CONSULTATION PAPER

Regulatory Alignment of Schemes and Code Offers – Application of Certain Code Rules to Schemes

18 September 2023

TAKEOVERS PANEL
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Contents

Glossary

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

>50% minimum acceptance condition	the requirement under rule 23 of the Code that a Code offer be conditional on the offeror receiving acceptances in respect of voting securities that, when taken together with voting securities already held or controlled by the offeror, confer more than 50% of the voting rights in the target company (unless the offeror already holds or controls more than 50% of the voting rights in the target, or is making a partial offer)
2022 Recommendations	the Panel's Recommendations to the Minister of Commerce and Consumer Affairs – Amendments to the Takeovers Code and Related Legislation dated April 2022 (available at: https://www.takeovers.govt.nz/assets/LawReform/Recommendations/Recommendations-to-Minister-Technical-Amendments-April-2022.pdf)
75% Voting Threshold	a component of the shareholder approval required under section 236A(2)(a) of the Companies Act to enable the Court to make an order approving a scheme; this component requires that the scheme be approved by a resolution approved by a majority of 75% of the votes of the shareholders in each interest class entitled to vote and voting on the question
Australian Panel	the Australian Takeovers Panel
City Code	the City Code on Takeovers and Mergers (UK)
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 made under the Code for voting securities and any other financial products to which the offer is required to extend under the Code
Companies Act	the Companies Act 1993
Dominant Ownership Threshold	under a Code offer, when a person (or two or more persons acting jointly or in concert) becomes the holder or controller of 90% or more of the voting rights in the target company
FMA	the Financial Markets Authority
FMCA	the Financial Markets Conduct Act 2013
FMCA Fair Dealing Provisions	has the meaning set out in paragraph 41(b)
Hong Kong Code	the Codes on Takeovers and Mergers and Share Buy-backs (Hong Kong)
IAR	an independent adviser's report on the merits of a proposed transaction
Letter of Intention	a letter from the Panel stating the Panel's intention (on the then-available information and assuming voting thresholds are met) to issue a No-objection Statement, with such letter usually being provided prior to the initial Court hearing in respect of a scheme and in the form set out in Appendix C to the Schemes Guidance Note

No-objection Statement	a statement from the Panel indicating that the Panel has no objection to a scheme under section 236A(2)(b)(ii) of the Companies Act
OIA	the Official Information Act 1982
paper	this consultation paper
Privacy Act	the Privacy Act 2020
scheme	a scheme of arrangement under Part 15 of the Companies Act
Scheme Booklet	in respect of a scheme, the notice of meeting together with its explanatory memorandum or notes, the IAR and any other accompanying materials
Schemes Guidance Note	the Panel's Guidance Note on Schemes of Arrangement dated 19 May 2022
SIA	a scheme implementation agreement or other analogous agreement under which parties agree the terms of a scheme and how it will be implemented
Singapore Code	the Singapore Code on Take-overs and Mergers (Singapore)
Takeovers Act	the Takeovers Act 1993

Introduction

The New Zealand takeovers regime and recent developments in market practice

1 In New Zealand, takeover offers are regulated by the 'rules based' system set out in the Code.[1] Given this rules-based regime, it is appropriate, from time to time, to review the rules of the Code to determine whether they are operating appropriately. This is important to ensure that the Code responds to market developments.

2 As to developments in the New Zealand takeovers market:

(a) The current regime for regulation of changes of control of Code companies has been in place since 2014, when amendments to the Takeovers Act and Companies Act brought in the current regulatory provisions relating to schemes.[2]

(b) Since 2014, the Panel has observed changes in the manner in which public M&A transactions are conducted, including:

(i) a reduction in the use of Code-regulated transactions over time, with a majority of transactions progressing by way of a scheme; and

(ii) SIAs becoming increasingly sophisticated, and in New Zealand, but particularly in Australia, deal protection mechanisms (such as exclusivity provisions) becoming increasingly common.

3 The Panel is of the view that the takeovers market in New Zealand functions well. In particular, the Panel considers schemes to be a legitimate structure to effect changes of control of Code companies.

4 However, the Panel has been considering whether certain changes to the New Zealand takeovers regime might be appropriate. In particular, the Panel wishes to satisfy itself that control change transactions involving Code companies, whether by Code offer or scheme, are conducted in a way that is transparent and equitable. While the scope of this review is relatively wide, the Panel's focus is not on wholesale change – rather, it contemplates adjustments to the current law.

Scope of this consultation

5 This paper relates to whether certain Code rules should be applied directly to schemes and how Panel enforcement powers might work if reform is appropriate.

6 The Panel has prepared this paper (and another related paper) to seek the views of market participants so that the Panel can take these views into account when deciding what (if any) next steps it should take, including whether to make any recommendations for law reform. The Panel expects that the key steps following publication of this paper would be as follows:

(a) The Panel receives and considers submissions. The Panel may then make law reform recommendations to the Minister of Commerce and Consumer Affairs.

[1] This contrasts with jurisdictions such as Australia, where the Australian Panel has a relatively broad and flexible jurisdiction to determine whether there have been 'unacceptable circumstances' in respect of takeover transactions.
[2] While schemes were well established as a transaction structure well before 2014, the current regulatory framework for Code companies, with the Panel's formal engagement in the process, was new.

(b) Assuming the Panel makes law reform recommendations, the process would likely proceed as follows:

(i) MBIE and potentially other Government agencies would analyse the law reform recommendations (this consultation is being undertaken at the initiative of the Takeovers Panel and is not, at present, part of a Government work programme).

(ii) The Minister / Cabinet would decide whether to progress any law reforms.

(iii) Parliamentary Counsel Office would prepare the relevant amending legislation and regulations.

(iv) Amendments to legislation/regulations would be enacted/made in the usual manner.

7 The other related consultation paper, entitled "Deal Protection Devices", considers how deal protection devices might be addressed in schemes and Code offers (it is available here).

Contents of this paper

8 This paper comprises:

(a) A summary of the Panel's background reasoning on this topic and the potential lack of alignment between the regulation of Code offers and schemes (paragraphs 20 – 38).

(b) A discussion of the specific Code rules which might be applied to schemes and the arguments for and against doing so. Specifically:

(i) rule 64 – misleading or deceptive conduct (paragraphs 39 – 46);

(ii) rule 47 and similar – requirement to provide disclosure documents to the Panel (paragraphs 48 – 62);

(iii) rules 21 and 22 and schedules 1 and 2 – disclosure requirements (paragraphs 63 – 75);

(iv) rules 35 – 37 – restrictions on acquisitions and disposals during the scheme period (paragraphs 76 – 85);

(v) rule 25 – conditions (paragraphs 86 – 100); and

(vi) new rules regarding the financing of offers and payment of consideration (paragraphs 101 – 109).

(c) A discussion of the Code rules and Takeovers Act sections which the Panel considers should not be extended to schemes (paragraphs 110 – 116).

(d) A summary of how the Panel's enforcement powers might work if any relevant Code rules are applied to schemes and the legislative changes that this might involve, including how the Panel's role could operate so as to avoid cutting across the Court's role in deciding whether or not to approve schemes (paragraphs 117 – 161).

9 In most cases, the Panel has identified a preferred reform approach and has set out its reasons for this preference. In some cases, the Panel has not identified a preferred option. In any case, the Panel will consider all information and feedback that it receives from this consultation process.

10 A table setting out all questions asked within this consultation can be found at **Schedule 1** to this paper.

Policy objectives

11 The Panel's objectives in considering the proposed amendments mirror the statutory objectives for the Code, as set out in section 20 of the Takeovers Act, namely:

(a) encouraging the efficient allocation of resources;

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

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

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

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

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

Request for comments on this paper

12 The Panel invites submissions on the issues raised in this paper and the proposals identified for addressing those issues.

13 The closing date for submissions on this paper is **Friday, 1 December** 2023.

14 Submissions should be sent by email to the Panel for the attention of:

Rebecca Budd
Law Clerk
rebecca.budd@takeovers.govt.nz

Mark Cunliffe
General Counsel
mark.cunliffe@takeovers.govt.nz

Discussions regarding the proposals

15 If you have any questions in relation to the matters raised in this paper that you would like to discuss prior to making a submission, please feel free to contact the Panel executive at the details above.

The Official Information Act and the Privacy Act

16 Any submissions received by the Panel are subject to the OIA. The Panel may make submissions available upon request under that Act.

17 If any submitter wishes any information in a submission to be withheld, the submission should contain an appropriate request (together with a clear identification of the relevant information to be withheld and the reasons for the request). Where a request is made for disclosure of submissions that the submitter has asked to be withheld, such a request will be considered in accordance with the OIA.

18 The Privacy Act establishes certain principles which apply to the collection, use and disclosure of information about individuals by various agencies, including the Panel. Any personal information you supply to the Panel in the course of making a submission will only be used for the purpose of assisting in the development of policy advice in relation to this consultation.

19 If you do not wish for your name, or any other personal information, to be included in any summary of submissions that the Panel may publish, please clearly indicate this preference in your response.

The Panel's background reasoning

Introduction

20 At present, Code offers and schemes are regulated by separate regimes – schemes under the Companies Act and Code offers under the Code and Takeovers Act. As such, code rules do not apply to schemes. In most cases, the Panel considers that this is appropriate; there are equivalent protections for shareholders in schemes which will promote the policy goals that underpin Code rules, albeit in different ways.

21 However, the Panel's current view is that there are some (relatively limited) areas where policy goals that underpin the Code are not reflected in the current regulation of schemes.

22 The Panel has given consideration as to how this might best be addressed and has reached the preliminary view that there may be benefit in extending a limited number of Code rules to schemes.

23 Critically, however, the Panel considers that any extension of Code rules to schemes should not impose unnecessary regulation (noting that schemes are primarily regulated by the Courts) or unduly compromise the flexibility which schemes provide. Nor does the Panel wish to interfere with the Court's substantive consideration of whether or not to approve a scheme.

24 Rather, the Panel's focus is on working towards optimal alignment of the two regimes to reflect common underlying policy goals and identifying areas where the Panel is best positioned to address issues which might arise in relation to scheme transactions. Accordingly, in general terms, the Code rules which the Panel considers might be extended to schemes relate to the conduct of the scheme process rather than the way a scheme is approved.

The Panel's underlying analysis and approach

Similar commercial outcomes but differing regulation – to be expected

25 The Panel's focus is to ensure that Code-regulated transactions and schemes involving Code companies are conducted in a way that is transparent and equitable. In this regard, the Panel is conscious that:

(a) schemes and Code offers are both mechanisms which may be used to acquire control of a Code company;

(b) schemes are more flexible and can incorporate, for example, restructuring; and

(c) despite the similar commercial effect, schemes and Code offers are regulated in quite different ways.

26 This paper focuses on the question as to whether there are any inappropriate inconsistencies (or potentially gaps) in the regulation of the two structures.

27 The Panel emphasises that:

(a) Differences in the regulation of schemes and Code offers are to be expected given their structural differences. It would not be appropriate to apply Code rules to schemes where there are already appropriate mechanisms which adequately protect the interests of shareholders.

(b) It considers that any additional regulation must not unduly limit the flexibility which schemes can provide. Any changes to regulation should seek to preserve as much flexibility as is reasonably possible with the scheme structure.

Schemes have different protection mechanisms

Role of the target board

28 The role (and negotiating position) of the target board will differ significantly depending on whether a transaction is progressed by scheme or Code offer.

29 Code offers can proceed without the agreement of the target board. This is central to a key trade-off in the Code – the Code's defensive tactics restrictions are designed to stop the board from taking actions which inappropriately prevent an offer being made to shareholders, but the Code also regulates the way in which that offer might be made. In a Code offer, the board *may* be engaged by the offeror, and *may* have the ability to negotiate preferable terms, but a critical part of the Code is preventing the board's ability to block a potential offer.

30 In contrast, a scheme cannot practically proceed without the target company's agreement. This significantly changes the dynamics which boards face. In a scheme, the target board can simply refuse to put a proposed scheme to its shareholders. This will generally afford target boards more opportunity to negotiate than they would have in the case of a takeover offer (subject to the offeror's ability and/or willingness to launch a Code offer instead of progressing a scheme).

Differing structural protections

31 Schemes and Code offers both address shareholder participation and equity, albeit in different ways. Differential consideration and fairness between shareholders is an instructive example:

(a) Under rule 20, the Code restricts any arrangement which would result in differential consideration for same-class securities and the Panel has taken a strict approach in enforcing this rule.

(b) In a scheme, this concern is addressed by interest class composition (whereby any shareholders receiving sufficiently different consideration such that they cannot consult with other shareholders are placed in a separate interest class) and the Court's overarching review of a scheme.

(c) Accordingly, the underlying issue of fair treatment of shareholders is addressed in schemes, but in a different way than in Code offers. In the Panel's view, any further restrictions on equality of consideration unduly risks limiting the beneficial flexibility of schemes. Notwithstanding that rule 20 is a critical rule in the Code, the Panel sees no need for rule 20 to apply to schemes.

32 Similarly, Panel review of disclosures through the No-objection Statement process helps ensure that the disclosure which shareholders are provided with is broadly equivalent between Code offers and schemes.

Conclusions and approach

33 Accordingly, in most of the critical ways, the Panel considers that schemes and Code offers provide an analogous level of protection to Code offers.[3]

34 The focus of this paper is whether there are any inappropriate inconsistencies (or gaps) in how change of control transactions are regulated which mean that schemes do not provide shareholders with equivalent

[3] As to whether there are any differences in voting and acceptance thresholds for Code offers and schemes, please see the discussion at paragraphs 112 - 114(a) below.

levels of transparency and equity (i.e., fairness towards shareholders, target companies and offerors) as compared to Code offers and, if so, whether regulatory change is appropriate.

Schemes' flexibility is a benefit and should not be unnecessarily limited

35 One of the key benefits of schemes is that they provide flexibility which allows transactions to take place that would not normally be possible under a Code offer. Examples include:

(a) The 2019 acquisition of Westland Co-operative Dairy Company Limited by Hongkong Jingang Trade Holdings Co., Limited, where consideration for dairy farmer shareholders included both a cash component and a commitment to collect their milk at a certain price (the milk collection commitment would have likely been impossible under a Code offer other than by creation of a special purpose security instrument).[4]

(b) The 2022 acquisition of Z Energy Limited by Ampol Limited, where the use of a scheme allowed the parties time to obtain Commerce Commission approval that would have been very difficult to achieve within the timing rules for Code offers.

(c) The 2023 acquisition of Pushpay Holdings Limited, where use of a scheme enabled the bidder to make a second offer at a higher price to all shareholders except for a small group of event-driven arbitrage funds (who received the consideration offered in the initial bid and voted in a separate interest class).

36 Constraining schemes with the same level of prescription as applies to Code offers would undermine this flexibility and deprive shareholders of the benefits which it might provide.

37 Proceeding on this basis, the Panel's current view is that the policy principles of transparency and equity may be given effect to in differing degrees in schemes and Code offers. However, the Panel is keen to hear from market participants on this matter.

Resulting approach in this paper

38 Further to the reasoning above, the Panel has set out in this paper:

(a) a subject-by-subject analysis of the Code rules which the Panel thinks **might** appropriately apply to schemes (i.e., rules that the Panel considers should arguably be applied to schemes) – while the Panel's focus is ultimately on alignment of principles, the Panel considers that a rule-by-rule analysis is the best way to check the practical differences between the regimes;

(b) a summary analysis of the Code rules and Takeovers Act sections which the Panel considers should not be applied to schemes; and

(c) a summary of how the Panel's enforcement powers might work if any relevant Code rules are applied to schemes and the legislative changes that this might involve – in particular, the Panel has focused on how to ensure that any enforcement action by the Panel would avoid cutting across the Court's jurisdiction for approval of schemes.

[4] See https://www.takeovers.govt.nz/transactions/transactions-register/westland/ for more information.

Code rules which might be applied to schemes

Rule 64

Problem identification

Current position

39 Rule 64 prohibits misleading or deceptive conduct in relation to Code offers and other Code-regulated transactions. The Panel actively monitors compliance with rule 64 by the offeror, target, shareholders and any other person commenting on the transaction. Generally, the Panel's practice is to initially engage with the relevant party when there is a potential breach of rule 64. However, where this does not bring about compliance with rule 64, the Panel may exercise its enforcement powers. Further, if misleading or deceptive conduct is identified after completion of a Code offer, the Panel may also exercise its enforcement powers at that stage.

40 Rule 64 does not apply to schemes. This is because schemes are not a "transaction or event that is regulated by" the Code[5] and the Code does not apply where the Court has made final orders in relation to a scheme.[6]

41 Misleading or deceptive conduct is still, however, regulated in relation to schemes in other ways:

(a) When the Panel considers whether to provide a Letter of Intention or No-objection Statement it will consider whether the disclosures provided to shareholders are misleading or deceptive.

(b) There is 'direct' regulatory restriction on such conduct under Part 2 of the FMCA (the **FMCA Fair Dealing Provisions**). The FMCA Fair Dealing Provisions prohibit, amongst other matters:

(i) in trade, persons from engaging in conduct relating to financial products or services that is or may:

(A) be misleading or deceptive;[7] or

(B) amount to an unsubstantiated representation;[8] and

(ii) persons from engaging in conduct that is misleading or deceptive or likely to mislead or deceive in relation to any dealing in quoted financial products.[9]

Any breach of the FMCA Fair Dealing Provisions may lead to civil liability.[10] Remedies include a declaration of contravention, a pecuniary penalty order, a compensatory order and/or a civil liability order.[11]

(c) The FMCA also prohibits the making of false or misleading statements or the dissemination of information that:[12]

(i) the person responsible knows or ought to know is false or materially misleading; and

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[5] Nor are schemes transactions or events "likely to be regulated by" the Code (see rule 64(2)).
[6] See section 236B of the Companies Act and section 23A of the Takeovers Act.
[7] Section 19(1) of the FMCA.
[8] Section 23.
[9] Section 19(2).
[10] See subpart 3 of Part 8 of the FMCA.
[11] See sections 486, 489, 494 and 497, respectively.
[12] Section 262.

(ii) is likely to have certain consequences, including inducing a person to exercise a voting right in a particular way.

(d) Further, the FMA may bring criminal charges against a person if the person knows the statement made or information disseminated was false in a material respect or materially misleading.[13] If the FMA is satisfied that a person has contravened or is likely to contravene the prohibition set out at paragraph 41(b) above, it may also make a direction order.[14]

42 At a high level, there is no 'gap'. Misleading or deceptive conduct in a public change of control transaction is regulated in both Code and scheme transaction structures.

Issues with the currently regulatory approach

43 Although the current approach does not leave a 'gap' in the regulation of schemes, the Panel has considered whether the inconsistencies in the current approach between Code offers and schemes are appropriate:

(a) *Lack of a rational basis for different regulation:* Ultimately, schemes and Code offers are alternative means of achieving the same outcome. The Panel considers that shareholders would not expect rules governing disclosure in schemes to apply a different standard. Yet, there are differences in how disclosure is regulated:

(i) In a scheme context, for a statement to be subject to regulation under the FMCA Fair Dealing Provisions, it would have to be made by a person "in trade" where the target is unlisted, whereas in a takeover, all relevant statements are regulated by rule 64, regardless of whether they are made by a person "in trade" or not. The requirement for comments in respect of an unlisted target to be "in trade" to be subject to the FMCA can therefore exclude from regulation any public (or widely disseminated) comments made by shareholders on a scheme where those persons are not "in trade", yet such statements would be regulated in a takeover.

(ii) In a scheme context, there is a restriction on unsubstantiated representations. The lack of a restriction on unsubstantiated representations in Code offers is an issue on which the Panel has recently consulted (available here). When the Panel published the consultation document it was not sure whether reform would be appropriate, wishing to hear the views of a broad range of market participants before deciding on a preferred option for reform. The feedback received by the Panel led it to conclude that it would be preferable to retain the status quo and not amend the Code to include a restriction of this type. The rationale for not recommending a restriction on unsubstantiated statements included that:

(A) rule 64 addresses the key concern (misleading or deceptive conduct) whereas a restriction on unsubstantiated representations may create liability in respect of statements that were not misleading or deceptive;

(B) a restriction of this type could create difficulties with honest expressions of opinion, which are common and important in contested takeover situations where there are often different perspectives;

[13] Section 264.
[14] Section 468.

(C) a restriction on unsubstantiated statements would increase the scope for disputes and create uncertainty around the required level of due diligence and verification (both of which are difficult in a time pressured transaction such as a takeover); and

(D) associated increased compliance costs which did not outweigh uncertain benefits given the fact that any conduct which is misleading or deceptive is regulated.

(iii) The maximum pecuniary penalties differ – in a scheme context, a penalty can equal up to three times the amount of the gain made or loss avoided, whereas penalties in a Code offer are limited to a maximum sum of $5 million.

(b) *Lack of clarity as to which restriction applies and when:* Code offers and schemes are structures used to achieve a commercial outcome. If the transaction structure that an offeror will use is initially uncertain (or changes) this introduces uncertainty in relation to the regulatory standards (and remedies) which apply.[15] In the Panel's view, this introduces unnecessary uncertainty and complexities to addressing conduct which relates to the same commercial outcome. The issue could become more pronounced should a "dual track" offer be made in New Zealand. Dual track offers involve an offeror making a takeover offer and proposing a scheme at the same time. They have been used in several recent prominent Australian transactions and may, at some stage, appear in the New Zealand market.

(c) *Potential inefficiency and delays in addressing issues intra-transaction:* The Panel actively monitors schemes including for potential misleading or deceptive conduct. It is also familiar with the schemes process, giving it institutional knowledge and familiarity in relation to any issues that might arise during a transaction. While the FMA is a well-staffed organisation with deep knowledge of financial markets law and prosecutorial experience, there would necessarily be a delay in it addressing misleading or deceptive conduct as FMA personnel would likely not be as familiar with the background facts as the Panel staff would be. The Panel considers that prompt correction of misleading information is desirable to allow shareholders to decide on the merits of the offer themselves. However, this concern should not be overstated as the Panel and the FMA operate under a memorandum of understanding and if the FMA's assistance is required the Panel is confident that it would be addressed by the FMA as a priority matter. The Panel expects that any delay in practice would arise simply because of the logistical exercise of involving an additional group of personnel.

44 There is the further question as to whether, if rule 64 is applied to schemes, the relevant portions of the FMCA should continue to apply to schemes (i.e., there would be 'dual' regulation).[16] In the Panel's view, there are two options:

(a) **Dual Regulatory Approach:** Under this approach, the FMCA would continue to apply to schemes in addition to rule 64. If this approach is adopted, the Panel also considers that it would be important to make several further amendments to the FMCA and the Takeovers Act to ensure that the two regimes did not inappropriately overlap or conflict. Specifically:

(i) the FMCA and the Takeovers Act should be amended so that pecuniary penalties cannot be imposed under both the FMCA and the Takeovers Act for the same conduct;

[15] As to practical examples, the Panel is aware of some transactions which, during negotiations, changed from a scheme to a Code offer. Taking this a step further, some Australian transactions have adopted a "dual track" process where an offeror has undertaken a scheme and a takeover offer simultaneously for the same target company.

[16] For clarity, if a scheme involves the offer of scrip consideration, Part 3 of the FMCA should apply to the offer of financial products (as it does where scrip consideration is offered in a Code offer).

(ii) the Takeovers Act should be amended so that the Panel cannot make a compliance order under section 33AA of the Takeovers Act which conflicts with a direction order issued by the FMA under section 468 of the FMCA (and vice-versa); and

(iii) the FMCA should be amended so that the restriction on unsubstantiated representations does not apply in relation to schemes (see paragraph 43(a)(ii)).

(b) **Single Regulatory Approach:** The FMCA could be amended so that the FMCA Fair Dealing Provisions do not apply where the Code applies. If this approach were to be followed, the Panel expects that it would be effected by extending section 32(1) of the FMCA, which currently provides that the FMCA Fair Dealing Provisions do not apply to 'takeover offers' to the extent the conduct is regulated by the Code.

45 As to the appropriate approach, the Panel is conscious of a number of relevant factors:

(a) It might be more efficient for market participants to only have to deal with one regime and regulator in relation to the same misleading or deceptive conduct. However, this concern may not be as material as it is possible for the same conduct to result in more than one legal consequence.

(b) The remedies under the FMCA and the Takeovers Act differ. However, the Panel is currently undertaking an exercise to assess whether its penalty regime is appropriate and any 'gaps' in the Panel's powers or sanctions as compared against the FMCA's penalty regime might be closed as part of this review.

(c) The FMA is also a well-resourced regulator which has a record of successfully pursuing breaches of the FMCA and has a particularly deep experience in prosecuting matters such as pecuniary penalty proceedings.

(d) If the Single Regulatory Approach is adopted, it might be difficult to determine when the Code would apply instead of the FMCA.

Conclusions

46 The Panel's preferred approach is to apply rule 64 to schemes:

(a) Reform would address the issues outlined above. It would provide more clarity and consistency in the regulation of misleading or deceptive conduct in change of control transactions. This approach would be simpler and more efficient than the current regulatory regime including by providing a uniform standard and removing delays in enforcement which might result from engaging additional regulators.

(b) Reform would not create new or additional obligations on market participants. The Panel expects that this would not require material changes to the schemes process given the standards that currently apply under the FMCA. Rather, reform would:

(i) assist in ensuring that the holders of financial products are provided equivalent levels of protection in respect of the information provided under the Code and in a scheme; and

(ii) maintain a proper relation between the costs of compliance with the Code and a scheme of arrangement and the benefits resulting from them.

47 If rule 64 is applied to schemes, the Panel is uncertain whether the Single Regulatory Approach or Dual Regulatory Approach would be preferable. The Panel would appreciate the market's views on this point.

Questions: Rule 64	
1	Do you favour applying rule 64 to schemes? Please give reasons.
2	What problems or benefits are there with applying rule 64 to schemes that are not identified in this paper?
3	If rule 64 is applied to schemes, do you prefer the Single Regulatory Approach or the Dual Regulatory Approach? Alternatively, is there a better option? Please give reasons.
4	If the Dual Regulatory Approach is adopted, are there any other changes which should be made to avoid the potential for conflict between the two regimes?

Requirement to provide disclosure documents to the Panel

Problem identification

Active monitoring of transactions

48 The Panel monitors transactions in real time. The Panel considers that such active monitoring is critical in public transactions – it allows issues (particularly regarding disclosure) to be addressed intra-transaction so that shareholders are able to determine whether transactions should proceed or not, and can do so with the benefit of appropriate information. It also helps avoid the difficulties of establishing appropriate remedies for deficient disclosure after completion of a transaction.

49 These imperatives are reflected in the speed with which a section 32 meeting can be held and the nature of the Panel's powers under the Takeovers Act, which are primarily focused on addressing issues intra-transaction.

Provision of information to the Panel in respect of Code offers

50 To facilitate the Panel's active monitoring of Code offers, rules 41 to 48 of the Code require:

(a) the offeror and target company to provide the Panel (amongst other parties) with relevant documents at the same time as they are provided to shareholders; and

(b) any person to provide the Panel with any statements or information relating to an offer or takeover notice that is published or sent to offerees by an offeror or target company, that may not already be required to be provided by the Code.

51 This allows the Panel to consider whether issues requiring Panel intervention have arisen in real time (rather than relying on complaints being made) and keeps the Panel apprised of the full public discourse so it can understand the context of issues which arise and address them expeditiously.

Provision of information in relation to schemes

52 The Panel's role in relation to schemes is to assist the Court. Primarily, this is done through its consideration of whether or not to issue a No-objection Statement.

53 Disclosure is a critical issue which the Panel will consider in this regard. In deciding whether to issue a No-objection Statement, the Panel will consider various factors, including:[17]

(a) whether all material information relating to the scheme has been disclosed to shareholders; and

(b) whether disclosure to shareholders is of the standard that would be required by the Code in a Code-regulated transaction (or is otherwise appropriate in the circumstances).

54 Accordingly, the Panel considers it important that it receives all relevant information to have a full understanding of what has been provided to shareholders in the same way as it would in a takeover.

55 In terms of requirements to provide information to the Panel, the Companies Act requires a Code company in a scheme to give notice to the Panel of its application to the Court when it is filed. There are no other legal obligations to provide information to the Panel. For example:

(a) a scheme applicant is not required to provide final copies of its Scheme Booklet or other shareholder communications to the Panel; and

(b) there is no requirement on third parties to provide the Panel with copies of communications to shareholders in relation to a scheme.

56 While this information may be provided as a matter of practice, there is no legal obligation to do so.

57 This issue could become more acute if rule 64 is extended to schemes. If that were to occur, the Panel would be the body responsible for regulating misleading or deceptive conduct during a scheme, but would have no direct regulatory jurisdiction to require that it receive key materials.

What information should be provided to the Panel?

58 The Code rules for document provision would need to be modified in order to apply them to schemes, as transaction documents differ. The table below sets out the key documents which are provided to the Panel in a Code offer and the equivalent documents which might be required to be provided in a scheme:

Rule	Code offer document to provide to Panel	Scheme-equivalent document	Notes
41	Takeover notice	SIA and any accompanying announcement	Execution of the SIA is generally the first concrete step towards a transaction. Announcement of an SIA generally acts as a 'notice' to the market of a transaction which will be put to shareholders.
42A	Class notice	N/A	As a scheme must be agreed, the offeror should not need to be given notice of equity securities in the target.
44	Offer document	Scheme Booklet	

[17] See *Guidance Note on Schemes of Arrangement* (19 May 2022) at 2.24.

Rule	Code offer document to provide to Panel	Scheme-equivalent document	Notes
45	Despatch notice		A Scheme Booklet is broadly equivalent to a combined offer document, target company statement and IAR. A despatch notice from the offeror should not be required as the target sends shareholder communications itself.
46	Target company statement and IAR		
47	Other documents that must be sent to Panel or that Panel may require[18]	Any communications with shareholders, call scripts, etc.	The Panel expects this should be applied directly to schemes.
48	Notification of altered offer document	Amendments to SIA	This is essentially a direct transposition.

59 The Panel notes, however, that while schemes are often used in change of control transactions, they may also be used to effect different arrangements, such as the redomiciling, restructuring or demerger of a Code company. In these instances, it may not be appropriate to produce all of the documents/information identified above. In such cases, the Panel considers that it could waive the requirement to provide relevant documents.

Conclusions

60 The Panel considers that the Code should be amended to require provision of the following documents/information to the Panel at the following times (unless waived by the Panel):

(a) SIA and any related documents (e.g., Deed Poll) and amendments to any of them – when executed;

(b) copies of any papers filed with the Court – on filing;

(c) Scheme Booklet and any amendments to it – when sent to shareholders; and

(d) other communications to shareholders – when sent.

61 As with current practice, the Panel does not consider there should be a requirement to provide draft documents to the Panel, but intends to continue its current practice of being available to review draft documents.

62 The Panel prefers this approach as:

(a) While the Court is suited for substantive approvals for schemes, the Panel is likely better placed to actively monitor live transactions (including schemes) and requiring transaction documents to be provided would assist the Panel to do this effectively.

[18] Note that in the 2022 Recommendations the Panel recommended amendment of rule 47(4) of the Code to clarify that communications to non-retail shareholders will not be required to be provided to the Panel and call scripts are to be provided to the Panel and the other party. As at the date of this paper, these amendments to the Code have not been made. However, the Panel considers that its recommended amendments to rule 47(4) would also apply to schemes.

(b) If rule 64 is extended to schemes, a requirement to provide documents to the Panel will be necessary to enable the Panel to enforce the prohibition on misleading or deceptive disclosure.

(c) This change would not impact the relationship between the costs of compliance with the Code and a scheme of arrangement and the benefits resulting from them on the basis of market participants' typical engagement with the Panel in a scheme.

Questions: Requirement to provide disclosure documents to the Panel	
5	Do you agree that there should be an obligation to provide scheme documents and information to the Panel? Please give reasons (if different to those set out above).
6	Do you agree with the proposed documents and information to be provided to the Panel? Are there any other documents or information which should be required to be provided, or are there any which should not be required to be provided?

Disclosures required to be made to shareholders in a scheme

Problem identification

Introduction

63 Disclosure is critical in both Code offers and schemes. Effective disclosure is required so all shareholders have informed opportunities to participate in takeovers and ultimately decide for themselves the merits of a Code offer or a scheme.

64 While the Panel does not perceive a deficiency in the disclosures which have been provided in relation to schemes to date, the Panel is conscious that disclosure failures in schemes and Code offers have different consequences. In short, because schemes lack prescriptive disclosure requirements, there could be quite different outcomes for disclosure issues in a scheme compared to a Code offer. The Panel seeks feedback on whether the position should be made more consistent to better reflect the principles of equity and transparency in schemes.

65 As to the prescribed disclosure requirements in a Code offer, the Panel thinks they can be summarised as follows (their scheme counterparts have also been included):

(a) the obligations to provide a takeover notice, offer document, target company statement and associated notices under rules 41, 41A, 43 and 44-47 (analogous to the entry into a SIA and a Scheme Booklet);

(b) the obligation to give notice of any alterations or additions to the offer document under rule 28 (analogous to amendments to an SIA or other scheme document, or supplements to a Scheme Booklet);

(c) the disclosures required within a takeover notice, offer document and target company statement by Schedules 1 and 2 (broadly analogous to information set out in a Scheme Booklet); and

(d) the obligation to provide an IAR under rule 21 and, if applicable, a rule 22 report (analogous reports are generally provided in relation to schemes, albeit that in the case of a scheme, the same independent adviser will usually prepare both reports if both are required),

(together, the **Relevant Disclosures**).[19]

Disclosure in a Code offer

66 In a Code offer, in practice, all disclosures are customarily provided to the Panel executive in draft. The Panel executive will (on a without prejudice basis) confirm it has no further comments on the draft disclosures once it reaches this level of satisfaction. Where issues cannot be resolved, they may be escalated to the Panel.

67 This process is informed by the disclosure obligations in the Code in conjunction with the enforcement provisions in the Takeovers Act. Together, they provide a way to enforce disclosure requirements and obtain remedies where appropriate. To highlight some key details:

(a) There are specific disclosures which must be made. There is little room for debate about materiality (except in relation to remedy). In practice, this avoids arguments regarding whether the document as a whole was misleading or deceptive.

(b) There is effectively strict liability for disclosure breaches. Liability generally does not depend on negligence or intent (these will generally only act as aggravating or mitigating circumstances).

(c) Intra-transaction, the Panel has powers (which can be exercised rapidly) to compel corrective statements.

(d) A pecuniary penalty may be imposed for a contravention of the Code.[20] This is critical for prompt enforcement of disclosure issues as it allows a sanction to be imposed without the difficulty of having to measure loss (or gain) and prove causation. A pecuniary penalty can also seek to reflect the general market damage which can arise from poor disclosure.

(e) The Panel can function as a central body for enforcement purposes. This is important as individual shareholders may not have the resources to take action in respect of disclosure issues (or it might be uneconomic to do so).

(f) There is an added layer of personal liability on directors and senior officers of the offeror and target company as a result of having to certify their respective disclosures. Such persons may be liable on conviction to a fine of up to $300,000.[21]

(g) If disclosure issues are not identified and addressed intra-transaction, there is still an effective remedy after completion.

68 Accordingly, Code disclosure requirements and the related enforcement mechanisms are beneficial for protecting market integrity and providing remedies in cases of a breach.

[19] The Panel has previously recommended amendments be made to disclosure rules in relation to funding for Code offers. Accordingly, the Relevant Disclosures include any amendments to the disclosures as a result of the 2022 Recommendations.
[20] Section 33E of the Takeovers Act.
[21] Sections 44B and 44C. Liability for fines may only be incurred where other elements of the offences set out in these sections are established.

Disclosure in schemes

69 Disclosures equivalent to Schedules 1 and 2 of the Code have, to date, been included in all Scheme Booklets.[22] The Panel's guidance is that it expects "Code equivalent disclosure" (or a satisfactory explanation as to why it is not necessary) before the Panel provides a No-objection Statement. Where disclosures are incorrect, the FMCA Fair Dealing Provisions are likely to apply to such information, which, amongst other matters, may lead to civil liability (including pecuniary penalties) under Subpart 3 of Part 8 of the FMCA.[23]

70 However, after a scheme completes, there is no direct consequence or remedy for any missing Code-equivalent disclosures. To explain further:

(a) If a Scheme Booklet does not contain relevant information, that may make the Scheme Booklet misleading and in breach of the FMCA Fair Dealing Provisions (or rule 64 if this rule is extended to schemes). However, to establish a breach under the FMCA Fair Dealing Provisions, it would also need to be shown that the document *was* (or was likely to be) misleading (rather than that it merely lacked certain disclosures). This type of further evidential hurdle can significantly complicate non-disclosure proceedings.

(b) To a degree, this issue could be addressed by the Panel declining to issue a No-objection Statement unless a Scheme Booklet contains 'negative' disclosures – e.g., that except as disclosed, the offeror does not have any relevant interests in the target.[24] However:

(i) Refusal to provide a No-objection Statement is a blunt instrument and it may not always be appropriate to withhold one where there are disputes over disclosures.

(ii) This approach depends on the Panel's review. The Panel considers market participants should be primarily responsible for ensuring appropriate disclosure.

(c) Although shareholders might have claims for negligent misstatement where a party to a transaction fails to make certain disclosures, this would be a novel claim. Further, there would be complex questions of causation and quantification of loss complicating such proceedings. This contrasts with the relative simplicity of a pecuniary penalty.

(d) Although a claim of misleading the Court might be available where disclosure is not made or is inaccurate, such a claim would likely require an element of intention which could be difficult to establish.

(e) Finally, it is not clear why omissions from standard disclosure should be treated differently depending on transaction structure. At the most basic level, if disclosure of information is important, it should be required. The starting point should be fulsome and appropriate disclosure. If parties consider that certain disclosures are genuinely unnecessary, they can still seek relief on a case-by-case basis.

[22] There are some exceptions, such as the omission of director certifications, which required a complicated delineation of what information the "offeror" directors were certifying and what information the "target" directors were certifying.
[23] The Panel notes that if, as suggested in this paper at paragraphs 39 – 46, rule 64 is applied to schemes, then similar remedies (albeit with different penalties) would apply under the Code and Takeovers Act.
[24] The Code currently requires a statement of this type to be included in a takeover notice and offer document – see clause 6(2) of Schedule 1 to the Code. The statement must state that "except for those persons who are [disclosed as holding or controlling] equity securities of the target company, no [specified person – generally the offeror, its associates and their directors] holds or controls equity securities of the target company."

Possible reform

71 The possible reform would require the Relevant Disclosures in schemes, excluding certain disclosures which would only apply to takeover offers.[25] As to the review of drafts, the Panel is conscious that it may not be practical to require review of drafts of certain documents such as SIAs as they are being negotiated; rather, the Panel has in the past answered specific questions of parties who are negotiating transaction documents and, at times, reviewed drafts of documents such as voting agreements. The Panel considers this generally works well and does not see a need to change this practice so as to require submission of drafts.

72 In the Panel's view, if such a reform were made, the key question would be how to retain sufficient flexibility to address novel schemes (including where schemes are used for transactions such as redomiciling, demergers and corporate restructurings):

(a) At a minimum, the Panel considers it should have the ability to grant relief from any disclosure requirements which are wholly unnecessary, not applicable or otherwise superfluous through its exemption power.

(b) An alternative could be to allow the Panel to permit omissions from disclosure obligations by notice (essentially a less formal version of exemption relief).[26]

Conclusions

73 The Panel's current view is that reform would, on balance, be preferable.

74 However, the Panel's view is predicated on the assessment that there would not be a significant reduction in flexibility or increase in costs for schemes. The Panel notes that in some instances the need to obtain a notice permitting the omission of certain disclosures will introduce additional costs for some scheme parties. However, the Panel's inclination is that these costs would not be significant, the benefits of the reform would outweigh the potential for additional costs, and permitting omissions by notice (as opposed to by exemption) would maintain sufficient flexibility for offerors and target boards.

75 The Panel's reasoning is that it generally requires all equivalent disclosures to be made in order to issue a No-objection Statement. This suggests that reform prescribing these disclosures should not provide much additional work for market participants unless the scheme has unusual characteristics. However, the Panel is keen to get the market's views on this point.

Questions: Disclosures required to be made to shareholders in a scheme	
7	Do you favour requiring the Relevant Disclosures in schemes? Please give reasons.
8	If Relevant Disclosures were required for schemes, do you think that the Panel should have the ability to waive disclosure requirements by notice rather than by a formal exemption? Would either provide sufficient flexibility?
9	Do you agree with the proposed required disclosures? If not, what should (or should not) be required?

[25] The Panel sees clauses 9(2) and 19 of schedule 1, and clauses 19A(2) and 26 of schedule 2, as falling into this category.
[26] This has precedent in the Code – under rule 39(c), certain actions which might otherwise be prohibited defensive tactics are permissible with the prior approval of the Panel.

Disposals or acquisitions during the scheme period

Problem identification

Disposals and acquisitions in a Code offer

76 In Code offers, the offeror and its associates are restricted from selling or acquiring shares in a target during the offer period:

(a) *Dispositions:* Under rule 35, an offeror and its associates are prohibited from disposing of any securities in the target other than to the offeror or to another offeror making a separate Code offer.

(b) *Acquisitions:* Under rule 36, the offeror and its associates are prohibited from acquiring any securities in the target other than under the offer unless (among other requirements) certain notices are given and, where the offer remains conditional, the offeror does not acquire more than 20% of the voting rights in the target. Critically, under rule 37, if the consideration for the non-offer acquisition exceeds the offer consideration, the offer will be deemed to be increased to the amount of the non-offer acquisition.

77 These rules support the Code's objectives of ensuring that all shareholders are treated fairly (by not receiving a preference over shareholders that accept the offer) and recognising that shareholders must ultimately decide for themselves the merits of a takeover offer (by allowing shareholders to sell at less than the offer price should they wish). They also help to prevent offerors from circumventing rule 20 of the Code (same terms and consideration) by paying a premium to some shareholders but not others. Finally, they prevent other mischief that might occur during a Code offer (e.g., an offeror selling down their shareholding to avoid meeting minimum acceptance conditions).

Disposals and acquisitions in a scheme

78 An offeror in a scheme might cause mischief analogous to that which can be caused in a takeover by acquiring or disposing of shares before the shareholder vote.

79 For example:

(a) After the announcement of a scheme, the offeror and/or its associates may dispose of shares they hold in the target to a non-associate at a price lower than the scheme consideration. This might occur if the offeror is concerned that the main interest class may vote against a scheme resolution. By doing this, the offeror effectively "obtains" votes in the main interest class by selling shares on market (therefore anonymously) at a discount to the scheme consideration, knowing that the only likely purchasers are persons looking for an arbitrage opportunity to vote in favour of the scheme. For a cost, the offer would therefore "shift" votes from the offeror's separate interest class to the main interest class, increasing the chance that the main interest class approves the resolution.

(b) Say a scheme was proposed with the following dynamics:

(i) The scheme consideration was $10 per share, with the offeror holding a 10% pre-bid stake and the shareholders other than the offeror (the **Independent Shareholders**) holding 90%.

(ii) Several institutional shareholders holding a total of 5% of the voting rights made a public statement that they would vote against the scheme unless the consideration was increased by $1 or more and that they reserved their right to sell their shares ahead of the vote (the **Swing Institutions**).

(iii) An analysis of proxy votes and statements of intention shortly before the vote indicated that a total of 70% of *all* shares would be voted. The anticipated levels of voting would be:

(A) an offeror interest class holding 10% of voting rights (with the offeror having committed to vote all of its shares in favour of the scheme in accordance with usual practice);

(B) an Independent Shareholder interest class in which 60% of all votes would be cast (including the Swing Institutions); and

(C) a group comprising 30% of all votes which would not be cast.

(iv) As to voting within the Independent Shareholder interest class, the proxy votes and statements of intention indicated that:

(A) 43.8% of all votes would be cast in favour of the scheme (i.e., a 'yes' vote of 73%, insufficient to meet the 75% Voting Threshold); and

(B) 16.2% of all votes would be cast against the scheme (i.e., a 'no' vote of 27%, sufficient to prevent the 75% Voting Threshold being met) – note that this includes the Swing Institutions.

Accordingly, on the above numbers, the scheme would be defeated. However, if the Swing Institutions sold their shares to the offeror for their required price of $11, the Independent Shareholder interest class would reduce in size to 55% of all shares, as the Swing Institutions' shares would now be held by the offeror and voted within the offeror interest class. As to the expected voting in this scenario:

(v) 43.8% of all votes would again be cast in favour of the scheme (i.e., a 'yes' vote of 79.6%, meeting the 75% Voting Threshold); and

(vi) as a result of the Swing Institutions having sold their shares and not voting against the scheme, only 11.2% of all votes would be cast against the scheme (i.e., a 'no' vote of 20.4%, being insufficient to prevent the 75% Voting Threshold being met).

In summary, therefore, the offeror could purchase the Swing Institutions' shares at the higher price (i.e., $11), channelling additional consideration to those shareholders and significantly increasing the chances of the scheme succeeding.

80 At present, the Panel seeks to manage the issues noted above in the following ways:

(a) In order to obtain a No-objection Statement, the Panel will require offerors to sign a Deed Poll, enforceable by the Panel, that commits the offeror to continue to hold their shares and to vote them in favour of the scheme.[27] However, there is no equivalent to the Deed Poll in the case of an offeror *acquiring* shares.

(b) Should acquisitions or dispositions of shares occur during a scheme which would not be permitted under a Code offer, the Panel may withhold a No-objection Statement or make submissions to the Court.

81 Additionally, oversight comes from disclosure of the offeror's shareholding in affidavits filed with Court. This should mean that any manipulation of the type described above will be considered by the Court in its consideration of the scheme. As such, tactics of this type risk the Court not sanctioning the scheme. These

[27] This requirement is set out in the Schemes Guidance Note at paragraphs 5.11 – 5.12.

issues would likely be particularly pronounced where the offeror's actual position was not disclosed in the scheme booklet.

Limitations of the current approach

82 The key limitations of the current approach are that:

(a) Where changes occur late in a process, they will not be included in a scheme booklet and may not be adequately drawn to shareholders' attention.

(b) There is no direct legal restriction on acquisitions or dispositions during a scheme. This could be problematic:

(i) After a scheme completes, there would be no clear remedy for this type of conduct. Accordingly, if the Panel discovers at a later stage that such an acquisition did occur, it would be difficult for the Panel to meaningfully address it.

(ii) The requirement for a Deed Poll could be avoided by a scheme participant if they did not seek a No-objection Statement.

83 The Panel could potentially further develop the current Deed Poll / No-objection Statement process by introducing a policy that offerors sign an equivalent to the Deed Poll that restricts acquisitions. However, the Panel considers that this approach risks stretching the No-objection Statement process to cover an issue which could be better dealt with by direct regulation.

Possible reform

84 The potential reform identified to address these issues is the extension of the Code rules for acquisitions and disposals to schemes during the period from signing the SIA until completion of the scheme or when the scheme is terminated in accordance with its terms (the **Scheme Period**). Largely, this would formalise current practice.

Conclusions

85 The Panel currently favours the reform described above. The Panel's reasoning is:

(a) While the current Deed Poll practice provides a fair degree of the relevant protection, the Panel thinks that if this is an important issue, it is better regulated directly. The Panel is conscious of over-extending the ambit of the No-objection Statement process to cover a wide variety of issues which schemes might present. Put shortly, if this is effectively a rule, it is preferable to formalise it as such.

(b) There would be a clear penalty and/or remedy for acquisitions or disposals that occur during the Scheme Period in a way that could cause harm to shareholders. The limitations of the current Deed Poll / No-objection Statement would fall away.

(c) This reform would not require major changes to current schemes practices. This option formalises the requirements of the Deed Poll and the Panel's understanding of current market practice.

Questions: Disposals or acquisitions during the Scheme Period	
10	Do you agree with applying the Code rules on acquisitions and disposals to schemes? Please give reasons.

Questions: Disposals or acquisitions during the Scheme Period	
11	Are there any problems or benefits with either the current approach or the proposed reform that are not identified in this paper?

Conditions

Problem identification

Code rules relating to conditions

86 In a Code offer, there are three key restrictions on the conditions to which an offer may be subject and when any conditions may be relied on. Specifically:

(a) Any condition to an offer must not be within the control of the offeror (rule 25(1)). This restricts the form of the condition itself (i.e., it would be a breach of the Code for an offer to contain a condition of this type even if it was not relied upon).

(b) As to the ability to rely on a condition:

(i) an offeror cannot unreasonably rely on a condition of the offer;[28] and

(ii) an offeror cannot rely on a condition that restricts the target's activities in the ordinary course of business.[29]

87 The Panel's role in a Code takeover includes the power to convene a section 32 meeting to consider whether an offeror is attempting to rely on a condition in a potentially unreasonable way. The Panel's inquiry would not be whether the condition itself was unreasonable (or possibly even whether it had been breached) – the focus would be whether in the particular circumstances it would be reasonable to rely on the condition.

88 If the Panel determined that an offeror was unreasonably relying on a condition of the offer, the Panel has the power to make temporary orders in relation to the matter. Any permanent orders would likely require an application to the Court. A Court would also ultimately need to rule on whether or not a condition has been triggered – such contractual matters are outside of the Panel's jurisdiction.

89 Accordingly, the Panel's role would likely be to provide a rapid answer to a basic question as to whether the condition could be relied on in the particular circumstances of the takeover, providing an increased degree of certainty for parties at an early stage (but not a final determination).

Rationale for approach to conditions

90 The Code rules in relation to conditions are informed by several considerations:

(a) *Lack of negotiating leverage:* The disparate shareholder base of Code companies means that most shareholders will have no opportunity to negotiate conditions or will lack the leverage to do so effectively. Further, in an unsolicited offer the target board will not have the opportunity to negotiate on

[28] Rule 25(1A)(a) of the Code.
[29] Rule 25(1A)(b).

behalf of shareholders (and the possibility of an unsolicited offer reduces the target board's negotiating leverage).

(b) *Undue interference with target's business:* Conditions which prevent the target from carrying on business in the ordinary course can be problematic – absent a restriction on conditions of this type, targets would be at risk of having their business activities restricted for the duration of an offer period. Particularly in the case of an unsolicited offer, this could cause undue interference with the target's business.[30]

(c) *Promotion of transparency:* The target's shares will commonly be actively traded when an offer is announced and throughout the offer period. For the market to operate efficiently, it is desirable to have a degree of transparency to enable the market to assess whether the transaction may or may not fail due to the non-fulfilment of one or more conditions. Limiting the conditions to which an offer may be subject promotes this transparency and provides a degree of consistency between transactions. It is unrealistic to expect markets to make rapid assessments of the chances of a transaction completing where there are uncertainties as a result of highly conditional terms.

(d) *Uncertainty for acceptors:* Acceptances of Code offers are usually irrevocable. As a result, accepting shareholders may have to wait some months to know if the offer will become unconditional, but will be unable to trade their shares in the interim – 'locking up' their shares. Restricting conditionality helps avoid excessive uncertainty for shareholders in this position.

(e) *International consistency:* It is beneficial that New Zealand regulation of the M&A market is consistent with international practice. International consistency is also a helpful 'cross-check' as it shows how other jurisdictions have chosen to strike the balance between competing imperatives. As to regulation of conditions in takeovers in other key jurisdictions,[31] New Zealand's approach is broadly in line with international practice:[32]

(i) Generally, conditions that depend on the judgment of the offeror are not permitted.[33]

(ii) While the precise provisions differ, in the UK,[34] Hong Kong[35] and Singapore[36] there is, in general terms, a materiality threshold which must be met before an offeror may rely on a condition that would cause the offer to not proceed. These thresholds are analogous to the Code's restrictions on unreasonable reliance on a condition and reliance on a condition that restricts the ordinary business of the target. The caveat to this is that international jurisdictions have a track record of robust application of these restrictions (i.e., it is understood in the respective markets that there is a high

[30] To be clear, the condition *itself* would not restrict the target's activities, but the consequence of such a condition existing is that the board could not take actions that could result in the condition being unsatisfied without potentially depriving the target shareholders of the opportunity to decide on the merits of the offer themselves, potentially breaching the Code's defensive tactics restrictions.
[31] Specifically, the UK, Hong Kong, Singapore and Australia.
[32] Albeit that the New Zealand regime is untested and it is clearly difficult to rely on conditions in other jurisdictions.
[33] See rule 13.1 of the City Code, rule 30.1 of the Hong Kong Code, rule 15.1 of the Singapore Code and section 629 of the Corporations Act.
[34] Rule 13.5(a) of the City Code states that "An offeror may only invoke a condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn with the consent of the Panel…The Panel will normally only give its consent if the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer. This will be judged by reference to the facts of each case at the time that the relevant circumstances arise."
[35] Note 2 to Rule 30.1 of the Hong Kong Code states that "[a]n offeror should not invoke any condition, other than the acceptance condition, so as to cause the offer to lapse unless the circumstances which give rise to the right to invoke the condition are of material significance to the offeror in the context of the offer."
[36] Note 2 to Rule 15.1 of the Singapore Code states that "[a]n offeror should not invoke any condition, other than the acceptance condition, so as to cause the offer to lapse unless the circumstances which give rise to the right to invoke the condition are of material significance to the offeror in the context of the offer, and information about the condition is not available from public records or is not known to the offeror before the offer announcement."

hurdle to cross in order to rely on conditions), whereas the New Zealand approach has yet to be formally tested.

(iii) Notably, under the City Code, there is a further restriction on reliance on conditions – a defeating condition cannot be relied on without the UK Panel's prior consent.

91 There is also benefit in helping to provide rapid resolution of disputes regarding conditions. To the extent that any uncertainty arises over the status of an offer, rapid resolution may mitigate the adverse effects that might otherwise follow:

(a) Rapid resolution can encourage the price of any traded securities to reach an efficient level and reduce the period during which the market is operating without critical information.

(b) During a protracted dispute, a target arguing that the offer cannot be withdrawn would likely have to continue to operate under the offer conditions, affecting the target's ability to carry on its business. Conditions which might not prevent the target carrying on business in the ordinary course over a short term might do so if they are to be complied with over a longer term.

Conditions in a scheme

92 Unlike in the case of a Code offer, there are no formal restrictions on conditions to a scheme. The conditions are negotiated and agreed between the offeror and the target board.[37]

93 There are two key differences between schemes and Code offers which support this approach:

(a) As schemes must be agreed transactions, the target board will always have the opportunity to negotiate conditionality. Accordingly, this provides a protection for shareholders as the board (at least in theory) can negotiate conditions which appropriately balance the various interests at stake.

(b) Further, this flexibility as to conditions helps facilitate the broader flexibility which schemes provide. For instance, where additional regulatory consents are required for a scheme to complete (such as Commerce Commission or Overseas Investment Office approval) and the regulator imposes new requirements on the offeror (for instance, that it divest parts of its business prior to completion of the scheme), it may not always be appropriate for the Panel to prohibit the offeror's ability to rely on such a condition on the basis that it is within the offeror's control; in some instances, it may be appropriate for conditions to exist that are within the offeror's control.[38]

94 The question the Panel is considering is whether these two factors mean that it is inappropriate to place rule 25-type limitations on conditionality in schemes. The Panel's current view is that the existing regulation of schemes does not provide a complete answer for the following reasons:

(a) *Targets may only have the **opportunity** to negotiate:* The negotiated nature of a scheme only provides the target board with the *opportunity* to negotiate appropriate conditions. In practice, the target board may lack (or perceive it lacks) leverage in the negotiation process. Our engagement with the market has indicated that directors face significant pressure to put transactions to shareholders where the price meets a requisite standard, irrespective of the conditionality. Particularly where leaks occur, pricing

[37] The Panel has issued guidance on its expectations for target boards in negotiating conditions but is limited in its enforcement mechanisms, as the Panel only has 'negative' leverage (i.e., the ability to refuse to grant a No-objection Statement or otherwise oppose the scheme). Negative leverage is ineffectual where an offeror does not wish to complete a transaction.

[38] As an example, as noted at paragraph 35(b) above, in 2022 the Commerce Commission granted clearance for Ampol to acquire Z Energy under a scheme, subject to an undertaking from Ampol that it sell Gull New Zealand Limited.

information can be released without adequate description of the conditions attached to the leaked price. The practical reality is that the market can then tend to focus on the leaked price and not on the conditionality which is either unknown or not fully explained.

(b) *Potential lack of independent directors:* For unlisted Code companies, there is also a possibility that there would be no independent directors on the target board. If there are no independent directors, then the reliance on negotiation to strike an appropriate balance becomes tenuous.

(c) *Delays add to uncertainty:* If a dispute arises as to whether a condition has been satisfied and the parties cannot reach agreement, it can require resolution via litigation. Litigation through the Courts can be prolonged. This can be problematic in public M&A transactions:

(i) Delays in the resolution of disputes increase the period of time during which the market will operate with a significant degree of uncertainty.

(ii) It can be problematic for the target to continue to operate under the restrictive covenants which are negotiated in contemplation of a relatively short pre-settlement period (a target will have to continue to comply with restrictive covenants if it wishes to seek specific performance).

These issues are mitigated in Code transactions by the higher thresholds which conditions must cross to be relied on, and the ability of the Panel to provide a preliminary answer on the threshold question as to whether a condition can be relied on (and to do so rapidly). The Panel notes that parties to schemes do have the ability to mitigate the impact of potential delays by providing for expert determination or arbitration in the SIA. However, there are limitations and drawbacks to this as:

(i) negotiating such provisions will likely depend on the target board's negotiating position;

(ii) expert determination or arbitration can take weeks or, in some cases, months to resolve the issue at hand; and

(iii) expert determination or arbitration will often result in non-public decisions which do not provide clarity for the market in the case of future disputes.

(d) *Disclosure in schemes may not address the issues in time:* The Panel considers it is potentially ambitious to expect retail shareholders (in particular) to understand the prospects of conditions being invoked based on the SIA alone. The Panel considers that the Scheme Booklet is critical to facilitating this understanding. The problem in a scheme is that the Scheme Booklet is often produced several months after a transaction is announced. This contrasts to a takeover, where disclosure documents are issued early in the transaction process under the Code's timing requirements. The Panel accepts that if a material issue arose in relation to a scheme, a listed Code company would likely need to make continuous disclosure announcements to clarify the position. However, this does not address the position of unlisted Code companies or allow shareholders to understand at the time of announcement of a scheme the risks of non-completion. Accordingly, this appears to be an issue which is difficult to fully address by disclosure.

(e) *International comity:* In some other relevant jurisdictions, restrictions on conditions expressly apply to both takeovers and schemes.[39]

[39] This includes the UK (section 3(b) of the Introduction to the City Code), Hong Kong (definition of "Offer" in the Hong Kong Code) and Singapore (definition of "Offer" in the Singapore Code).

Options for reform

95 At this stage, the Panel has not formed a view on whether there ought to be reform in this area. Market practice to date does not indicate that boards are frequently accepting conditions within the control of the offeror, and recent transactions indicate that boards are considering the effect of conditions (including their impact on the risk of non-completion) and negotiating them with care. However, the Panel is conscious that market practice can vary and current practices do not necessarily provide a complete answer to the issues identified above.

96 Although the Panel has not reached a view on whether any reform is appropriate, the Panel's preliminary reasoning is that *if* there is to be reform, it might progress as follows:

(a) Any reform would likely be in the form of extending some or all of the restrictions on conditions in rule 25 to schemes (although see (b) below regarding how application of the rules might differ). The rationale is that the Panel expects that developing new restrictions for conditions in schemes would introduce undesirable complexity.[40]

(b) It might be appropriate to apply some of the restrictions in rule 25 differently in the context of a scheme and/or to permit additional tolerance to allow departure from them, ideally by notice from the Panel, or potentially by formal exemption, in order to facilitate scheme flexibility. At a high level, the Panel expects that there might be a case for more tolerance for conditions which would not be acceptable in a Code offer. The Panel expects that this could be clarified through guidance.

(c) There may be stronger arguments for extending some parts of rule 25 to schemes, but not others.

Arguments for and against reform

97 The advantages of the reform approach outlined above are that:

(a) It would address the issues with the current regime identified above. In particular:

(i) Utilising the Panel's enforcement powers would mean disputes about reliance on a condition could be dealt with more rapidly, at least at the first stage.

(ii) An extension of this rule to schemes would improve New Zealand's consistency with comparable international jurisdictions. As noted, there are restrictions on conditions that depend on the judgment of the offeror in other jurisdictions, and this prohibition extends to schemes in several key jurisdictions (specifically, the UK, Hong Kong and Singapore).[41]

(iii) There could be a benefit to public understanding in that shareholders could expect conditions in public change of control transactions to operate in a broadly similar way, irrespective of the structure of the transaction.

(iv) Restricting the offeror from relying on conditions in an improper way would increase shareholders' ability to assess the likelihood of transaction conditions being met or otherwise, thereby helping remove the potential for inefficient trading following announcement of transactions.

[40] As to how the same rule might be applied differently to schemes and Code offers – an offeror might, for example, be able to argue that it is reasonable to rely on a condition that was accepted by the target board in negotiation, albeit that this might not be a complete answer and would be weighed against other relevant considerations.

[41] The Panel understands that the Australian Panel has not considered whether unacceptable circumstances could arise from unreasonable reliance on a condition in a scheme, so the Australian position is currently unclear.

(b) The rationale behind this approach is already reflected in the Panel's approach to schemes. In particular, the Panel requires offerors holding or controlling shares in the target to sign a Deed Poll committing them to vote in favour of the scheme in order to prevent the offeror from being able to use their voting rights to effectively turn the scheme into an option. Extending the prohibition on conditions within the control of the offeror would similarly prevent effective optionality for the offeror.

98 The disadvantages of this option stem from it reducing the flexibility of schemes. This could have adverse effects in that:

(a) The target and offeror may not be able to negotiate conditions as they see fit.

(b) This option may reduce the ability to use schemes where restructures are contemplated and conditions which are effectively under the offeror's control may be necessary.

99 For the Panel, a key threshold issue with this reform is ensuring that enough flexibility will remain through allowing the rule to be waived where appropriate. As to how this might be achieved, the Panel considers that a waiver by notice (rather than a formal exemption) would be preferable. In particular, the Panel is conscious that transactions can move quickly and the formalities of an exemption process might cause undue delay and cost.

100 The Panel expects that any waiver policy would be supported by written guidance to assist market participants to understand how the Panel would be likely to approach relevant issues. The Panel is keen to understand market participants' views as to whether guidance would provide sufficient certainty.

Questions: Conditions	
12	Do you favour reform in this area? Please give reasons.
13	If there is to be reform, do you agree with the potential approach set out above? Please explain any concerns you have with it which are not set out above.
14	Would an ability to waive rules in relation to schemes be sufficient to maintain flexibility in relation to schemes?
15	Are there any issues with the status quo or potential reform which are not identified in this paper or in your other responses?
16	Are there any other options that the Panel should consider in relation to scheme conditions? Please explain the rationale for any such option.

Committed financing and payment of consideration

Problem identification

101 It is rare for offerors in a public transaction to have the necessary cash consideration immediately available upon launching an offer. Further, offerors are likely to obtain their financing from a variety of different sources (e.g., a mix of debt and equity, or a call of committed funds from a related party).

102 However, it is important that offerors can actually complete transactions in accordance with their terms. A failure to make payment would undermine confidence in the market as a whole. Regulatory settings should generally minimise (as far as practicable) the prospect of a transaction failing to settle because of lack of financing. To the extent there is finance risk, this should be disclosed so that shareholders can assess it.

However, the Panel considers that disclosure alone will not always be sufficient to mitigate these issues. Further, offerors are ultimately best placed to manage this risk, and should be incentivised to minimise it.

103 While the Code currently provides some protection in the context of Code offers through a required statement about the offeror's financing,[42] the Panel proposed enhancing these protections in the 2022 Recommendations by amending the Code to:[43]

(a) place a direct obligation on the offeror to have sufficient committed funding in place to meet its commitments under the offer and in respect of any liabilities incurred in respect of the offer;

(b) require specific disclosures regarding the offeror's funding arrangements; and

(c) require payment of consideration when due.

104 In effect, the same issues arise in the case of schemes. There is no regulatory requirement for an acquirer to:

(a) have the resources available to pay the consideration (or other related amounts);

(b) disclose the acquirer's financing arrangements (and even if disclosure is made in a Scheme Booklet it will be made some time after the transaction has been announced and the risk of financing issues arising has already commenced); or

(c) make payment when due.

105 Despite the lack of an express regulatory obligation, there are some ways in which this issue may be addressed in schemes:

(a) Due to the "agreed" nature of schemes, the target board can assess the creditworthiness of the offeror and, to the extent there are concerns, seek mitigating obligations. However, market practice varies and not all target boards seek (or have the negotiating leverage to demand) the same assurances. The recent SIA in relation to the Pushpay Holdings Limited scheme contained a number of provisions of this type, for example by imposing obligations to enforce equity commitment letters and to secure alternate debt financing if necessary.

(b) Schemes generally settle on all shareholders at once via a centralised payment which is held in escrow until payment is made to all shareholders simultaneously. Therefore, non-payment would likely prevent completion. In contrast, a Code offer may settle in stages, and it might be possible for early acceptors to be paid while later acceptors are not.

106 Despite these mitigating considerations, the Panel considers that a failure to make payment on completion of a scheme would be a significant issue and taking reasonable steps to protect against this possibility would be positive for market integrity.

107 This issue becomes more acute if the Code is amended as proposed in the 2022 Recommendations. If the proposed amendments are implemented, an offeror would be required to have committed funding and make payment in relation to Code offers, but not under a scheme. The Panel does not consider that schemes and Code offers are sufficiently different to merit a difference in treatment of this type.

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[42] Under clause 9 of Schedule 1 to the Code, the offeror must provide confirmation that "resources will be available to the offeror sufficient to meet the consideration to be provided on full acceptance of the offer and to pay any debts incurred in connection with the offer".
[43] See section 5 of the 2022 Recommendations for more detail on the proposed inclusion of rule 34A and amendments to Schedule 1 of the Code.

Potential reform

108 The potential reform proposed is:

(a) The application of the same funding obligations to schemes that will apply in Code offers (including as amended should the 2022 Recommendations be implemented). This would most likely apply the proposed new rule 34A of the Code (as set out in paragraph 5.14 of the 2022 Recommendations) to schemes, i.e., offerors would have to have the resources available to pay the consideration to be provided under the offer. An obligation would also be imposed on acquirers to make payment when due.

(b) The requirement to make more detailed disclosures in relation to offer financing (see the amendments proposed to clause 9 of Schedule 1 to the Code in the 2022 Recommendations).

Conclusions

109 The Panel's current view is that reform is preferable – i.e., the funding and payment obligations set out in the 2022 Recommendations should apply to schemes. The Panel's reasoning is as follows:

(a) Any potential failure to make payment to complete a scheme transaction is a significant issue for wider market integrity. Reform would help minimise the risk of a transaction failing to settle. It would offer target companies greater protection and certainty.

(b) The Panel is concerned that the market does not appreciate the potential differences between schemes and Code offers in this regard – amendment would treat structures that achieve the same commercial outcome in the same manner.

(c) This reform would align New Zealand with comparable jurisdictions, such as Australia and the United Kingdom, which provide significantly more assurance to shareholders regarding financing of schemes than the current New Zealand regime does.

(d) This reform would provide the benefits of more secure financing discussed above, with little need for change in current best practices to execute – the Panel understands that the proposed reform would generally align with what prudent and considered offerors and target boards do now. The Panel considers that the benefits this reform could provide to the market in the long term significantly outweigh any potential costs.

Questions: Committed financing and payment of consideration	
17	Do you agree with the Panel's approach? Please give reasons.
18	Is there a better case for applying some of the financing/payment obligations to schemes than others? Please explain your reasoning.

Code rules and Takeovers Act sections which the Panel considers should not be applied to schemes

Reasoning and approach

110 The Panel considers there are a number of Code rules and sections of the Takeovers Act which are unnecessary and/or not applicable in relation to schemes. As discussed above, the Panel's concern is alignment of principles. Accordingly, where a concept in the Code is adequately addressed in the scheme process, the Panel's view is that the Code rule should not be applied to schemes – such an approach would be unnecessarily duplicative and increase regulatory burden for no apparent purpose.

111 A summary of these rules/sections and the Panel's reasoning is set out below.

Code rules and Takeovers Act sections which the Panel considers should not be applied to schemes	
Rule/Section	**Panel's reasoning**
Basic requirements for Code offers (full and partial): Rules 8 – 14E	The scheme equivalents of the basic Code requirements for full and partial offers are covered by statutory voting thresholds and the Court process. The Code requirement for equivalent offers for different classes of shares can be addressed in a scheme through composition of interest classes and the No-objection Statement process. The Panel considers that these measures address the issue sufficiently while allowing appropriate flexibility.
Same terms and consideration: Rule 20	This requirement is covered by the statutory voting thresholds (particularly interest class composition) and the Court process.
Minimum acceptance condition: Rule 23	These restrictions should not be necessary given there will always be a shareholder vote on a scheme (which effectively approves the level of the increase in the offeror's voting rights). Any residual issues should be able to be addressed through the Court process. Imposing this type of restriction could unduly limit the flexibility of schemes.
Offer period (and extensions of it): Rules 24 – 24C	Restrictions of this type could unduly restrict the flexibility of schemes. The Court process and potential for the Panel to withhold a No-objection Statement or otherwise make submissions to the Court should be sufficient to mitigate any concerns that these rules address in a Code offer.
Variations to offers: Rules 27 – 32 (other than requirements to provide notice of variations and additional IARs)	The Panel does not consider that the majority of the Code's key requirements relating to variations need to be imposed as fixed rules in relation to schemes because: • Boards can negotiate varied terms (and there will also be Court oversight and potentially Panel consideration of variations through the No-objection Statement process). Therefore, the Panel does not consider it necessary to set out express requirements as to what variations might be permitted. • Providing shareholders with sufficient time to consider a variation can be addressed through the Court's and Panel's oversight (as is currently the case).

Code rules and Takeovers Act sections which the Panel considers should not be applied to schemes	
Rule/Section	**Panel's reasoning**
Payment of consideration by specified date: Rules 33 and 34	The Panel does not consider that these rules (requiring the offeror to specify a payment date and allowing withdrawal of acceptance if payment is not made by that date) need to be applied to schemes. These matters can be dealt with under SIAs. Any concerns about the adequacy of these matters can be addressed through the Panel's review of schemes and the Court's oversight and approval. The Panel does, however, consider that the proposed requirement to pay consideration when due should be applied to schemes – see the discussion at paragraphs 101 – 109.
Restrictions against defensive tactics: Rules 38 – 40	The Panel does not consider that Code restrictions against defensive tactics by target company directors should apply to schemes, as schemes can only occur via agreement between the target board and the offeror. Where the target directors do not agree to a scheme proposal, an offeror may make an unsolicited takeover offer under the Code instead.
Offer procedure: Rules 41 – 49C	Other than the notice and disclosure aspects of these provisions (see the discussion at paragraphs 63 – 73), the Panel does not consider that this level of prescription is necessary in relation to schemes.
Compulsory acquisition: Rules 50 – 63	The Panel considers that the procedural matters dealt with in these rules are adequately addressed through the existing scheme process. The appropriateness of the relevant thresholds and whether there should be any ability to challenge consideration payable in a scheme are discussed in the Thresholds Paper.
Right of reimbursement: Sections 48 and 49 of the Takeovers Act	Under these sections, target directors and target companies have a right to be reimbursed for expenses properly incurred on behalf of, and in the interests of, shareholders of the target in relation to an offer. The Panel considers that these rights do not need to be extended to schemes, as scheme parties will always have the opportunity to negotiate these matters between themselves.

Voting/acceptance thresholds

112 As an additional matter, the Panel has considered whether it might be appropriate to re-examine the thresholds which must be met by an offeror in a Code offer and a scheme to reach 100% control – i.e., the Dominant Ownership Threshold in Code offers (of 90%) and the 75% Voting Threshold in schemes. Some market participants in recent years have suggested that the current Dominant Ownership Threshold is too high in comparison to the 75% Voting Threshold. These market participants often note that, since schemes were incorporated into New Zealand's takeovers regime in 2014, they have increasingly become a preferred transaction structure.

113 Although the level of *shareholder* approval required to achieve 100% control can differ between a scheme and a Code offer, the Panel does not consider this to necessarily be a problem:

(a) Direct comparison of the thresholds is simplistic – an offeror's pre-bid stake in a target can make the 75% Voting Threshold harder to reach under a scheme, whereas in a Code offer an offeror is provided with a "head start" towards reaching the >50% minimum acceptance condition and, if applicable, the Dominant Ownership Threshold.

(b) Any comparison of the approval/acceptance thresholds in Code offers and schemes must also consider the relevant context of such thresholds. For example, a scheme provides a first hurdle of target board approval before the transaction is even presented to shareholders, which a Code offer does not.

(c) New Zealand's current approval/acceptance thresholds are broadly reflective of those in all other comparable jurisdictions.

(d) Any increase in the 75% Voting Threshold would be difficult to justify, given that a 75% shareholder vote is sufficient to pass a special resolution which can, for example, authorise the sale of all of a company's business and assets and the subsequent liquidation of the company.

114 Further, the Panel is conscious that the rise in popularity of schemes might be attributable to matters other than the posited advantages of the 75% Voting Threshold as compared against the Dominant Ownership Threshold, including:

(a) schemes' flexibility, which allows them to address issues with timing (for instance, where additional regulatory approvals are required) or other matters that can be problematic in the more rigid Code structure;

(b) the fact that, from the perspective of a shareholder in favour of a transaction, voting on a scheme is generally preferable to accepting an offer with a 90% minimum acceptance condition which requires shareholders to accept an offer, thereby "locking up" their shares without knowing whether the transaction will settle (often for several months). In turn, this can lead to Code offers stagnating through shareholders delaying acceptances; and/or

(c) the increased prevalence of passive funds, which may not be able to accept a Code offer (at least until the Dominant Ownership Threshold has been reached).

115 Accordingly, while the Panel has considered the voting/acceptance thresholds under a Code offer and a scheme, it has not identified compelling evidence that there is a policy problem to address. However, the Panel would like to understand market participants' views on this matter.

Questions

116 The Panel would appreciate feedback on the analysis above.

Questions: Code rules and Takeovers Act sections which the Panel considers should not be applied to schemes	
19	Do you agree with the Panel's analysis as to the Code rules and Takeovers Act sections which should not be applied to schemes?
20	Should any of the identified Code rules or Takeovers Act sections apply to schemes? If so, why?

21	Do you think the current Dominant Ownership Threshold remains appropriate? Please give reasons.

How should Panel enforcement powers operate if Code rules are extended to schemes?

Problem identification

117 If one or more Code rules are applied to schemes, the Panel considers that this should be done so that:

(a) The enforcement mechanisms available in respect of schemes mirror those under the Code, to the extent possible. A key aim of this review is to consider how best to promote the alignment of the policy underlying the regulation of Code offers and schemes. Consistent with this objective, the enforcement of any rules should, to the extent possible, operate in a similar way. This helps ensure consistency and builds on a practice which is well understood by the market and on precedents which the Panel has developed over the course of its operation.

(b) However, any Panel enforcement of Code rules in respect of schemes should not cut across the Court's jurisdiction / ultimate discretion as to whether to approve (or not) a scheme. The Panel's role should continue to be complementary to the Court process rather than in conflict with it.

118 The Panel considers that it is critical that the enforcement powers under the Takeovers Act should give effect to both objectives set out above. The approach proposed below is designed with these objectives in mind.

119 In order to achieve the first objective (of aligning enforcement), the Panel's current view is that any enforcement powers in relation to Code rules that are applied to schemes should be based on the Panel's current enforcement powers under the Takeovers Act. As is discussed below, the Panel's powers are generally temporary in nature, with Court involvement/orders typically being required for more permanent orders. For the Panel, the key questions are:

(a) whether any of the current enforcement mechanisms under the Takeovers Act may not be appropriate in a scheme; and

(b) if there are any such issues, how they should be addressed.

120 Conveniently, the current broad enforcement scheme of the Takeovers Act seems relatively well suited to being applied to schemes. At a high level, the Panel is able to investigate issues and preserve the status quo, but Court orders are required where a permanent solution is sought. The key additional feature of Panel enforcement processes for schemes would be ensuring that any order made by the Panel (rather than by the Court) would not prevent compliance with existing Court orders. In the Panel's view, only the Court should be able to make an order which would prevent compliance with pre-existing Court orders.

121 This section expands on the thinking summarised above. It is broken into:

(a) An introductory summary of the current division of powers between the Court and the Panel under the Takeovers Act.

(b) The Panel's analysis as to how its regulatory powers might sit alongside (and complement) the Court's role in relation to schemes.

(c) A summary of the Panel's anticipated amendments to the Code and other relevant legislation to give effect to the proposed approach to enforcement.

122 The Panel would like to emphasise that it is difficult to precisely determine the appropriate approach to enforcement in this area before knowing which (if any) Code rules might be applied to schemes (or precisely how they would be applied). Accordingly, the Panel has sought to keep the analysis in this section at a relatively high level.

Current division of powers between the Court and the Panel under the Takeovers Act

Current enforcement approach under the Takeovers Act

123 Broadly, the respective roles of the Panel and the Court in relation to enforcement under the Takeovers Act can be summarised as follows:

(a) The Panel can investigate potential issues, either in response to a third-party complaint or request or of its own volition (its **Investigative Powers**). To do this, the Panel may inspect documents and receive evidence.[44] These powers are generally connected to the Panel's power to hold meetings under section 32 of the Takeovers Act (a **Section 32 Meeting**) following which the Panel may make a determination that:

(i) the Panel is satisfied that a person has acted, is acting or intends to act in compliance with the Code; or

(ii) the Panel is not satisfied that a person has acted, is acting or intends to act in compliance with the Code (a **Not Satisfied Determination**).

(b) Following a Not Satisfied Determination (and, to a more limited extent, in anticipation of a Section 32 Meeting) the Panel may make, or seek from the Court, certain orders. In broad terms, they are:

(i) *Temporary restraining orders:* the Panel may issue temporary restraining orders which are essentially intended to allow the status quo to be maintained for a period of up to 21 days (capable of being extended by a further 21 days);[45]

(ii) *Permanent compliance orders:* the Panel may make orders requiring a person to make a statement or disclosure (or to refrain from doing so) – i.e., the Panel's "permanent" powers are very limited and relate to matters which cannot realistically be dealt with on a temporary basis (once disclosure is made, it is, in reality, permanent);[46] and

(iii) *Civil remedy orders:* the Panel may seek more permanent "civil remedy orders" from the Court. These are injunctions, orders under section 33I, compensatory orders and pecuniary penalties; each is discussed further below. Importantly, the Panel cannot make these orders of its own volition.

(c) Finally, the Panel may also accept enforceable undertakings under section 31T of the Takeovers Act (**Undertakings**), although any enforcement of such Undertakings must occur through the Court.

(d) The Court's enforcement powers under the Takeovers Act are the powers:

(i) to issue injunctions;[47]

(ii) to make various orders under section 33I of the Takeovers Act – these include things such as cancelling an agreement for the acquisition or disposal of financial products, varying contracts and directing the disposal of financial products;

[44] See sections 31A – 31 EB and 31L – 31S of the Takeovers Act.
[45] See sections 32(4) and 33 of the Takeovers Act.
[46] See section 33AA of the Takeovers Act.
[47] See sections 33F – 33H of the Takeovers Act.

(iii) to make compensatory orders, directing a person in contravention of the Code to make payment to an aggrieved person and potentially varying contracts;[48]

(iv) to set and order payment of a pecuniary penalty;[49] and

(v) to make a declaration of contravention, essentially facilitating a civil remedy order or compensatory order.[50]

(e) Note that the Panel also has a role in the exercise of these powers, as it may apply to the Court for the exercise of its powers and may limit other parties doing so (assuming the Panel acts promptly in doing so).[51]

124 In summary, the Panel's role is generally regarded as a type of "first responder" to address immediate issues, with the Court's role being that of the final arbiter where more significant measures are to be taken and the Panel has at least had the opportunity to remove some of the urgency of a matter through the issuance of temporary orders.

125 The Panel considers that this general scheme of the Takeovers Act has significant merit as it balances two competing considerations:

(a) Takeovers are often time sensitive transactions – issues such as misinformation can have an outsized and lasting effect if not addressed rapidly. Further, it is better for issues to be addressed rapidly so that shareholders can determine whether a transaction proceeds or not. This is generally preferable to having to deal with misconduct after the event, where damages may be difficult to prove and quantify. Rapid resolution of this type lends itself to a body such as the Panel which can rapidly convene its expert Panel members and is not subject to competition for Court time and resources.

(b) The Court is generally the best venue for making more considered and final decisions which will affect things such as contractual or property rights.

How the Panel's regulatory powers might operate alongside (and complement) the Court's role in relation to schemes

126 The Panel's current view is that the best approach to enforcing the Code rules which apply to schemes would be to use, with some modification, the current framework in the Takeovers Act. For clarity, any powers which the Panel would have under the Takeovers Act in relation to schemes would only relate to the rules which applied to schemes – e.g., the Panel would have powers under the Takeovers Act in relation to misleading or deceptive conduct in relation to a scheme, but it would not have any powers in relation to alleged defensive tactics in relation to a scheme.

127 As to the Panel's reasoning:

(a) The starting position is that the Panel is better suited to rapidly address issues in relation to live transactions, and, in particular, is well suited to consider disclosure issues. On the other hand, the Court is best suited to making broader and more permanent orders – this helps ensure natural justice is not compromised.

[48] See sections 33K and 33L of the Takeovers Act.
[49] See sections 3M – 33R of the Takeovers Act.
[50] See sections 33N – 33O.
[51] See section 35 of the Takeovers Act.

(b) This division between the roles of the Court and the Panel is reflected in the Takeovers Act and, where it has been applicable, it has worked well for over 20 years.[52]

(c) Further, the Panel considers that the current Takeovers Act framework is well suited to supervision of schemes. Specifically, the Panel's focus should be on time critical process matters, with disclosure being a key concern, vis-à-vis the Court whose natural focus is on more permanent matters including the ultimate decision as to whether to sanction the transaction (or not). The key issue is ensuring that:

(i) the Panel cannot make orders which would contradict Court orders; and

(ii) there is nonetheless an appropriate avenue for seeking enforcement orders.

(d) There are also practical reasons for applying similar enforcement powers:

(i) Schemes and Code offers are, to an extent, interchangeable, and it is at least theoretically possible to run a "dual track" combined Code offer and scheme (as has occurred several times recently in Australia). In order to sensibly deal with such structures, the Panel considers consistency of approach is preferable to avoid difficult jurisdictional questions.

(ii) The Court's regulation of schemes does not typically start until several months after the SIA has been signed and announced (and several more months after negotiations commenced). Until such time as an originating application is made to the Court, there is no Court case in which the Panel can become involved, yet issues going to the equity or transparency of a transaction can still arise in this pre-Court period. Rather than try and develop a new process through which the Panel could seek orders regarding a future application to Court for a scheme, the Panel thinks it best for it to be able to address any issues within its purview though existing and familiar processes.

128 The Panel's proposed approach to applying each category of the Panel's powers to schemes is set out below.

<u>Investigative Powers</u>

129 The Panel's Investigative Powers would operate much as they would in a Code offer. These powers focus on information gathering, so the Panel sees no issue with them being applied in relation to schemes. Notably, the Panel has yet to experience any material reluctance by market participants to provide information to the Panel in connection with a scheme. This suggests to the Panel that the power to compel information is unlikely to be problematic. As to how any information which the Panel acquires might be relayed to the Court, the Panel's view is:

(a) In a number of cases, the Panel is likely to draw the conclusion that there is no concern with the relevant underlying issue – essentially the information will provide an adequate explanation for the approach taken. In this scenario, the Panel expects it would not draw the information to the Court's attention. The Panel expects this might also be the case if the information revealed a substantive issue, but that issue was adequately addressed.

(b) In other cases, it might be that the underlying information did present a matter of concern which was not satisfactorily addressed (or could not be addressed through the Panel's enforcement powers). If this were the case, the Panel would expect that it would draw that matter to the Court's attention.

[52] The Panel notes that Australia's experience has demonstrated that increased Panel powers (e.g., the ability to rewrite contracts or require the sale of securities without a Court order) can work well. However, the Panel sees no need to depart from the current New Zealand approach.

130 To this end, the Panel expects that there would need to be an exception to the restriction on disclosing information acquired under an inspection in section 31E of the Takeovers Act.[53] The Panel does not, however, consider that the restriction on compelling the Panel or its personnel to give evidence or discover a document needs to be amended.[54]

Temporary restraining orders and permanent compliance orders

131 The Panel expects that there should not be a significant issue with the Panel making temporary restraining orders in the majority of cases – fundamentally, they are about maintaining the status quo, and generally, the status quo should not change significantly until the Court issues final orders. However, it is possible that temporary restraining orders could conflict with Court orders. The Panel's view is:

(a) Market participants should not be put in a position where they are unable to comply with Court orders.

(b) Accordingly, the Takeovers Act should provide that the Panel may not issue temporary restraining orders in relation to a scheme which would prevent compliance with Court orders in relation to that scheme.

(c) However, to ensure that the status quo can be preserved, the Court should, if it determines it to be appropriate and on application by the Panel, be able to grant any order which the Panel was prevented from issuing by virtue of conflict with prior Court orders. In connection with this, the Court should also have the ability to vary any initial orders where the Court considers it appropriate in light of the further orders granted under the Takeovers Act.

132 In relation to permanent compliance orders, the Panel is influenced by the fact that disclosure issues are very much central to its expertise. Further, the Panel is aware that Code companies will often be subject to separate disclosure obligations (in particular, the continuous disclosure regime under the Listing Rules) which may require disclosure of certain price sensitive information during the course of a transaction. Having multiple parallel disclosure requirements is therefore an existing issue and one which the Panel considers Code companies can (and do currently) manage. Further, various parties have, at the Panel's suggestion (or in consultation with the Panel), made corrective disclosures in several schemes. Finally, the Panel notes that the FMA's powers in respect of misleading or deceptive conduct are broadly framed and, in the context of a scheme, strictly overlap with matters of fact and process within the Court's jurisdiction. The potential changes outlined in this paper would address this by amending the FMCA such that the FMCA Fair Dealing Provisions would cease to apply to Code company schemes.

133 Accordingly, the Panel sees no need to limit the Panel's permanent compliance orders, except that the Panel should not be able to make an order that conflicts with existing Court orders (most likely the initial orders for holding the scheme meeting). For example, where the Panel considers that a Scheme Booklet should be amended in a way that is not permitted by the initial Court orders, the Panel would need to apply to the Court for an order requiring that amendment. This should prevent the Code company from being forced to breach one set of Court orders as the Code company could apply to the Court to vary the initial orders to permit it to act on any order made under the Takeovers Act.

[53] Section 31E states that a person must not communicate to any other person any information acquired in the course of an inspection under section 31A (i.e., the Panel's use of its Investigative Powers), except in accordance with the Takeovers Act disclosure rules (section 31C), or for the purposes of the Takeovers Act, the Financial Markets Authority Act 2011 (or its associated Acts), the OIA, Privacy Act 2020 or in the course of criminal proceedings in some circumstances.
[54] See section 33D of the Takeovers Act.

134 As to how this might work in practice, the Panel considers the following example to be useful:

(a) the Panel reviews a draft Scheme Booklet and issues a Letter of Intention in respect of the scheme;

(b) the Court gives initial orders including that the Scheme Booklet be issued to shareholders, and it is distributed accordingly;

(c) shortly prior to the shareholder meeting, the Panel becomes aware of new information and forms the view that the notice of meeting was misleading or deceptive (and that it would not have issued a Letter of Intention had it been aware of this information); and

(d) the nature of the misleading or deceptive information is such that the Panel considers that:

(i) the misleading or deceptive statements should be corrected by issuance of corrective disclosure;[55] and

(ii) the date of the shareholder meeting (the functional equivalent to the closing date of an offer) should be extended.[56]

135 In this scenario (assuming the parties did not agree to take appropriate actions):

(a) The Panel could take relatively swift action to require issuance of corrective disclosure. This would help ensure that the relevant information was in the market.

(b) Depending on the precise terms of the Court orders, the Panel would be unlikely to be able to require the meeting to be delayed or for a formal amendment to the notice of meeting to be issued. However, the Panel could apply to the Court and ask the Court for orders to this effect. The Code company could then apply to the Court for corresponding variations to the initial orders.

136 This differs from a Code offer where the Panel would be able to require all relevant corrective disclosure be made and that the offer date be extended. However, the Panel considers that its proposal presents a suitable adaptation of existing enforcement procedures in the scheme context.

Civil remedy orders and Undertakings

137 The Panel considers that its ability to apply for civil remedy orders or receive and enforce Undertakings should apply directly in relation to Code rules which apply to schemes. These remedies cannot 'cut across' the Court's jurisdiction as their exercise depends on the Court issuing orders. Accordingly, the Panel does not see application of these provisions as being problematic.

Summary of amendments to the Code and related legislation

138 To provide further clarification as to the Panel's proposal, a brief summary of amendments that the Panel expects would be required to give effect to its proposal above is set out below.

[55] Were the Code to apply, this could be compelled under section 33AA(c) of the Takeovers Act without Court involvement.
[56] If the transaction was a Code offer the closing date could be extended by the Panel without Court involvement – see section 32(4)(d) of the Takeovers Act.

Amendments to apply the Code to schemes – the Code, the Companies Act and the Takeovers Act

139 If schemes are to be regulated by the Code, the key changes would be:

(a) Deleting section 236B of the Companies Act and section 23A of the Takeovers Act (these provisions currently provide that the Code does not apply where final orders have been made). The repeal of these sections would mean that schemes are restricted by rule 6 of the Code (where applicable).

(b) Adding schemes to the list of transactions in rule 7 by which a party may increase their control in a Code company in a way which would otherwise contravene rule 6.

(c) Where appropriate, amending the relevant rules of the Code to be clear that they do (or do not) apply to schemes.

140 To be clear, the Panel considers that the No-objection Statement process would remain – i.e., a scheme could not be approved unless:

(a) the Court is satisfied that the shareholders of the Code company will not be adversely affected by the use of a scheme rather than a Code offer (see section 236A(2)(b)(i)); or

(b) the Panel provides a No-objection Statement (see section 236A(2)(b)(ii)).

Accordingly, section 236A of the Companies Act would be retained.

141 However, the Panel considers that the trigger for the application of section 236A should be amended. At the moment, section 236A applies to schemes which change the relative voting control of a Code company, even if there is no breach of rule 6. If rule 6 was to apply to schemes (as is proposed), the threshold for the application of section 236A could be changed to "a proposed arrangement or amalgamation which is restricted by rule 6 of the Code" (or similar). This would have the benefit of aligning the application of the schemes process under the Companies Act with the application of the Code.

Criminal liability

142 If schemes are a transaction regulated by the Code, section 44 (which imposes criminal liability for not providing information to the Panel and related matters) and sections 44B and 44C (which impose criminal liability for misleading or deceptive conduct) would automatically be extended to schemes. This would effectively duplicate the general market manipulation offence under section 262 of the FMCA (the carve out for takeover offers under section 263 of the FMCA would not apply, as schemes are not takeover offers).

143 This raises a very similar question as arises in relation to rule 64 (see paragraphs 44 and 45) – i.e., should criminal liability apply in relation to misleading or deceptive conduct. In the Panel's view, the questions in relation to criminal misleading or deceptive conduct are:

(a) should such conduct be regulated by the FMCA and the Takeovers Act (with an added clarification that there cannot be two sanctions for the same conduct); or

(b) should such conduct be regulated by only one regime and, if so, which regime.

144 In contrast to the rule 64 question, however, the Panel considers that it is at least arguable that sections 44B and 44C should not apply to schemes for the following reasons:

(a) The focus of the Panel and the Takeovers Act regime is on active regulation rather than after the fact prosecutions. This is where the Panel's core competency lies. This approach to enforcement relies more on the application of rule 64 than on sections 44B and 44C.

(b) Such active supervision helps reduce the number of prosecutions, further reducing the relevance of section 44B and 44C.

(c) The FMA has significant experience in running criminal prosecutions with dedicated investigative and prosecution teams. Such resources and experience may make the FMA more suited to prosecuting the relevant conduct than the Panel, notwithstanding the Panel's subject matter expertise.

145 Accordingly, the Panel considers that it might be appropriate to not apply sections 44B and 44C to schemes. The Panel would appreciate the market's views on this matter.

Technical changes to the Takeovers Act

146 If any Code rules are extended to schemes, the enforcement provisions of the Takeovers Act will automatically apply in relation to breach / potential breach of those rules. A number of these provisions would be directly relevant to addressing issues in relation to schemes (e.g., under section 33J(i) of the Takeovers Act, the Court would be able to issue a civil remedy order requiring variation or cancellation of an SIA).

147 However, given the structural differences between schemes and Code offers, the Panel considers that if the Code is extended to schemes the Takeovers Act should be amended to provide certain further enforcement powers and remedies. The general approach would be to create "scheme equivalents" to the current enforcement powers.

Civil remedy orders regarding voting direction

148 Under sections 33F and 33G of the Takeovers Act, the Court may grant an injunction restraining a person from doing something in contravention of the Code (i.e., a prohibitory injunction). In the 2022 Recommendations, the Panel noted that under these sections, the Court might not have the power to order a person to take a positive action (i.e., a mandatory injunction) and recommended that this be clarified by expressly granting the Court the jurisdiction to grant a mandatory injunction in this context.

149 Unless and until this amendment is made, it is unclear whether the Court has injunctive power to require persons to vote on a scheme in a certain manner (e.g., to do so consistent with their public statements).[57]

150 The Panel considers that the Court should be given a specific ability under section 33J to direct persons to vote a certain way or to accept an offer.

Ability to enforce payment of consideration

151 The Panel also considers that an additional enforcement power should be introduced requiring that a person pay consideration promised under a scheme (or under a Code offer).

[57] We note that there may still be other remedies available if a person does not act consistently with their public statements.

152 Under the 2022 Recommendations, the Panel recommended that the Code be amended to require payment of consideration when due in a Code offer. The Panel understood this to be non-controversial given that payment of consideration is a fundamental part of public change of control transactions and that there should be a direct ability to enforce these promises under the Code for both schemes and takeovers. As discussed above, the Panel considers that this Code rule should also apply to schemes.

153 In terms of enforcement, the Panel had previously considered that this could be addressed through obtaining a mandatory injunction. However, as with the issue of voting directions / requiring acceptances discussed above, the Panel considers it would be helpful for section 33J (civil remedy orders that may be made by the Court under the Takeovers Act) to specifically reference orders requiring payment of consideration.

154 Further, the Panel considers that the drafting should be permissive –it may be appropriate for orders to be made in respect of the acquirer and the target to ensure that the target is put in funds sufficient to complete the transaction.

Extension of persons who may apply to Court

155 Sections 35(1), 35(3) and 44V of the Takeovers Act set out the persons who may apply to the Court following the Panel's consideration of a Code matter, or who are entitled to appear and be heard at an application to the Court.[58] This list includes takeover offerors who have made an offer within the last six months.

156 If the Code applies to schemes, the Panel considers that any parties to an SIA which is either on foot, or was on foot in the previous six months, should be added as persons that may apply and be heard in the Court. This would treat offerors in schemes in the same way as offerors in Code offers.

Fees for schemes enforcement

157 Regulation 4(2) of the Takeovers Regulations 2000 allows the Panel to require payment of fees incurred in respect of its consideration of an application for a No-objection Statement. If the Panel's regulatory activity expands in relation to schemes as a result of the introduction of Code rules, it may mean that the activity the Panel may charge for concurrently expands (for instance, enforcement activity might occur during the course of an application for a No-objection Statement).

158 The Panel considers that if its role and responsibilities expand in relation to schemes as recommended, then its funding should reflect those additional obligations. The benefit of the application of the proposed additional enforcement powers is a mix of private (as between the parties to the scheme, including shareholders) and public (the benefit of greater market certainty). The Panel considers that an increase in the Panel's Crown appropriation and/or an increase in the scope of activities that the Panel charges for would be appropriate.

Conclusions and questions

159 As noted at the outset of this part, the Panel has not reached concluded views on how it should approach the questions identified in this part. Any approach will need to be informed by the specific Code rules (if any) that are ultimately extended to schemes.

[58] The persons who may currently apply to the Court include: the Panel; a Code company's licensed market operator; the Code company; a shareholder of the Code company; and an offeror who has made an offer within the last six months. Any other person may apply but must first get the leave of the Court to do so.

160 If any amendments are ultimately made to the Panel's enforcement powers, the Panel expects it would issue guidance on how such changes would be operationalised.

161 At this stage, the Panel is seeking to test the analysis set out above and get market feedback on its general approach to this area. The questions set out below have been drafted accordingly.

Questions: How should Panel enforcement powers operate if Code rules are extended to schemes?	
22	Do you agree with the approach to the Panel's jurisdiction vis-à-vis the Court's?
23	Do you agree with the Panel's approach to amendments to the Takeovers Act, FMCA and Companies Act to address regulatory overlap between them? If not, please explain.
24	Have you identified any additional issues that could arise from applying Code rules to schemes that are not set out in this paper? If so, please explain.
25	Are there any other enforcement powers under the Takeovers Act that should be amended if certain Code rules were to apply to schemes? Are the suggested amendments to the enforcement powers appropriate? Are there any limitations which should be incorporated?
26	Regarding criminal misleading or deceptive conduct: (a) should such conduct be regulated by the FMCA and the Takeovers Act (with an added clarification that there cannot be two sanctions for the same conduct); or (b) should such conduct be regulated by only one regime and, if so, which regime?

Schedule 1: Table of consultation questions

Consultation Questions: Application of certain Code rules to schemes	
Rule 64	
1	Do you favour applying rule 64 to schemes? Please give reasons.
2	What problems or benefits are there with applying rule 64 to schemes that are not identified in this paper?
3	If rule 64 is applied to schemes, do you prefer the Single Regulatory Approach or the Dual Regulatory Approach? Alternatively, is there a better option? Please give reasons.
4	If the Dual Regulatory Approach is adopted, are there any other changes which should be made to avoid the potential for conflict between the two regimes?
Requirement to provide disclosure documents to the Panel	
5	Do you agree that there should be an obligation to provide scheme documents and information to the Panel? Please give reasons (if different to those set out above).
6	Do you agree with the proposed documents and information to be provided to the Panel? Are there any other documents or information which should be required to be provided, or are there any which should not be required to be provided?
Disclosures required to be made to shareholders in a scheme	
7	Do you favour requiring the Relevant Disclosures in schemes? Please give reasons.
8	If Relevant Disclosures were required for schemes, do you think that the Panel should have the ability to waive disclosure requirements by notice rather than by a formal exemption? Would either provide sufficient flexibility?
9	Do you agree with the proposed required disclosures? If not, what should (or should not) be required?

Consultation Questions: Application of certain Code rules to schemes	
Disposals or acquisitions during the scheme period	
10	Do you agree with applying the Code rules on acquisitions and disposals to schemes? Please give reasons.
11	Are there any problems or benefits with either the current approach or the proposed reform that are not identified in this paper?
Conditions	
12	Do you favour reform in this area? Please give reasons.
13	If there is to be reform, do you agree with the potential approach set out above? Please explain any concerns you have with it which are not set out above.
14	Would an ability to waive rules in relation to schemes be sufficient to maintain flexibility in relation to schemes?
15	Are there any issues with the status quo or potential reform which are not identified in this paper or in your other responses?
16	Are there any other options that the Panel should consider in relation to scheme conditions? Please explain the rationale for any such option.
Committed financing and payment of consideration	
17	Do you agree with the Panel's approach? Please give reasons.
18	Is there a better case for applying some of the financing/payment obligations to schemes than others? Please explain your reasoning.
Code rules and Takeovers Act sections which the Panel considers should not be applied to schemes	
19	Do you agree with the Panel's analysis as to the Code rules and Takeovers Act sections which should not be applied to schemes?
20	Should any of the identified Code rules or Takeovers Act sections apply to schemes? If so, why?
21	Do you think the current Dominant Ownership Threshold remains appropriate? Please give reasons.

Consultation Questions: Application of certain Code rules to schemes	
How should Panel enforcement powers operate if Code rules are extended to schemes?	
22	Do you agree with the approach to the Panel's jurisdiction vis-à-vis the Court's?
23	Do you agree with the Panel's approach to amendments to the Takeovers Act, FMCA and Companies Act to address regulatory overlap between them? If not, please explain.
24	Have you identified any additional issues that could arise from applying Code rules to schemes that are not set out in this paper? If so, please explain.
25	Are there any other enforcement powers under the Takeovers Act that should be amended if certain Code rules were to apply to schemes? Are the suggested amendments to the enforcement powers appropriate? Are there any limitations which should be incorporated?
26	Regarding criminal misleading or deceptive conduct: (a) should such conduct be regulated by the FMCA and the Takeovers Act (with an added clarification that there cannot be two sanctions for the same conduct); or (b) should such conduct be regulated by only one regime and, if so, which regime?