CIVIL ENFORCMENT UNDER THE TAKEOVERS ACT

Recommendations to the Minister of Commerce and Consumer Affairs

16 September 2025

TAKEOVERS PANEL
TE PAE WHITIMANA

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Contents

Glossary

In this paper, unless the context otherwise requires, the following terms have the meaning set out below:

Civil Enforcement under the Takeovers Act Consultation	the Panel's Civil Enforcement under the Takeovers Act Consultation Paper released to the market on 14 February 2025 (available at: https://www.takeovers.govt.nz/assets/LawReform/Consultations/Civil-Enforcement-under-the-Takeovers-Act-14-February-2025.pdf)
civil remedy order	an order made by the Court under section 33I of the Takeovers Act
compensatory order	an order made by the Court under section 33K of the Takeovers Act
Code	the Takeovers Code as set out in the schedule to the Takeovers Regulations 2000
Code company	has the meaning set out in section 2A of the Takeovers Act and rule 3A of the Code
Code offer	an "offer", as defined in the Code, being an offer to which the Code applies for voting securities and any other financial products to which the offer is required to extend under the Code
Commerce Act	the Commerce Act 1986
declaration of contravention	a declaration made by the Court under section 33M of the Takeovers Act
FMCA	the Financial Markets Conduct Act 2013
Law Commission Report	Law Commission *Guidance for Legislative Design* (NZLC R133) (2014)
LDAC Guidelines	Legislative Design and Advisory Committee *Legislation Guidelines* (2021 Edition)
Limitation Act	the Limitation Act 2010
management ban	an order made by the Court under section 44F of the Takeovers Act
NZX	NZX Limited
Official Information Act	the Official Information Act 1982
OIA	the Overseas Investment Act 2005
offeror	an offeror or a potential offeror
Panel	the New Zealand Takeovers Panel
pecuniary penalty	a non-criminal monetary penalty imposed by the Court in civil proceedings
section 32 meeting	a meeting held under section 32 of the Takeovers Act, following which the Panel may make a determination that it is or is not satisfied that a person has acted or is acting or intends to act in compliance with the Code

Takeovers Act	the Takeovers Act 1993

Introduction

Background

1 The Panel's functions include keeping under review the law relating to takeovers of Code companies and recommending to the Minister any changes to that law that the Panel considers necessary.

2 The Code came into force on 1 July 2001. The Panel has administered the Code since then and from time to time identifies issues with the Code and Takeovers Act, including to bring the Code and Takeovers Act up to date with contemporary practice.

3 The recommendations in this paper relate to proposed amendments to the civil enforcement regime under the Takeovers Act. The Panel considers that these changes are essentially an updating and modernisation of the current regime.

No change in the Panel's approach

4 The Panel would like to emphasise that, while this paper recommends increases to penalties under the Takeovers Act this should not be taken as an indication that the Panel wishes to change its enforcement approach to seek to punish conduct rather than (in the first instance) work with market participants to ensure compliance. Moreover, the Panel considers it critical that it continue to focus on resolving issues intra-transaction. None of the changes are intended to facilitate any change in enforcement approach.

5 Notably, in some areas, the Panel has recommended removing certain aspects of the current regime which might lead to inappropriate results, such as automatic management bans. Where the Panel has recommended increases to the amount of pecuniary penalties, this is generally a case of wanting to ensure that (in summary):

(a) where a pecuniary penalty becomes a necessary remedy (e.g., because the Code breach was only discovered after completion and other remedies are impractical) there is an appropriate remedy, noting that the current maxima have become outdated given increases in the value of Code companies and transaction sizes; and

(b) there is appropriate alignment with comparable regimes, such the FMCA, OIA and Commerce Act.

Process and consultation

6 The Panel's process of consideration and public consultation relating to these recommendations was as follows:

(a) During late 2024 and early 2025, the Panel considered whether law reform might be appropriate. Where the Panel considered that law reform was, or might be, appropriate, the Panel sought market feedback through a consultation process.

(b) The Panel published a consultation document on 14 February 2025. This documents is available here: Civil Enforcement under the Takeovers Act Consultation Paper.

(c) In addition to publicly announcing the consultation, the Panel sought submissions from key market participants in New Zealand which the Panel considered to be best positioned to comment on the proposals.

(d) The closing date for submissions was set as Friday, 18 April 2025. However, some extensions were granted to allow time for interested parties to complete their submissions.

(e) In total, 5 submissions were received. Four of those submissions were from major New Zealand corporate law firms and one submission was from the Ministry of Justice.

(f) The Panel considered the submissions at a meeting on 3 June 2025.

(g) Draft recommendations were considered and approved by the Panel on 9 August 2025.

Approach of this paper

7 This paper sets out the Panel's final recommendations following consideration of submissions. The Panel notes that the Parliamentary Counsel Office is the body responsible for drafting legislative amendments.

Recommendation

8 The Panel recommends to the Minister, under section 8(1)(a) of the Takeovers Act, that the amendments to the Takeovers Act proposed in this paper are made, together with any other consequential amendments to other legislation to effect those amendments.

Carl Blanchard
Chair
Takeovers Panel
16 September 2025

Pecuniary penalties for breaches of the Code

Maximum pecuniary penalty amounts

The current approach

9 Section 33P of the Takeovers Act sets the maximum pecuniary penalty that can be imposed for a contravention of the Code at $500,000 for an individual and $5,000,000 for a body corporate.

10 For context, it is important to emphasize that these maxima are not a set penalty. Critically, the statutory maxima essentially set the amount of the fine for the most serious possible breach. Accordingly, considering the statutory maxima in isolation from the practical context can be misleading.

11 When calculating a pecuniary penalty, the Courts will adopt the following approach:[1]

(a) record the maximum pecuniary penalty;

(b) establish the appropriate starting point range for the pecuniary penalty, taking into account the aggravating and mitigating factors relating to the contravention(s); and

(c) discount or increase the starting point pecuniary penalty to take into account any aggravating or mitigating considerations specific to the defendant(s).

12 To demonstrate how this works in practice, the Panel notes that in *New Image* (where, although there were mitigating factors, the Court held that "[t]he actions of NTL and NEW contravened the Code and its central premise") the above approach yielded the following:

(a) the maximum penalty that could be imposed on NTL was $10 million and that the maximum penalty that can be imposed on NEW was $5 million;

(b) the starting point penalty was in the range of $2.1 to $2.5 million in respect of the three contraventions of the Code; and

(c) a 35% discount was applied, resulting in a final pecuniary penalty range of $1.365 million to $1.625 million, with the final amount being $1.5 million.

The problem

13 The Panel agrees with the Law Commission's view that the maximum pecuniary penalty should be set at a level that sufficiently deters the classes and sizes of participants within New Zealand's corporate takeovers market.[2] Such penalties should also be fair and proportionate to the maximum level of harm that could be caused by the non-compliance.

14 The Panel considers that the current maximum penalties are out of date:

(a) There has been a significant increase in the value of Code transactions since the pecuniary penalty regime was introduced as a natural result of increases in the value of companies over time and inflation. The Panel considers that a reasonable indication can be provided by the market capitalisation of NZX-listed

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[1] See *Takeovers Panel v New Image Group Limited and New Image Holdings Limited* [2022] NZHC 1504 at [46] (***New Image***)
[2] Law Commission Report, Guideline 17.

Code companies between 25 October 2006 (when the pecuniary penalties regime was introduced under the Takeovers Act) and 5 November 2024. As shown in the table below, there has been a significant increase in the value of listed Code companies:

NZX-listed Code company market capitalisation			
	25 October 2006 ($)	**5 November 2024 ($)**	**Change (%)**
Listed Code companies			
Mean	598,700,000	1,361,700,000	127.4
Median	110,100,000	191, 500,000	73.9
Top 50 listed Code companies			
Mean	1,456,500,000	3,044,200,000	109.0
Median	643,700,000	1,717,700,000	166.8

(b) There have been updates to comparable regimes since the Takeovers Act's pecuniary penalties regime was introduced. The Panel surveyed the maxima set out in the FMCA, OIA and Commerce Act. The key points of note are:

(i) The FMCA and relevant provisions of the Commerce Act and OIA, currently apply a variable approach to determining the maximum pecuniary penalty that can be imposed. Section 83 of the Commerce Act and section 48 of the OIA also impose higher fixed maximum penalties of $10,000,000 for body corporates (compared to the Takeovers Act fixed maximum of $5,000,000).

(ii) The FMCA, being the most closely analogous regime was instructive. Section 490(1) of the FMCA provides that the maximum amount of a pecuniary penalty for a contravention or involvement in a contravention of a civil liability provision is the greatest of:

(A) the consideration for the transaction that constituted (if any); and

(B) if it can be readily ascertained, three times the amount of the gain made, or the loss avoided, by the person who contravened the civil liability provision;[3] and

(C) $1,000,000 in the case of a contravention, or involvement in a contravention, by an individual or $5,000,000 in any other case.

15 For international comparison purposes, in Australia the maximum pecuniary penalty amounts are as follows:[4]

(a) For an individual, the greater of:

(i) 5,000 penalty units (approximately (NZ$ 1,804,000); and

[3] Section 491 of the FMCA provides guidance for the Court on how to determine gains made or losses avoided for this purpose.
[4] For under the Corporations Act 2001, pecuniary penalties are set by reference to a 'penalty unit'. According to ASIC's website, the value of a penalty unit (from 7 November 2024) is AUD$330 (NZD$360.75) – the Panel understands that this value is reassessed each year. The Panel used the spot conversion rate of $AUD to $NZD conversion rate of 1.09 to calculate the figures (which are rounded to the nearest NZ$ 1,000).

(ii) if the Court can determine the benefit derived and detriment avoided because of the contravention - that amount multiplied by 3.

(b) For a body corporate, the greater of:

(i) 50,000 penalty units (approximately NZ$ 18,037,000); and

(ii) if the Court can determine the benefit derived and detriment avoided because of the contravention - that amount multiplied by 3; and

(iii) either:

(A) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or

(B) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units - 2.5 million penalty units (approximately NZ$ 901,875,000).

16 The Panel considers that there are some limitations with the Takeovers Act's approach to pecuniary penalty maxima that warrant reform:

(a) *Time since pecuniary penalty levels were set:* Unlike comparable regimes, section 33P has not been reviewed or updated since its insertion into the Takeovers Act in 2006. Given inflation and the increase in the value of Code companies, the pecuniary penalty levels under the Takeovers Act are lower than penalty levels of other comparable regimes.

(b) *Deterrent provided by fixed approach:* A fixed pecuniary penalty regime may not set an effective deterrent for all cases. For example, a maximum penalty amount of $5,000,000 may not be enough to deter contraventions of the Code in a high value transaction. The Law Commission Report notes that it is inevitable that higher maximum penalties may be required to adequately deter the wealthiest potential contraveners.[5]

(c) *Penalty fixed regardless of deal size:* It is difficult to set an appropriate maximum under a fixed approach as deal sizes vary, risking an overly severe sanction in relation to smaller transactions if a fixed amount is set based on what might be appropriate in the largest transactions.

(d) *Misalignment with comparable pecuniary penalty regimes:* As discussed above, section 33P differs from comparable regimes which have been updated more recently and from the Australian approach. The Panel considers that there is a benefit in comparable regimes being broadly similar and for comity with New Zealand's largest trading partner.

(e) *Undermining of the objectives of the Code:* The current approach ineffectively achieves the Code's objective of promoting the international competitiveness of New Zealand's capital markets. Insufficient pecuniary penalties run the risk of failing to appropriately punish and deter contraventions of the Code. This, in turn, may harm the integrity of New Zealand's capital markets and the promotion of competition for the control of Code companies relative to comparable jurisdictions. Notably, the New Zealand maxima are significantly lower than the Australian maxima.

[5] Law Commission Report, at [7.35].

17 In addition, the Panel is conscious that the Takeovers Act has been amended to include a financial threshold – accordingly, this is not a situation where significant penalties are likely to be imposed in relation to a company which is not of material size.

18 The Panel is conscious that a variable approach based on the gain or loss may lead to a substantial maximum penalty. However, the Panel considers that this is outweighed by the factors outlined above. Further, the Court must always set the amount of the penalty. The Panel considers that the Court's discretion provides an important safeguard against the risk of the regime operating in an unfair manner.

<u>Consultation submissions</u>

19 A majority of submitters agreed with:

(a) increasing the fixed maximum penalty to $1,000,000 for individuals and $10,000,000 for bodies corporate (or non-individuals);

(b) a variable approach to determining maximum penalties; and

(c) including the proposed mechanisms for determining the maximum variable pecuniary penalty amounts.

20 Two submitters disagreed with the variable approach and considered that a simple regime is appropriate. The concerns raised by one submitter were (in summary):

(a) While there has been an increase in the value of listed Code companies, such companies only provide a small sample size of all Code companies.

(b) The proposed fixed maximum penalties exceed those set out in section 490(1) of the FMCA, noting that it is a comparably larger and broader regime. The submitter did not see any compelling reasoning that justifies the fixed maximum penalties under the Civil Enforcement Regime being higher than the penalties under the FMCA.

(c) Any concerns the Panel may have with the current approach can be sufficiently addressed through its proposal of a variable approach to determining the maximum penalty (although they favour significantly lower variable penalties).

(d) The FMCA covers a significantly greater range of transactions than the Takeovers Act and in a securities offering, a penalty equal to the aggregate consideration paid may be appropriate as this is the sum the issuer (as the likely contravener) would have received as a benefit from the offering. This is not the case in a takeover context, where the 'gain' from the transaction is likely to be a fraction of the consideration.

21 Another submitter opposed a variable approach and considered that a simple regime is appropriate. They submitted that the variable approach could result in individuals and companies facing maximum penalties that are grossly disproportionate to their contravention, and this is unjustified on public policy grounds.

Further, they disagree with the Panel's attempt to align with the variable regime under other legislation, submitting that it should not be a "one-size-fits-all" approach.

Analysis and recommendations

22 The Panel recommends that the limitations outlined above be addressed by amending section 33P so that:

(a) The maximum pecuniary penalty, except in the case of an individual would be set at the greatest of the following (to the extent they are applicable):

(i) if the contravention related to a transaction (or a transaction which was part of a group of related transactions), the aggregate consideration for that transaction (or group of related transactions); and

(ii) if the gain made or loss avoided by the person who contravened the Code can be readily ascertained, three times the amount of such gain or loss (provided that if the gain or loss is ascertainable as being within a band, the gain or loss shall be the midpoint of that band); and

(iii) $10,000,000 in any other case.

(b) The maximum pecuniary penalty that can be imposed on an individual would be the same as that set out above, except that the fixed amount would be set at $1,000,000.

23 The Panel recommends including a deeming provision similar to section 491 of the FMCA. This would provide that:

(a) a person must be treated as:

(i) making a gain if they acquire a financial product for less than its value; and

(ii) avoiding a loss if they dispose of a financial product for more than its value;

(b) the gain made or loss avoided will be the difference between the consideration paid or received and the value the financial product would have had at relevant times (had the contravention not occurred); and

(c) the above guidance does not:

(i) limit the circumstances in which the Court might find that a person has made a gain or avoided a loss; or

(ii) prevent it from finding that the amount of the gain made or the loss avoided, was greater than the amount calculated under this deeming provision.

24 The Panel's reasons for its recommendation are that this reform would:

(a) set penalties at a level that is proportionate to the level of harm that could be caused by a contravention or the gain which might be made;

(b) provide a more effective deterrent against potential contraventions of the Code;

(c) avoid the need to regularly review a fixed penalty amount to ensure it is set at an appropriate level as transaction values change over time;

(d) align more closely with the approach to pecuniary penalties in comparable regimes; and

(e) better uphold the Code's objective of promoting the international competitiveness of New Zealand's capital markets.

25 As to the transaction value limb, the Panel considers that a test of this nature is appropriate to ensure that there is an amount which is relatively simple to calculate. The Panel's reasoning is as follows:

(a) It will often be difficult to calculate the amount of profit or loss on a particular transaction, even if there is some legislative guidance. This reduces the efficacy of the gain/loss limb as there are likely to be extended debates about value in order to arrive at a base figure.

(b) Critically, having a clearer base figure does not eliminate the relevance of gain or loss, they just become factors which help determine the starting point, using the base amount as a reference point.

(c) This allows a more constructive assessment of the substance of the matter.

(d) This seeks to mirror the 10% of revenue figures which are used in other contexts. However, the Panel considers that a revenue figure is unlikely to be as representative in a takeover context as transaction size – for example, a takeover may only be for a small outstanding portion of the shares (e.g., moving from 85% to 100%). A revenue figure would be inappropriate in this circumstance as the transaction effectively only relates to a portion of the revenue.

26 Importantly, the Panel reassures the market that increasing the maximum penalty and related amendments to pecuniary penalties will not change the Panel's approach to regulation – see paragraphs 4 and 5 above.

Seriousness standard

27 As a separate matter but supporting the imposition of increasing the maximum penalty amount, the Panel consulted on section 33M(c) and in particular, the "Seriousness Standard" (as defined below). Section 33M(c) sets out the criteria which must be met for the Court to make a pecuniary penalty order. It provides that the Court may only order a person to pay a pecuniary penalty where it is satisfied that:

(a) the person has contravened the Code;

(b) the person knew or ought to have known of the conduct that constituted the contravention; and

(c) the contravention:

(i) materially prejudices the interests of offerees, the Code company, the offeror or acquirer, competing offerors, or any other person involved in or affected by a transaction or event that is or will be regulated by the Code, or that is incidental or preliminary to a transaction or event of that kind; or

(ii) is likely to materially damage the integrity or reputation of any of New Zealand's financial markets; or

(iii) is otherwise serious,

(the **Seriousness Standard**).

28 The Panel set out a number of issues with the Seriousness Standard in the Civil Enforcement under the Takeovers Act Consultation including the nebulous nature of the standard, its potential to dissuade the Panel from seeking pecuniary penalties or from obtaining a declaration of contravention and the repetition of seriousness assessment (the seriousness of the breach always being a factor in the amount of the penalty). On this basis, the Panel had been inclined to propose removing the Seriousness Standard.

29 However, one submitter noted that the Seriousness Standard plays an important role in ensuring that only breaches that are sufficiently serious should attract a pecuniary penalty and removing it risks pecuniary penalties becoming a routine feature of any breach through the following logic:

(a) there was a breach of the Code (for which there could be legitimate competing views); and

(b) it would be argued that the person ought to have known it was a contravention because in the context of a control transaction, the person should know the requirements of the Code.

30 The submitter noted a risk of many breaches of the Code resulting in a pecuniary penalty which is unbalanced in a regulatory setting. Further it was stated that aligning with other regimes without a more holistic assessment of the entire remedy framework is not appropriate.

31 On one hand, the Panel considered that the Seriousness Standard should be removed as a matter of principle. Given limited resources and the extreme effort that is required to prosecute a pecuniary penalty claim, any risk of pursuing a pecuniary penalty claim except in respect of a serious breach is effectively non-existent. However, on the other hand, retaining the seriousness standard is unlikely to be problematic for precisely this reason – the Panel cannot conceive of a situation where it would seek a pecuniary penalty for a breach which was not serious.

32 Ultimately, the Panel is also conscious that it is proposing significant amendments to the penalty maxima. As such, the Panel agreed that there is merit in retaining the Seriousness Standard to address the (small) risk that a non-serious breach of the Code was to incur an unduly large penalty.

Considerations for Court in determining pecuniary penalty

<u>The Problem</u>

33 Section 33Q of the Takeovers Act sets out factors that the Court must have regard to in setting a pecuniary penalty. It provides:

Considerations for court in determining pecuniary penalty

In determining an appropriate pecuniary penalty, the court must have regard to all relevant matters, including-

(a) *the principles contained in the [Code]; and*

(b) *the nature and extent of the contravention; and*

(c) *the likelihood, nature, and extent of any damage to of any damage to the integrity or reputation of any of New Zealand's financial markets because of the contravention; and*

(d) *the nature and extent of any loss or damage suffered by a person referred to in section 33M(c)(i) because of the contravention; and*

(e) *the circumstances in which the contravention took place; and*

(f) *whether or not the person in contravention has previously been found by the Court in proceedings under (the Takeovers Act) to have engaged in any similar conduct.*

34 The factors in section 33Q are not exclusive. As noted by the Court in *New Image*, other factors that have been considered relevant when determining pecuniary penalties under similar regulatory regimes can be relevant to determining the appropriate penalty under the Takeovers Act.[6]

35 While section 33Q allows the Court to look at other factors, the Panel considers that section 33Q has fallen out of step with other comparable legislation. Also, because any factors which are not listed are not mandatory, the Court might not take account of them. This would not be appropriate if the factors are sufficiently important. Specifically, section 492 of the FMCA provides that the Court must have regard to additional factors (not referred to in section 33Q), including:

(a) gains made (or losses avoided) by the person in contravention or who was involved in the contravention, that were made (or avoided) because of the contravention or involvement in the contravention;

(b) whether or not a person has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the contravention; and

(c) prior findings by the Court in proceedings under the FMCA, or any other enactment, that the person in contravention has engaged in any similar conduct,

(the **Additional Penalty Amount Factors**).

36 The Panel recommends that the Additional Penalty Amount Factors should be added to section 33Q. Its reasoning is as follows:

(a) It could be argued that the gains made or losses avoided should not be considered because section 33Q expressly refers to the extent of any loss or damage suffered by a person because of the contravention. Alternatively, the Court may consider it should focus on the loss or damage, rather than the gains made or losses avoided. The Panel considers it important that the gains made or losses avoided are always considered, and that they may be more relevant in this context than the damage or loss suffered:

(i) The gains which might be made, or losses which might be avoided, by breach of the Code may be a key motivation for a person to breach the Code. As such, they should be factors used in calculating the amount of the pecuniary penalty to ensure there is a sufficient disincentive to breaching the Code.

(ii) The gains made/losses avoided factor is the most relevant factor from the point of view of the person in contravention. Accordingly, it is the most appropriate consideration in arriving at a penalty which focuses on punishing the contravener. The amount of a penalty should reflect its punitive purpose.

(iii) Section 31U(2)(b) enables the Court to make an order, where a person has breached a term of an undertaking given under section 31T, to pay the Crown up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach. It would be inconsistent not to consider gains made or losses avoided in determining an appropriate pecuniary penalty when such a factor is considered for other misconduct under the Takeovers Act.

(iv) The LDAC Guidelines note that any financial gain made, or loss avoided, from the breach should be a factor for the Court to consider.[7]

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[6] *New Image* at [51].
[7] LDAC Guidelines, at [26.6]

(b) There is currently no requirement to consider whether the person in contravention has taken actions or steps to avoid or mitigate any actual or potential adverse effects post-contravention. The Panel considers this to be a relevant factor. Inclusion of this factor may also encourage parties to take active steps to rectify breaches of the Code.

(c) Section 33Q(f) requires the Court to consider only previous proceedings under the Takeovers Act. The Panel thinks this is unduly restrictive. The Panel prefers the approach in section 492(f) of the FMCA, which requires consideration of whether the person has previously been found by the Court in proceedings under the FMCA *or any other enactment* to have engaged in any similar conduct. The Panel considers it odd that Takeovers Act proceedings could be relevant in future FMCA proceedings, but the reverse would not apply.

(d) The potential reform aligns more closely with the approach to pecuniary penalties applicable in a key comparable regime (the FMCA), improving the consistency and predictability of the law.

<u>Consultation submissions</u>

37 A majority of submitters agreed with section 33Q being amended to include equivalents to the Additional Penalty Amount Factors.

38 Some submitters, while not objecting to the proposal, did not consider it necessary to introduce additional mandatory factors for the Court to consider. In their view, the Court is better placed to decide what these factors are. They noted that section 33Q stipulates that the Court must have regard to all relevant factors, and as the Panel noted in the Consultation Paper, this does not preclude the Court from considering other factors beyond the list provided.

39 The Panel remains of the view that despite the Court having to consider all relevant factors, the express inclusion of the additional mandatory factors provides consistency and certainty that sufficiency important considerations will be given weight to by the Courts.

<u>Analysis and recommendations</u>

40 The Panel recommends that Additional Penalty Amount Factors should be added to section 33Q for the reasons set out above.

Pecuniary penalties for breach of an Undertaking

The Problem

41 Under section 31T of the Takeovers Act, the Panel may accept a written undertaking given by or on behalf of a person in connection with a matter in relation to which the Panel is exercising any of its powers or performing any of its functions under the Takeovers Act or any other Act (an **Undertaking**).[8]

42 Currently, if the Panel considers that a person has breached a term of an Undertaking, the Panel may apply to the Court for the following orders:[9]

(a) an order directing the person to comply with the term;

(b) an order directing the person to pay to the Crown an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach (a **Payment Order**);

(c) any order that the Court thinks appropriate directing the person to compensate any other person who has suffered loss, injury or damage as a result of the breach; and/or

(d) an order for any consequential relief that the Court thinks appropriate.

43 The Panel considers that further consequences should be available for a breach of an Undertaking:

(a) Often the Panel will use Undertakings as a way of making sure that a person acts, or will act, in a Code compliant manner where it appears they might not otherwise do so, or to address conduct which appears to have breached the Code. When Undertakings are given in these circumstances, they may result in the Panel not taking further enforcement action because compliance with the Undertakings would effectively address the issue.

(b) Accordingly, the Panel considers that breach of an Undertaking is a discrete and serious wrong. A meaningful punitive sanction should be available where a person breaches an Undertaking.

(c) While section 31U does provide for consequences following a breach of an Undertaking, those consequences may be of limited effectiveness in practice where the Undertaking simply requires a person to take the steps needed to comply with the Code. There might be a punitive sanction for breaching the Code, but no additional sanction for breaching the Undertaking.

(d) The New Image matter was an example of this – during the offer, the Panel formed the view that there was an appreciable possibility that the offeror had made a differential offer in breach of rule 20 of the Code. However, the Panel decided not to convene a section 32 meeting on the basis that an acceptable Undertaking was provided. Following the Undertaking being provided, the offeror then either continued the differential offer or made a new one, breaching rule 20 of the Code. While it was not established in the proceedings that the Undertaking had been breached, there was some evidence that this may have occurred. The Panel considers it unsatisfactory that the potential breach of an Undertaking in such circumstances, if proved, would be likely to have little impact on the level of penalty imposed.

[8] 36 Under section 31T(2), the person giving the Undertaking may withdraw or vary the Undertaking with the consent of the Panel.
[9] Section 31U.

(e) In the Panel's view, a Payment Order does not provide a sufficient deterrent – the maximum sum payable is limited to no more than the breacher's financial benefit "reasonably attributable" to its breach. This minimises the incentive for bad actors to comply with an Undertaking – financially, they could never be worse off in aggregate for choosing to breach the Undertaking.

(f) Both the Commerce Act and the OIA enable the Court to impose a pecuniary penalty where a person contravenes an enforceable undertaking.

44 In summary, if the enforcement tools available to uphold Undertakings are insufficient, their usefulness is reduced.

45 As a related matter, the Panel considers that the Panel's and Court's enforcement powers (e.g., in relation to section 32 meetings) should extend to a potential breach of an Undertaking. Again, the New Image matter showed this to be an issue – the potential breach of the Undertaking was intertwined with the breach of rule 20 but the Panel could not directly consider whether the Undertaking had been breached. The Panel considers that focusing enforcement only on the Code breach, to the exclusion of breach of an Undertaking, artificially narrows the potential enquiry.

<u>Consultation submissions</u>

46 Submitters generally agreed with the potential reform proposed by the Panel which would involve:

(a) applying a pecuniary penalty regime to breaches of Undertakings;

(b) extending the enforcement powers of the Panel and the Court to breaches of Undertakings in the same way they extend to breaches of conditions to exemptions;

(c) extending the enforcement powers of the Panel and the Court to breaches of Undertakings in the same way they extend to breaches of conditions to exemptions; and

(d) the maximum pecuniary penalties for breach of an Undertaking proposed by the Panel to be appropriate, acting as a deterrent while not being excessive.

47 One submitter noted that this may result in market participants being less willing to give Undertakings or taking a more legalistic approach. The Panel acknowledges the concern but considers this is outweighed by the fact that Undertakings are primarily used to avoid the need for section 32 meetings.

<u>Analysis and recommendations</u>

48 At a high level, the Panel recommends that potential reform involve:

(a) applying a pecuniary penalty regime to breaches of Undertakings; and

(b) extending the enforcement powers of the Panel and the Court to breaches of Undertakings in the same way they extend to breaches of conditions to exemptions (see section 2(2) of the Takeovers Act).

49 The Panel recommends that a pecuniary penalty order for this type of breach should be imposed by the Court on the application of the Panel. This reflects both the LDAC Guidelines and Law Commission Report and established practice within the Takeovers Act and other enforcement regimes

Maximum amount of a pecuniary penalty for breach of an Undertaking

50 The Panel recommends the penalty for breach of an Undertaking should be a fixed maximum penalty, rather than a variable maximum penalty, mirroring the approach taken in the Commerce Act and the OIA.[10]

51 The reasoning for this approach is as follows:

(a) While the wrongdoing behind each penalty for a Code breach will vary depending on the circumstances, for a breach of Undertaking the underlying wrong remains largely the same – the person has reneged on an enforceable promise made to a regulator.

(b) It may be more challenging to determine the financial consequences of the breach of the Undertaking (as opposed to the loss or gain derived from conduct breaching a Code rule).

52 The Panel proposes the fixed penalty maximum be set at $500,000 in respect of each act or omission.

53 The Panel hopes that this sum would provide both a sufficient deterrent effect and an appropriate sanction, without being disproportionately severe.

54 In accordance with the LDAC Guidelines, the Panel also proposes that the Takeovers Act provide guidance to the Court on how to determine the penalty amount. The Panel proposes that this would broadly mirror the proposed approach above regarding factors to be taken into account in setting a pecuniary penalty for Code breaches.

55 The Panel also recommends that the Takeovers Act clarify that a person may not be liable to more than one pecuniary penalty in respect of the same conduct (although if a person breaches an Undertaking and the Code by the same conduct, separate pecuniary penalties could be imposed in respect of each matter, and one would not affect the other).

56 Additionally, the Panel recommends introducing a provision reflecting section 85C of the Commerce Act, to provide that the Court must not take into account:

(a) whether it was appropriate for the Panel to accept the Undertaking;

(b) whether the Undertaking is still necessary or desirable;

(c) whether any of the terms of the Undertaking are still necessary or desirable; and

(d) whether the breach of the Undertaking also involved a breach of the Code.

57 The addition of this provision would reflect the policy underpinning a pecuniary penalty for breach of an Undertaking – i.e., that a breach of a written commitment to a regulator is a discrete and serious wrong.

58 Finally, the Panel notes that this pecuniary penalty regime would operate alongside the other remedies under section 31U, which would continue to be available.

[10] Section 85A(3) of the Commerce Act and section 46F(2)(a) of the OIA.

59 For completeness, the Panel notes that:

(a) The availability of a pecuniary penalty in this context is not at odds with the principle that legislation should avoid "double jeopardy" (punishing persons twice for the same conduct) highlighted in the LDAC Guidelines and the Law Commission Report.[11] This is because the entering into and subsequent breach of an Undertaking represents conduct that is distinct from the conduct involved in breach of any relevant Code rule.

(b) The Panel has considered whether any specific defences should be introduced for the proposed new pecuniary penalty. In the Panel's view, no additional provisions regarding defences are necessary.

[11] See LDAC Guidelines at [26.7] and Law Commission Report, at chapter 10.

Management bans

The Problem

60 Currently, management bans may be ordered against a person under the Takeovers Act, banning them from being a director, promotor or taking part in the management of a company for a period of time (or on a permanent basis). They are punitive but also serve to protect against future misconduct.

61 Sections 44F and 44G allow for the imposition of management bans on a case-by-case basis. Section 44J provides for the imposition of automatic management bans in certain circumstances.

62 The Panel sees two issues with the current approach to management bans in the Takeovers Act:

(a) *Automatic bans:* Under section 44J, the Takeovers Act provides that, in certain circumstances, a management banning order is to be imposed automatically, rather than being considered on a case-by-case basis. If a person is convicted of an offence under sections 44 or 44C or has a pecuniary penalty award made against them, an automatic management ban of five years must be imposed. There is no judicial discretion (except that a Court may grant leave from the ban under section 44J(2) – essentially, the onus falls on the person who was subject to the automatic ban to seek the leave of the Court). The Panel's concerns with this approach are as follows:

(i) An automatic ban risks being arbitrary in its effect. It is inconsistent if the Court can have discretion in setting the amount of a fine or pecuniary penalty but no discretion in imposing a management ban.

(ii) Management bans should be reserved for serious misconduct where a proper assessment of all factors can be made.

(iii) If a management banning order is to be made against a person, it should be at the Court's discretion, having taken account of all of the relevant factors.

(iv) The severity of an automatic consequence may affect the decision-making of the Court or the Panel in imposing or seeking pecuniary penalties or convictions where a management ban would be excessive.

(b) *The persistent failure standard:* At present, the Takeovers Act allows for the imposition of management bans on directors of entities where:[12]

(i) the director has "persistently contravened" the Code or other related legislation; or

(ii) the entity has breached the Code, and the director has "persistently failed to take all reasonable steps" to obtain compliance with the Code or related legislation.

The Panel considers both limbs of this test to be problematic. In the Panel's view:

(iii) "Persistence" is confusing in the context of a Code transaction. It could be argued that "persistent" implies that breaches have occurred across a number of transactions. The Panel notes that while a "persistence" requirement may make sense in the context of the FMCA (where, for example, a debt issuer might issue debt securities over a longer period of time), in a Code context target companies

[12] Section 44F of the Takeovers Act.

may go through one control-change transaction and acquirers will use multiple acquisition vehicles, with none of them completing more than one transaction.

(iv) Any persistent or repeated contravention standard is too narrow. If repeated minor breaches allow the imposition of a ban, then a single serious breach should do so as well.

(v) Similarly, a persistent or repeated failure to take all reasonable steps is not the only thing which might justify a management ban on an individual. If there has been a serious failure to comply with the Code, then the Panel considers it should be sufficient that the director failed to take all reasonable steps to ensure compliance. In this regard, the Panel notes that, due to the nature of Code transactions, it is likely that almost all breaches of the Code will be by bodies corporate. If management bans are to be meaningful, there needs to be an effective "look through" to the relevant individuals. Accordingly, the standard should be repeated breaches by the body corporate with the person failing to take all reasonable steps to comply with the Code or Takeovers Act.

(c) *Narrow set of prescribed factors*: The Panel is concerned that the factors which the Takeovers Act requires to be applied in determining whether to issue a management ban are too narrow and do not capture all the conduct which might justify a management ban.

<u>Consultation submissions</u>

63 All of the submitters agreed with the Panel's proposal to repeal section 44J, which imposes automatic management bans.

64 The majority of submitters agreed with the changes to subsection (b) of section 44F, which requires "persistent" breaches of the Takeovers Act, Code or related legislation for a management ban to be imposed or being a director of a company which committed such breaches, and the person failed to take all reasonable steps to ensure compliance. Specifically, the Panel had proposed that the Court could, in its discretion, impose a management ban on a person if a person:

(a) committed a serious breach of the Code or committed a number of breaches of the Code which, together, were serious; or

(b) was a director of an entity which committed a serious breach of the Code or committed a number of breaches of the Code which, together were serious, and that person failed to take all reasonable steps to prevent such breach or breaches.

65 One submitter suggested an intention element of wilfulness be incorporated as the approach risks being arbitrary in effect as it appears to lower the threshold at which a management ban can be imposed. While the Panel agrees that wilful conduct may contribute to whether a breach of the Code was serious, proving intention is particularly difficult in these situations and fundamentally, the Code is a strict liability regime. Accordingly, the Panel does not consider that wilful conduct should be a pre-requisite for a management ban (although it may be relevant).

<u>Analysis and recommendations</u>

66 The Panel recommends the following approach to address the above issues:

(a) *Repeal of section 44J to remove automatic management bans:* The Panel proposes to repeal section 44J.

(b) *Changes to the "persistence" standard:* The Panel considers that a better expression of this standard would be "multiple times" or similar. For breaches by bodies corporate, the standard should be multiple failures to comply by the body corporate, with the person failing to take all reasonable steps to comply with the Code or Takeovers Act.

(c) *Serious breaches:* The Court should have the discretion to impose a management ban where the breach, or multiple breaches, were serious.

Limitation periods

The Problem

67 The limitation period for civil remedies under the Takeovers Act has fallen out of step with a changing approach to limitation periods in comparable regimes and may be shorter than appropriate.[13]

68 Limitation periods provide a time within which legal proceedings must be initiated. In general terms, limitation periods for civil matters typically comprise some or all of the following:

(a) *Finite Period:* A period starting from the date the matter giving rise to the cause of action occurred.

(b) *Discoverability Period:* A period starting from the date on which facts giving rise to the matter became "reasonably discoverable" (or similar).

(c) *Longstop Date:* Where there is a Discoverability Period, there is usually a date after which a claim cannot be brought even if the Discoverability Period has not ended. The Longstop Date will usually be set at a certain time after the cause of action arose.

69 The standard limitation rules for money claims are set out in the Limitation Act and apply as a default position for monetary claims. However, where a relevant statute sets out bespoke limitation periods it will apply instead of the default Limitation Act rules.

70 Currently, section 43C of the Takeovers Act sets out the limitation period for civil remedies – i.e. pecuniary penalties, civil remedies and injunctive relief (the **Section 43C Periods**). Section 43C provides:

33 Time limit for applying for civil remedies

(1) An application for a civil remedy order under section 33I or a pecuniary penalty order under section 33M may be made at any time within 2 years after the date on which the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.

(2) The usual time limits apply to all applications for other civil remedy orders.

(3) However, an application for a compensatory order in respect of a contravention may be made at any time within 6 months after the date on which a declaration of contravention is made, even if the usual time limit has expired.

71 In summary, the Section 43C periods provide a bespoke regime for most civil claims which might be brought under the Takeovers Act:

(a) There is a principal two-year Discoverability Period (without a Longstop Date). This period applies to most of the key orders and sanctions which might be made under the Takeovers Act, including pecuniary penalties and civil remedy orders.

(b) Section 43C(3) provides a six-month period within which shareholders or other aggrieved parties can seek a compensatory order following a declaration of contravention made by the Court under section 33M(b)

[13] For clarity, the Panel does not consider that any change needs to be made to the approach to limitation periods for commencing criminal proceedings (which is the general approach in the Criminal Procedure Act 2011, with some exceptions in relation to management bans). The focus of this section is solely in relation to civil remedies.

(the **Coattail Period**). The rationale is that the Panel must have concluded pecuniary penalty proceedings in order for the Court to make a declaration of contravention. Accordingly:

(i) the limitation period for a compensatory order can only start once the declaration of contravention is made; and

(ii) the principal two-year Discoverability Period still limits when compensatory orders can be sought.

(c) For civil remedy orders other than those referred to above, the Limitation Act periods set out below will apply. This will generally cover instances where an individual seeks a compensatory order where the Panel has not sought a pecuniary penalty or, separately, claims for injunctive relief.

72 In summary, while the Limitation Act periods operate differently to those in the Takeovers Act, they are generally materially longer than those under the Takeovers Act. Part 2 of the Limitation Act relates to “defence to money claims” and applies to “money claims” under the Takeovers Act to the extent the Takeovers Act does not provide a bespoke regime. Section 11 provides:

11 Defence to money claim filed after applicable period

(1) It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based (the claim’s primary period);

(2) However, subsection (3) applies to a money claim instead of subsection (1) (whether or not a defence to the claim has been raised or established under subsection (1)) if—

(a) the claimant has late knowledge of the claim, and so the claim has a late knowledge date (see section 14); and

(b) the claim is made after its primary period.

(3) It is a defence to a money claim to which this subsection applies if the defendant proves that the date on which the claim is filed is at least—

(a) 3 years after the late knowledge date (the claim’s late knowledge period); or

(b) 15 years after the date of the act or omission on which the claim is based (the claim’s longstop period).

73 There is also a fraud exception to the fifteen-year longstop under section 48 of the Limitation Act. It provides that the longstop period does not apply to a claim where the claimant did not know (or could not have reasonably known) of various matters because of fraud by or on behalf of the defendant.

74 The LDAC Guidelines provide that the limitation periods in Part 2 of the Limitation Act should apply to pecuniary penalties unless there is good reason to depart from this approach (the **Standard Approach**).[14]

75 The LDAC Guidelines set out the relevant considerations for policymakers in deciding whether to depart from the Standard Approach. They include the following:

(a) the time period within which breaches of the regulatory regime ought to be discoverable;

[14] LDAC Guidelines, at [26.3].

(b) the time period within which enforcement agencies ought to be able to make a decision to bring proceedings;

(c) fairness to potential defendants in relation to knowing whether or not proceedings will be commenced; and

(d) the public or market expectations of prompt prosecutorial action.

76 In addition to these guidelines, the Law Commission Report provides that:

(a) Pecuniary penalty statutes should generally adopt a limitation period of three years after reasonable discoverability of the contravention, with a ten-year longstop, subject to a fraud exception as provided in section 48 of the Limitation Act (the **Model Approach**).[15]

(b) The Limitation Act should be an alternative option for pecuniary penalties where there is a specific policy justification. Where there is a justification for the Limitation Act to apply, the legislation should specifically set out how it interacts with any pecuniary penalty provisions.[16]

77 Essentially, the Law Commission's position recognises that regulators have specific monitoring powers and resources to pursue proceedings, placing these proceedings in a different category to those brought by "ordinary" litigants.[17]

Consultation submissions

78 The majority of the submitters agree with the Panel that there is a case for reforming section 43C for the reasons stated above.

79 One submitter suggested that a Longstop Date of ten years is excessive, and it rather should be five years. They noted that they do not consider alignment with other legislation is relevant given the nature of the regulation of transactions relating to corporate control.

80 The Panel disagrees with this approach. This would result in a Longstop Date of 15 years under the FMCA for schemes of arrangement but five years under the Act for takeovers. We can see the justification for a shorter approach than the FMCA but consider that 10 years is a more appropriate benchmark (we note the New Image matter would have been time barred if the Longstop Date was five years). A 10-year Longstop Date also reflects the Commerce Act (although the Panel proposes that there is a fraud exception, unlike the Commerce Act).

Analysis and recommendations

81 The Panel recommends reforms to section 43C in the below manner:

(a) A Discoverability Period be retained for pecuniary penalties and civil remedy orders under section 33I, but it would be increased from two to three years.

(b) The Coattail Period be retained but would be extended from six months to one year.

[15] Law Commission Report, at guideline G20.
[16] Law Commission Report, at [18.7] and [18.65].
[17] Law Commission Report, at [18.36].

(c) A Longstop Date of ten years (with a fraud exception) be introduced for all claims (other than claims brought in the Coattail Period, where it applies), balancing the extended Discoverability Period.

(d) The Limitation Act apply to all other claims.

82 The Panel notes that should pecuniary penalties be introduced for breaches of Undertakings the limitation regime would also apply to them.

83 The Discoverability Period would be effectively reset where a person gives an Undertaking to the Panel (or proposes to take other corrective action) to resolve a potential contravention of the Code but ultimately continues to act in contravention of it. This is intended to ensure that where the Panel has been led to believe that a matter has been resolved and cannot reasonably discover that the person has continued to act in contravention, the Panel would not be time-barred from seeking a declaration of contravention for the original contravention of the Code.

84 The Panel notes that section 43C(2) of the Takeovers Act would be retained. Effectively, section 11 of the Limitation Act would apply to compensatory claims brought by a person other than the Panel, resulting in different limitation periods for the Panel and other defined litigants. Weighed against this inconsistency, the Panel has more resources than the ordinary litigant, justifying a shorter limitation period. Furthermore, the Coattail Period would limit instances where the different limitation periods would result in concurrent claims.

Additional updates

85 There are several additional minor changes to the Court's enforcement powers which the Panel recommends should be made. These are set out below. The majority of submitters agreed with the Panel's proposals.

Application of Takeovers Act to Crown corporations

86 The Law Commission Report states that it is not sufficient for an Act to provide only that "this Act binds the Crown" where pecuniary penalties under the relevant Act are to apply to the Crown or Crown-controlled body corporates. Rather, the legislation should specifically set out that pecuniary penalties may be imposed on the Crown or Crown-controlled bodies corporate.[18] The Panel agrees.

87 Accordingly, the Panel recommends for the Takeovers Act to provide that pecuniary penalties and other civil remedies shall apply to the Crown and Crown-controlled bodies corporate.

Clarification that the Panel can apply for a pecuniary penalty / declaration of contravention

88 Currently, section 33M of the Takeovers Act provides for a declaration of contravention to be granted only where the Panel has sought a pecuniary penalty order. The potential issue with this is that the Panel might consider a pecuniary penalty is not appropriate, but that a declaration of contravention is. Declarations of contravention are relevant to compensatory orders (which may be sought by aggrieved persons under section 33K) because section 33N enables persons seeking a compensatory order to rely on a declaration of contravention without the need to independently prove that a contravention of the Code has occurred.

89 While the Panel could apply for a pecuniary penalty but then ask the Court to make a nominal award or to not impose one (given that the Court has a discretion to impose a pecuniary penalty), this approach would be artificial. The Panel considers that the better approach would be for the drafting of section 33M to expressly allow the Panel to seek a pecuniary penalty or a declaration of contravention (or both).

Protection against double jeopardy

90 The LDAC Guidelines and Law Commission Report provide that an Act should include an explicit prohibition against double jeopardy, setting out that a person cannot be subject to both criminal and pecuniary penalty proceedings for the same conduct. Furthermore, once criminal proceedings have been determined (whether resulting in a conviction or not) there should be no pecuniary penalty proceedings based on the same conduct or vice versa.[19]

91 Section 44X of the Takeovers Act provides a level protection against double jeopardy, stating:

> ***No pecuniary penalty and fine for same conduct***
>
> *A person cannot be ordered to pay a pecuniary penalty and be liable for a fine under this Act for the same conduct.*

92 This addresses the basic issue of not having concurrent liability for both a pecuniary penalty and a fine for criminal liability. However, it does not address issues such as the potential for the Panel to commence proceedings for a pecuniary penalty after it has attempted (but failed) to secure a criminal conviction for the same conduct. The Panel proposes to amend section 44X to address this issue.

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[18] Law Commission Report, at [19.31].
[19] LDAC Guidelines, at [26.7] and Law Commission Report, at guideline G7.