

BRIEFING

for the incoming
Minister of Commerce and Consumer Affairs

▶ 13 December 2023



**TAKEOVERS
PANEL**
TE PAE WHITIMANA



1 Introduction

- 1.1 The purpose of the Takeovers Code (the **Code**) is to provide for transparent and equitable processes for mergers, acquisitions and other changes of control of New Zealand's largest and most widely held companies (**Code companies**).¹ These transactions, which we refer to as 'control-change transactions', include:
 - (a) takeover offers made to all shareholders for all or some of the equity securities that they own in a Code company;
 - (b) acquisitions of shares in a Code company from a shareholder;
 - (c) allotments of new shares by a Code company; and
 - (d) schemes of arrangement under the Companies Act 1993 that affect the voting rights of a Code company (**Code company schemes**).²
- 1.2 The Takeovers Panel (the **Panel**) is responsible for enforcing the Code. The Panel's services are intended to contribute to the outcomes of an efficient takeovers market and increase confidence in the integrity of New Zealand's capital markets. The Panel's role in schemes of arrangement is to ensure that schemes are transparent (in terms of the disclosures made for shareholders) and are conducted with equitable voting processes for shareholders.
- 1.3 We set out the key matters for consideration by the Minister at section 6 below.

2 Organisation

- 2.1 The Panel is an independent Crown entity established under the Takeovers Act 1993. Its monitoring department is the Ministry of Business, Innovation and Employment (**MBIE**).

Panel members

- 2.2 The Panel consists of 11 members³ who are appointed by the Governor-General on the recommendation of the Minister of Commerce and Consumer Affairs and must, in the opinion of the Minister, be qualified or experienced in business, accounting or law. The members of the Panel are the Board for the purposes of the Crown Entities Act 2004 and can act via divisions of three or more members in respect of certain matters. The Panel's members must include a Chair and a Deputy Chair.
- 2.3 Panel members are closely attuned to market practices and concerns as they are all currently active market participants. This helps to ensure that, to the extent legally appropriate and in accordance with best practice, the Panel can utilise its enforcement and exemption powers to promote the efficient application of the Code and confidence in the takeovers market.⁴
- 2.4 One Panel member is a member of the Australian Takeovers Panel and is appointed to the New Zealand Panel under reciprocal arrangements between New Zealand and Australia. The Chair of the New Zealand Panel is also a member of the Australian Panel under these arrangements. Both Panels benefit from the cross-appointee's contributions at their respective Board meetings.
- 2.5 The composition of the Panel's Board and the retention of the Panel's institutional knowledge are critical to the Panel's role in New Zealand's capital markets. The Panel's succession plan for members is built around these

¹ The Code applies to New Zealand-registered companies that are either listed on the NZX Main Board or are unlisted but widely held and exceed prescribed minimum financial thresholds.

² A scheme of arrangement is a statutory Court-approved procedure under the Companies Act 1993 that allows for the reorganisation of the rights and obligations of shareholders and companies. A takeover of a company can be conducted via a scheme of arrangement.

³ This is the maximum number provided for by the Takeovers Act.

⁴ Having a Panel of active market practitioners means that conflicts of interest have to be carefully managed. The Panel operates under a robust Conflicts of Interest for Members Policy to ensure that only non-conflicted members act in relation to any matter that comes before the Panel.



concerns. Due to the highly specialised nature of the Panel's work, finding suitable candidates for the role is essential.

- 2.6 Members are appointed for terms of up to five years and may be reappointed when a term expires. Members continue in office despite the expiry of their term until they resign, are reappointed, are replaced, or are informed that they are not to be reappointed and no successor is to be appointed.
- 2.7 The current Panel members and the expiry of their terms are set out in the table below. The Panel members whose terms have expired or will expire in 2024 are highlighted. Regarding these two appointments: Ms Glen can be reappointed, but the Panel will need a new Australian representative as Mr Hunt is stepping down from his appointment to the New Zealand Panel. The Panel is consulting with the Australian Panel on potential candidates.
- 2.8 In 2025, the Panel will need three new members. The Panel and MBIE will provide advice on potential new Panel members in 2024.

Panel member	Expertise	Term expiry
Carl Blanchard (Chair)	Corporate finance professional	28 August 2025
Anna Buchly (Deputy Chair)	Corporate lawyer	30 January 2028
Rachel Dunne	Corporate lawyer	6 June 2028
Megan Glen	Investment banker	19 May 2024
David Goatley	Corporate consultant (former investment banker)	6 June 2028
Richard Hunt (Australian Takeovers Panel representative)	Investment banker	29 April 2024
Sam Inglis	Corporate adviser	6 June 2028
Sacha Judd	Corporate adviser	28 August 2025
Silvana Schenone	Corporate lawyer	28 August 2027
Nathanael Starrenburg	Corporate lawyer	28 August 2025
Martin Stearne	Corporate consultant (former investment banker)	6 June 2028

The Panel executive

- 2.9 The Panel's staff (the **executive**) consists of a team of specialist lawyers and administrative support, totalling 7 FTE. The executive is based in Wellington and led by Chief Executive, Andrew Hudson.
- 2.10 The Panel utilises a conventional management structure, with the Panel Board being responsible for the performance management, remuneration and succession planning of the Chief Executive, and the Chief Executive being responsible to the Board for the performance of the executive.



3 The Panel's responsibilities

The Panel's role

- 3.1 The Panel's core function is the regulation of takeovers and other control-change transactions in Code companies. To perform this function effectively, the Panel has robust investigation and enforcement powers and the ability to make temporary restraining orders and some limited permanent orders. When exercising its enforcement powers, the Panel acts judicially as a tribunal.
- 3.2 The Panel does not regulate the 'merits' of a proposed control-change transaction or decide whether a transaction should be accepted or approved by shareholders.
- 3.3 Instead, the Panel's role is to ensure that the process of a proposed transaction is transparent for shareholders and that shareholders have all the information that they need (and adequate time to consider that information) in order to decide for themselves whether to accept or approve a transaction. The Code sets out the process that allows shareholders to decide for themselves the merits of a transaction, and the Panel's role is to ensure that this process is followed.

Core functions and powers of the Panel

- 3.4 The core functions and powers of the Panel are contained in the Takeovers Act, the Companies Act and the Code. These include the following:

(a) *Regulation of changes of control of Code companies through the enforcement of the Code:*

The Code requires that shareholders have adequate disclosure to enable them to decide how to respond to a transaction and sufficient time to make that decision. To promote compliance with Code disclosure rules, Panel staff review and comment on draft transaction documents. This allows potential disclosure or other compliance issues to be resolved before documents are provided to shareholders. In turn, this reduces the number of formal enforcement matters considered by the Panel. The executive actively monitors transactions as they proceed in order to ensure that the integrity of disclosure for shareholders and compliance with the Code's timing rules are maintained.

Where enforcement matters arise, the Panel can, and does when necessary, swiftly exercise its statutory enforcement powers for the protection of the rights of shareholders and other interested parties.

(b) *Considering no-objection statement applications for Code company schemes:*

The Panel monitors Code company schemes under the Companies Act to ensure that shareholders will not be adversely affected by the use of a scheme of arrangement rather than an offer mechanism under the Code to effect a transaction.⁵ The Panel's role is to ensure that disclosure to shareholders is equivalent to disclosure mandated by the Code and that shareholder 'interest classes' for the purposes of voting to approve or decline the scheme of arrangement are comprised fairly.⁶

(c) *Giving approvals for the appointment of independent advisers, and other approvals:*

Independent advice on the merits of any proposed control-change transaction is a fundamental part of the disclosure required for shareholders. The Panel approves the adviser for each transaction on the basis of independence and competence.

⁵ The Panel's jurisdiction to issue a no-objection statement in relation to Code company schemes is contained in section 236A of the Companies Act.

⁶ The Panel may inform the Court that it objects to a scheme proposal that failed to meet the Panel's criteria set out in the Panel's [Guidance Note on Schemes of Arrangement](#).



(d) *Granting of exemptions from compliance with the Code:*

The Panel has the power to grant individual exemptions to ensure that the Code applies effectively and appropriately to any particular transaction. ‘Class exemptions’ may also be granted to modify the application of the Code to classes of persons or transactions.⁷ The Panel can grant exemptions only if they are appropriate and consistent with the objectives of the Code.⁸

(e) *Reviewing takeovers law and takeovers practice, and recommending to the Minister of Commerce and Consumer Affairs any law changes that the Panel considers necessary:*

As an expert body comprised of experienced takeovers practitioners and corporate advisers, the Panel is well placed to understand problems with takeovers law that need to be resolved. This enables the Panel to recommend law changes to deal with changing market behaviours and to facilitate international competitiveness of New Zealand’s capital markets.

(f) *Promoting public understanding of takeovers law and practice:*

The Panel is committed to educating investors, directors and practitioners to improve their understanding of the obligations, rights and protections under the Code and under the Companies Act for control change transactions. This contributes to increased confidence and participation in New Zealand’s capital markets.

4 Control-change transactions

Overview of the Code

- 4.1 The Takeovers Code ensures that a Code company’s shareholders have the opportunity to participate in control-change transactions on an equitable basis. The Code specifies the processes that must be followed in a control-change transaction and sets out the information that must be provided to shareholders to assist their decision-making.
- 4.2 The Code sets the control-change threshold at 20% of the company’s voting rights. If a shareholder owns more than 20% of a Code company’s shares, then any increase in that shareholder’s ownership of voting rights must be carried out in compliance with the Code.⁹ The Code prescribes rules that provide all shareholders with the opportunity to participate in the transaction on equitable terms.

Takeover offers

- 4.3 A takeover offer can be made by any person for all or some of the shares in the Code company. The Code requires that the offer be made to all shareholders and on the same terms. To enable shareholders to make their decision on whether to accept the offer, adequate disclosure, including advice from the company’s directors and an assessment of the merits of the transaction from an independent adviser, must be provided. In addition, the Code also mandates the timing for each step of an offer to ensure that shareholders have adequate time to make their decision.
- 4.4 If the person making the offer receives enough acceptances of the offer to reach 90% ownership of the company, the Code provides for the compulsory acquisition of the rest of the shares. This ensures a fair ‘exit’ for the minority shareholders and efficient outcomes for the acquirer.

⁷ Unlike individual exemptions, which can be approved by a division of the Panel, class exemptions must be approved by the full Panel.

⁸ Section 45(6) of the Takeovers Act.

⁹ For some transactions, an exemption from the Code may provide relief from some of the Code’s requirements. This relief may be subject to conditions. In addition, shareholders who hold or control more than 50% and less than 90% of a company’s voting rights may acquire up to 5% of the company’s voting rights over any 12-month period under a Code-permitted exception.



Acquisitions or allotments approved by shareholders

- 4.5 If an acquisition of some or all of an existing shareholder's shares or an allotment of new shares results in a person holding more than 20% of the voting rights in a Code company, the Code requires shareholders who are not involved in the acquisition or allotment to approve the transaction by a majority vote. The Code prescribes the disclosures that must be provided to shareholders, including advice from an independent adviser on the merits of the transaction.

Schemes of arrangement under the Companies Act

- 4.6 A scheme of arrangement is a statutory Court-approved procedure that allows for the reorganisation of the rights and obligations of shareholders and companies. Takeovers and other control-change transactions can be conducted via a scheme of arrangement as an alternative to offers under the Code. Code company schemes are schemes of arrangement that affect the voting rights of a Code company. Unlike a takeover offer under the Code, where shareholders decide whether to accept or reject the offer, a takeover via a scheme requires shareholders to vote whether to approve the scheme.
- 4.7 The High Court has the ultimate authority over the conduct and approval of a scheme of arrangement. The Panel's role is to assist the High Court by reviewing scheme documents to ensure that:
- (a) appropriate information is given to shareholders (including advice from an independent adviser);
 - (b) voting classes of shareholders with similar interests have been adequately identified; and
 - (c) other protections available to shareholders under the scheme are appropriate.
- 4.8 The Panel also helps to ensure that other matters that are relevant to the Court's decision are properly brought to the Court's attention.
- 4.9 If the Panel is satisfied with these matters, it can issue a 'no objection statement'.¹⁰ However, the Court has the power to approve a scheme without the Panel having provided a no objection statement, if 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 takeover under the Code.

5 Policy work

Public understanding

- 5.1 A key function of the Panel's policy work is to promote public understanding about takeovers law and practice. The Panel does this by:
- (a) maintaining a comprehensive website to promote access to information about the Panel and the Code, including the Panel's guidance to assist practitioners in complying with their obligations under the Code, advice for directors and shareholders, and a database of historical transactions;
 - (b) encouraging and responding promptly to public enquiries; and
 - (c) engaging with stakeholders, including shareholders, directors, lawyers, independent advisers and the media, by way of guidance, meetings and presentations to help them better understand the Code.

¹⁰ Section 236A(2)(b)(ii) of the Companies Act 1993 provides the Panel's jurisdiction to issue a no-objection statement in respect of a Code company scheme.



Law reform

5.2 As noted, a key function of the Panel's role is to review takeovers law and make recommendations to you, the Minister of Commerce and Consumer Affairs, of any changes that the Panel considers necessary.

5.3 The Panel is currently undertaking the following law reform projects:

(a) *2022 recommendations*

In April 2022, the Panel made a number of recommendations for law reform relating to the Takeovers Act and the Takeovers Code. The recommendations included proposed amendments to the '12 month look back' in the definition of 'Code company', to remove the look back for listed companies that are taken private and de-listed, and to apply the look back to some unlisted Code companies. The Panel also recommended amendments to provide increased disclosure and certainty around payment of consideration in takeovers and schemes of arrangement as well as a number of technical amendments intended to increase certainty and efficiency for the market.

These recommendations have not been progressed.

(b) *Panel fees review*

In late 2022, the Panel commenced a review of its revenue streams, and the focus of the project is now on updating the Panel's fees. The Panel carried out extensive analysis of its fees in 2023, and this work has provided a compelling case for updates to the Panel's fee levels and fee-chargeable activities. The Panel has produced a draft public consultation document setting out the business case for fee changes and the underlying analysis applied.

The Panel executive met with MBIE on 16 November 2023 to discuss the draft consultation paper and next steps for the project. MBIE supports the project and considers that the Panel has set out a compelling case to update its fees. The next steps required to take this project forward are set out at paragraph 6.1(b) below.

(c) *2017 recommendations*

The Panel made various recommendations for law reform in March 2017. Many of the Panel's recommended reforms came into force in October 2018 through regulations made to amend the Code. Amendments to the Takeovers Act came into force in January 2020.¹¹

There remains one final recommendation yet to be implemented, for an amendment to the definition of 'unlisted Code company' to remove the term 'share parcels', to align with section 199 of the Companies Act. This recommendation was to be included in an omnibus Regulatory Systems Bill that addressed minor changes to several Acts. The Bill has been repeatedly delayed since 2020 and the onset of Covid.

(d) *Schemes and deal protection device consultations*

The Panel has been consulting on a range of potential amendments to the regulation of schemes of arrangement. There are two consultation papers. The first considers potential amendments to provide greater alignment between the regulation of schemes of arrangement and Code takeovers. The second paper

¹¹ Among the amendments to the Act were changes to the definition of 'Code company' to include a financial threshold in the definition of unlisted Code company.



considers the effect of deal protection devices on takeovers and schemes. The Panel published these papers on 18 September 2023 and consultation closed on 1 December 2023.

The Panel expects that it will make law reform recommendations to the Minister in 2024. The scope of these recommendation will become clear once the Panel has had a chance to consider market feedback.

6 Pending decisions and actions for the Minister

6.1 Priority matters for consideration by the Minister are set out below:

(a) *2022 recommendations*

As noted at paragraph 5.3(a) above, the Panel made these recommendations in April 2022, and they have not to date been progressed.

To progress the recommendations, MBIE must prepare Cabinet advice seeking policy approval of the Panel's recommendations. The Panel asks the Minister to prioritise the work required for Cabinet approval.

(b) *Panel fees review*

As noted at paragraph 5.3(b) above, the Panel has prepared a draft fees consultation paper and the executive met with MBIE in November 2023 to progress the project. MBIE is supportive of the project. To change the Panel's fees, regulatory amendments are required.

To amend the fees regulations, the Panel asks the Minister to provide his approval at each of the following stages (with each stage to be accompanied by Cabinet papers prepared by MBIE) – firstly, agreement to the consultation and the project as a whole; secondly, policy approval after consultation has been completed; and finally, approval of the draft amending regulations that will be produced by Parliamentary Counsel. MBIE will lead this process with support from the Panel.

The Panel seeks the Minister's support to prioritise this work.

(c) *2017 recommendations*

As noted at paragraph 5.3(c) above, the Bill to implement the final recommendation made by the Panel in 2017 has been repeatedly delayed. MBIE leads the Regulatory Systems Bill work. The Panel seeks the Minister's support to prioritise this work.

(d) *Schemes rules alignment and deal protection consultation*

As noted at paragraph 5.3(d) above, the Panel has been consulting on potential amendments to the regulation of schemes of arrangement. Following a review of market feedback, the Panel expects to make law reform recommendations to the Minister in 2024.

The Panel will be seeking the Minister's support to prioritise the work required to enable statutory and regulatory law reform in 2024/2025.

(e) *Panel member appointments*

As noted in paragraph 2.7 above, Ms Glen's term will expire in May 2024 and Mr Hunt's in April 2024. MBIE will brief you on the reappointments or new appointments that need to be made.