

**TAKEOVERS PANEL**

**STATEMENT OF INTENT**

**2017/2018 – 2021**

## **Table of contents**

<b>Statement of responsibility</b> .....	<b>3</b>
<b>Introduction</b> .....	<b>4</b>
How the Takeovers Panel makes a difference in the capital markets.....	4
Why capital markets transactions matter to New Zealand.....	4
Purpose of the Code and the Panel’s role .....	5
Summary of Statement of Intent .....	5
<b>The Panel’s strategic intentions</b> .....	<b>6</b>
<b>The Panel’s 2017/2018 – 2021 Performance Framework</b> .....	<b>7</b>
<b>Nature and scope of the Panel’s functions and intended operations</b> .....	<b>8</b>
The members of the Takeovers Panel .....	8
Executive team.....	8
<b>How the Panel intends to manage its functions and operations to meet its strategic intentions</b> .....	<b>9</b>
Government priorities .....	9
Efficiency.....	9
Knowledge .....	9
Enforcement.....	9
Strategic intentions.....	9
<b>How to judge the Panel’s performance</b> .....	<b>10</b>
Impact Efficiency.....	10
Impact Enforcement.....	12
Impact Knowledge .....	14
Value for money approach.....	15
Government’s expectations.....	15
Panel’s value for money approach .....	15
Opportunities and risks .....	16
<b>Managing the Panel’s organisational health and capability</b> .....	<b>17</b>
Operating capability .....	17
Staff engagement and retention .....	17
Capital investments .....	18
<b>Consulting with and reporting to the Minister of Commerce and Consumer Affairs</b> .....	<b>18</b>
Consultation with Minister and Ministry .....	18
Reporting to Minister and Ministry .....	18
<b>Process for acquisitions</b> .....	<b>18</b>
<b>Other matters</b> .....	<b>18</b>
<b>APPENDIX</b> .....	<b>19</b>
Panel’s statutory functions .....	19
The Takeovers Code .....	20
Code company schemes .....	21

© This copyright work is licensed under the Creative Commons Attribution 3.0 New Zealand licence. In essence, you are free to copy, distribute and adapt the work, as long as you attribute the work to the Takeovers Panel and abide by the other licence terms. To view a copy of this licence, visit:

<http://creativecommons.org/licences/by/3.0/nz/>.

**Statement of responsibility**

The information on future operating intentions of the Takeovers Panel for 2017/2018 – 2021 contained in this Statement of Intent has been prepared in accordance with section 141 of the Crown Entities Act 2004.

We acknowledge responsibility for the preparation of this statement of the Panel’s strategic intentions and for the judgements used in it.

In our opinion the information contained in this Statement of Intent fairly reflects the Takeovers Panel’s operating intentions for the reporting period. It should be read in conjunction with the Panel’s Statements of Performance Expectations that relate to the reporting period.

Signed on behalf of the Panel by:



---

**Andy Coupe**  
**Chairman**  
**Takeovers Panel**

**Date: 11 April 2017**



---

**Murdo Beattie**  
**Chairman of the Audit and Risk**  
**Committee**  
**Takeovers Panel**

**Date: 11 April 2017**

## **Introduction**

The Takeovers Panel presents its Statement of Intent for the period from 1 July 2017 to 30 June 2021.

The Panel is an independent Crown entity established under the Takeovers Act 1993 to administer and enforce the Takeovers Code. The Minister of Commerce and Consumer Affairs is the Panel's responsible Minister.

### How the Takeovers Panel makes a difference in the capital markets

The Takeovers Panel is a body of experts experienced in takeovers and the capital markets. It enforces compliance with the Takeovers Code and has a role in reviewing certain schemes of arrangement undertaken under the Companies Act 1993 (**Code company schemes**).

The transactions that the Panel regulates involve changes in ownership of the shares (**control-change transactions** or **changes of control**) in New Zealand companies known as **Code companies**.<sup>1</sup>

Much of the transactional activity that occurs in New Zealand is not subject to the Panel's oversight because only a very small percentage of New Zealand's c.500,000 companies (fewer than 1%) are subject to the Code. However, the Panel plays an important role in strengthening the integrity of the capital markets because it regulates changes of control in New Zealand's largest and most widely-held companies, some of which have tens of thousands of shareholders.

### Why capital markets transactions matter to New Zealand

Attracting high-quality business investment into all parts of New Zealand is critical to strengthening economic growth and lifting productivity, and is an essential ingredient for building the economy. Investor confidence levels can have a major impact on investment activity.<sup>2</sup>

Investors, small and large, who invest in the capital markets, need to be confident that they have the right information in making their investment decisions. Investors need confidence that the markets are well-regulated, when making their investment choices.

Takeovers, acquisitions and certain allotments are the main kinds of capital markets transactions that are regulated by the Takeovers Code. These transactions, along with schemes of arrangement undertaken under the Companies Act (some of which the Takeovers Panel has a role in regulating, i.e., Code company schemes) are important to New Zealand's capital markets:

- (a) Generally speaking *takeovers* occur because the prospective acquirer believes that better value can be created out of the target company. Accordingly, takeovers should result in

---

<sup>1</sup> A Code company is a New Zealand registered 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 12-month period before a date or the occurrence of an event referred to in the Code; or
- (c) has-
  - (i) 50 or more shareholders (with voting rights) and 50 or more share parcels; **and**
  - (ii) *\$30 million or more of assets*; **or**
  - (iii) *\$15 million or more of annual revenue*.

The definition set out in this footnote assumes that recommendations that the Panel made to the Minister in March 2017 to change the definition of Code company to introduce a value threshold (as shown in italics) in order to remove small by value companies from the coverage of the Code, have been effected.

<sup>2</sup> *Business Growth Agenda | Towards 2025*, Chapter 03, Building Investment, pp. 1 - 2.

## *Ensuring transparent and equitable takeover processes*

the best use of resources, increasing efficiency and improving the company's performance. This, in turn, has a positive impact on the economy;

- (b) There are many kinds of *acquisitions* that occur in the capital markets. People trade their shares on regulated markets such as those provided by NZX Limited, or through other, unregulated or lesser regulated trading platforms, or privately between themselves;
- (c) *Allotments* relate to the important economic activity of businesses raising capital to fund such matters as R&D, expansion in their domestic and export markets, balance sheet management, or to deal with cash-flow issues. Typically, investors provide the business with cash, and in return are issued shares or other securities by the business; and
- (d) *Schemes of arrangement* are also undertaken for a variety of reasons. Code company schemes can involve any of the transaction types described in (a) to (c) above, and other types of transactions, such as a return of capital to the shareholders.

When the capital markets are well regulated, investors from overseas and those based domestically are more confident to invest their money in these markets. The takeovers market regulated by the Takeovers Act and the Takeovers Code, and by the Companies Act for Code company schemes, forms part of the business and capital markets environment. However, there are many other types of transaction in the capital markets that do not fall within the Panel's regulatory role, including the acquisition of business assets such as real estate and plant, and the acquisition of privately owned businesses.

### Purpose of the Code and the Panel's role

The purpose of the Takeovers Code is to ensure transparency and equitable processes for control-change transactions in the shares of Code companies. This objective supports the integrity of the capital markets environment. The Panel's role in Code company schemes ensures that they, also, are more transparent (in terms of the quality of the disclosures made), with equitable voting processes for shareholders. The key features of the Code and of Code company schemes under the Companies Act are described in the Appendix at the end of this Statement of Intent.

In many ways the Panel is like a referee in a sports game – it ensures that the rules are followed without taking sides.

While there are many contributors to the health of New Zealand's capital markets, the Panel plays an important part in the regulation of those markets, to support investor confidence.

### Summary of Statement of Intent

This Statement of Intent includes a description of the Panel's strategic plan for the four year period to which it relates. It describes the three outcomes that the Panel contributes to: an efficient takeovers market, reduced transaction costs for investors, and increased confidence in the integrity of the takeovers market. These outcomes are predicated on the Panel's role of ensuring that the processes for transactions and events that are regulated by the Code and by the Companies Act for Code company schemes are transparent and equitable (see page 7 below, which sets this out in diagrammatic form).

## *Ensuring transparent and equitable takeover processes*

This Statement of Intent also explains how the Panel will measure its performance on meeting the three intended impacts of the services it provides to the public of New Zealand. The intended impacts are:

- (a) **Efficiency:** takeovers law is efficient, with improved information for shareholders;
- (b) **Enforcement:** 100% compliance with the Takeovers Code, and 100% of applicants for Code company schemes seek a No-objection Statement from the Panel; and
- (c) **Knowledge:** shareholders, acquirers, and their advisers will be better informed about the role of the Code and of the Panel, and will be better informed about Code company schemes and the Panel's role in those schemes.

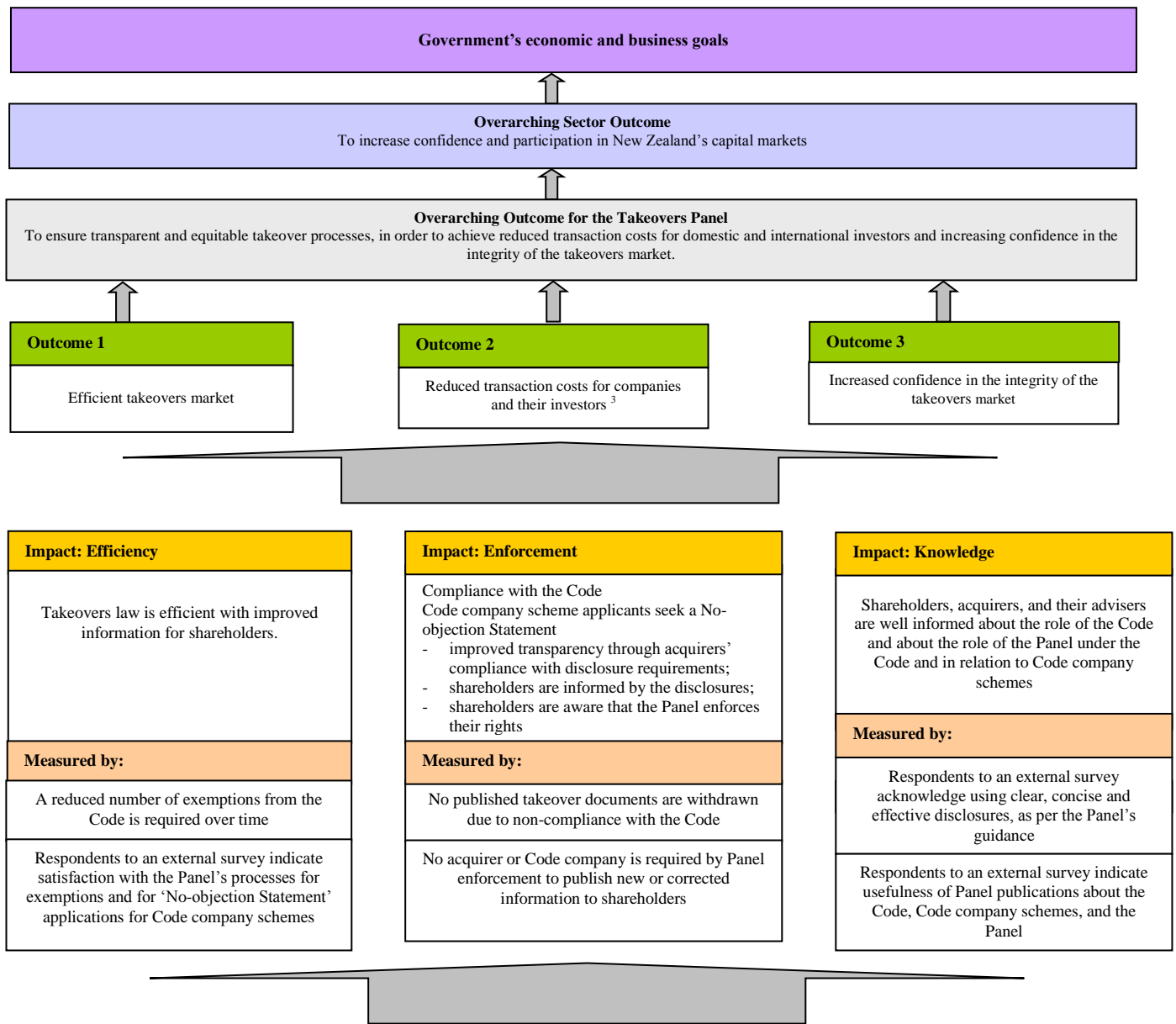
Information on the services (outputs) that the Panel intends to provide can be found in its annual Statements of Performance Expectations (**SPE**). The SPE sets out how the Panel intends to measure its performance of those services for the financial year to which the SPE relates. The required forecast financial information is also set out in the SPE.

### **The Panel's strategic intentions**

The strategic objectives that the Panel intends to achieve or contribute to are set out in diagrammatic form on page 7, below. In summary, the Panel intends to contribute to the overarching objective of New Zealand's financial sector regulators: increasing confidence and participation in New Zealand's capital markets. The Panel will make this contribution through ensuring transparent and equitable takeover processes (for Code-regulated transactions and for Code company schemes).

**The Panel's 2017/2018 – 2021 Performance Framework**

The diagram below represents the Panel's performance framework. It depicts the Panel's strategic intentions, that is, its intended services (outputs) for the reporting period, the intended impacts of those services and the outcomes that they contribute to.



<sup>3</sup> The transaction costs for investors include access to information about Code-regulated transactions and about their rights and obligations as shareholders of Code companies, and also avenues for enforcing their rights.

## **Nature and scope of the Panel's functions and intended operations**

The nature and scope of the Panel's functions and operations are described in the Appendix to this Statement of Intent.

### The members of the Takeovers Panel

The Panel has 11 members, the maximum number provided for by the Takeovers Act. The members of the Panel are the Board for the purposes of the Crown Entities Act. Information about [current Panel members](#) is on the Panel's website.

One member is an Australian Takeovers Panel member and is appointed to the New Zealand Panel under reciprocal arrangements between New Zealand and Australia. The Chairman of the New Zealand Panel is also a member of the Australian Panel under these arrangements. Both Panels benefit from the cross-appointee's contribution at their respective Board meetings.

Members are appointed by the Governor-General on the recommendation of the Minister of Commerce and Consumer Affairs. The Panel's members must include a Chairman and a Deputy Chairman.

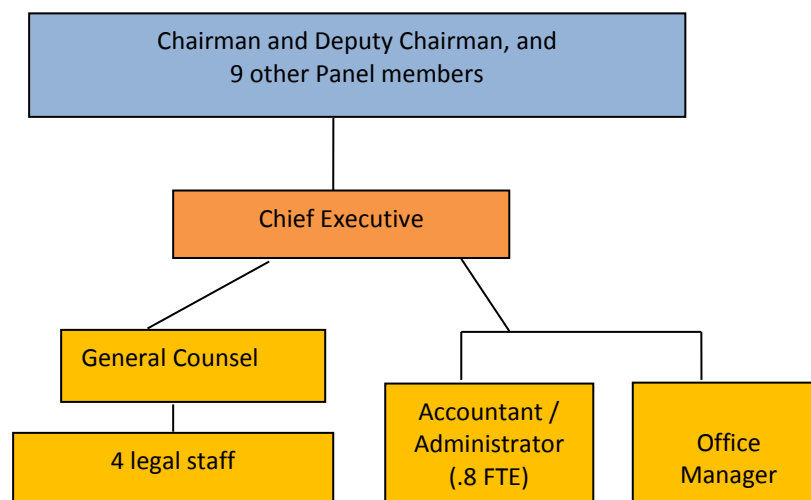
Panel members must be qualified or experienced in business, accounting or law. Members are senior practitioners (lawyers, investment bankers, corporate advisers, company directors, etc) in the mergers and acquisitions market or in the corporate market.

### Executive team

The Panel is supported by a professional executive that consists of the Chief Executive, a General Counsel heading a specialist legal team, and administration staff.

The Panel utilises a conventional management structure, with the Panel responsible for the performance management, remuneration and succession planning of the Chief Executive, and the Chief Executive responsible to the Board for the performance of the executive.

### Panel Organisation Structure





## **How the Panel intends to manage its functions and operations to meet its strategic intentions**

### Government priorities

By performing its statutory functions (as described in the Appendix to this Statement of Intent), with a highest priority of responding to Code-regulated transactions and to Code company schemes, and also undertaking law reform initiatives and educating the public about takeovers law when transaction levels allow, the Panel achieves its impacts of Efficiency, Enforcement and Knowledge. The Panel's services thereby contribute to economic improvement and to business performance because well-functioning capital markets are integral to the economy and to business.

The Panel has always been a cost-conscious public body. It constantly strives to improve internal efficiencies to ensure that it operates within budget and is financially sustainable. These on-going initiatives contribute to the management of the Government's finances, in that the Panel expects to manage its functions and operations in a way that meets its strategic initiatives, without seeking additional Government funding, at least over the medium term.

### *Efficiency*

The Efficiency impact aims to improve takeovers law in a way that reduces the number of exemptions that individuals need to seek from the Panel. That equates to a reduction in businesses' compliance costs for their commercial transactions.<sup>4</sup>

### *Knowledge*

Similarly, the Panel's Knowledge impact aims to reduce transaction costs for investors because they will have better access to information. By giving an increased focus to information for shareholders being clear, concise and effective, the Panel aims to help retail and non-expert investors to more readily understand the information that is provided to them.

### *Enforcement*

The Panel's Enforcement impact supports Government goals for economic improvement because a well-regulated takeovers market contributes to confidence and participation in New Zealand's capital markets. Investors, both domestic and international, are more likely to participate in capital markets investments when they know that there are well enforced rules in place that require takeover transactions to have transparent processes and outcomes.

### Strategic intentions

The Panel's strategic intentions for the medium term will take into account the Government's economic and public services priorities. The Panel is an independent Crown entity. Accordingly, the Government of the day cannot direct it to give effect to Government policy.<sup>5</sup> However, the Panel's responsible Minister outlines to the Panel each year, in the annual Letter of Expectations, how the Minister expects the Panel to perform its functions taking into account the Government's priorities. Where these priorities are focused on improving the efficiency and competitiveness of business, the

---

<sup>4</sup> There is no contradiction between this impact measure and the statement on page 19, in paragraph (c), regarding the importance of the Panel's function to grant exemptions. The Panel's policy/law reform function can result in streamlining the application of the Code where the modification to the law does not need to be fact specific. This reduces compliance costs, as otherwise exemptions would have to be sought to deal with the issue. However, it can take a number of years to achieve a law change, so exemptions can be granted as an interim measure. On the other hand, for novel situations, exemptions provide a means of modifying the application of the law, in accordance with the principles of the Code, for a specific fact scenario.

<sup>5</sup> Section 105, Crown Entities Act

## *Ensuring transparent and equitable takeover processes*

Panel increases its focus for services under outputs 3 and 4 of developing, and educating on, policy proposals that maintain a proper balance between the cost of compliance with the Code and the benefits arising from it.

The Panel has a strong and positive relationship with its monitoring department, MBIE. This responsive relationship results in efficient policy development outcomes, as the respective organisations co-operate to improve efficiency of processes. The Panel and MBIE officials engage regularly to keep each other informed on matters of mutual interest and concern.

The strength of New Zealand's economy is, at the period of this Statement of Intent, reflected in a solid flow of Code-regulated transactions and Code company schemes. While this strong level of transactions could be impacted by domestic or international shocks, the major earthquakes in central New Zealand in 2016 had no perceptible impact on the level of domestic mergers and acquisitions; likewise with international political shocks over 2016. This suggests a fairly robust takeovers market and a likely continuation for the time being of transactions that will be regulated by the Panel. Because of this, the Panel expects to maintain a stronger focus on monitoring and enforcement of the Code and of Code company schemes (outputs 1 and 2) than on policy and public education (outputs 3 and 4), unless a reduced level of transactions occurs.

The Panel's flexible use of its resources allow it to move between service outputs, as and when necessary.

At the heart of this flexibility is the Panel's intention to maintain its service model of attending to transactional work as its highest priority. Accordingly, the Panel will ensure that monitoring of the market and 'soft enforcement' activities such as reviewing draft regulatory documents is done responsibly, courteously and professionally.

The Panel will also continue to expend resources on the policy work of reviewing takeovers law and practice, and on undertaking public education services to improve investors' and directors' understanding of takeovers law. To the extent that transaction volumes increase or decrease, work on policy and on public education ebbs and flows correspondingly. Thus, while a core level of these latter two functions is maintained, responding to transactions remains the Panel's highest priority for the use of its resource.

### **How to judge the Panel's performance**

The Panel delivers a specialised range of regulatory services in the narrow field of takeovers law involving Code companies. The Performance Framework on page 7 above shows how these services contribute to the Panel's intended impacts and outcomes, to the broader financial sector's goals, and to Government goals.

The discussion below sets out the way the Panel intends to go about achieving its intended impacts and how it will measure this achievement.

#### Impact Efficiency

The Panel's policy function of reviewing takeovers law and market practice and recommending changes to the law, is aimed at improving the efficiency of takeovers law. Exemptions can also contribute to an efficient market by, when appropriate, modifying the application of the Code, in accordance with the principles of the Code, to better meet the circumstances of transactions.

The Panel's policy function also balances efficiency for acquirers with protection for shareholders. Accordingly, recommendations for law change often include proposals for improving the disclosure

## *Ensuring transparent and equitable takeover processes*

of information to, and processes for, shareholders. The Panel's role in Code company schemes came about after the Panel recommended law changes to provide for that role.<sup>6</sup>

The most significant improvements to the efficiency of the Code have occurred already with a number of class exemptions having been granted and several significant rounds of technical amendments to the Code having been made since the Code came into effect in 2001. The Panel will continue to undertake law reform initiatives whenever problems in the takeovers market are identified.

There are two main influences on the number of exemptions considered by the Panel. These are the level of Code-regulated transactions (with more transactions raising the possibility of more exemption applications),<sup>7</sup> and the extent to which improvements to the drafting of the Code reduce the need for exemptions to accommodate innovative transaction structures or one-off circumstances.

The Panel measures the achievement of the Efficiency impact in two ways. The first measure is the extent to which there is a reduction in the number of exemptions granted (see the graph on page 13, below).<sup>8</sup> There will be occasional highs and lows relating to market specific or transaction specific circumstances, and this is particularly apparent in the 2010 year when just three exemption applications related to 32 of the 65 exemptions granted. However, the number of exemptions granted is expected to trend down.

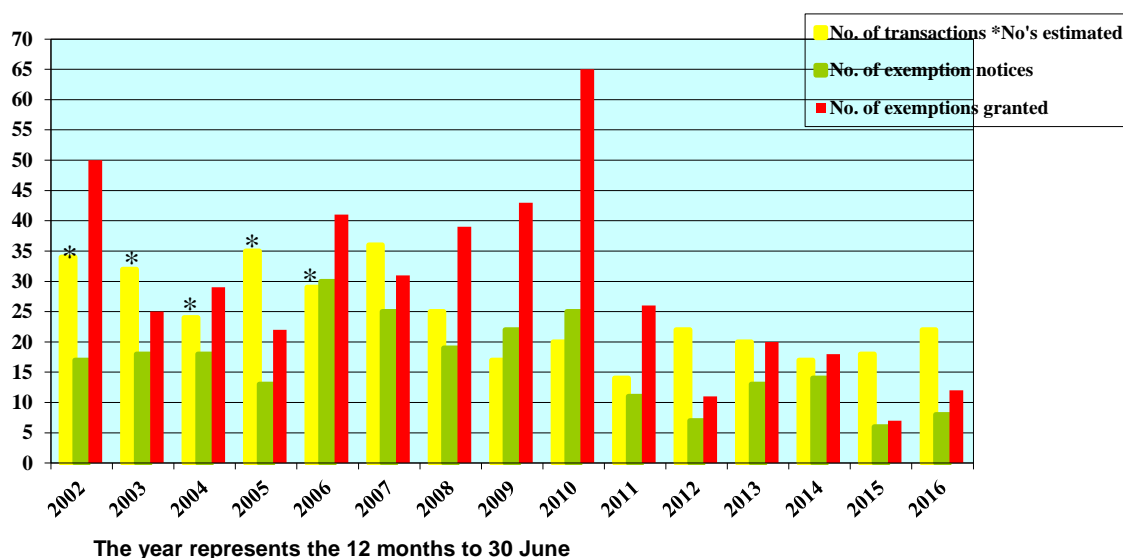
---

<sup>6</sup> 19 August 2008 Recommendations on Schemes and Amalgamations Involving Code companies.

<sup>7</sup> But note that the correlation between transaction levels and exemptions applied for is not precise, as the graph on page 12 shows. There is only a loose correlation between the number of transactions and the number of exemptions sought, but the driver of the number of exemptions tends to be the extent to which the market innovates in terms of transaction structures, in ways that the Code's strict rules inhibit. Another driver of exemption activity is dealing with past breaches of the Code which require a technical exemption to enable a mitigating action.

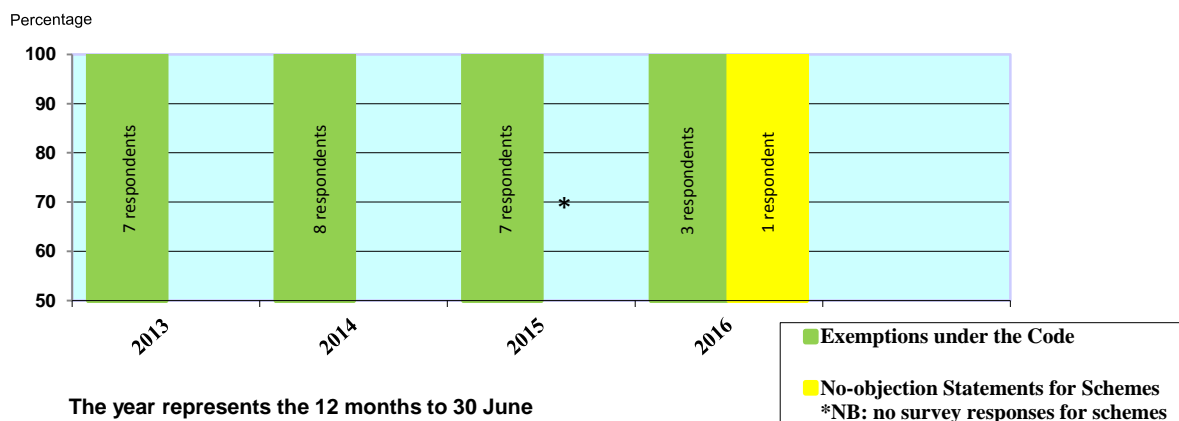
<sup>8</sup> Each exemption that has been granted from a Code rule is counted for the purposes of measuring the impact. Note that an application for exemption can cover several different aspects of a transaction that require exemptions from the Code. Hence, it is relatively common for the Panel to grant several exemptions in response to an application. The notice which gives effect to the Panel's decision may therefore contain several exemptions. For these reasons, the graph shows fewer exemption notices than the number of exemptions granted. Note that, also for the purposes of measuring the impact, exemptions to amend previously granted exemptions are not counted, since they generally relate to an oversight in or change from the original exemption.

### Number of exemptions granted



The second measure for the Efficiency impact is the extent to which participants in an on-line survey find the processes for exemptions and for No-objection Statement applications for Code company schemes to be satisfactory. This is depicted in the graph below.

### % Practitioners find exemptions process and No-objection Statement process satisfactory



### Impact Enforcement

The highest priority for the Panel's resources goes to responding to Code-regulated transactions and Code company schemes. An important part of the Panel's effectiveness as a regulator is achieved through the Panel's staff reviewing documents in draft, and giving informal assistance on how to comply with the Code or how to obtain a No-objection Statement from the Panel for a Code company scheme. This practice of 'soft' enforcement, which began around 2005, together with the Code's bedding in and the respect of practitioners for the Panel, has largely contributed to the reduction in formal hearing processes (see the graph on page 13, below).

The Panel aims for 100% of Code company scheme applicants to seek a No-objection Statement from the Panel. The graph on page 14 tracks progress with this aim. If achieved, it means that, for

every Code company scheme, the Panel will have been satisfied with the proposed scheme process, with the quality of the information for shareholders, and that the interest classes, for the purposes of voting on the scheme, have been properly identified.

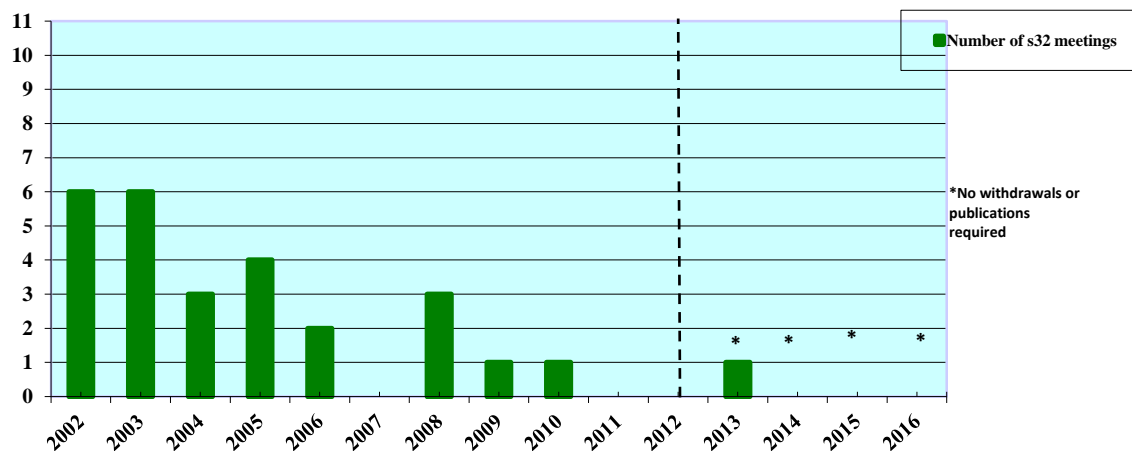
The Panel also aims for 100% compliance with the Code so that shareholders, especially small shareholders, are protected from unfair practices and all shareholders have a transparent and orderly process under which they make the decisions that lie before them in a Code-regulated transaction. The Panel uses two measures for the achievement of this impact: no Code-regulated documents being withdrawn under a section 32 enforcement action, due to non-compliance with the Code, and no acquirer or Code company being required under a section 32 enforcement action to publish new or corrected information to shareholders.<sup>9</sup>

This impact is already achieved to a very high level, as can be inferred from the graph below, since section 32 meetings always arise out of an alleged breach of the Code. Note that, although the graph shows the number of section 32 meetings held since the Code came into effect, the measure for the Enforcement impact was instigated only from the 2012/2013 year.

The Panel aims to maintain 100% achievement of this impact in a constantly changing market.

### Section 32 Meetings

**Number of Withdrawals of documents or publications of information - Performance measure commences in the 2013 year<sup>10</sup>**

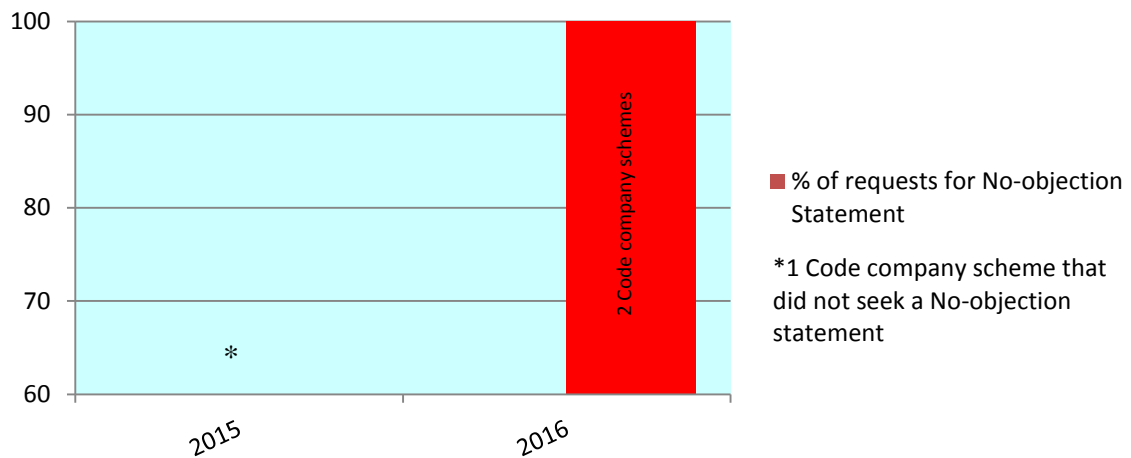


The year represents the 12 months to 30 June

<sup>9</sup> The publication of new or corrected information could be required where, for example, material changes in circumstances had occurred that rendered earlier information inaccurate, or in response to allegations that an earlier publication omitted material information, etc. Withdrawal of a non-compliant document would likely occur due to a serious breach of the Code that could not be resolved through the publication of new or corrected information.

<sup>10</sup> The errors in this graph from previous years have been corrected.

**% of Code company schemes applicants that sought a No-objection Statement from the Panel.  
Performance measure commences in the 2015 year**



The year represents the 12 months to 30 June

Impact Knowledge

The Panel’s function of promoting public understanding of takeovers law and practice is aimed at all sectors of the takeovers market, including in relation to Code company schemes. The Panel engages transparently with its stakeholder base and uses its publication *Code Word* and its website to provide accessibility to its decisions, Guidance Notes and other useful information.

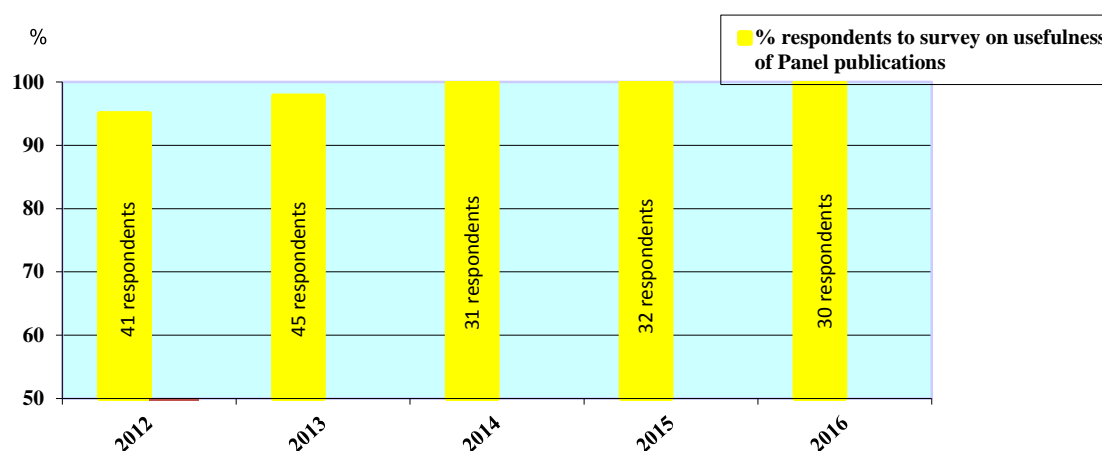
Practitioners and independent advisers involved in Code-regulated transactions and Code company schemes are invited to participate in an ongoing on-line survey. The Panel publishes results from the survey in its Annual Reports.

The Panel intends to continue to focus as much resource as possible on promoting public understanding so that the Code and the Panel’s role are better understood. This is intended to contribute to better informed investors, thus reducing their transaction costs. By giving an increased focus to information for shareholders being clear, concise and effective, the Panel aims to help retail and non-expert investors to more readily understand the information that is provided to them.

The Panel measures the achievement of its Knowledge impact in two ways. The first relates specifically to the quality of the information for shareholders in terms of applying the Panel’s guidance on clear, concise and effective disclosure, and the second relates to the Panel’s publications about the Code and about the Panel. The indicator for improved information for shareholders is that at least 90% of respondents to an on-line survey indicate that they applied clear, concise and effective disclosure to their drafting, as set out in Panel guidance. This will be measured from the 2017/2018 year.

The measure for improving knowledge about the roles of the Code and of the Panel is that at least 90% of the respondents to an on-line survey indicate that they find the Panel’s publications about the Code and about the Panel useful. This is shown in the graph on page 15, below.

### % Takeovers Practitioners find Panel publications useful



The year represents the 12 months to 30 June

### Value for money approach

#### *Government's expectations*

The Panel is cognisant of the Government's expectations that Crown entities remain focused on value for money outcomes. The Panel believes it is well aligned with the goals of the Government's Better Public Services programme:

- *Clear priorities: providing high quality, cost effective services* – the Panel has created a culture of cost effective and customer focused services, particularly through its accessibility for public enquiries and its 'soft' enforcement practices, which promote Code compliance at low cost;
- *High quality services: ensuring services are modern, responsive and provide value for money* – the Panel maintains an investment in its technology, and sets high standards for the efficient delivery of its customer services;
- *Reducing waste: ensuring administration is efficient, streamlined and well organised* – the Panel has consistently reflected this approach for its own administration.

#### *Panel's value for money approach*

The Panel has always been mindful of making the most efficient use of its funding. It is aided in this goal by receiving a single unallocated Government appropriation. This supports the Panel's ability to match its resources to its priorities in a market environment that is prone to volatility.

Cost effectiveness measures taken by the Panel have included digital-only dissemination of most of the Panel's publications in order to eliminate printing and mailing costs, and strictly limiting the use of professional design for publications. The All of Government Contracts regime also provides some savings to the Panel.

The Panel continues to find ways to make its website a useful and accessible database of public information about Code-regulated transactions and Code company schemes. In 2016, the Panel

## *Ensuring transparent and equitable takeover processes*

added a 'timing rules calculator' to the website to assist practitioners to manage compliance with the timing rules in the Code. The calculator allows users to calculate and see, on a digital calendar, the actual dates that result when applying the Code's timing rules to their transaction. These initiatives improve the Panel's outwards facing and its inwards facing accessibility to information.

### Opportunities and risks

The level of takeover activity is largely influenced by the state of the economy. This is because takeovers are often large transactions, typically costing acquirers tens of millions to hundreds of millions of dollars, which require both funding and confidence. Other Code transactions also reflect economic conditions in that shareholders can be asked to approve capital raisings to help companies impacted by a downturn. Conversely, under improving market conditions, shareholders can be asked to approve capital raisings to fund business expansion.

The Panel intends to continue its focus on use of its website to modernise and improve how it does business and to deliver best value on its public funding. This will include producing and improving technical guidance for practitioners, and completing the back-loading of transactions documents onto the website, to create a comprehensive database of Code-regulated, and Code company scheme, documents.

The internet and the Panel's website will be used for cost efficient information delivery. The Panel also intends to work with other professional bodies and agencies such as the Institute of Directors to improve the Panel's reach to the market.

As noted in footnote 1 above, this Statement of Intent assumes the passage of legislation and the coming into force of regulations that implement the 2016/2017 technical amendments to the Code. However, there is a risk that the legislation will not be passed and the technical amendments may not be implemented. If this occurs, then the status quo will remain in place. While the legislation would reduce the number of companies subject to the Code by somewhere in the vicinity of 10% to 20%, it is thought that few of the excluded companies have dealings with the Panel under the status quo, and some may not have even been aware that they were subject to the Code.

Accordingly, failure of the legislation to be passed may have no discernible impact on the Panel's operations because the level of work undertaken by the Panel may not change to any notable extent whether the legislation is passed or not.

The *Takeovers (Fees) Regulations 2001* ("fees regulations") prescribe the fees that the Panel can charge for some of its activities. Accordingly, the fees regulations set the level of third party funding that the Panel can receive.

The level of third party funding is also directly impacted by the level of transactional activity (which generates modest application fees for adviser approvals and modest to significant fees for exemptions and for Code company scheme No-objection Statement applications, depending on their level of complexity). The extent to which chargeable enforcement activity (i.e., section 32 meetings) is undertaken by the Panel has a significant impact on its expenses, and also on its third party funding if it is able to make costs orders.

The level of fees chargeable under the fees regulations has not been amended since the regulations were enacted in 2001, and the Panel has been under-recovering for the resources it expends, by approximately 40%. In 2010 MBIE began a review of the fees regulations; however, the review was put on hold in 2013.



Third party funding for the Panel fluctuates significantly. It has been as low as c.\$100,000 (in 2011/2012) and as high as c.\$550,000 (in 2001/2002). The Panel maintains its operations in this volatile environment through robust controls on spending and a strong focus on internal efficiency. The Panel relies heavily on its Government funding of \$1.49 million per annum.

## **Managing the Panel's organisational health and capability**

### Operating capability

The Panel has few tangible assets and its main resource is its 11 part-time members and its eight staff located in an office in Wellington.

Members are committed to proactively and pragmatically enforcing the Code, and the Panel has always been able to find suitable candidates to put themselves forward to take up the public service role of the Panel.

The Panel's efficiency is supported by its ability under the Takeovers Act to make most of its decisions by "divisions" of members. The ability to act in divisions also enables the Panel to effectively manage the conflicts of interest that inevitably arise where members are professionals working in the market. Members who would be conflicted in relation to a particular transaction are not appointed to the division that regulates that transaction. If a division member becomes conflicted during the course of a matter, he or she retires from the division and the division is reconstituted.

### Staff engagement and retention

The Panel's executive staff is comprised of 7.8 FTEs, of whom 6.8 FTEs are lawyers and accountants. The lawyers' skill mix enables the Panel to respond to changes in the market by instantly reallocating resources as necessary. The funding constraints in the public sector make maintaining appropriate remuneration packages an increasing challenge. Nevertheless, robust controls on spending, and on-going improvements in efficiency are still proving to be effective tools for the Panel's sustainability.

The Panel keeps its Chief Executive accountable for managing the work priorities of the staff on a daily basis and also for their engagement and retention.

The Panel's organisational health and capability will be maintained over the next four years by valuing the Panel's people and at the same time holding them accountable for their behaviour and performance. The Chief Executive maintains the following initiatives:

- (a) The training and development needs of each staff member being identified and supported;
- (b) Remuneration being linked to performance and supporting professional progression;
- (c) Recruitment initiatives aiming to increase the diversity of the Panel executive;
- (d) Maintaining flexible work practices that support the recruitment and retention of people with family and community commitments and that support work life balance;
- (e) Maintaining the Panel's Good Employer Policy with its focus on mutual respect, support, accountability, and team culture;
- (f) Maintaining employer-funded 'flu vaccinations and other small 'wellness' initiatives for staff and an Employee Assistance Programme.

## *Ensuring transparent and equitable takeover processes*

### Capital investments

The Panel intends to update aspects of its IT security and other software and a small amount of office furniture, early in the reporting period. This is expected to require a minor capital investment of approximately \$30,000. It is expected that when the next cycle of server renewal arises, Government cloud computing may provide a viable alternative.

There are no plans for significant software upgrades, nor are there any plans for major repairs or refurbishments to the Panel's offices.

### **Consulting with and reporting to the Minister of Commerce and Consumer Affairs**

#### Consultation with Minister and Ministry

The Panel enjoys a positive and productive relationship with MBIE and liaises closely with officials on its policy development work. This enables MBIE to provide robust and timely advice to the Minister on any recommendations the Panel may make for law changes. The Minister and MBIE consult with the Panel on appointments of new Panel members.

The Panel fully co-operates with the Minister's expectations regarding its performance and accountability and also in terms of the 'no surprises' regime, with the Panel apprising MBIE and the Minister of any relevant issues relating to the Panel's operations and sphere of responsibility.

#### Reporting to Minister and Ministry

The Panel reports to the Minister on a six-monthly basis. The matters that the Panel reports to the Minister include the Panel's financial performance, the achievement of its outputs, the use of its litigation fund and the outlook for the remainder of the financial year.

### **Process for acquisitions**

The Panel has no intention of acquiring any shares or interests in any partnership, joint venture or other association of persons, or any other interest in a company, for the purposes of section 100 of the Crown Entities Act, in the next four years.

### **Other matters**

The Panel has included in this Statement of Intent information on all of the matters that are reasonably necessary to achieve an understanding of the Panel's intentions and direction.

## APPENDIX

### Panel's statutory functions

The core functions and powers of the Panel are contained in the Takeovers Act and Code. They are:<sup>11</sup>

- (a) reviewing takeovers law and takeovers practice, and recommending any law changes that the Panel considers necessary to the Minister of Commerce and Consumer Affairs

As an expert body comprised of experienced, commercially-focused takeovers practitioners and company directors, the Panel is well placed to understand problems with takeovers law that need to be resolved. This policy function enables the Panel to recommend law changes to deal with changing market behaviours and also to facilitate innovations in the market.

- (b) giving approvals for the appointment of independent advisers, and other approvals

The Panel's approvals policy sets high standards for the independence and competence of the independent advisers who provide advice to shareholders about the merits of Code-regulated transactions and about Code company schemes. This is designed to give shareholders in Code companies quality advice that is prepared with regard to their interests and for their benefit. Shareholders can use the Independent Adviser's Report when considering their response to the proposed transaction.

- (c) the granting of exemptions from compliance with the Code

Without the ability for the Panel to grant exemptions, the Code would be inflexible and innovation in the takeovers market would be stifled. Exemptions can be granted to assist with ensuring that the Code applies effectively and appropriately to the particular transaction to which the exemption relates. Exemptions can also be granted to modify the application of the Code to classes of persons or transactions. Class exemptions can improve the efficiency of takeovers law because they provide a speedy method to modify the application of the Code in a manner that is consistent with the Code's principles, across a broad range of circumstances. The Panel can only grant exemptions that are appropriate and consistent with the objectives of the Code.<sup>12</sup>

<sup>11</sup> Aside from the functions set out here, the Panel also has a function of co-operating with overseas regulators. The resources expended on this function are very minor.

<sup>12</sup> Section 45(4A) Takeovers Act.

- (d) the regulation of changes of control of Code companies through the enforcement of the Code

When parties to transactions under the Code comply with their obligations, shareholders in Code companies are given the information and time they need to support their decisions for the transaction. The Code ensures that the processes are equitable to all who are involved. 'Soft' enforcement actions, such as the Panel's staff giving informal advice on Code compliance and reviewing draft documents, assist the efficiency of the takeovers market. This 'vetting' practice is widely used.<sup>13</sup> The Panel generally takes a commercially pragmatic approach to enforcement issues, although it can and does swiftly exercise its statutory enforcement powers when necessary for the protection of the rights of shareholders and other interested parties, or when formally requested.

- (e) promoting public understanding of takeovers law and practice

The Panel is committed to educating investors, directors and practitioners, to increase their understanding of the obligations, rights and protections under the Code and under the Companies Act for Code company schemes. This contributes to confidence and participation in New Zealand's capital markets.

- (f) considering No-objection Statement applications for Code company schemes

The Panel provides the same 'soft' enforcement approach to Code company schemes as it does to monitoring and enforcing takeovers and other transactions that are regulated under the Takeovers Code. The Panel's role in objecting or not objecting to Code company schemes provides an assurance to shareholders that they will be provided with clear information about the scheme proposal.<sup>14</sup> A requirement for majority shareholder approval of scheme proposals means that company boards and scheme promoters are incentivised to ensure that shareholders understand and participate in the decision.

## **The Takeovers Code**

The Takeovers Code is a statutory regulation that is essentially a rule-book about process. It governs transactions and events that impact on the voting rights attaching to the shares owned by shareholders of Code companies.

The rules of the Code relate to transactions that engage shareholders in the three following things:

- (a) deciding whether to accept a takeover offer for some or all of their shares;
- (b) being subject to a compulsory acquisition process, if they are amongst the last 10% of shareholders of a Code company; and
- (c) voting on a resolution at a shareholders' meeting about whether a person should be allowed to increase his, her or its voting control percentage in the company. The increase

<sup>13</sup> This practice was endorsed by the High Court in 2010, and recognised as a legitimate exercise of the Panel's enforcement jurisdiction (*Marlborough Lines Ltd v Takeovers Panel & Anor* CIV-2010-485-001150, paras [5], [47] – [49]).

<sup>14</sup> The Panel would be likely to object to a scheme proposal that failed to meet the Panel's requirements for obtaining a No-objection Statement, as set out in the Panel's [Guidance Note on Schemes of Arrangement](#).

## *Ensuring transparent and equitable takeover processes*

in voting control will usually be through the acquisition of another shareholder's shares or through an allotment to the person of a parcel of new shares issued by the company or through a buyback by the company of its own shares.

The Code supports the integrity of the takeovers market in New Zealand through its two main purposes: *transparency* and *equitable processes*.

The Code provides for *transparency* through mandating the disclosure of information to shareholders about the transaction or event. The information is focused on helping shareholders understand the background to and rationale for the transaction as well as the relevant agreements and arrangements put in place by the key parties involved. Shareholders can respond to the proposed transaction with the benefit of having all the information that is material to their decision.

Importantly, the Code company's directors must, for every Code-regulated transaction, obtain for the company's shareholders an independent adviser's report on the merits of the transaction. The company's directors are also required to either make a recommendation to the shareholders about how, in the directors' view, the shareholders should respond to the transaction, or to explain why they make no recommendation.

The Code's second main purpose is to provide for *equitable processes*. It achieves this through constraining some, and mandating other, actions during every transaction that is regulated by the Code. The Code also stipulates the timeframes for every step of a takeover. Minimum and maximum time periods must be adhered to. This ensures that shareholders have the opportunity to make an informed decision in a timely process.

The Code's timing rules also ensure that in a 'competition for control', a competing offeror (that is, another person who wants to take over a company that is already the target of a takeover by someone else), has a level playing field. The equitable processes mean that all potential offerors are governed by the same rules.

Similarly, the Code ensures that all shareholders, no matter how large or small their percentage of share ownership, are given the same offer (including the price per share) in a takeover.

The Panel is not a 'merits' regulator. The Code provides an environment in which shareholders decide for themselves on the merits of the transaction, because what may be a good investment outcome for one shareholder may not be good for another.

The purpose of the Code and the Panel is to provide and maintain the framework for transparent and equitable processes for share transactions in Code companies. This reduces the transaction costs for investors because the Panel will act on their behalf to protect their Code-given rights. The transparency and equitable processes underpin the integrity of the takeovers market. This, in turn, contributes to the goal of increasing investors' confidence and participation in New Zealand's capital markets.

### **Code company schemes**

The ability to undertake transactions such as takeovers or mergers under the Companies Act provides the flexibility of a different process from that required by the Takeovers Code. Part 15 of the Companies Act sets out a process for obtaining orders from the High Court to give effect to the transaction on any terms or conditions that the Court approves.

All schemes of arrangement, including Code company schemes, involve two stages at Court. At the first stage, initial orders are sought that relate to the applicant's proposals for holding a meeting of

## *Ensuring transparent and equitable takeover processes*

the company's shareholders to vote upon whether to approve the proposed scheme. At this first stage, the Court considers the scheme documents to be sent to the shareholders for the meeting, and makes orders about the process for the shareholder meeting, including as to 'interest classes' of the shareholders.

At the second stage (which occurs after the shareholder meeting), the Court is advised of the outcome of the shareholders' vote. The Court then decides whether to approve the scheme and to make the various orders necessary to give effect to the transaction.

For Code company schemes, the Court cannot approve the scheme if it affects the voting rights of a Code company unless:

- (a) it is satisfied that the shareholders of the Code company will not be adversely affected by the use of a scheme rather than the Code to effect the change involving the Code company; or
- (b) the Court is presented with a No-objection Statement from the Panel.

The Court is entitled to rely on the No-objection Statement to approve a scheme. However, the Court does not have to approve a scheme merely because the Court has been presented with a Panel no-objection statement.

The Panel's role in a scheme is to assist the Court by:

- (a) reviewing scheme documents to ensure that appropriate information is placed before shareholders and that interest classes of shareholders have been adequately identified; and
- (b) helping to ensure that matters that are relevant to the Court's decision are properly brought to the Court's attention.