taken (or in relation to the associated time and expense).
- 3.11 The point at which the Panel's usual supervision crosses into being a matter which could reasonably result in a section 32 meeting being called (a **Potential Enforcement Matter**) may not be clear to the parties. However, if the Panel convenes an Initial Division Meeting in relation to a Potential Enforcement Matter, the Panel will typically follow the approach set out below. Division meetings may also be called to address matters which are not Potential Enforcement Matters – e.g., where parties have proposed resolutions which the Panel executive expects will address the relevant issues. Such division meetings may not adopt all of the procedures described below.

Initial Division Meetings relating to Potential Enforcement Matters

Process

- 3.12 The Panel will, in advance of an Initial Division Meeting relating to a Potential Enforcement Matter, to the extent practicable and appropriate, endeavour to:
- (a) advise the parties that an Initial Division Meeting will be called;
 - (b) communicate to all relevant parties the process it intends to follow and any subsequent changes to this process;
 - (c) seek relevant information as is appropriate in the circumstances from parties (potentially by way of search and seizure or by summons in accordance with sections 31A or 31N of the Takeovers Act);
 - (d) allow relevant parties an opportunity to make submissions on the matter (the Panel may ask parties to address particular factual or legal matters, including those not already raised by the parties themselves);
 - (e) consider whether it is appropriate to provide any submissions, evidence or other information in the Panel's possession to any party (bearing in mind, without limitation, whether the materials are confidential, sensitive or otherwise inappropriate to provide);
 - (f) if and to the extent that the Panel considers it appropriate to provide any materials referred to in (c) to another party, provide such materials to that party (although, consistent with the Panel's investigative nature and the factors referred to above, the Panel may also decline to share such materials or delay sharing them, for example, until after the examination of relevant witnesses at a section 32 meeting); and
 - (g) consider whether it is appropriate to issue confidentiality orders in relation to the matter and, if appropriate, issue such orders (although such orders may be made at any time).
- 3.13 In all cases, a quorum of three Panel members must be present, but divisions may have four or five members. The division usually includes at least one lawyer. The Panel generally does not proactively advise names of Panel members considering a matter at an Initial Division Meeting, but may do so. Recognising the small size of the New Zealand market, Panel members (other than members of the division) may represent parties and make submissions on their behalf in relation to an enforcement matter until such time as a section 32 meeting has been called, including making submissions at the Initial Division Meeting phase.
- 3.14 Regarding communications and correspondence, the Panel's general approach is that, once a matter becomes a Potential Enforcement Matter:
- (a) All correspondence to the Panel should (as always) be directed through the Panel executive.



- (b) All material communications between the Panel and the parties in relation to a Potential Enforcement Matter should be in writing. However, if timing considerations require it or if the Panel otherwise considers it necessary and/or expedient, the Panel may communicate with parties by phone.
- (c) The Panel will generally communicate with all parties together in relation to logistical matters.
- (d) Despite the approach to logistical matters, given the investigative nature of section 32 meetings:
 - (i) where the Panel is seeking evidence, the Panel may make individual requests of the relevant parties;
 - (ii) separate requests may be made of individual parties regarding legal submissions; and
 - (iii) parties should not, at this early stage, expect that they will be provided with all of the information another party has in its possession or which the Panel has been provided (critically, at this point, the Panel is primarily considering whether to call a section 32 meeting which, if called, will provide an opportunity for materials to be shared, if appropriate).

3.15 To support the progress of the Panel's decision-making within short timeframes by providing assurance about factual matters, the Panel may also, if appropriate, ask parties to provide statutory declarations in relation to factual matters.

3.16 The Panel is unlikely to publicly disclose the existence of a complaint or that it will hold an Initial Division Meeting, but reserves the right to do so. The Panel may also decline to advise parties whether it has received a complaint or the identity of any person who made a complaint.

Timing

3.17 The timing of Initial Division Meetings will vary depending on the circumstances. In a live matter, an Initial Division Meeting may need to be held shortly after the Panel becomes aware of the possible non-compliance. In relation to historic matters, timing may be longer, and the Panel may be able to provide more time for information to be gathered.

3.18 The Panel will comply with the natural justice requirement to provide parties reasonable time (in the context of the matter) to make submissions and provide information to the Panel. However, to fulfil its role in the market and obligations under the Takeovers Act, the Panel must also ensure prompt resolution of intra-transaction enforcement matters. As such, the Panel may decide to limit or restrict submissions prior to calling a section 32 meeting on the basis that such submissions have limited relevance to the decision as to whether to call a section 32 meeting or that they may be provided at the section 32 meeting itself. Parties should note that it is possible that they may be given short timeframes (including outside of usual business hours) within which to prepare submissions and provide information for the Panel.

4 Calling section 32 meetings

Notice of meeting

- 4.1 If the Panel decides to convene a section 32 meeting, notice of the meeting will be given in writing to all relevant parties. No special form of service of the notice is required. The Panel may use whatever means are appropriate to ensure the parties receive the notice.
- 4.2 The notice of meeting will state the identified issues which will be before the Panel and the matters the Panel wishes to investigate at the time of issue of the notice.
- 4.3 While a notice of meeting will seek to identify the issues which are to be investigated, the notice will not unduly limit the scope of the Panel's inquiry. For example, if evidence arises during the Panel's inquiry that suggests there may have been further breaches of the Code, the Panel may investigate these matters, particularly where they are connected to the matters identified in the notice of meeting (unless the application of natural justice prevents this).



- 4.4 A notice of a section 32 meeting will not contain a full ‘statement of the case’ against any particular party. Given the inquisitorial nature of a section 32 meeting, there is typically not a ‘case’ to be tested. Rather there are areas of enquiry. The Panel will endeavour to identify these areas, although this may be in general terms.
- 4.5 Under section 31V of the Takeovers Act, all persons to whom notice of the meeting is given have a right to be heard and have legal representation at the section 32 meeting. In practice, the Panel may summons, pursuant to section 31N, all those persons to whom notice of the meeting is given. Their attendance at the meeting to give evidence will then be mandatory.
- 4.6 The Panel can also grant leave to be heard and represented to any other person who, in the opinion of the Panel, ought to be heard or will assist the Panel in its consideration of the matter before it.

Public statement

- 4.7 If the Panel decides to convene a section 32 meeting it will usually, but is not required to, make a public statement to that effect. One of the reasons for this is to ensure other interested parties who may wish to apply for leave to appear at the meeting are informed. If a temporary restraining order is made, this will usually also be made public. If, at an Initial Division Meeting, the Panel decides that it will not convene a section 32 meeting, the Panel may, depending on the circumstances, make a public statement of its decision.
- 4.8 Once a statement has been made that a section 32 meeting is to be held, further media comment on the specific proceedings by the Panel or Panel staff is unlikely, although the Panel may announce that the meeting has concluded and indicate likely next steps.

Summons

- 4.9 The Panel will typically issue summonses under section 31N of the Takeovers Act to the witnesses which it wishes to hear from at the section 32 meeting. The persons who are summonsed must appear before the Panel in accordance with the terms of that summons. If a person summonsed is a corporate entity, individual directors and officers may be summonsed as well as the entity itself.
- 4.10 In addition to a summons to appear to give evidence, the Panel may summons a person to provide documents or information that are in the person’s possession or control that are relevant to the matter to be considered at the section 32 meeting. A summons of documents or information is likely to require delivery of the documents or information to the Panel prior to the section 32 meeting so that the Panel can review and consider it prior to the meeting. A person may therefore receive two summonses – one to provide documents or information prior to the section 32 meeting and one to appear and give evidence at the meeting.
- 4.11 Under section 31N(3), a summons may be served personally on the person summonsed, but it is sufficient if the summons is left at the usual place of residence or business of the person at least 24 hours before their attendance is required. If the legal representatives of a person being summonsed advise the Panel that they are authorised to accept service and that they will accept electronic service, a summons will usually be sent electronically to the legal representative.
- 4.12 Any documents or information provided to the Panel under a summons (or otherwise) are for the Panel’s use to assist the Panel’s inquiry. As the Panel’s section 32 meetings are inquisitorial in nature, copies of the documents or information may not be provided to the parties to the meeting on a counsel only basis or with other restrictions and may instead be provided after witnesses have been examined or not provided at all, as is appropriate in the relevant circumstances.

Temporary restraining orders under section 32(2)

- 4.13 At the same time as the Panel decides to give notice of the section 32 meeting, it may make temporary (interim) restraining orders. The types of temporary orders the Panel can make are set out in section 33 of the Takeovers Act. Temporary restraining orders are intended to maintain the status quo at the time the restraining order is



made while the Panel considers whether the Code has been complied with. A temporary restraining order expires at the close of the second day after the date of the section 32 meeting (unless revoked earlier by the Panel).

Submissions

- 4.14 The Panel is likely to request written legal submissions from parties in advance of the section 32 meeting on the matters to be considered by the Panel at the meeting. While the Panel may give guidance on the legal issues that submissions should address, it is not required to do so, and this may be impracticable given that the relevant facts may only be ascertained through the course of the section 32 meeting. Written legal submissions should generally be copied to other parties to the meeting. The Panel may allow a right of reply to submissions, but this may not be afforded where time does not permit or the further submissions are unlikely to be of benefit.
- 4.15 Any submissions should be focused as much as possible on the areas where the Panel has requested submissions. Parties are discouraged from providing unnecessary or uninvited submissions.



Timing

- 4.16 Section 32 meetings will often proceed on an expedited basis. The need to take rapid action in relation to enforcement matters is reflected in the Takeovers Act:
- (a) section 32(1) of the Takeovers Act requires the Panel to convene a section 32 meeting within 7 days of forming the view that it should convene a section 32 meeting; and
 - (b) section 35(3) of the Takeovers Act provides parties with rights under the Takeovers Act should the Panel not make a determination under section 32(3) within 14 days after a person has made a request for a section 32 meeting to be held.
- 4.17 Accordingly, when the Panel deals with an enforcement matter intra-transaction, it is important for the Panel's enforcement processes to be carried out quickly. Rapid resolution of intra-transaction disputes may be critical to ensure that shareholders have the appropriate information and time to decide for themselves the merits of a transaction.¹
- 4.18 However, the need for rapid resolution of a matter is not an absolute consideration. The Panel will assess how rapidly a matter should be resolved in the relevant circumstances (with some matters being more urgent than others) and look to balance other relevant factors. Such other factors may include:
- (a) the practicalities of gathering factual information;
 - (b) logistical matters such as the availability of Panel members; and
 - (c) the requirements of the principles of natural justice as they apply in the relevant circumstances.
- 4.19 As to practicalities, the Panel gives such notice of a section 32 meeting as it considers appropriate in the circumstances, but under section 32(1), the notice period must not exceed seven days. While the notice period can be shorter than seven days, the time required for parties to file and circulate written submissions and for the Panel to deal with any applications will usually mean that a shorter notice period is given only when urgency requires it.

¹ See section 20(1)(e) of the Takeovers Act.



4.20 The maximum seven days' notice period would be as follows:

Day 1	The Panel gives notice that it will hold a meeting on day 9 and may issue section 32(2) temporary restraining orders and section 31N summonses. The Panel makes a press release, and NZX announcement if applicable.
2	 7 clear days (maximum notice permitted under section 32(1)) 
3	
4	
5	
6	
7	
8	
9	Meeting held
10	
11	Temporary restraining orders expire at midnight

Adjournments

- 4.21 The time frame for convening a section 32 meeting is short. For meetings that involve a large number of parties or particularly complicated evidence, the Panel may convene the meeting and then adjourn for such time as the Panel directs while evidence is gathered, submissions are prepared and/or logistics are organised.
- 4.22 Where the Panel considers adjourning a section 32 meeting in this way, the decision as to whether to adjourn (and how long to adjourn for) will be made after considering the urgency of the matter and the need to resolve the matter before any particular time or events. Such assessment will bear in mind all relevant considerations including the need to comply with the requirements of natural justice.
- 4.23 Where the Panel anticipates that it will adjourn a section 32 meeting, it may consult with the parties for input. The Panel is unlikely to adjourn a section 32 meeting for a significant period if it has issued temporary restraining orders, since these orders cannot be extended without the Panel making a determination of non-compliance with the Code under section 32(3)(b).

Third party requests for a section 32 meeting

- 4.24 Any person can request the Panel to hold a section 32 meeting. A fee of \$1,000 plus GST is payable to the Panel for the request. The Panel is under no obligation to hold such a meeting.
- 4.25 No form of request is prescribed, but the Panel prefers the request in writing with reasons why the person considers such a meeting should be held. If the requester has evidence supporting those reasons, it should also be given to the Panel in writing.
- 4.26 In addition to the \$1,000 fee, the person who requests a section 32 meeting may be liable for fees related to certain of the Panel's internal and external costs incurred in respect of the meeting (including for its time spent in the lead-up to the meeting and in the completion of all elements of the section 32 process) under the Regulations.



These costs may be significant, so it is recommended that a person considering whether to request a section 32 meeting engages with the Panel at an early stage to discuss potential costs.

- 4.27 A request for the Panel to hold a section 32 meeting may be withdrawn at any time. However, the withdrawal of a request does not negate that a request has been made or the party's liability for fees under the Regulations. However, when considering whether to hold (or continue) a section 32 meeting and what fees should be payable in respect of it, the Panel may take account of the fact that a party who requested a meeting does not wish to continue with the matter.
- 4.28 On occasion, the Panel has received what appeared to be requests to hold a section 32 meeting. Where the party's intention is not clear, the Panel will endeavour to clarify the requesting party's intention.

5 Procedure at the section 32 meeting

Purpose and principles

- 5.1 The purpose of a section 32 meeting is for the Panel to make a determination as to whether it is satisfied, or not satisfied, that a person (or persons) has acted or is acting or intends to act in compliance with the Code.
- 5.2 The Panel has the power to regulate its own procedure and may decide on each occasion how meetings are to be conducted. However, in the exercise of its functions and powers, the Panel must comply with the principles of natural justice. The rules of natural justice generally are likely to require that, when a section 32 meeting is called:
- (a) the procedure is fair;
 - (b) a person who might be adversely affected is advised of the issues into which the Panel is enquiring and has the right to be heard; and
 - (c) the adjudicators of the issue are free from bias.
- 5.3 The Panel will generally regulate the procedure of section 32 meetings in the manner set out below in this section. However, the Panel may depart from this procedure, provided that it complies with the principles of natural justice. To this end, the Panel may make determinations as to matters of procedure during the course of the section 32 meeting as it sees fit.

Who will make the determination?

- 5.4 A section 32 meeting will generally be considered by a division of the Panel.² The Takeovers Act requires that an experienced New Zealand or Australian lawyer or barrister of not less than seven years' practice attend the meeting – that person need not be on the division, nor even a Panel member.
- 5.5 Participants are usually informed in advance of the meeting of the names of the members who will comprise the Panel division.

Conflicts of interest

- 5.6 The Panel has a robust conflicts policy and no conflicted member sits on a division for any matter, including for section 32 meetings.
- 5.7 As discussed at paragraph 3.13 above, Panel members may represent parties and make submissions on their behalf at the Initial Division Meeting phase. However, Panel members who are representing a party to a section 32 meeting should not appear as counsel or make submissions at the section 32 meeting. Nor should any Panel member make written submissions on behalf of a party to a section 32 meeting once one has been called.

² See paragraph 3.13 above regarding the composition of divisions at the Initial Division Meeting phase, which also applies at the section 32 meeting itself.



- 5.8 Despite this policy, it may be impractical for a Panel member who has been advising on a matter to entirely recuse themselves from the matter should a section 32 meeting be called – the Panel member will likely have large amounts of background information which is necessary for the party’s preparation. A Panel member in this situation may remain involved in advising the party once a section 32 meeting has been called, but shall not make submissions on their behalf or substantively engage with the Panel on the matter until the relevant issues have been resolved.

Attendance at the meeting

- 5.9 As noted in paragraphs 3.22 and 3.25 above, the Panel may summons all those persons to whom notice of the meeting is given to appear before the Panel to give evidence at the section 32 meeting. In the absence of a summons, any person to whom a notice of meeting is sent may apply to the Panel for leave to be heard and be represented.
- 5.10 Other interested parties can apply to the Panel to give evidence at a section 32 meeting in accordance with section 31V(2). The Panel may grant leave if the Panel considers that the party ought to be heard, or that its appearance or representation will assist the Panel.
- 5.11 A person who has been summonsed to appear before the Panel is required to attend and give evidence, answer questions, and provide any documents requested.³
- 5.12 Because a section 32 meeting is inquisitorial in nature, the Panel seeks to hear directly from all relevant parties, test the evidence before it, and make a determination based on the most complete and accurate evidence possible. The effectiveness of this process depends on parties engaging with the Panel when required. While the Panel will seek to be reasonable with logistics, attendance at a section 32 meeting when summonsed is not optional. When convening a section 32 meeting, parties are expected to work with the Panel’s scheduling requirements rather than vice versa.
- 5.13 If a person fails to appear when summonsed, the Panel is unable to hear any potential counterarguments or ask clarifying questions based on written evidence or oral evidence provided by other parties. In such cases, the Panel may draw inferences (including adverse inferences) to continue discharging its enforcement functions.⁴

Submissions and evidence

Evidence on oath

- 5.14 Section 31MA of the Takeovers Act allows the Panel to receive evidence on oath. The Panel usually requires evidence at a section 32 meeting to be given on oath. The Panel may receive evidence via audio-visual communication.

Submissions

- 5.15 The Panel usually hears legal submissions from the parties or their legal counsel on the matters under consideration at the section 32 meeting. However, the Panel’s procedure is not adversarial, and the Panel may allow each party to give only a brief oral summary of submissions in order to allow sufficient time for questioning witnesses, as is appropriate in the context. In other situations, the Panel may proceed on only written submissions.
- 5.16 Any submissions should be focused as much as possible on the areas where the Panel has requested submissions. Parties are discouraged from providing unnecessary or uninvited submissions.

³ Section 44 of the Takeovers Act.

⁴ See also section 33C of the Takeovers Act where a refusal or failure to comply with requirements under a summons may be used in evidence against that person in proceedings for an offence under section 44(1).



Giving evidence and cross-examination

- 5.17 Parties who are witnesses are usually entitled to listen to the legal submissions, but during the giving of evidence are usually required to leave the meeting room except when called to give their own evidence. The Panel may allow parties' counsel to remain present throughout the hearing of evidence, subject to restrictions on what may be discussed with their clients.
- 5.18 As the Panel acts as an inquisitorial body, questioning of witnesses will be led by the Panel (including through its counsel). The Panel may have regard to the rules of evidence while conducting the inquiry and assessing the evidence, but the rules of evidence do not apply directly in section 32 meetings. Under section 31M of the Takeovers Act, the Panel may receive in evidence, whether admissible in a court of law or not, any statement, document, information, or matter that, in the opinion of the person receiving it, may assist the Panel in dealing effectively with any matter before it.
- 5.19 The Panel does not generally allow cross-examination of witnesses by other parties. However, once the Panel has finished the examination of a witness, the Panel may ask parties whether there are additional matters that the Panel should consider putting to the witness. The Panel (with assistance from its counsel) will consider whether such matters and any related questions should be put to the witness. Any such questions shall be put to the witness by the Panel (including through its counsel).
- 5.20 Once a witness has given their evidence, they may be allowed to remain in the meeting room. However, if the Panel deems it appropriate, a witness may be asked to leave the room while another witness gives evidence.

Privilege against self-incrimination

- 5.21 There is no privilege against self-incrimination at a section 32 meeting. A witness cannot elect to not answer any question or to produce any document on the grounds that to do so might incriminate the witness (section 33B of the Takeovers Act).

Correspondence

- 5.22 All correspondence with the Panel in relation to a section 32 meeting should be through the Panel executive.

Meeting records

- 5.23 The practice of the Panel is to have a transcript of the section 32 meeting made. Where a transcript is taken, copies of the transcript will be made available to parties as soon as possible after the meeting.

Public or private meeting

- 5.24 The Panel can decide to hold any part of a section 32 meeting in public or private (section 31W). The Panel's usual practice is to make the fact of the meeting public, but to hold it in private.

Offences under the Takeovers Act

- 5.25 If a person knowingly furnishes false or misleading information to the Panel or its staff, tries to mislead the Panel or its staff or contravenes a confidentiality order of the Panel made under section 31X, that person commits an offence (section 44).
- 5.26 If a person is summonsed to a Panel meeting and refuses or fails to appear, refuses to take an oath or affirmation, or refuses to answer any question or to produce documents or information as required, that person commits an offence (section 44).



6 Determinations and procedure following a section 32 meeting

No determination

- 6.1 Section 32(3) of the Takeovers Act provides that, following the meeting, the Panel may make a determination as to compliance with the Code. It is possible that the Panel may decide not to make any determination. If it makes no determination, then the Panel cannot make a restraining order.
- 6.2 If a meeting was requested in terms of section 35(3) and the Panel does not make a determination within 14 days after the request, then any of the persons specified in section 35(3) may make an application to the court under any of sections 33F (for an injunction), 33I (for a civil remedy) or 33K (for a compensatory order).

The Panel's determination on whether satisfied or not satisfied of compliance

- 6.3 Usually, following the section 32 meeting, the Panel makes a determination either that it is satisfied that a person has acted or is acting or intends to act in compliance with the Code, or that it is not so satisfied.

Publishing determinations

- 6.4 The practice of the Panel is to make a press statement as soon as practicable regarding the outcome of a section 32 meeting, and to publish its determination on the Panel website.
- 6.5 The Panel is required to give written notice of its reasons for its determination to the persons the determination concerns as soon as reasonably practicable. In practice, the statement of reasons may take a number of weeks to prepare and will generally be published as soon as it has been provided to the affected persons (although the Panel may provide its determination to the affected persons for a brief embargo period where appropriate, principally where this may help with orderly disclosure to the market).

Panel orders

- 6.6 If the Panel makes a determination that it is not satisfied of Code compliance, it may then make temporary restraining orders of the type set out in section 33 of the Takeovers Act under section 32(4)(a). Temporary restraining orders may be in place for up to 21 days (although this can be extended under section 32(4)(b)). The Panel may also make a permanent compliance order of the type set out in section 33AA under section 32(4)(c) and extend a takeover offer period (section 32(4)(d)).

Application for Court orders

- 6.7 If the Panel makes a determination that it is not satisfied about compliance with the Code, it may make an application to the court under section 35 for an order under sections 33F (injunctions), 33I (civil remedy orders), 33K (compensation orders) or 33M (pecuniary penalty orders and declarations of contravention).

Undertakings

- 6.8 In addition to the powers granted to the Panel in respect of restraining orders, the Panel also has the ability to accept undertakings under section 31T from any person in connection with a matter considered at a section 32 meeting (or indeed any matter before it, whether or not a section 32 meeting has been called).
- 6.9 As discussed above, provision of a suitable undertaking may mean that the Panel does not need to call a section 32 meeting. Similarly, provision of a suitable undertaking may remove the need for the Panel to impose temporary restraining orders or apply for permanent orders. Undertakings may be accepted by the Panel in conjunction with restraining orders.



Appeals and further rights of parties

- 6.10 There is no right of appeal against a Panel determination. However, the Panel's decisions may be judicially reviewed in the High Court.
- 6.11 In addition to judicial review, certain parties may have rights to bring proceedings under the Takeovers Act. If the Panel makes a determination that it is not satisfied of Code compliance, the Panel has the right to apply for certain Court orders. In addition, certain parties may have rights to apply to the Court for orders under sections 33F (injunctions), 33I (civil remedy orders) or 33K (compensation orders) of the Takeovers Act.⁵ These rights arise where:
- (a) the Panel makes a determination that it is not satisfied of Code compliance and either of the following applies:
 - (i) the Panel consents to the party's application to the Court; or
 - (ii) the person requested in writing that the Panel make an application to the Court and the Panel did not do so within 10 days of that request; or
 - (b) a request was made to the Panel to hold a section 32 meeting, and the Panel did not, within 14 days, make a determination.

⁵ Only the Panel may apply for a pecuniary penalty order and declaration of contravention under section 33M.



Schedule: Version control, disclaimer and copyright

Version Control

This version (Panel document reference number 1006843.1) 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 the Panel's background considerations regarding enforcement actions, its approach in recent transactions, and its response to instances of refusal or failure to appear by witnesses.	#1006843.1
7 December 2021	Expanded on the Panel's process for deciding whether or not to call a section 32 meeting.	#431099.1
11 February 2014	N/A – This was the first version of this Guidance Note.	#347143.1

Disclaimer

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