Ref: 700-100 / 337576

A TAKEOVERS PANEL CONSULTATION PAPER

Proposed Amendments to the Takeovers Code
October 2016

TAKEOVERS PANEL

Contents

Request for comments on this paper

The Panel invites submissions on the proposals and the questions set out in this paper. The questions asked throughout this consultation paper are also available as a separate document. It would be helpful if respondents used the questions document for their submission.

The closing date for submissions is **5.00 p.m., Friday 2 December 2016.**

Submissions should be sent to the attention of Rebecca McAllum to:

By email	communications@takeovers.govt.nz P**lease reply to the email sent to you in October 2016 and attach your submission to your reply.**
By post	Takeovers Panel Level 3, Solnet House 70 The Terrace P O Box 1171 WELLINGTON 6011

While the Panel prefers to receive written submissions (including any email comments), verbal feedback is also acceptable, especially from shareholders or directors of small Code companies. Please contact Rebecca McAllum on 04 815 8456 if you would like to discuss the options and questions in this paper.

Official Information Act

Any submissions received are subject to the Official Information Act 1982. The Panel will make submissions available upon request under that Act. If any submitter wishes any information in a submission to be withheld, the submission should contain an appropriate request (together with a clear identification of the relevant information and the reasons for the request). Any such request will be considered in accordance with the Official Information Act 1982.

Structure of this paper

There are two main sections to this paper.

Section One contains three substantive subsections that incorporate a framework and policy analysis similar to that found in Regulatory Impact Statements. The three subsections are: *Small Code Companies*, *"Days" in the Code*, and *Electronic Access for Shareholders.*

Section Two contains technical amendments of low policy content, most of which are drafting anomalies or minor inconsistencies in the wording of the Code. The six subsections in Section Two are: *Offer documents*, *Target company statements*, *Notices of meeting*, *Compulsory acquisition*, *Communications*, and *Timing*.

SECTION ONE: SUBSTANTIVE AMENDMENTS

Policy Objectives

1. The Panel's objectives in considering the three substantive issues are the statutory objectives for the Code, as set out in section 20 of the Takeovers Act 1993, namely:

   (a) encouraging the efficient allocation of resources;

   (b) encouraging competition for the control of Code companies;

   (c) assisting in ensuring that the holders of financial products in a takeover are treated fairly;

   (d) promoting the international competitiveness of New Zealand's capital markets;

   (e) recognising that the holders of financial products must ultimately decide for themselves the merits of a takeover offer; and

   (f) maintaining a proper relation between the costs of compliance with the Code and the benefits resulting from it.

REDUCING THE COST OF CODE COMPLIANCE FOR "SMALL CODE COMPANIES"

Problem identification

Background

2. The Code applies to "Code companies". A company is a Code company if it is a New Zealand incorporated company that:

   (a) is listed with financial products that confer voting rights (e.g., ordinary shares quoted on a licensed market, e.g, an NZX market); or

   (b) was within paragraph (a) at any time during a 12 month period before a transaction or event covered by the Code; or

   (c) has 50 or more shareholders (with voting rights) and 50 or more share parcels.

3. Up until 2006, when an amendment was made to the Takeovers Act and the Code, small-by-value unlisted companies were excluded from being subject to the Code. There was a value threshold of "$20,000,000 or more of assets" required to be met before an unlisted company was a Code company. The asset threshold was removed in 2006 (under a suite of securities law reforms) to more closely align the New Zealand Takeovers Code with Australia's takeovers legislation.

4. Within the broad capital markets context, the Panel's role relates to administering the Takeovers Code which regulates a range of takeover and share acquisition transactions with respect to New Zealand companies that are Code companies. Code companies are estimated to be fewer than 1% of New Zealand's c.500,000 companies. The number of Code companies is unknown, given the lack of available data, but is estimated to be

somewhere in the order of 1000 to 1500 companies. Of these, some 130 are listed (on the NZX Main Board, NZAX, or NXT).

5. As an independent Crown entity, the Panel is not subject to directions from the Government about how to exercise its powers. However, the Panel is part of the State Services and is accountable to its Minister. In recent years, the Minister's annual letter of expectations has asked the Panel to consider ways it can contribute to the Government's Business Growth Agenda goals. The most relevant section of the Business Growth Agenda for the Panel is that on Building Investment. It focuses on encouraging direct foreign investment into New Zealand and reducing compliance costs for New Zealand businesses to raise capital.

6. It is this policy environment in which the Panel has sought, and received, feedback on the compliance costs the Code imposes on small companies. The Panel consulted on the issue in October 2014, February 2015 and again in September 2016. In response to submissions received, the Panel granted, and in October 2016 decided to extend the reach of, the Takeovers Code (Small Code Companies) Exemption Notice 2015 ("small Code companies Class Exemption").[1] The effect of the exemption is to allow unlisted companies with total assets of $20 million or less to opt out of Code compliance where a person increases their holding or control of voting rights (i.e., their share ownership) as a result of an allotment of voting securities by the Code company. At the time of writing, the exemption has only been relied on once.

7. The Panel is now seeking feedback on whether the Code prevents small companies from raising the capital they need to survive, thrive, and grow, or undertake other share transactions cost-effectively, and if so, specific examples of how.

Q1: What are your views on whether the Code prevents small companies from raising capital or undertaking other share transactions? Please give examples.

How the Code regulates increases of shareholdings in Code companies

8. Shareholders, and prospective shareholders, are subject to rule 6 of the Code, the fundamental rule. Rule 6 prohibits a person from increasing their ownership of the voting rights in a Code company unless, after the increase, that person and that person's "associates" would hold or control in total not more than 20% of the voting rights in the Code company. [2] Accordingly, any associates' ownership of the company's shares has to be included in the calculation to work out whether an increase by a person would trigger the Code's 20% threshold.

9. Rule 7 of the Code provides the mechanisms by which a person can increase their ownership of Code company voting rights without breaching the rule 6 prohibition. Rule 7 permits a person to increase their shareholding position in a Code company, above the 20% threshold, by making a full or partial takeover offer, by obtaining the

[1] The extension of the small Code Companies Class Exemption was not yet in force at the time of publication of this consultation paper.

[2] Rule 4 of the Code defines the important term "associate". "Associate" covers related companies, persons who act jointly or concert together or who follow one another's wishes, as well as persons with business or even personal relationships. See rule 4 for the complete definition.

approval of the company's shareholders for an acquisition or an allotment or other increase, by making "creeping" increases by a maximum of 5% over a 12-month period (if the person already owns more than 50% of the voting rights in the Code company), or by any means if the person already owns 90% or more of the voting rights in the Code company.

10. All these mechanisms, other than the last two, usually require full Code compliance, including the provision of an independent adviser's report for the company's shareholders on the merits of the transaction.

11. Another common mechanism by which a person can increase their ownership is when the Code company buys back some of its own shares. The company cancels the shares it buys back, meaning that the shareholding percentage of persons not participating in the buyback increases. If a person's shareholding position would increase above the 20% threshold, or if already above 20% would increase at all (unless the Code's "creeping" provisions can be used), approval from the company's other shareholders can be obtained under clause 4 of the Takeovers Code (Class Exemptions) Notice (No 2) 2001 (the conditions of which include that an independent adviser's report be provided to the company's shareholders) (the "Buyback Class Exemption").

12. There can be significant costs to the Code company to facilitate any of these mechanisms for a person increasing ownership in the company. For takeovers of small Code companies, the costs are unlikely to be less than $100,000 and can be several times this figure. For other Code-regulated transactions in small Code companies that require shareholder approval (e.g., allotments, acquisitions and buybacks), the costs may be similar to those of a takeover if the transaction is complex, or between $50,000 and $80,000 for smaller transactions. These costs are associated with legal advice, an independent adviser's report and holding a shareholders' meeting. For small Code companies, these costs may outweigh the benefits of Code compliance.

Q2: Do you agree with the Panel's estimates of the costs of transactions under the Code?

Status quo - small Code companies and the Code

13. Following the Panel's 2014/2015 consultation on reducing the compliance burden of the Code for small-by-value Code companies, the Panel granted the small Code companies Class Exemption for persons who increase their holding or control of voting rights in a small, unlisted Code company as a result of an allotment of voting securities by the Code company.

14. The purpose of the exemption was to lower the disproportionate cost barriers to capital-raising for small companies, by potentially enabling the company to avert the costs of holding a shareholders' meeting, obtaining an independent adviser's report, and obtaining legal advice to facilitate the process.

15. The exemption permits a small, unlisted Code company to opt out of Code compliance for raising capital through an allotment (or series of allotments). For the purposes of the

exemption, a company is "small" if, at its most recent balance date, it has total assets that do not exceed $20 million.

16. The exemption applies only if:

    (a) the company's board has resolved that, in its opinion, opting out is in the best interests of the company;

    (a) the company has given shareholders a brief disclosure document and an opportunity to object to the opt out (and thereby to require full Code compliance); and

    (b) objections to the opt out represent less than 5% of the "non-exempt" shares.

17. Non-exempt in this context means the shares belonging to shareholders who are not relying on the exemption, and who are not associates of the shareholders relying on the exemption.

18. As set out in the Panel's consultation papers on small Code companies, there are other similar opt out/opt in regimes in New Zealand. For example NZX Limited's NXT market rules contain similar opting provisions for shareholders in relation to transaction announcements, and the Companies Act 1993 also contains similar opting provisions for shareholders for audit requirements, annual meeting requirements, and electronic communication options.

19. At the time of writing, the small Code companies class exemption has been relied on once. The Panel decided in October 2016 to extend the exemption's application to buybacks and acquisitions (in addition to allotments).

20. However, the Panel cannot overreach its own powers by, for example, extending the class exemption to cover every class of transaction that can be undertaken under the Code. Nor can it change the threshold for being a Code company through its exemption process. Accordingly, if the Code is, in fact, imposing compliance costs which are out of balance with the benefits to shareholders of small Code Companies, and if the small Code companies Class Exemption is not appropriately alleviating those costs, then the Panel believes that it may be appropriate to propose an amendment to the Takeovers Act to change the statutory thresholds of Code compliance.

Options

21. The options considered by the Panel are:

    (a) to maintain the status quo;

    (b) to recommend an amendment to the Takeovers Code that would not change the threshold for being a Code company but would instead create a lighter compliance regime for small Code companies - a "Code light";

    (c) to recommend an amendment to the definition of "Code company" in the Takeovers Act and Code to add an asset threshold of total assets of more than $20 million for unlisted companies (preferred option).

Option 1 – Maintain the status quo

Key features of Option 1

22. Under this Option, all Code companies, large and small, and their shareholders, would need to continue to comply with, and would retain the benefits of, the provisions of the Code, including:

    (a) regulated takeovers that require the same offer terms to be made to every shareholder, and adequate time to consider the takeover offer before deciding whether to accept it or not;

    (b) the requirement for shareholder approval to be obtained for Code-regulated acquisitions, allotments, and buybacks;

    (c) the disclosure of required information in notices of meeting and related documents, and in takeover documents, including directors' recommendations;

    (d) an independent adviser's report on the merits of the transaction; and

    (e) the protection of rule 64 of the Code (which prohibits misleading or deceptive conduct) and the Panel as regulator.

23. A person may increase their ownership of Code company voting rights without any Code-compliance obligations where:

    (a) the person does not increase their share ownership (together with that of any associates) above the Code's 20% threshold;

    (b) "creeping" acquisitions of up to 5% are made in any 12-month period, if the person holds or controls more than 50% of the voting rights in the Code company; or

    (c) by any means if the person holds or controls 90% or more of the voting rights.

24. Unlisted Code companies whose total assets do not exceed $20 million at the most recent balance date, and their shareholders, may choose to opt out of Code compliance under the small Code companies Class Exemption, where the company is raising capital through an allotment (or through an acquisition or buyback, once the exemption has been amended) and a person increases their ownership in the company as a result of the allotment, above the Code's 20% threshold.

Analysis of Option 1

25. Option 1 meets the Panel's objectives to some degree, as indicated in the table below.

Objectives of Code:	**How Option 1 meets the Code's objectives:**
(a) Encouraging the efficient allocation of resources	Anecdotal evidence suggests the Code may unduly impede the allocation of resources for small unlisted Code companies. The Panel believes that the settings are appropriate for the efficient allocation of resources for medium and

Objectives of Code:		How Option 1 meets the Code's objectives:
		large Code companies and listed companies.
(b)	Encouraging competition for the control of Code companies	Anecdotal evidence suggests the Code may unduly impede competition for control for small unlisted Code companies. The Panel believes that the settings are appropriate for competition for control for medium and large Code companies and listed companies.
(c)	Assisting in ensuring that the holders of financial products in a takeover are treated fairly	This option continues to ensure that all shareholders are treated fairly and are provided with appropriate levels of advice. It is arguable that some transactions do not occur because of the relative compliance costs that would be incurred by small companies, especially for small transactions.
(d)	Promoting the international competitiveness of New Zealand's capital markets	The status quo is in line with other reputable jurisdictions, including Australia (New Zealand's Code is similar to Australian law). Direct foreign investment in New Zealand businesses is enhanced and encouraged by regulatory protections for investors.
(e)	Recognising that the holders of financial products must ultimately decide for themselves the merits of a takeover offer	This option continues to furnish shareholders with comprehensive information to make decisions about their investments. It is arguable that some transactions do not occur because of the relative compliance costs that would be incurred, so arguably shareholders may have no opportunity to decide in those cases. One of the purposes of this policy objective is to ensure that the Code and the Panel do not step into merits decisions (i.e., 'stand in the shoes of shareholders' by taking the decision out of their hands). The status quo maintains this policy.
(f)	Maintaining a proper relation between the costs of compliance with the Code and the benefits resulting from it	The costs of compliance with the Code may outweigh the benefits of Code protection for unlisted small Code companies, but is appropriate for larger and for listed companies.

26. Option 1 ensures consistency with the objectives of the Code and ensures that shareholders are fairly treated and provided with an appropriate level of advice, particularly in respect of listed and larger Code companies.

27. Small Code companies may choose to utilise the small Code companies Class Exemption to decrease their compliance burden when undertaking a capital raising, and for acquisitions and buybacks when the small Code companies Class Exemption is amended.

28. Option 1 offers strong protections for shareholders of Code companies when changes of ownership of voting rights result in a person's holding or control of voting rights increasing above the Code's 20% threshold. It could be argued that shareholders in small, unlisted, Code companies bear the greatest benefit from the Code, as they lack the ongoing disclosures that listed companies must make to their shareholders. However, the Code originally did not cover small unlisted companies, with the $20 million asset threshold being removed in 2006. For many small Code companies, the cost of Code compliance may far outweigh the benefit of the Code's protections. Accordingly, Option 1 is not the Panel's preferred option.

Q4: Given the current policy settings for the capital markets, do you agree that the costs outweigh the benefits of Code compliance for small unlisted Code companies? Please give your reasons.

Option 2 - Recommend an amendment to the Takeovers Code that would not change the threshold for being a Code company but would instead create a lighter compliance regime for small Code companies - a "Code light".

Key features of Option 2

29. Under this option, all Code companies, large and small, would remain subject to the Code and to the regulation and oversight of the Panel as described for Option 1.

30. However, small Code companies (as defined in paragraph 16 above) would only be subject to the Code for takeover offers made under rule 7(a) or 7(b) of the Code (i.e., full or partial takeovers respectively), and would not be subject to the Code for acquisitions, allotments, or buybacks except if shareholders choose to "opt in" to the Code. In this respect, the "Code light" would operate much in the same way as the expanded version of the small Code companies Class Exemption.

31. The Panel suggests the following process for this option:

    (a) If a proposed acquisition, allotment or other transaction or event (other than a full or partial takeover offer) would trigger rule 6 of the Code, the board of the small Code company must complete a prescribed form which sets out the details of the proposed transaction. The form must be sent to all shareholders, who then have 15 working days to return a notice of objection to the company to vote for opting back in to normal Code compliance for the proposed transaction (or 10 working days if all documents can be, and are, sent to all shareholders electronically and all shareholders can respond electronically).

    (b) If the company receives objections from shareholders representing 5% or more of the non-triggering voting rights, to opt back in to Code compliance for the proposed transaction, the transaction must proceed with full Code compliance (or be abandoned), subject to any other applicable exemptions.

32. Non-triggering in this context means the shares belonging to shareholders who are not crossing above the Code's 20% threshold, or increasing an existing holding or control stake which is already above that threshold, as a result of the proposed transaction and are not associates of any such person.

33. The Panel proposes similar information to that required to be sent to shareholders under the small Code companies Class Exemption. Accordingly, the information for the relevant transaction would have to—

    (a) give a brief description of the transaction; and

    (b) contain information along the following lines:

        (i) a statement that the company falls within the definition of "small Code company" and therefore is not subject to full Code compliance for the transaction;

        (ii) shareholders will not receive an independent adviser's report on the merits of the transaction or other information normally required by the Code, and shareholders will not have the opportunity to vote for or against the transaction;

        (iii) a description of the opt out/opt in process, including how to object to opting out of Code compliance.

    (c) state the price (if applicable) for the securities being acquired or allotted;

    (d) set out the reasons for the transaction;

    (e) identify any director who is or may be increasing their holding or control of voting rights in the Code company due to the transaction;

    (f) set out the following information in respect of each person who may increase their holding or control of voting rights in the Code company above the Code's 20% threshold, or who may increase an existing holding or control stake which is already above that threshold:

        (i) the identity of the person;

        (ii) the control percentage of the person immediately before the transaction;

        (iii) the control percentage of the person as a result of the transaction or, if the control percentage is not known, the maximum control percentage achievable under the transaction;

        (iv) the aggregate control percentage of the person and the person's associates as a result of the transaction or, if the aggregate control percentage is not known, the maximum aggregate control percentage; and

(g) provide the form for giving a notice of objection, clear instructions for submitting the form, and reasonable means to facilitate submission of the form (including a pre-paid reply envelope if sent by post).

34. The disclosure document must not be longer than 2 A4 pages in a minimum of 10pt font when printed (excluding the form of notice of objection).

Analysis of Option 2

35. Option 2 meets the Panel's objectives to a certain extent, as discussed in the table below.

Objectives of Code:		**How Option 2 meets the Code's objectives:**
(a)	Encouraging the efficient allocation of resources	The efficient allocation of resources may be enhanced if the proposal is seen to effectively reduce compliance costs for small Code companies. However, it is possible the proposal's regime would also add an additional layer of complexity for the very companies it would aim to assist. The Panel believes the settings are appropriate for the efficient allocation of resources for medium and large Code companies and listed companies.
(b)	Encouraging competition for the control of Code companies	Competition for control may be enhanced if the proposal is seen to effectively reduce compliance costs for small Code companies for the type of transactions covered by the proposal ("opt out transactions"). However, since takeovers would still be subject to full Code compliance, the proposal has little impact on competition for control over and above the status quo. The Panel believes the settings are appropriate for competition for control for medium and large Code companies and listed companies.
(c)	Assisting in ensuring that the holders of financial products in a takeover are treated fairly	The Panel would continue to ensure that all shareholders are treated fairly and provided with appropriate levels of advice.
(d)	Promoting the international competitiveness of New Zealand's capital markets	Direct foreign investment is enhanced/encouraged by regulatory protections for investors. The opt out mechanism would still ensure shareholders participate in control change transactions that are takeovers (i.e., because takeovers would still be subject to full Code compliance). However, the opt out mechanism would also increase the overall complexity of the New Zealand Code as compared with Australia's and other reputable jurisdictions' Codes, for

Objectives of Code:		How Option 2 meets the Code's objectives:
		transactions for small Code companies.
(e)	Recognising that the holders of financial products must ultimately decide for themselves the merits of a takeover offer	The proposal would furnish shareholders with information for making their own decisions, albeit that information provided under opt out transactions would not be as comprehensive as that provided under the status quo, unless enough shareholders object to the opt out, resulting in full Code compliance for the transaction.
(f)	Maintaining a proper relation between the costs of compliance with the Code and the benefits resulting from it	The proposal provides for a more balanced approach between Code compliance and the benefits resulting from it through the opt out mechanism for small unlisted Code companies. A key possible problem with the proposal, however, is that it increases the overall complexity of the Code itself for the very companies it is aimed at assisting. While the cost of an independent adviser would be avoided for opt out transactions, unless the shareholders objected and opted back in to Code compliance, legal fees may not be reduced, or not significantly. A further key problem with the proposal is that small Code companies may have less ready access to legal advice than larger, or listed, companies.

36. Under Option 2, shareholders in small unlisted Code companies would still be protected by the Code even for opt out transactions, in that communications and documentation regarding a transaction would still be subject to the rule 64 prohibition against misleading or deceptive conduct.

37. While Option 2 appears superficially attractive, it adds a layer of complexity for small unlisted companies to understand the Code. The small Code companies class exemption has only been relied upon once to date, which raises questions as to its utility.

38. The real policy question to decide is getting the balance right between protection for investors/the integrity of the capital markets, and not unduly inhibiting business growth. The Panel thinks that it may be timely, in the government's current policy settings for the capital markets, to support a less complex compliance regime than Option 2 would provide. Accordingly Option 2 is not the Panel's preferred option.

Q5: Do you agree with the Panel's view that Option 2 would increase the overall complexity of the Code for small Code companies? Please give your reasons.

Option 3 – Recommend an amendment to the definition of "Code company" in the Takeovers Act and Code to add an asset threshold of total assets of more than $20 million for unlisted companies (Preferred option).

Key features of Option 3

39. Under this option, companies that are listed, with voting rights quoted on a licensed market such as the NZX, would need to continue to comply with, and would retain the benefits of, the provisions of the Code.

40. For an unlisted company to be a Code company it must have:

    (a) 50 or more shareholders (with voting rights) and 50 or more share parcels; and

    (b) total assets of more than $20 million at its most recent balance date.

41. The transitional arrangements would be as follows: where –

    (a) a notice of meeting has been sent by a Code company under rule 15 or 16 or under an exemption granted by the Panel, or

    (b) an offer has been sent by an offeror under rule 43B of the Code,

    the Code would continue to apply for the shareholder approval or takeover.

42. That is to say, a shareholder approval process or takeover offer commenced before the commencement of the new definition of "code company" must be completed under the Code.

Analysis of Option 3

43. Option 3 meets the Panel's objectives to quite an extent, as indicated in the table below.

Objectives of Code:		**How Option 3 meets the Code's objectives:**
(a)	Encouraging the efficient allocation of resources	The proposal facilitates and increases flexibility for capital-raising by, and also takeovers of small, unlisted companies. The current settings are appropriately efficient for medium and larger Code companies and listed companies.
(b)	Encouraging competition for the control of Code companies	The proposal facilitates and increases flexibility for takeovers and other control-change transactions, of small, unlisted companies. The current settings are appropriate for encouraging competition for control for medium and larger Code companies and listed companies.
(c)	Assisting in ensuring that the holders of financial products in a takeover are	Shareholders in former Code companies, and in small unlisted companies that are growing, would now have a significantly greater hurdle to

Objectives of Code:		How Option 3 meets the Code's objectives:
	treated fairly	overcome to obtain the protection of the Code through their company becoming a Code company. Shareholders in these companies would now have no ability to participate in control-change transactions, unless an offer was made specifically to them (or the transaction fell within the Companies Act provisions for shareholder approval, such as a major transaction). There would be no requirement to provide shareholders with independent advice about transactions and no regulator to oversee the quality of any information provided, nor of the process aspects of transactions. However, the preferred option has no impact on larger and listed Code companies.
(d)	Promoting the international competitiveness of New Zealand's capital markets	New Zealand's takeovers law would now be out of step with Australia's in terms of the asset threshold. However, larger and unlisted companies would still be subject to the status quo regulatory environment. The Panel believes that the relatively low value threshold of >$20 million total assets for being an unlisted Code company ensures that only relatively low-value direct foreign investment would be impacted. However, it is reasonable to assume that investors would perceive a higher risk to prospective investments in small unlisted companies.
(e)	Recognising that the holders of financial products must ultimately decide for themselves the merits of a takeover offer	Shareholders in small unlisted companies would not have the same protection and access to information that would formerly have been required under the Code. Arguably, more transactions would occur in these companies' shares because of the reduced compliance costs and the relative lack of regulatory impediments, but consequently their shareholders would be very likely to have less opportunity to be involved in transactions.
(f)	Maintaining a proper relation between the costs of compliance with the Code and the benefits resulting from it	The proposal removes and reduces the disproportionate compliance costs for small unlisted companies, while retaining the appropriately balanced settings for larger and listed companies.

44. It is thought that excluding small-by-value unlisted companies from the ambit of the Code would maintain a better relation between the costs of compliance with the Code and the benefits resulting from it. The Panel has received anecdotal evidence, and submissions in relation to the Panel's consultations for the small Code companies Class Exemption, that the costs of Code compliance are out of proportion to the value of some transactions for small Code companies. The most strident arguments about this have come from crowdfunding platforms. The Panel accepts that if this is in fact true for crowdfunded companies it must also be the case for all small Code companies.

45. The preferred option would provide a bright line test as to whether an unlisted company was covered by the Code or not. Accordingly, it has the benefit of simplicity and certainty.

46. For all of the above reasons, Option 3 is the Panel's preferred option.

Q7: Do you agree with Option 3? Please give your reasons.

Q8: Do you agree with the proposed transitional arrangements for the preferred option, set out in paragraph 41 above?

Q9: Do you have a proposal that the Panel has not included, that would better reduce compliance costs and also meet the Panel's other Policy Objectives? If so, please provide the possible key features of that proposal and some analysis of how it would meet the Panel's Policy Objectives.

Conclusion

47. The Panel would like to hear the views of advisers to, directors of, and in particular, shareholders of, small unlisted Code companies as to whether they agree with the preferred option. Whether consultees agree or disagree, the Panel would like to have the benefit of understanding the reasons for the person's view.

48. The Panel recognises that there will most likely be views expressed on both sides, so the goal is to achieve the most balanced and appropriate outcome that contributes to the integrity of New Zealand's capital markets, while not unduly inhibiting business growth and risk-taking.

49. Amending the Takeovers Act would require an Act of Parliament. This would allow Parliament to reconsider the threshold for "Code company" and the threshold could be matched to current policy settings for the capital markets.

"DAYS" IN THE CODE

Problem identification

50. Occasionally, concerns have been expressed to the Panel regarding the potential difficulties caused when takeovers occur over holiday periods. These difficulties are said to occur because timing requirements in the Code are stated and defined as "days" – meaning calendar days and not working days.

Status quo

51. The Code's timing requirements are contained within some 37 rules scattered throughout the Code. They set out timeframes within which things must or must not occur during takeovers and compulsory acquisitions. For instance, in respect of a takeover, under rule 24, the offer period "must not be shorter than 30 days and not longer than 90 days." Similarly, under rule 29(1) "an offer may not be varied, and a variation notice may not be sent, later than 14 days before the end of the offer period."

52. The Code differs from other corporate legislation in that timeframes in the Code are referenced by calendar days and not working days. A "calendar day" means any and all days of the week, month or year.[3]

53. Lawyers involved in Code transactions will be familiar with other legislation, such as the Companies Act, which uses working days, and defines the term "working day" as follows:

> **working day** means a day of the week other than—
> (a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, the Sovereign's birthday, Labour Day, and Waitangi Day; and
> (ab) if Waitangi Day or Anzac Day falls on a Saturday or a Sunday, the following Monday; and
> (b) a day in the period commencing with 25 December in any year and ending with 2 January in the following year; and
> (c) if 1 January in any year falls on a Friday, the following Monday; and
> (d) if 1 January in any year falls on a Saturday or a Sunday, the following Monday and Tuesday.

54. Accordingly, "working day" means only weekdays, and not weekdays that are public holidays (as defined).

55. It has been said that the Code's use of calendar days has the potential to be impractical for shareholders, potential competing bidders, target companies, and independent advisers, particularly in situations where takeovers occur over the Christmas holidays. These problems become clear when considering the application, during holiday periods, of the various rules that have short timeframes.

56. For example, rule 46 of the Code requires the target company statement to be sent within 14 days after the target company receives the takeover notice or despatch notice. More critical is rule 42A, which requires a "class notice" to be sent by the target company no later than two days after receiving a takeover notice. The application of these rules in the context of a takeover offer near to or during a holiday period may cause company directors, and also legal and financial professionals, unnecessary urgency and inconvenience over the holiday period. It may also inhibit the availability of advice provided to shareholders.

57. Of potentially greater concern for the Panel, as a regulator, is that the Code's use of calendar days means that takeover offers made over the Christmas holiday period or Easter break can leave shareholders with little time to consider the information provided to them. Moreover, these holiday periods are a time when many shareholders may be

[3] Rule 3(2) of the Code provides for doing anything that is required by the Code to be done, on the next day that is a working day, if the day on which or time within which the thing to be done "*expires or falls on a day other than a working day*."

away on holiday, and may be less likely to have access to financial and legal advisers, whose firms may be closed for part of the holiday period.

58. As a consequence, some shareholders may have greater difficulty in accessing the information and advice that they need to make a fully informed decision on the offer. Those shareholders who are away may not even realise that an offer has been made until close to the end of the offer period.

59. Another scenario where shareholder action is required within a relatively short period of time relates to the Code's compulsory acquisition rules. When a person becomes a "dominant owner", that is, they become the holder or controller of 90% or more of the company's voting rights, they may elect to undertake a voluntary sale process. The minority shareholders (referred to as "outstanding security holders" by the Code) need to decide whether to remain as a shareholder of the company, or to exit under this process. That is, the Code gives them the right to sell their shares to the dominant owner.[4]

60. If this process occurs over the Christmas holiday period, outstanding security holders will have very little time to return the relevant transfer document, given that rule 59(1) allows only 21 days after the date on which the dominant owner sent the acquisition notice to the outstanding security holders. This may cause some shareholders to miss the opportunity to exit the company at a fair and reasonable price and under the regulatory protection of the Code. However, the voluntary sale process is very rarely adopted by dominant owners and the Panel is not aware of any outstanding security holder being prejudiced by a compulsory acquisition occurring over a holiday period.[5]

61. To date the Panel has little evidence that the use of "days" rather than "working days" for Code transactions causes a problem. Doubtless this reflects the fact that in almost all cases the bidder will have a common interest with shareholders that adequate time for bid assessment exists. However, from time to time practitioners express the view that the Code's timing rules should be expressed as "working days."

Q9: Do you have experience of detrimental effects being caused by takeovers or compulsory acquisitions occurring over a holiday period? If yes, please describe the detriment caused, and to whom, and give your views as to how the Code's timing rules caused this detriment.

[4] However, the usual method adopted by dominant owners is to undertake a "compulsory sale." Under the compulsory sale process, outstanding shareholders can return the transfer document to the dominant owner, and receive payment seven days later. If they do not return the transfer document, the dominant owner must provide the money (or other consideration) to the Code company, which must hold it on trust until the shareholder claims it. The dominant owner becomes the registered holder of all of the shares in the company.

[5] The process is effectively automatic for outstanding security holders in the case of a compulsory sale process, so the identified problems are unlikely to arise for a compulsory sale.

Options

62. The options being considered by the Panel (if as a result of consultation it becomes apparent that there is, in fact, a problem) are:

    (a) to maintain the status quo;

    (b) to recommend an amendment to the Code to the effect that takeovers or compulsory acquisitions that involve a voluntary sale process, occurring over the holiday period, have extra time;

    (c) to recommend an amendment to the Code to the effect that the timing provisions under the Code are expressed in working days as defined in the Companies Act (preferred option).

Option 1: Maintain the status quo

Key features of Option 1

63. Under option 1, the status quo would be maintained, meaning that weekends and public holidays would continue to be counted as days when calculating timeframes under the Code.

Analysis of Option 1

64. Option 1 meets the Panel's policy objectives to some degree, as discussed in the table below:

Objectives of Code:		**How Option 1 meets the Code's objectives:**
(a)	Encouraging the efficient allocation of resources	The use of calendar days probably has a neutral effect on the efficient allocation of resources. The majority of takeovers and compulsory acquisitions must be completed in a reasonable timeframe. The target company's business activities are not unduly interrupted by the takeover process, so efficiency is maintained.
(b)	Encouraging competition for the control of Code companies	Competitors for control of a Code company may have a limited opportunity to make a competing bid where a surprise takeover occurs over a minimum duration over a holiday period. However, it is unlikely that holiday timing is a significant factor in terms of competition in takeovers in New Zealand.
(c)	Assisting in ensuring that the holders of financial products in a takeover are treated fairly	The use of calendar days has no effect on the fair treatment of shareholders in a takeover, other than where shareholders may experience difficulty in obtaining financial and/or legal advice over the holiday period, and consequently may feel uncertain as to whether they are being treated

		fairly.
(d)	Promoting the international competitiveness of New Zealand's capital markets	Chapter 6 of Australia's Corporations Act 2001 uses a mix of both business days and calendar days. Accordingly, parties to international transactions in the Asia Pacific region will have experience calculating timeframes using both calendar days and working days, and thus should not face difficulties understanding the New Zealand Code's timing requirements.
(e)	Recognising that the holders of financial products must ultimately decide for themselves the merits of a takeover offer	The use of calendar days does not directly impact the ability to decide for one's self; however the difficulties in obtaining advice during holiday periods may restrict shareholders from gaining a thorough understanding of the merits of an offer and its applicability to their own situation.
(f)	Maintaining a proper relation between the costs of compliance with the Code and the benefits resulting from it	Retaining the status quo would have a neutral impact on compliance costs. All parties to takeovers and compulsory acquisitions have the benefit of the simplicity of counting calendar days without having to work out what days are holidays.

65. One of the main benefits of the status quo is the simplicity in calculating time periods using calendar days. However, this benefit, which is best enjoyed by takeover bidders and target companies (who have strict obligations to do or refrain from doing certain acts during the specified days) may be outweighed by the impact on shareholders in terms of their ability to properly consider and respond to a takeover that occurs over a holiday period.

66. For the reasons above, Option 1 is not the Panel's preferred option.

Q10: Do you agree with the Panel's analysis of the Option 1? If not, please give your reasons.

<u>Option 2: Recommend an amendment to the Code to the effect that takeovers and compulsory acquisitions involving a voluntary sale process occurring over the Christmas holiday period are given extra days.</u>

Key features of Option 2

67. A second option would be to address the effect of the Christmas holiday period. That is to say, the Code could be amended to provide extra time for a takeover or compulsory acquisition involving a voluntary sale occurring over the Christmas holiday period, as follows:

(a) **Takeover notice periods**: for a takeover notice, if the notice period included all or part of the Christmas holiday period *then the offeror must send the offer during the period beginning **21 days**, and ending 30 days* after the takeover notice has been sent (c.f. rule 43B(b) which states the offeror must send the offer during the period "*beginning 14 days, and ending 30 days"*). In other words, the minimum takeover notice period would be one week longer than is currently required, but the maximum of the 30 days would not be increased.

(b) **Takeover offer periods:** if the offer period in a takeover included all or part of the Christmas holiday period, then the offer period *must be not shorter than **40 days*** (c.f. rule 24(2)(b) which states the offer period "*must not be shorter than 30 days and not longer than 90 days*"). In other words, a takeover offer that runs over the Christmas holiday period must remain open for a minimum of 40 days, being 10 days more than is currently required, but the maximum of 90 days would not be increased.

(c) **Compulsory acquisitions using the voluntary sale process**: for a compulsory acquisition where:

(i) the acquisition notice is sent under rule 54 of the Code; and
(ii) the acquisition notice specified that outstanding security holders have a right to sell (as found in rule 55(1)(b)(ii)); and
(iii) the date on which the acquisition notice was sent would result in the 21 day period referred in rule 59 including a public holiday in December or January,

the outstanding security holders would have ***30 days*** within which to return the instrument of transfer to the dominant owner. In other words, for a voluntary sale, the time period would be 9 days longer than is currently required.

Analysis of Option 2

68. Option 2 would meet some of the Panel's policy objectives, as discussed in the table below:

Objectives of Code:		**How Option 2 meets the Code's objectives:**
(a)	Encouraging the efficient allocation of resources	Option 2 represents a complicated change to the Code's timing rules that would only apply to a select few takeovers and compulsory acquisitions. Be that as it may, Option 2 directly deals with the identified problem. Option 2 would have little impact on the efficient allocation of recourses in the sense that only minimum timeframes would be extended for takeovers, not maximum timeframes.
(b)	Encouraging competition for the control of Code companies	Competition may be marginally enhanced by adding extra days to offer periods over the Christmas holiday period, as it would mean that other bidders would have more of an opportunity to produce competing bids. However, it is unlikely that holiday timing is a significant factor in terms

		of competition in takeovers in New Zealand.
(c)	Assisting in ensuring that the holders of financial products in a takeover are treated fairly	Option 2 would have no impact on fairness to shareholders in a takeover, other than that they would have more time to consider their options over the Christmas holiday period, and would have greater opportunity to consult professional advisers about the terms of the takeover.
(d)	Promoting the international competitiveness of New Zealand's capital markets	Option 2 would represent a significant change to already complex timing rules, and thus would have a small impact on compliance costs for international investors. Although unlikely, this may inhibit the competitiveness of New Zealand's capital markets, and deter international participation in Code transactions.
(e)	Recognising that the holders of financial products must ultimately decide for themselves the merits of a takeover offer	Extra days during holiday periods would assist shareholders in having more time to obtain financial or legal advice on the transaction or, if they would not have sought professional advice, would give them more time, themselves, to reflect on their circumstances, and help them to decide on the merits of a takeover.
(f)	Maintaining a proper relation between the costs of compliance with the Code and the benefits resulting from it	The compliance costs to the market would be raised to a limited extent as resources would be expended on understanding the new rules, calculating the timeframes and ensuring compliance occurs. It is doubtful if this higher cost of compliance would be outweighed by the benefit to shareholders.

69. It is the Panel's view, that the cost of introducing a complicated amendment to the Code's already complex timing rules outweighs any discernible benefits that Option 2 would offer to shareholders.

70. For the reasons given above, Option 2 is not the preferred option.

Q11: Do you agree with the Panel's view that there would be no real benefit to amending the Code to the effect that takeovers and compulsory acquisitions involving a voluntary sale process occurring over the Christmas holiday period are given extra days? Please give your reasons.

Option 3: Recommend an amendment to the Code to state the timing provisions under the Code as working days.

Key features of Option 3

71. Another option is to recommend that the Code be amended to state timing obligations in "working days" in line with the definition found in the Companies Act.

72. The Code's timing rules would accordingly change as described in the table below:

Days under status quo rules in the Code	**Days under Option 3 rules in the Code**
90 days	60 working days
60 days	40 working days
30 days	20 working days
21 days	15 working days
14 days	10 working days
10 days	8 working days
7 days	5 working days
3 days	3 working days
2 days	2 working days
1 day	1 working day

73. Although in reality the amount of time that passes during a "calendar day" timeframe and a "working day" timeframe is broadly the same (except when the working day timeframe includes a public holiday(s)), the working day timeframe *appears* shorter (i.e., 60 working days as opposed to 90 calendar days), but broadly speaking is in fact not, as it is calculated to exclude Saturdays and Sundays. The Panel sees a clear benefit in rounding the working day count, even if there is a marginal shortening of periods. In the event that a working day timeframe includes a public holiday within its duration, the actual duration of the timeframe would extend only for the amount of days that the public holiday endures.

Analysis of Option 3

74. Option 3 fully meets the Panel's policy objectives, as discussed in the table below:

Objectives of Code:		**How Option 3 meets the Code's objectives:**
(a)	Encouraging the efficient allocation of resources	Using working days, instead of calendar days, would be largely neutral as compared to the status quo. Takeovers and compulsory acquisition periods would be extended by around ten days over Christmas/New Year and by two days over Easter. The Panel expects this would have a minimal impact on the efficient allocation of resources.
(b)	Encouraging competition for the control of Code	Competition may be marginally enhanced, as other potential bidders would have a greater opportunity in terms of timing to produce

	companies	competing offers, although it is unlikely that holiday timing is a significant factor in terms of competition in takeovers in New Zealand.
(c)	Assisting in ensuring that the holders of financial products in a takeover are treated fairly	Option 3 has no impact on fairness to shareholders in a takeover, other than that they would have more time to take and to consider professional advice on the terms of the offer, given the almost two week extension to an offer period or notice period over Christmas and January.
(d)	Promoting the international competitiveness of New Zealand's capital markets	International competitiveness would not be greatly impacted as compared with the status quo since some of the Australian takeover provisions are expressed as calendar days and some as working days. There would be a marginal compliance cost to understanding the change to the New Zealand Code's timing rules, but the concept of working days will already be understood.
(e)	Recognising that the holders of financial products must ultimately decide for themselves the merits of a takeover offer	Working days would give shareholders extra time during holiday periods to obtain advice in order to assist them to decide for themselves on the merits.
(f)	Maintaining a proper relation between the costs of compliance with the Code and the benefits resulting from it	Changing the Code's timing rules to working days would initially raise compliance costs, but only to a small extent as practitioners will already have a sound understanding of working days.

75. Option 3 represents an opportunity for the timing rules within the Code to become consistent with other important legislation in New Zealand, such as the Companies Act. Creating consistency and clarity within the rules of the Code facilitates ease of compliance for target companies, potential bidders and independent advisers, and improves timeframes over holiday periods for shareholders.

76. For the reasons set out above, Option 3 is the Panel's preferred option.

Q12: Do you agree with the preferred Option? Please give your reasons. If you have a proposal that would better resolve the problem, please provide its key features and your analysis of how it would meet the Panel's policy objectives.

ELECTRONIC ACCESS FOR SHAREHOLDERS

Problem identification

77. Another concern expressed to the Panel in respect of potential difficulties that might arise when takeovers occur over holiday periods, relates to the reducing speed of postal services, the limited use of electronic communication by target companies and offerors during takeovers, and the limited accessibility of Code documents for shareholders of Code companies.

Status quo

78. The Code was drafted at a time when written communications were normally made in hard copy, including Code documents such as notices of meetings, takeover notices and offer documents, target company statements, notices of dominant ownership and notices of compulsory acquisition. Postal services were rapid, with next day delivery being the norm, at least in urban areas. In recent times, however, postal delivery can take much longer, particularly over the Christmas holiday period.

79. If, as appears to still normally be the case, all shareholder communications are sent by post for takeovers, particularly where an offer period is short or occurs over the Christmas holiday period, shareholders may have only a week or so to consider the target company's and independent adviser's advice before they need to make their decision to accept or reject the offer. Offerors tend to urge shareholders to accept the offer quickly, which can exacerbate this problem, and shareholders do not always understand that they should wait to receive the target company statement and independent adviser's advice before making their decision.

80. The Code does not regulate whether Code companies and takeover offerors communicate with shareholders by post or electronically. Nor does the Code prevent electronic communications.[6] In respect of their own shareholders, companies must provide documents by electronic means if the shareholder so notifies the company.[7]

81. Rule 42B of the Code requires a target company to send the offeror a copy of the target company's share register. The share register may or may not include shareholders' email addresses. The offeror therefore may be unable to access the email addresses of the target company's shareholders and its only option is to send the takeover offer and any subsequent communications by post.

82. The Code company is able to send documents by email to those shareholders who have opted for electronic communication. However, the Panel understands that target companies still mostly use only postal services during takeovers, and not email. Accordingly, shareholder communications can be very slow, and it is the Panel's view that this is unsatisfactory.

[6] Section 20 of the Electronic Transactions Act 2002 enables legal requirements to deliver information to be met by giving the information in electronic form. However, this is subject to the requirement that the person to whom the information is required to be given consents to the information being given in electronic form.
[7] Section 391(3A) and (3B) of the Companies Act.

83. The problem is partly mitigated by the fact that the NZX requires all NZX-listed companies to publish material information on the NZX website as part of its continuous disclosure regime. Shareholders with access to the internet will have access to Code documents in respect of listed companies through the NZX website regardless of whether they or the company have opted for electronic communication.

84. Since 2011, approximately 67% of all Code-regulated transactions that have occurred have been in respect of NZX-listed companies, and 70% of takeovers regulated by the Code have been of listed companies. Of those Code companies not listed (and whose documents are therefore not available on the NZX website), many publish Code documents on their own websites.

85. While these practices mitigate the problem to a certain extent by reducing the instances in which Code documents are not available to shareholders electronically, not all unlisted companies make their documents available on their website.

86. Informal discussions with one of the main registry providers for companies in New Zealand indicate that the number of shareholders whose email addresses are held by the company varies dramatically from company to company, from as many as 80% for some companies to as few as 20% for others.

Q13: Do you agree that there is a problem regarding low usage of electronic communications under the Code? Please give your reasons.

Options

87. The Panel is considering two options:

    (a) to maintain the status quo; or

    (b) to recommend amendments to the Code to the effect that:

        (i) a target company is required to provide to an offeror, with its share register, the email address of every shareholder (holding equity securities or voting securities the subject of the offer) who has provided their email address to the target company for the purposes of electronic receipt of documents ("e-shareholder");

        (ii) every Code-regulated communication made by a Code company or an offeror to an e-shareholder is required to be made electronically, however, an e-shareholder can request to also receive communications in hard copy;

        (iii) the Takeovers Panel may make copies of Code-regulated documents available on its website.

Option 1: Maintain the status quo

88. Under this option, the status quo would be maintained, meaning that the Code would not regulate whether Code companies and takeover offerors communicate with shareholders by post or electronically.

Analysis of Option 1

89. Option 1 increasingly does not meet the Panel's policy objectives, as discussed in the table below:

Objectives of Code:		**How Option 1 meets the Code's objectives:**
(a)	Encouraging the efficient allocation of resources	Option 1 potentially inhibits the efficient allocation of resources as a result of the reducing efficiency and timeliness of postal communication.
(b)	Encouraging competition for the control of Code companies	The status quo may discourage competition for the control of Code companies to the extent that it prevents potential competing offerors from communicating with shareholders electronically. However, this is unlikely to be a significant issue for competition.
(c)	Assisting in ensuring that the holders of financial products in a takeover are treated fairly	Option 1 is likely to have a neutral impact on ensuring that the shareholders in a takeover are treated fairly, as the delivery method of communications relating to a takeover does not affect the substance of those communications.
(d)	Promoting the international competitiveness of New Zealand's capital markets	Sending documents by post is consistent with the requirements in section 648C of Australia's Corporations Act 2001 for sending takeover documents, thus parties to international transactions in the Asia-Pacific region would be familiar with the use of postal communications.
(e)	Recognising that the holders of financial products must ultimately decide for themselves the merits of a takeover offer	Option 1 is likely to have a neutral impact on shareholders' ability to decide for themselves the merits of a takeover offer, except as to the extent to which postal delays restrict the time they have to consider those merits and take advice on them.
(f)	Maintaining a proper relation between the costs of compliance with the Code and the benefits	Retaining the status quo would have a neutral impact on compliance costs for Code companies, as they can choose whether to utilise electronic delivery to shareholders who

resulting from it	have opted for this. However, under the status quo, offerors do not have that choice and therefore their compliance costs increase as postal costs increase, with no ability to mitigate that cost.

90. For the reasons outlined above, maintaining the status quo is not the Panel's preferred option.

Option 2: Recommend amendments to the Code

91. Under this option, the Panel would recommend amendments to the Code to the effect that:

    (a) a target company is required to provide to an offeror, with its share register, the email address of every e-shareholder;

    (b) every Code-regulated communication made by a Code company or an offeror to an e-shareholder is required to be made electronically. Such communication is to be in place of, not in addition to, postal delivery. However, an e-shareholder can request to also receive communications in hard copy, and the offeror or Code company, as the case may be, must comply with that request; and

    (c) the Panel may make Code-regulated documents available on the Takeovers Panel website. As a consequential amendment, the words "*in hard copy and (if possible) in electronic form*" should be deleted from rule 19A and rule 47 of the Code.

Analysis of Option 2

92. Option 2 fully meets the Panel's policy objectives, as discussed in the table below:

Objectives of Code:		**How Option 2 meets the Code's objectives:**
(a)	Encouraging the efficient allocation of resources	Option 2 would encourage the efficient allocation of resources because of the increased efficiency of electronic communication.
(b)	Encouraging competition for the control of Code companies	Option 2 may marginally improve competition for the control of Code companies to the extent that it would provide potential competing offerors with greater access to takeover documents and to Code company shareholders.
(c)	Assisting in ensuring that the holders of financial products in a takeover are treated fairly	Option 2 is likely to have a neutral impact on ensuring that the holders of financial products in a takeover are treated fairly, as the delivery method of communications, and accessibility of documents, relating to a takeover does not affect the substance of those documents.

Objectives of Code:		**How Option 2 meets the Code's objectives:**
(d)	Promoting the international competitiveness of New Zealand's capital markets	Adopting Option 2 would be unlikely to have a significant impact on the international competitiveness of New Zealand's capital markets. It may marginally increase the competitiveness, given that the use of electronic communication and internet accessibility in capital market transactions is likely to increase over time rather than decrease as it becomes more prevalent in commercial transactions more generally. However, investors used to dealing with Australian takeover requirements would need to expend some resource in understanding the e-communications environment in New Zealand under Option 2, as opposed to the postal communications environment under Australian law.
(e)	Recognising that the holders of financial products must ultimately decide for themselves the merits of a takeover offer	Ensuring shareholders can receive documents in the manner of their choice from the Code company and the offeror would be likely to increase shareholders' ability to weigh the merits of the takeover offer, as it would provide them with more time to consider an offer and would provide them with the benefits of electronic communication including the ability to search within documents, forward them to advisers, etc. Increasing the availability of documents on the internet, via the Panel's website, also would improve accessibility of Code-regulated documents for shareholders.
(f)	Maintaining a proper relation between the costs of compliance with the Code and the benefits resulting from it	Option 2 would have a significant effect on reducing communication costs to the Code company and offeror in relation to widely held Code companies with high uptake of electronic communications by shareholders. There would be a marginal increase in costs associated with sorting between electronic communications for e-shareholders and postal communications for those who had not provided an electronic address. However, professional share registries will have processes that can readily undertake the sorting exercise.

93. Option 2 would provide significant benefits for Code companies, takeover offerors, and shareholders. Code companies and offerors would benefit from reduced hard-copy communication costs, although the exact impact would vary significantly from

transaction to transaction depending on the proportion of e-shareholders among the Code company's shareholders.

94. For shareholders, Option 2 would ensure they receive communications from both the target company and offeror by their preferred method, whether electronically or by post. Furthermore, the provision of the Code documents on the Panel's website would potentially significantly benefit shareholders of unlisted companies by increasing the accessibility of Code-regulated documents. This would potentially also enable increased market commentary on unlisted Code company transactions. Notwithstanding the cost should shareholders wish to print the documents themselves, electronic communication and electronic access would provide shareholders who utilise this Option with a greater opportunity to seek advice on the offer and consider its merits, and would allow them to utilise the benefits of electronic documents, as described above.

95. The benefits of Option 2 to the parties to a takeover offer and other Code transactions are only likely to increase as electronic communication and internet access increasingly becomes the norm. Early adoption of electronic communication as the de facto method of communication between offerors and Code companies and shareholders is also likely to be positive for the international competitiveness of New Zealand's capital markets.

Q14: Do you agree with the Panel's preferred option? Please give your reasons, particularly if you disagree.

SECTION TWO: TECHNICAL AMENDMENTS OF LOW POLICY CONTENT

Policy objectives for low policy content technical amendments

96. The Panel's policy objectives in undertaking this review of the Code are to identify areas where the Code can be improved to ensure that:

    (a) investors in New Zealand Code companies are fully informed in respect of an offer for their equity securities and voting securities;

    (b) the market for takeovers of Code companies is efficient and competitive; and

    (c) the confidence of investors in the integrity of New Zealand's takeovers market is maintained.

97. The Panel also wishes to improve clarity and certainty about the requirements of the Code through removing inconsistencies in the wording of the Code and other drafting anomalies.

98. This section identifies some drafting anomalies and inconsistencies in the Code which require remedying, but do not raise any substantive policy issues.

99. Each problem is set out below and is accompanied by the Panel's suggested amendment to resolve the problem.

Offer documents

A. Identifying the controller of the offeror in the offer document

Problem identification

100. Clause 2 of Schedule 1 of the Code requires an offer document to state the name and address of the offeror and the names of the directors. However, there is no requirement to state the name of the person or persons who control the offeror.

101. This is a problem because offerors are often a special purpose entity that has been set up for making the takeover offer. This means that shareholders of a Code company in a takeover might not be fully informed, especially where the offer vehicle is an overseas entity, a joint venture or limited partnership. Even where the offeror is a subsidiary of a New Zealand company, it arguably should not be left to shareholders to have to search the Companies Office Register simply to determine who the "real" offeror is.

102. By contrast, rule 15(a) of the Code, which relates to notices of meeting for acquisitions of parcels of shares, requires the controller of the relevant acquirer to be disclosed. Accordingly, the disclosure requirements for an acquisition under a takeover offer do not match up with those of an acquirer under a notice of meeting.

103. Takeover transactions are already very complex for retail investors to consider, and leaving those shareholders to do further research for themselves to find out the controller of the offeror is unreasonable and might be overwhelming. The Panel believes that such important information should be required by the Code to be provided to shareholders.

Suggested resolution of problem

104. The Panel's suggested resolution to this problem is to recommend that the Code be amended to include a new requirement in Schedule 1 of the Code, which would require the identity of the person or persons controlling the offeror to be contained in, or accompany, a takeover notice and offer document.

105. By requiring the identity of the person/s controlling the offeror to be disclosed, shareholders would be more fully informed and this should help to maintain shareholder confidence in the integrity of New Zealand's takeovers market.

B. Clarifying statement of consistency of information to regulators – Clause 14, Schedule 1 of the Code

Problem identification

106. The statement that is required by clause 14(3) of Schedule 1 of the Code has been found to contain a drafting anomaly. Clause 14(3) was introduced into the Code in 2013 as a result of the last round of technical amendments to the Code. It states:

> *"*[the offer document and takeover notice must contain…] *A statement that statements made under this clause* [i.e., statements about the offeror's intentions] *are consistent with any information that has been given by the offeror to any regulatory body (in New Zealand or in an overseas jurisdiction) in relation to the offer."*

107. The only exception to this requirement is given in clause 14(4). Clause 14(4) states that the clause 14 disclosures are not required if the offer is a full offer that is conditional on a 90% minimum acceptance condition that cannot be waived. In all other circumstances, the clause 14(3) statement must be included in the takeover notice and offer document.

108. The problem arises when the clause 14(3) statement is required to be made when no information has been given by the offeror to any regulatory body other than the Panel (not every takeover offer is subject to oversight by another regulator). Making the clause 14(3) statement in these circumstances not only does not provide any useful information to the offerees, it is also confusing.

109. In October 2015, the Panel granted a class exemption (clause 25C of the Takeovers Code (Class Exemptions) Notice (No 2) 2001) to temporarily resolve the drafting anomaly. The clause 25C class exemption is an exemption from having to make the statement required by clause 14(3) for every offeror that has not given (and was not required to give) any information to any regulatory body (in New Zealand or in an overseas jurisdiction), except the Takeovers Panel, in relation to the offer.

Suggested resolution of problem

110. The problem has been temporarily rectified by the granting of the clause 25C class exemption. However, it is appropriate to resolve the drafting in the Code rather than rely on tertiary legislation and practitioners' knowledge of the class exemption to enable offerors to avoid making the clause 14(3) statement where to do so would be irrelevant and confusing.

111. The Panel's suggested resolution to this problem is to recommend that the Code be amended by adding a new clause 14(5) to Schedule 1 of the Code, which effectively incorporates the clause 25C class exemption so that:

    (a) the statement referred to in clause 14(3) is not required if:

        (i) the person is not required to give, and has not given, any information to any regulatory body (in New Zealand or in an overseas jurisdiction), other than the Panel, in relation to the offer; and

        (ii) the takeover notice or offer document (whichever is applicable) contains, or is accompanied by, a statement by the person to the effect that the person is not required to give, and has not given, any information to any regulatory body (in New Zealand or in an overseas jurisdiction), other than the Panel, in relation to the offer.

112. By preventing a confusing statement from being made to shareholders, the amendment will help investors to be fully informed, and will promote confidence of investors in the integrity and efficiency of the takeovers market.

C. Disclosure of the date on which multiple transactions took place under clause 7, Schedule 1 of the Code

Problem identification

113. Clause 7 of Schedule 1 of the Code contains a drafting anomaly. Clause 7 requires the offeror to disclose whether certain persons have, during the 6 month period before the date of the takeover notice or the offer document (as relevant), acquired or disposed of any equity securities in the target company. Clause 7(1) requires a disclosure of the following:

    (a) the total number and designation of each class of the securities acquired or disposed of; and

    (b) for single transactions, the number of securities, the consideration paid and the date of the transaction; and

    (c) for multiple transactions on any day, the total number of securities acquired or disposed of on that day and the weighted average consideration per security per class.

114. As it is currently worded, although clause 7(1)(c) refers to "that day", it does not require the disclosure of the date of that day on which the multiple transactions took place. In comparison, clause 7(1)(b) requires the date on which a single transaction is made.

115. The disclosure of dates is appropriate for shareholders to make sense of the information provided, by seeing when transactions took place. The date may be material in order to compare the consideration for the transactions, and it may be useful to know whether they took place six months ago or closer to the date of the takeover offer.

116. Generally, it has been common practice for the offeror to disclose the date of multiple transactions even though the offeror is not technically required to do so. However, the drafting anomaly should be amended to clarify the requirements under clause 7.

Suggested resolution of problem

117. The Panel's suggested resolution to this problem is to recommend that clause 7(1)(c) of Schedule 1 be amended to require, in the case of multiple transactions on any day to which subclause (1) applies, the total number of securities acquired or disposed of on that day, in each class, the weighted average consideration per security per class, ***and the date on which the multiple transactions occurred***.

118. The suggested amendment ensures shareholders are provided with the relevant date on which multiple transactions may have taken place. The amendment would keep shareholders fully informed of the recent trading prices and the dates on which the shares traded in the lead up to a takeover offer. This would also increase confidence in the integrity of the market.

Target company statements

D. Disclosure of equity holdings of target company in related company of offeror

Problem identification

119. Schedule 2 of the Code sets out the information to be contained in or accompany a target company statement.

120. Clause 8 of Schedule 2 of the Code requires the target company to disclose, if the offeror is a company, the ownership of equity securities in the offeror held or controlled by the target company and each director and senior officer of the target company and their associates.

121. Clause 9 of Schedule 2 requires the target company to disclose, if the offeror is a company, the number and designation of any equity securities of the offeror that were acquired or disposed of by the persons referred to in clause 8 during the six month period before the date of the target company statement.

122. Clauses 8 and 9 do not require disclosure of ownership or trading in equity securities of any related company of the offeror by the persons referred to in clause 8.

123. It is not uncommon for a special purpose subsidiary to be formed to undertake an offer. Although it is not expressly required by the Code, general practice has been for the target company to include in the clause 8 and 9 disclosures, any interests in the holding company or other related company of the offeror.

124. Shareholders may not be fully informed about relevant relationships between controllers or associates of the offeror and the target company if this information is not disclosed. However, in practice, rule 64 and clauses 24 and 26 of Schedule 2 ensure that all relevant information is disclosed.[8]

Suggested resolution of problem

125. The Panel's suggested resolution to this problem is to recommend that clause 8 of Schedule 2 of the Code be amended to require the target company to disclose, if the offeror is a company, the number, designation, and percentage of equity securities of any class of the offeror, ***or any related company of the offeror***, held or controlled by the target company and each director and senior officer of the target company and their associates.[9]

126. The Panel also suggests that clause 9 be similarly amended to refer to any related company of the offeror.

---

[8] Rule 64 prohibits misleading or deceptive conduct (including by omission). Clause 24 requires disclosure in the target company statement of any other information that could reasonably be expected to be material to offerees, and clause 26 requires certification that the information contained in the target company statement is true and correct and not misleading, whether by omission of any information or otherwise.

[9] Under the definitions in the Companies Act (which the Code relies on), the reference to "related company" would also ensure that offerors' controllers who were bodies corporate other than companies would also be covered by this change.

127. The amendment would help ensure that the market for takeovers is efficient and competitive because the amendment would help target companies to understand their disclosure obligations, which the target company is already required to comply with, under the general requirements of rule 64 and clauses 24 and 26 of Schedule 2.

E. Half-year and interim reports not to be sent with target company statement

Problem identification

128. Clause 18 of Schedule 2 of the Code sets out the following financial information that must be referred to in, or accompany, a target company statement, including:

    (a) the requirement to state in the target company statement that a copy of the most recent annual report is available on request (there is no requirement to actually provide a copy of the most recent annual report with the target company statement);

    (b) the requirement that a copy of the half-year report accompany the target company statement; and

    (c) the requirement that a copy of any interim report accompany the target company statement.

129. The requirement to send a copy of a half-year report or interim report with the target company statement to every offeree may impose unnecessary printing and mailing costs on target companies with wide shareholdings and arguably, the inclusion of hard copies of the half-year and interim reports provides only marginal benefits to shareholders.

130. Listed Code-companies are required to publish their half-year reports through the market announcements platform on NZX and most listed companies also publish their half-year and interim reports on their respective company websites.

131. Given the availability of half-year and interim reports online, compliance costs for target companies could be reduced by not requiring those reports to be sent with the target company statement. However, of course shareholders should be able to ask for a hardcopy of these reports to be sent to them.

Suggested resolution of problem

132. The Panel's suggested resolution to this problem is to recommend that clause 18 of Schedule 2 of the Code be amended to only require the target company, if its documents are available on its website, to state in the target company statement that a copy of the half-year or interim report (as applicable) is available on request in hard copy or electronic form.

133. The availability of half-year and interim reports on company websites means that those reports are easily accessible to shareholders who have internet access and by not requiring the target company to send copies of those reports with the target company statement, the target company's compliance costs will be reduced. Shareholders would be able to request a hard copy of, or electronic access to, the half-year or interim reports if they desired. Companies that do not publish their documents on their website would

still need to meet the current requirements, to provide hard copies with the target company statement.

134. The amendment would help to ensure efficiency in the New Zealand takeovers market by ensuring shareholders are provided with, or have access to, the relevant information online without target companies having to go to the expense of providing unnecessary hardcopy documents.

Notices of meeting

F. Rule 15(g) and rule 16(g) statement to apply to any person increasing control

Problem identification

135. Where an acquisition or allotment of shares must be approved by the shareholders of the Code company, a notice of meeting must be sent to the shareholders that includes the information required by rule 15 (for an acquisition) or rule 16 (for an allotment).

136. For convenience, the problem is described as it applies to rule 16, however, the problem also arises in rule 15, which is worded similarly.

137. Rule 16(a) was amended in 2013. Rule 16(a) now requires that, as well as the name of the allottee, the identity of *any person increasing their control* in the Code company must also be disclosed in the notice of meeting.

138. Rule 16(g) requires a statement by the allottee setting out the particulars of any agreements and arrangements between them and any other person in respect of the allotment.

139. As it currently stands, rule 16(g) does not capture the intended effect of the broader disclosure requirement in rule 16(a), as amended in 2013. This is because the allottee may not be the controller identified in rule 16(a). This means that any agreements or arrangements entered into by the controller do not need to be disclosed in the notice of meeting under rule 16(g).

140. For example, B Limited Partnership ("BLP") proposes to increase its voting control in Code Co under an allotment. Pursuant to rule 16(a), the notice of meeting discloses BLP as the identity of the allottee and C (BLP's General Partner) and D (BLP's Investments Manager) as persons who would become controllers of an increased percentage of voting securities in Code Co as a result of the allotment to BLP.

141. Pursuant to rule 16(g), the notice of meeting includes the particulars of any agreements or arrangements entered into between BLP (the allottee) and any other person in respect of the allotment.

142. Rule 16(g), as currently worded, does not require C or D to make the same disclosures. C and D could, in effect, have entered into agreements that might be material to shareholders when voting on the relevant resolutions. Although rule 64 of the Code provides an overlay effectively requiring all material information to be disclosed, it would be sensible to make rules 15 and 16 internally consistent by having the paragraph (g) disclosure requirement match the paragraph (a) disclosure requirement.

143. An amendment to the Code would be necessary in order to require the statement at rule 16(g), and likewise at rule 15(g) for acquisitions, to also be made by the persons increasing their control in the Code company (being those persons identified in rules 15(a) and 16(a) respectively).

Suggested resolution of problem

144. The Panel's suggested resolution to this problem is to recommend that the Code be amended to require the statements at rules 15(g) and 16(g) to be made by all of the persons identified in rules 15(a) and 16(a) (whichever applies).

145. The amendment would ensure that shareholders are provided with information about any agreements entered into by the relevant parties that may be material to shareholders when voting on the relevant resolutions. This would help to ensure that shareholders are fully informed and it would maintain confidence in the integrity of the takeovers market.

Compulsory acquisition

G. Rule 3A(2) be clarified so it clearly only applies to Code regulated transactions which result in a person becoming the "dominant owner" of a company

Problem identification

146. Rule 3A defines the companies that are subject to the Code. It states:

> *"(1) Code company means a company that—*
>
> *(a) is a listed issuer that has financial products that confer voting rights quoted on a licensed market; or*
>
> *(b) was within paragraph (a) at any time during the period of 12 months before a date or the occurrence of an event referred to in this code; or*
>
> *(c) has 50 or more shareholders and 50 or more share parcels.*
>
> *(2) However, if, as a result of a transaction or an event regulated under this code, a company that previously satisfied subclause (1)(c) ceases to have 50 or more shareholders and 50 or more share parcels, that company continues to be a code company for the purposes of Part 7.*"

147. Rule 3A(2) was an amendment added to the Code in 2012 because some practitioners had interpreted the definition as allowing a company to cease being a Code company mid-takeover. That is, they suggested the Code could apply at the start of the transaction but cease to apply (along with all of the shareholder protections given by the Code) before the transaction concluded, on the basis that acceptances of an unconditional takeover offer resulted in the company having fewer than 50 shareholders – even though the takeover may still have some days or weeks to run.

148. The intention was that rule 3A(2) would clarify that Code regulated transactions which result in a person becoming a dominant owner of the company (that is, holding or controlling 90% or more of the voting rights in the company), must be completed under

the Code's Part 7 compulsory acquisition procedure; what starts with the Code, ends with the Code.

149. On the other hand, if, at the conclusion of a transaction, a Code company drops below the "50 shareholders/50 share parcels" threshold in rule 3A(1)(c) of the Code without any person becoming a dominant owner, then rule 3A(2) does not apply to that company and that company ceases to be a Code company.

150. Some practitioners are now suggesting that rule 3A(2) means the company will continue to be a Code company regardless of how few shareholders it has, until any such time when the provisions in Part 7 can be applied. In other words, they argue that even though a transaction such as a takeover may have resulted in the offeror acquiring less than 90% of the company, but the company having fewer than 50 shareholders (possibly as few as ten or two), it would not cease to be a Code company at the conclusion of the takeover.

151. The Panel published a statement in November 2013 which explains how rule 3A(2) should be interpreted.[10] However, an amendment is necessary to clarify the language of rule 3A(2) as it is still confusing for some.

Suggested resolution of problem

152. The Panel's suggested resolution to this problem is to recommend that rule 3A(2) of the Code (and by extension, section 2A(2) of the Takeovers Act which contains the same wording as rule 3A(2) of the Code) be amended to the following:

> *However, if as a result of a transaction or an event regulated under this code, a company that previously satisfied subclause (1)(c) ceases to have 50 or more shareholders and 50 or more share parcels, that company continues to be a code company for the purposes of Part 7* ***if a person becomes the dominant owner as a result of the transaction or event.***

153. An amendment would help to improve the efficiency of the market. By clarifying how rule 3A(2) applies, shareholders will have more confidence in the takeover process as there would be less confusion. The amendment would address a technical issue which the Panel has already addressed temporarily through the publishing of its view on the interpretation of the rule, and would be more efficiently dealt with in a technical amendment to the Code rather than the market having to rely on published guidance.

Communications

H. Shareholder access to target company share register

Problem identification

154. Shareholders of a Code company sometimes want to communicate with each other, (e.g., during a takeover – especially if there is a strong view that the offer is undervalued). However, it can be difficult, at best, to obtain an electronic copy of the share register from the target company without delay during a Code-regulated

[10] See CodeWord 35 here.

transaction. Although it might be thought that the target company would want to assist its shareholders to communicate during a takeover offer, this is not always the case.

155. Shareholders have the power to request a copy of the company's share register under section 218 of the Companies Act and section 223 of the Financial Markets Conduct Act 2013, but neither of these Acts specifies the format that the share register should be provided in. Furthermore, the High Court has determined that a watermarked copy of a share register, required to be provided to a person on request under section 52 of the Securities Act 1978, was not in breach of that Act.[11]

156. In the event that a shareholder wants to communicate with other shareholders regarding a Code-regulated transaction, he or she is at a disadvantage to the offeror (who is provided with a copy of the share register under rule 42B of the Code) if he or she cannot obtain an electronic copy of the share register without delay. The Companies Act provisions are inadequate for this purpose, as they do not have Code transactions, particularly takeovers, in mind.

Suggested resolution of problem

157. The Panel's suggested resolution to this problem is to recommend that the Code be amended to include a new rule, similar to rule 42B, for shareholders and in respect of any Code-regulated transaction or event:

> ***X Shareholder may request copy of share register***
>
> *(1) A shareholder of a Code company may request a copy of the Code company's financial products register solely for the purposes of contacting other shareholders in respect of a Code-regulated transaction or event which has been notified by or to the Code company.*
>
> *(2) If a shareholder requests the Code company's financial products register under sub-clause (1), the Code company must send, within 1 day of receipt of the request, to the shareholder, in electronic form (or in such form as the shareholder reasonably requests), a copy of the company's financial products register relating to the class or classes of financial products to which the transaction or event relates, including any email addresses held by, or on behalf of, the Code company.*
>
> *(3) The Code company must notify the Panel of the sending of the company's financial products register at the same time as it sends the financial products register to the requesting shareholder.*

158. The proposed amendment would improve the efficiency and competitiveness of the takeovers market by preventing shareholder requests for the share register being hindered by the slow provision of a hard copy, or the provision of an unhelpful form, such as PDF or watermarked copy. Shareholders would be able to readily communicate with other shareholders in respect of a Code-regulated transaction. This would also facilitate shareholders being fully informed about the transaction.

---

[11] *Kennedy v Contact Energy Ltd* [2013] NZHC 2576. Section 223 of the Financial Markets Conduct Act contains similar wording to section 218 of the Companies Act.

Timing

I. Standardising 'timing' rules in the Code

Problem identification

159. The timing rules in the Code are currently worded in non-uniform fashion in two respects. Most significantly, how the days are counted depends upon whether the rule is:

(a) 'exclusionary' in nature (the first or last day (or both) referred to in the rule is not counted in the number of days); or

(b) 'inclusionary' in nature (the first or last day referred to in the rule is counted in the number of days); or

(c) a combination exclusionary/inclusionary rule (one of the days referred to in the rule is not counted, and the other day referred to is counted, in the number of days).[12]

160. For instance, rule 10(2) requires that a copy of a shareholders' approval or objection to a partial offer must be sent by the target company to the offeror within 2 days of receipt of the approval or objection. "Within" is interpreted as being a combination of exclusionary and inclusionary, as the day on which the approval or objection is received is excluded from the specific time period, but the day on which the approval or objection must be sent is included. The rule therefore covers, effectively, three days.

161. Compare this with rule 42A(2) which stipulates that the target company must send the offeror a class notice no later than 2 days after receiving the takeover notice. This is an example of an exclusionary rule as both the day the target company receives the notice and the day the target company sends a class notice are excluded from the time period. This rule therefore covers, effectively, four days.

162. There are many permutations of how to count days throughout the Code's timing rules. Some rules simply stipulate a duration of time, for instance, rule 24(2)(b) which stipulates the period for which a takeover offer must run. Some rules stipulate a one-day turn around and other rules, a longer period of time within which something must be done.

163. The other respect within which there is a lack of uniformity in the wording of the rules is in the expression of the time. For example, some rules say "no later than" and others, "not later than". It is accepted that inconsistences of this nature have no impact on the meaning of the expressions of time; however, ideally, there should be consistency.

164. The Panel's Guidance Note on Timing Rules, first published in 2010, has been successful in removing almost all the uncertainty that used to prevail in respect of how to count days referred to in the Code. Moreover, the Panel has improved on this guidance by providing a Timing Rules Calculator on its website that allows users to see, on a digital calendar, the dates in 'real time' when things can or must occur.

[12] Note that the courts have interpreted statutory references to "day" to mean a full day, as found in the High Court decision *T v J* [2000] 2 NZLR 236.

165. Nevertheless, these are piecemeal solutions. It would be beneficial to standardise the wording of the timing rules to make timeframes consistent.

Suggested resolution of the problem

166. The Panel's suggested solution is to standardise the use of inclusionary or exclusionary wording so that, leaving aside the rules that simply express a duration of time, the rules mandating when a thing is to be done use just one type of inclusionary or exclusionary wording. This would result in there being the same number of days covered for rules such as the examples above in rule 10(2) and rule 42A(2).

167. Given that several rules require an act to be done in a very short timeframe of just one or two days, the Panel proposes to adopt wording which results in a combination of exclusionary/inclusionary wording (as with rule 10(2) described above). This means that the first day on which something occurs in the rule is excluded from the time period, but the final day of the time period for something to occur is included.

168. Amendments such as these would increase the consistency in the Code, and consequently assist the efficiency of the New Zealand takeovers market.

Q15: Do you agree with the Panel's suggested resolutions of the low policy content amendments? If not, please identify which one you disagree with and explain why.