Guidance Note

SCHEMES OF ARRANGEMENT

31 July 2024

TAKEOVERS PANEL
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This Guidance Note sets out key information relating to schemes of arrangement involving Code companies. The Guidance Note addresses the Companies Act 1993 requirements as well as the Panel's role in relation to schemes of arrangement.

1 Introduction

1.1 Schemes of arrangement and amalgamations under Part 15 of the Companies Act 1993 (**schemes** and the **Companies Act** respectively) are statutory Court-approved procedures that allow the reorganisation of the rights and obligations of shareholders and companies.

1.2 The Panel views schemes as a legitimate and valuable means for undertaking corporate transactions, including where they affect the voting rights of Code companies. The ability to carry out corporate transactions under a Companies Act process, rather than under the Code, provides economically sensible commercial flexibility.

1.3 The Court is the primary regulator of schemes as the Court makes orders which give effect to a scheme. However, the Panel has a regulatory role in relation to schemes which affect the voting rights of Code companies.

1.4 In practice, the Panel's primary function is to decide whether or not to issue a statement that the Panel does not object to the scheme under section 236A(2)(b)(ii) (a **No-objection Statement**). There are two main aspects of this function:

(a) A decision whether to issue a "letter of intention" (a **Letter of Intention**). If applicable, a Letter of Intention will be issued prior to the first Court hearing (at which the Code company will seek orders convening the shareholder meeting in respect of the scheme). A Letter of Intention is, in summary, a statement that, on the information presented to the Panel, the Panel intends to issue a No-objection Statement in relation to the scheme.

(b) A decision whether or not to issue a No-objection Statement in relation to the scheme. If applicable, a No-objection Statement will be issued prior to the second Court hearing (at which final orders giving effect to the scheme are sought).

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1.5 In addition, the Panel has a residual function to consider applications for orders in respect of a scheme which affects the voting rights of a Code company and, if necessary, bring matters to the Court's attention. If a No-objection Statement is sought, this will generally be reserved for exceptional matters.

1.6 If a No-objection Statement is not sought, the Panel will review the application for Court orders in respect of the Scheme (and any interlocutory orders) and consider whether to make submissions to the Court.

2 The Panel's jurisdiction, scope and functions

Panel's jurisdiction – schemes that "affect the voting rights" of a Code company

2.1 The Panel has a role in relation to schemes where the relevant scheme "affects the voting rights" of a Code company.

2.2 Section 236A(5) of the Companies Act provides that "affects the voting rights" of a Code company, in respect of a scheme, means:

> *[A]n arrangement or amalgamation that involves a change in the relative percentage of voting rights held or controlled by 1 or more shareholders.*

2.3 On its face, *any* change in the relative percentages of voting rights of any shareholders meets this definition. However, there may be some schemes where the change in the holding or control of voting rights in a Code company is so immaterial that section 236A of the Companies Act does not apply. This may be the case where there is a change in voting control which arises as a result of rounding to an insignificant decimal point. An example of this was *Re Tilt Renewables Limited* [2020] NZHC 1398, where Tilt Renewables Limited (**Tilt**) sought to complete a pro-rata return of capital by cancellation of shares under a scheme under Part 15 of the Companies Act (the **2020 Tilt Scheme**). In this case, there was no change in the relative voting control of shareholders when control percentages were rounded to the 8th decimal point. The Court decided that section 236A did not apply to the 2020 Tilt Scheme.

2.4 If a scheme promoter is unsure whether a scheme triggers section 236A, they should consult with the Panel at an early stage:

(a) The Panel may be prepared to issue a letter to the effect that it considers that section 236A of the Companies Act should not apply to a scheme, but should the Court find otherwise, the Panel would be prepared to issue a No-objection Statement.

(b) The Panel may also be prepared to treat the scheme as an Immaterial Change in Voting Control Scheme and consider a more streamlined process for its review of such schemes (see below at paragraphs 4.13 - 4.15).

Regulation of (and additional requirements for) Code company schemes

2.5 Schemes must be approved by the Court under section 236(1) of the Companies Act. Under sections 236A and 236B of the Companies Act, additional requirements apply in relation to schemes which affect the voting rights of a Code company.

2.6 The additional requirements include:

(a) Notice to the Panel: The Panel must be given notice of the application when it is filed. Typically, this application will be filed when orders for holding the shareholder meeting are sought.[1]

(b) Shareholder approval by prescribed thresholds: The scheme must be approved by shareholders by prescribed majorities.

[1] The Court process begins (and centres around) an originating application for orders under section 236(1) of the Companies Act. However, parties will also file an interlocutory application without notice for orders to approve the disclosure to shareholders and convene the shareholder meeting.

(c) No-objection Statement or no adverse effect: Either:

(i) the applicant must have filed a No-objection Statement; or

(ii) the Court must be satisfied that the shareholders of the Code company will not be adversely affected by the use of section 236(1) rather than the Code to effect the change involving the Code company.

The Court's role

2.7 The Court is the body which will ultimately determine whether a scheme (including a scheme which affects the voting rights of a Code company) is approved and determine whether or not to grant orders under section 236(1) approving a scheme.

2.8 The test for whether or not a scheme should be approved has been expressed in slightly different terms over time, but a recent statement of the test is set out in *Re Abano Healthcare Group Ltd*:[2]

> *(a) first, there has been compliance with the statutory provisions as to meetings, resolutions, the application to the Court, and the like;*
>
> *(b) second, the scheme has been fairly put to the class or classes of shareholders concerned, and that if a circular or circulars have been sent out, as is usual, whether before or after the making of the application to the Court, they give all the information reasonably necessary to enable the recipients to judge and vote upon the proposals;*
>
> *(c) third, the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and*
>
> *(d) fourth, the arrangement was such that an intelligent and honest person of business, a member of the class concerned, and acting in respect of his or her interest, might reasonably approve it.*

2.9 The Court in *Re Abano Healthcare Group Ltd* further stated in relation to the fourth limb that it was necessary to consider whether the proposed arrangement is generally fair and equitable.[3]

Shareholder approval

2.10 While the Court will ultimately give orders giving effect to a scheme (or not), schemes which affect the voting rights of a Code company may only proceed if they are approved by the prescribed shareholder majorities. Accordingly, shareholders will always be provided with the ability to vote on whether or not to approve a scheme.

2.11 Under section 236A(4) of the Companies Act, the Code company's shareholders may only approve a scheme which affects the voting control of a Code company by a resolution approved by:

(a) a majority of 75% or more of the votes of the shareholders in each interest class entitled to vote and voting on the question (i.e., the shares voted at the meeting); and

(b) a simple majority of all of the eligible voting rights.

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[2] *Re Abano Healthcare Group Ltd* [2020] NZHC 3343 at [21] per Fitzgerald J.
[3] At [22] per Fitzgerald J.

The Panel's role

2.12 The Panel's role in relation to schemes is to assist the Court. The Panel seeks to do this by:

(a) reviewing scheme documents to ensure that appropriate information is placed before shareholders, that interest classes of shareholders have been adequately identified, and that other protections available to shareholders (and other equity security holders) under or in connection with the scheme are appropriate; and

(b) helping to ensure that matters that are relevant to the Court's decision are brought to the Court's attention.

2.13 In this way, the Panel assists shareholders to decide for themselves on the merits of a transaction – by enabling them to properly exercise their vote on the scheme in an informed manner. The Panel notes that this reflects one of the objectives of the Code (that shareholders decide for themselves on the merits of a takeover offer).[4]

2.14 Since the introduction of sections 236A and 236B of the Companies Act, the Panel's primary means of interaction with the Court has been through the issuance of Letters of Intention and No-objection Statements (which are then submitted to the Court as annexures to affidavits by applicants).

2.15 However, the Panel may make submissions to the Court in relation to a scheme proposal irrespective of whether it is asked to provide, or in fact issues, a Letter of Intention or gives a No-objection Statement. The Panel will be less likely to make submissions or formally intervene in the Court process if it gives a Letter of Intention and No-objection Statement.

2.16 While it is ultimately at the discretion of the Court whether to hold an in-person hearing on a scheme or to consider the matter on the papers, the Panel prefers that parties do not ask the Court to give final orders on the papers. If the Panel becomes aware of such a request, it may make an application for an in-person hearing.

2.17 If no application for a No-objection Statement has been made, or if the Panel does not intend to issue a No-objection Statement, the Panel may seek to be heard at the initial Court proceedings. There, the Panel may object to the scheme, ask the Court to make orders on various matters (e.g., the information to be provided to shareholders or the composition of interest classes) or otherwise draw matters to the Court's attention.

2.18 Even where the Panel issues a Letter of Intention or No-objection Statement, the Panel considers that, in some cases, the Court may benefit from receiving the Panel's views as the regulator which has a broad overview of the takeover market and experience in identifying matters that need to be drawn to the Court's attention.

2.19 The Panel will not normally request to see an applicant's evidence and submissions prior to their filing with the Court. Typically, a review of the Scheme Implementation Agreement (the **SIA**) and any relevant supporting or related documents, such as any voting agreements (together, the **Scheme Documents**) and disclosure documents will suffice. However, where novel, potentially legally significant or contentious issues arise the Panel may wish to review draft Court materials to determine whether or not the applicant has canvassed the matter appropriately for the Court, such that the additional submissions from the Panel are not required.

No-objection Statements

2.20 Under section 236A, the Court cannot approve a scheme that affects the voting rights of a Code company unless:

(a) it is satisfied that the shareholders of the Code company will not be adversely affected by the use of a scheme rather than the Code to effect the change involving the Code company; or

(b) the Court is presented with a No-objection Statement from the Panel.

2.21 The Panel will consider applications for a No-objection Statement on a case-by-case basis. The Panel will consider providing a No-objection Statement only at the request of an applicant.

[4] See section 20(1)(e) of the Takeovers Act 1993.

2.22 The Panel is not required under the Companies Act to provide a No-objection Statement and a scheme applicant is not required to apply for a No-objection Statement.

2.23 The Panel will issue a No-objection Statement where it considers that an appropriate balance has been struck between:

(a) alignment of the relevant scheme with what would be permitted under a Code offer; and

(b) the inherent flexibility of schemes,

bearing in mind the objectives of the Code[5] and the respective roles of the Court and the Panel.

2.24 Accordingly, when considering whether to give a No-objection Statement, the Panel will consider:

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

(b) whether the standard of 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);

(c) whether interest classes of shareholders have been composed appropriately;

(d) whether the protections available to shareholders (and other equity security holders) under the Code and/or the Takeovers Act 1993 (the **Takeovers Act**) (or equivalents to those protections) have been provided for under or in connection with the scheme; and

(e) such other factors as the Panel considers to be applicable in the relevant circumstances bearing in mind the respective roles of the Panel and the Court.

2.25 The granting of a No-objection Statement or a Letter of Intention does not indicate any view on the merits of the scheme by the Panel.

Residual consideration of schemes

<u>Where a No-objection Statement is sought</u>

2.26 In addition to determining whether or not to issue a No-objection Statement, the Panel will review the terms of the scheme and the disclosure to establish whether there are relevant matters that should be put before the Court.

2.27 If a No-objection Statement is sought, it will be rare for the Panel to wish to raise matters with the Court. Examples of matters which the Panel may wish to raise could include:

(a) An SIA (or arrangements prior to the SIA) which provides the bidder with absolute exclusivity without the potential for superior offers to be considered, excessively high break fees or "naked no vote" break fees (i.e., break fees which are payable simply because shareholders did not approve the transaction).

(b) A scheme where there were no target company directors that were independent of the bidder.

In each of these cases, the Panel may wish to ensure that the matter is appropriately brought to the Court's attention so the Court can consider that matter under the fourth limb of the *Abano* test.

<u>Where a No-objection Statement is not sought</u>

2.28 Regardless of whether a No-objection Statement is sought, the Panel must be notified of all schemes that affect the voting rights of Code companies. If a No-objection Statement is not sought, the Panel's review will focus on matters that it considers relevant for the Court's consideration.

[5] See section 20 of the Takeovers Act 1993.

2.29 In order to review the relevant materials and determine whether or not to make submissions to the Court (and if applicable, engage counsel and make submissions) the Panel may need more time than the standard notice period of one week, and may ask the Court to delay considering the application accordingly.

3 The Panel's procedure for considering No-objection Statement applications

Introduction

3.1 The Panel's review of schemes will focus on a review of the disclosure to be provided to shareholders – usually the notice of meeting together with its explanatory memorandum or notes, the independent adviser's report and any other disclosure materials (together, the **Scheme Booklet**).

3.2 The Panel will also review Scheme Documents. However, the Panel's review of Scheme Documents will likely focus on identification of issues which need to be addressed in respect of the scheme (e.g., in disclosure or the composition of interest classes). The Panel will review Scheme Documents following execution and typically does not need to see draft Scheme Documents. However, if potential applicants are concerned about any issues in draft Scheme Documents, the Panel executive is available to discuss them.

3.3 The Panel will also consider specific questions prior to an application for a Letter of Intention or No-objection Statement. For example, the Panel has, on several occasions, considered novel interest class questions in advance of reviewing a Scheme Booklet or Scheme Documents having been executed. The Panel executive is willing to discuss draft Scheme Documents (or proposals) on a confidential basis, in much the same way as the Panel executive reviews draft Code transaction documents.

Provision of documents to the Panel prior to first Court hearing

3.4 Under section 236A(1) of the Companies Act, the applicant for final Court orders for a scheme which affects the voting rights of a Code company must notify the Panel of the application at the same time as filing the application in Court. As any orders to hold a scheme meeting are obtained by way of an interlocutory application without notice, this notification will arise prior to distribution of the notice of meeting.

3.5 However, to ensure that the Panel has had time to review the Scheme Booklet and Scheme Documents, a Code company that wishes to apply for a No-objection Statement (an **Applicant**) should apply for a Letter of Intention well in advance of the application to the Court for initial orders under section 236(2) of the Companies Act. In addition, any prospective Applicant should provide the Panel with a copy of the SIA forthwith after its execution.

3.6 Timeframes to consider an application for a Letter of Intention depend on factors such as the quality of the draft Scheme Booklet and application, whether there are novel and complex issues, the responsiveness of the Applicant to comments from the Panel and availability of resources. Applicants should allow for a minimum of three weeks between submission of draft Scheme Documents and a decision on whether to issue a Letter of Intention (although more time may be required). The Panel executive is available to discuss timeframes on a case-by-case basis.

3.7 When making an application to the Panel, the Applicant must specify the dates by which the applications for initial Court orders and final Court orders are intended to be filed. The Panel will do its best to meet reasonable timeframes.

3.8 The information that the Panel expects to receive in an application for a Letter of Intention and No-objection Statement is listed in Appendix A to this Guidance Note.

3.9 Generally, applications for a No-objection Statement can be processed more rapidly, assuming a Letter of Intention was issued and there have been immaterial changes to the documents or other issues to consider.

3.10 If the Panel has not had adequate time to consider the Scheme Documents, the Panel will be unlikely to give a No-objection Statement.

Letter of Intention

3.11 The purpose of providing a Letter of Intention is to indicate to the Court that the Panel is minded to issue a No-objection Statement on the basis of the information considered by the Panel at that stage. As such, the Panel considers a Letter of Intention to be a key mechanism for the Panel to feed into the Court process.

3.12 The Panel's decision as to whether or not to issue a Letter of Intention is a discretionary matter. However, if, on the materials presented to the Panel prior to initial orders being sought, the Panel is satisfied of the matters referred to in paragraphs 2.23 and 2.24, the Panel will be likely to issue a No-objection Statement in relation to the scheme, assuming that:

(a) the relevant majorities of shareholders vote in favour of the scheme; and

(b) no additional information comes to the Panel's attention or circumstances change such that the proposed disclosure is misleading, or it would otherwise be inappropriate for the Panel to issue a No-Objection Statement.

3.13 The Letter of Intention is likely to be in a form similar to that set out in Appendix C of this Guidance Note, but may be varied if the Panel considers it appropriate in the circumstances.

3.14 The Panel's position set out in the Letter of Intention may change if the scheme's circumstances change. For example, the Panel's position may change if a person engages in misleading or deceptive conduct, or in conduct that is likely to mislead or deceive, in relation to the scheme.

3.15 In order to allow the Panel to assist the Court, the Panel strongly encourages Applicants to seek a Letter of Intention prior to filing applications for initial orders. To this end:

(a) A Letter of Intention will usually be treated as a prerequisite to the Panel issuing a No-objection Statement – i.e., if the Panel does not issue a Letter of Intention, it will usually not issue a No-objection Statement.

(b) The Panel strongly cautions Applicants against applying for initial orders without receiving a Letter of Intention (even if the Applicant advises the Court that a Letter of Intention has been requested, but not yet obtained). Such an approach risks misleading the Court as to the Panel's view of the scheme. Should an Applicant take this approach, the Panel may cease its consideration of the application for a Letter of Intention and any No-objection Statement.[6] In this circumstance, the Panel will likely communicate any concerns it has with the scheme directly to the Court through counsel. Further, the Panel is significantly more likely to oppose the scheme given the high threshold an Applicant will have to cross in order to meet section 236A(2)(b)(i) where the Panel does not issue a No-objection Statement.

(c) The Panel is unlikely to be sympathetic to timing constraints as a reason for not applying for a Letter of Intention or waiting for a decision in relation to an application. Applicants should ensure that they leave sufficient time in their timetables to address any potential issues.

No-objection Statement

3.16 If the Panel provides a No-objection Statement it will be issued to the Applicant just prior to the filing for the second Court hearing, at which the Court makes final orders regarding the scheme (usually to approve the scheme and give effect to it). This ensures that the Panel has had an opportunity to observe the entire scheme process and satisfy itself that there have been no material changes to the circumstances of the scheme and no material changes to the information it considered in advance of the hearing for initial Court orders. A statement outlining any material changes (or if none, a statement to this effect) should be included in the application for a No-objection Statement.

[6] This would mean that the scheme proponent would have to satisfy the Court that the shareholders of the Code company will not be adversely affected by the use of a scheme rather than the Code. This is a high threshold.

3.17 The Panel's No-objection Statement is likely to be in a form similar to that set out in Appendix D of this Guidance Note.

Shareholders' consideration of schemes

3.18 It is critical that shareholders have adequate time to consider a scheme prior to voting on it. While there is often a significant period of time between announcement of a scheme and the shareholder vote, the Panel sees the critical period as the period commencing when the Scheme Booklet is sent to shareholders and ending on the shareholder vote. Prior to the receipt of disclosure, it is unreasonable to expect shareholders to give due consideration to the scheme as they would not be doing so on a fully informed basis.

3.19 The Panel considers that the scheme meeting should typically be held at least 20 working days after distribution of the Scheme Booklet. This corresponds to the 20-working-day minimum offer period provided under the Code.

3.20 Further, if there is a variation to a scheme, the Panel expects that the scheme meeting should not be held earlier than 10 working days after the distribution of any supplemental disclosure (variations are discussed in more detail at paragraphs 5.27 and 5.28 below).

3.21 The Panel acknowledges that there may be certain limited circumstances where shorter periods than those provided above may be appropriate. However, the Panel considers these situations would be the exception, rather than the norm. It is important that shareholders have adequate time to consider the relevant disclosure and make an informed decision.

Objection by a shareholder

3.22 Under the Companies Act, shareholders are generally entitled to make submissions to the Court on a scheme. Shareholders have this ability irrespective of whether or not a No-objection Statement is given. This is an important protection for shareholders and should not be undermined.

3.23 A shareholder or other interested party may also submit an objection to the Panel in relation to matters which are within the Panel's jurisdiction.

3.24 The Panel may consider such an objection when determining whether to provide a No-objection Statement and/or to make submissions to the Court.

3.25 However, when considering whether the Panel should make submissions to the Court, the Panel may form the view that shareholders should raise an issue with the Court themselves and it is not a productive use of the Panel's resources to do so. Shareholders should be aware that the Panel does not wish to be unnecessarily drawn into commercial disputes regarding proposed transactions.

3.26 The Panel may seek the scheme Applicant's and/or promoter's views on any objections the Panel has received from shareholders or third parties, and the identity of the complainant may be kept confidential if that is considered appropriate or necessary in the circumstances.

3.27 To ensure shareholders have adequate time to consider the Scheme Documents and potentially lodge an objection to the Court and/or a complaint with the Panel, Code companies should ensure that their timetable allows for adequate time to consider complaints. Code companies should allow at least five working days from when the results of the shareholder vote are announced for objections to making final orders to be filed with the Court (a longer period might be required in the case of more complex transactions). Shorter periods are likely to unreasonably prejudice shareholders.

Fees

3.28 Under the Takeovers Regulations 2000 (the **Regulations**), the Panel is able to charge for certain aspects of its work, including the processing of No-objection Statement applications.

3.29 The Panel's charges will be calculated at the rates set out in the Regulations. Applicants will be billed monthly.

4 Disclosure to shareholders

Information disclosure

4.1 The Panel has two key requirements for Scheme Booklets and other shareholder disclosure:

(a) Scheme Booklets should contain the disclosures required by Schedules 1 and 2 of the Code and rules 15 and 16 of the Code (as applicable), subject to modifications where the disclosures may be omitted or modified where clearly unnecessary or inappropriate (e.g., the certifications usually required by clause 19 of Schedule 1 and clause 26 of Schedule 2 to the Code). If an Applicant considers that departures from usual disclosures are appropriate, an explanation should be provided setting out why the modification or omission is necessary or desirable. Repetition and irrelevant Code-like language should be avoided.

(b) Scheme Booklets (and other shareholder disclosure) must not be misleading or deceptive.

Clear, concise, and effective Scheme Booklets (and other shareholder disclosure)

4.2 The Panel expects user-friendly Scheme Booklets (and any other disclosure documents) for shareholders. Drafting should follow a clear and concise style, with minimal use of jargon and repetition, and with plain English used where possible. If information is summarised, a balanced view of any advantages and disadvantages should be provided.

4.3 More specifically, Scheme Booklets and other shareholder disclosure documents should be:

(a) Clear:

(i) use plain language;

(ii) use a font and font size that are easily readable;

(iii) be logically ordered and easy to navigate;

(iv) highlight important information; and

(v) explain complex information in plain language and include a clear explanation of any necessary jargon;

(b) Concise:

(i) use short sentences;

(ii) avoid unnecessary repetition;

(iii) highlight important information in balanced summaries;

(iv) use diagrams and graphs effectively; and

(v) minimise the use of brand information, photographs and other images;

(c) Effective:

(i) give adequate and accurate information about the scheme; and

(ii) convey an accurate and balanced impression.

4.4 The Panel is aware that Code companies will want to promote schemes to shareholders (and may be contractually obligated to do so). Nonetheless, Code companies need to present the information fairly, and with appropriate balance, to avoid the information being misleading or deceptive.

4.5 The Scheme Booklet should disclose all material conditions in relation to a scheme.

Misleading or deceptive statements in respect of a scheme

4.6 Section 236B provides that the Code does not apply where the Court has made an order under section 236(1) that affects the voting rights of a Code company. Accordingly, rule 64 of the Code does not apply to a person increasing their control percentage in a Code company on the completion of a scheme.

4.7 However, the Panel will, when considering disclosure in respect of a scheme, assess the disclosure against the rule 64 standard and the prescribed disclosures set out in the Code, as that is the standard of disclosure which would be provided in respect of a takeover offer under the Code.

4.8 During the course of a scheme, misleading or deceptive conduct is regulated under the Financial Markets Conduct Act 2013 (the **FMCA**). While the FMCA is regulated by the Financial Markets Authority (the **FMA**), the Panel has a Memorandum of Understanding with the FMA and may report instances of potential misleading or deceptive conduct in a scheme to the FMCA. Misleading or deceptive conduct may also affect whether the Panel will issue a Letter of Intention or No-objection Statement and what (if any) submissions the Panel might make to the Court.

Disclaimers

4.9 While appropriate disclaimers are permissible, disclaiming a party's responsibility for a Scheme Booklet or other disclosure document has the potential to be misleading. Parties should not attempt to disclaim liability for contravention of any applicable prohibition on misleading or deceptive conduct. The Panel suggests parties avoid the use of disclaimers that are broad and catch-all.

4.10 In addition, where a Letter of Intention is given, the Panel requires that the Scheme Booklet contains, or be accompanied by, the following statement:

> *Role of Takeovers Panel and High Court*
>
> *The fact that the Takeovers Panel has provided a letter of intention indicating that it does not intend to object to the scheme (or subsequently issues a no-objection statement in respect of the scheme), or that the High Court has ordered that a meeting be convened, does not mean that the Panel or the Court:*
>
> *(a) has formed any view as to the merits of the proposed scheme or as to how shareholders should vote (on this matter shareholders must reach their own decision); or*
>
> *(b) has prepared, or is responsible for the content of, the scheme booklet or any other material.*

Independent adviser reports

4.11 Other than in exceptional cases,[7] the Panel will provide a No-objection Statement only for scheme proposals that are accompanied by an independent adviser's report. In terms of the types of report which are likely to be required:

(a) In most cases, it is expected that there will be an independent adviser's report which is similar to a rule 21 Code report on the merits of the proposed transaction.

(b) In addition, an independent adviser's report which is similar to a rule 22 report may be required (or those matters might be required to be addressed in the rule 21-equivalent independent adviser's report). Situations where such a report is more likely to be required include where there are multiple interest classes of shareholders who will be asked to vote on the scheme. Such a report may also be relevant where an offer is made to equity security holders (other than shareholders) which is conditional on the scheme proceeding.

[7] The main exception is likely to be Immaterial Change in Voting Control Schemes – see below.

4.12 The independent adviser must be approved by the Panel for the purposes of providing the report. Full details of the Panel's policy and practice on approvals for independent advisers and reviewing independent adviser reports are contained in the Panel's *Guidance Note on Independent Advisers*.

Reduced disclosure for Immaterial Change in Voting Control Schemes

4.13 The Panel is conscious that some schemes may involve only immaterial changes in the holding or control of voting rights in a Code company (such schemes being **Immaterial Change in Voting Control Schemes**). Although the matter is fact dependent, Immaterial Change in Voting Control Schemes may include:

(a) pro-rata returns of capital where there are minor changes in voting control (although it is possible that schemes such as this, which result in de minimis changes in relative voting control as a result of rounding, do not trigger section 236A at all – see further below); and

(b) corporate restructures where a new holding company is inserted at the top of a corporate group (such a transaction may result in a new holder of voting rights, but not involve any change in relative control amongst the ultimate controllers of voting rights).

4.14 Where the Panel is satisfied that a scheme is an Immaterial Change in Voting Control Scheme, the Panel may consider dispensing with some of the disclosure requirements which would otherwise be expected and/or the need for an independent adviser's report.

4.15 If a scheme promoter considers a scheme to be an Immaterial Change in Voting Control Scheme, the scheme proponent should engage early with the Panel (i.e., before making an application for a No-objection Statement) and provide the following information:

(a) the reasons for this view;

(b) the proposed interest classes and the basis for their proposed composition;

(c) whether or not an independent adviser's report should be provided (and the reasons for this view);

(d) a statement detailing which of the usual disclosures the scheme promoter considers unnecessary (and the reasons for this approach); and

(e) any other relevant matters in this regard which the scheme promoter considers may assist the Panel in its consideration of the application.

5 Legal issues

Voting and interest classes

5.1 The voting requirements must be disclosed in the Scheme Booklet. Valid votes by proxy or representative are included for counting the shares voted at the meeting.

5.2 Following the shareholder vote (and before the Panel issues a No-objection Statement) the Panel will want to be presented with evidence that the relevant thresholds were met. This has commonly taken the form of a certificate or affidavit from the Code company's share registrar or auditor who administered the vote. The Panel executive is available to discuss what might be appropriate in specific circumstances.

5.3 Under the common law, and in accordance with section 236A of the Companies Act, a scheme must be considered and voted on by each interest class affected by the scheme. The requisite voting threshold needs to be achieved in each interest class if the scheme is to succeed.

5.4 When a scheme involves separate interest classes, the Panel expects the division of classes to be clearly disclosed in the Scheme Booklet, together with an explanation of why the divisions have been drawn.

5.5 The interest classes are to be determined in accordance with Schedule 10 of the Companies Act (**Schedule 10**) as a starting point.[8]

5.6 Schedule 10 provides that:

"…an interest class may be determined in accordance with the following principles:

(a) shareholders whose rights are so dissimilar that they cannot sensibly consult together about a common interest are in different interest classes:

(b) shareholders whose rights are sufficiently similar that they can consult together about a common interest are in the same interest class:

(c) the issue is similarity and dissimilarity of shareholders' legal rights against the company (not similarity or dissimilarity of any interest not derived from legal rights against the company):

(d) if the rights of different shareholders will be different under a proposed arrangement or amalgamation, then those shareholders are in different interest classes."

5.7 Under Schedule 10, to determine interest classes, the parties need to look at the rights and obligations of shareholders and the effect of the scheme on them. Accordingly, if the scheme would result in a different legal effect for a group of shareholders, that group of shareholders should likely be considered as a different interest class for the purposes of voting on the scheme.

5.8 However, the common law also needs to be considered. For example, in respect of shareholders being able to sensibly consult together about a common interest, where the acquirer or their associate holds shares, that shareholder will likely have to vote in a separate interest class from the other shareholders.[9]

5.9 The Panel will not expect different interest classes to be identified unnecessarily.

5.10 While association is not a feature of the Schedule 10 interest class determination, association will be relevant to disclosure in the Scheme Booklet and may restrict the scheme promoter's ability to acquire voting securities outside of the scheme.

Promoter and associates must commit to vote in favour

5.11 If any promoter of the proposed scheme (or any of its associates) is a shareholder of the Code company and will be eligible to vote on the resolution to approve the scheme, the promoter (and any relevant associates) must commit to vote in favour of the scheme by way of deed poll enforceable by the Panel. As a corollary of this, the scheme promoter must undertake to retain the relevant shares until the proposed scheme is implemented or the SIA is terminated.

5.12 A standard form deed poll is attached as Appendix B to this Guidance Note.

Voting Agreements

<u>Introduction and Code implications</u>

5.13 A scheme promoter may wish to enter into voting agreements prior to undertaking a scheme.

5.14 A voting agreement is a legal commitment by a shareholder in a Code company to vote for or against a scheme (a **Voting Agreement**). Voting Agreements are analogous to Lock-up Agreements in respect of takeovers. Commonly,

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[8] See *Re New Zealand Oil & Gas Limited* [2015] NZHC 39 at [13] – [19].

[9] See *Re Hellenic & General Trust Ltd* [1976] 1 WLR 123, in which a scheme was rejected by the Court as a 53% shareholder ought to have been placed in a separate class for voting purposes, as it was a wholly-owned subsidiary of the bidder. For further examples see *Advicewise People Ltd v Trends Publishing International Ltd* [2016] NZHC 2119, *Aston Resources Ltd* [2012] FCA 229 and *Re Cashcard Australia Limited* (2004) 48 ACSR 738.

scheme promoters wishing to increase deal certainty will seek to enter into Voting Agreements. A Voting Agreement will typically:

(a) contractually bind the shareholder to vote in favour of the scheme; and

(b) contractually restrict the shareholder from selling their shares in the Code company prior to the shareholder meeting to vote on the scheme.

5.15 Accordingly, Voting Agreements confer control over voting rights on the promoter of the scheme, as the scheme promoter has effective control over the voting rights as a matter of contract. As such, Voting Agreements can place the persons who can enforce the commitment to vote for or against the scheme (and any upstream parties of those persons) in breach of the Code.

5.16 The Code does not restrict Voting Agreements that do not result in a person increasing their voting control beyond the 20% control threshold set out in rule 6(1) of the Code. However, rule 6(1) may be breached by a scheme promoter entering into a Voting Agreement (in the absence of reliance on an exemption) if either:

(a) the scheme promoter and their associates together hold or control less than 20% of the voting rights in the Code company, but entering into the Voting Agreement increases their aggregate holding or control to more than 20% (as a result of obtaining control of voting rights under the Voting Agreement); or

(b) the scheme promoter and their associates already hold or control more than 20% in aggregate prior to entering into the Voting Agreement.

5.17 Accordingly, scheme promoters need to take care not to breach the Code's 20% threshold in rule 6(1).

Class Exemption for Voting Agreements

5.18 Voting Agreements are, however, able to be entered into in reliance on the *Takeovers Code (Voting Agreements for Schemes of Arrangement) Exemption Notice 2020* (the **Class Exemption**). The Class Exemption permits any person to enter into a Voting Agreement which would otherwise breach rule 6(1), provided that the conditions of the Class Exemption are satisfied.

5.19 The conditions of the Class Exemption, include that:

(a) the voting commitment must relate to a scheme that is proposed under an SIA that is duly executed by all parties to the agreement and is in force – i.e., the voting commitment cannot relate to a theoretical or potential scheme which might be proposed in the future;

(b) the Voting Agreement must expressly provide that the person that may enforce the commitment to vote for or against the scheme (the **Specified Person**) does not become the controller of the voting rights attaching to the voting securities that are the subject of the Voting Agreement in any way other than in respect of that voting commitment;

(c) the Specified Person must, as soon as is reasonably practicable but, in any event, within one working day after the Voting Agreement is entered into, send certain material information about the Voting Agreement to the Panel and the Code company; and

(d) if the Specified Person becomes aware that any material information has changed, the Specified Person must, as soon as is reasonably practicable but, in any event, within one working day after becoming aware of the change, send a notice of the change to the Panel and the Code company.

5.20 Following disclosure of the material information, the Panel considers that it is best practice for the Code company to promptly disclose the material information to shareholders. An omission to do so may be misleading to shareholders.

5.21 The Panel will engage with the Code company to ensure that appropriate disclosures are made. Voting Agreements should be disclosed in the Scheme Booklet. In addition:

(a) The Panel expects that a listed Code company will likely be required to announce any Voting Agreement (or varied material information) under the FMCA, with the relevant announcement:

(i) including all material information (or all varied material information); and

(ii) being made within one working day.

In any event, the Panel considers this is best practice. The Panel also notes that this is likely to apply both before and after distribution of the Scheme Booklet.

(b) An unlisted Code company should contact the Panel executive and discuss what disclosure is appropriate in the circumstances. The appropriate disclosure may vary depending on the circumstances, but generally speaking:

(i) If the Code company issues any written communications to shareholders regarding the scheme prior to release of the Scheme Booklet, the Panel is likely to expect the Code company to disclose the material information in those communications, as at that date.

(ii) If a Voting Agreement is entered into (or varied) after distribution of the Scheme Booklet, the Panel is likely to expect that the Code company disclose the material information (or varied material information), as at that date, in a supplemental disclosure document.

5.22 Any failure by a Code company to make appropriate disclosures will be addressed when the Panel considers whether or not to issue a No-objection Statement (if one is sought), but the Panel may also seek to ensure that disclosure issues are canvassed appropriately before the Court. If a No-objection Statement is not sought, the Panel may none the less appear in Court and draw the Court's attention to this matter.

Voting Agreements and interest classes

5.23 In considering the identification of interest classes as part of an application for a No-objection Statement, the Panel will assess Voting Agreements on a case-by-case basis. A Voting Agreement between the scheme promoter and a shareholder who is not, or does not become, related to the scheme promoter is unlikely to result in the Panel forming the view that the shareholder should vote in a separate interest class.[10]

5.24 A Voting Agreement for a scheme will not, on its own, result in an assumed association between parties to the agreement. The Panel will assess whether the terms of a Voting Agreement may give rise to a potential association in the context of a proposed scheme on a case-by-case basis.

Statements of intention

5.25 Voting intention statements can be made by shareholders declaring publicly how they intend to vote in respect of a scheme.

5.26 Although section 236B of the Companies Act excludes the application of the Code to schemes which affect the voting rights of Code companies once final orders are issued, failure to act in accordance with public statements in relation to a scheme may amount to a breach of the FMCA.

Variations

5.27 There may be changes to a scheme after the Scheme Booklet has been distributed but before the shareholder vote.

5.28 Code companies should contact the Panel if there are to be any variations to a scheme once the Scheme Booklet has been released. The Panel may require that:

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[10] The inclusion of common 'deal protection' restrictions in a voting agreement, such as restrictions on the sale of shares and/or non-solicitation undertakings, will not, in itself, give rise to a requirement to vote in a separate interest class.

(a) Shareholders are provided with supplemental disclosure of the change via an addendum to the Scheme Booklet. The independent adviser may also need to be given the opportunity to provide an addendum to the independent adviser's report for shareholders.

(b) Shareholders are given adequate time to consider the variation and supplemental disclosure. The Panel expects that Code companies should allow a minimum of 10 working days for this.

Panel consideration of the Code's protections for shareholders and other equity security holders

5.29 The Code contains a number of protections for shareholders and other equity security holders beyond information disclosure. These protections, for example, limit the types of conditions that an offeror can rely on for avoiding the transaction, require timely payment, and require a fair and reasonable offer to be made to other equity security holders in the case of a full Code offer. The Panel will expect that the target company directors in a scheme have given appropriate weight to the protections that would have existed in a Code regulated offer, and are satisfied that it is appropriate in the circumstances if some or all of those protections are not included in the scheme.

5.30 When assessing a scheme, the Panel may consider the extent to which it is reasonable, given the scheme's particular set of circumstances, for the protections normally available to shareholders under a Code regulated offer to be absent. Circumstances which may influence the Panel could include there being no independent directors on the target company board, or the inclusion of conditions that depend on the judgement of a party to the scheme, or the fulfilment of which is in the power, or under the control of, a party to the scheme.

Differential consideration

5.31 Rule 20 of the Code provides that an offer must be made on the same terms and provide the same consideration for all securities belonging to the same class of equity securities under offer. Rule 20 is one of the key concepts of the Code and the Panel has historically taken a strict approach in enforcing rule 20 in the context of Code offers.

5.32 Conversely, the Panel considers that schemes can provide a level of economically sensible commercial flexibility which may not be possible in a Code offer. As such, the Panel will consider issuing a No-objection Statement in respect of a scheme which provides differential consideration[11] to shareholders in the target company and/or their associates, subject to the matters set out in paragraph 5.33.

5.33 Payment of differential consideration under a scheme is a significant departure from what would be permitted under a Code offer. Accordingly, the Panel will consider each case on its merits in light of all the relevant circumstances. Where differential consideration is proposed:

(a) The Panel will look to the composition of interest classes in the first instance as a means of ensuring that the interests of relevant shareholders are adequately protected. The Panel expects that it will be unlikely for it to issue a No-objection Statement unless the interest classes are composed such that the members of each interest class receive the same consideration. Notwithstanding this general position, in exceptional circumstances, the Panel may form the view that differential consideration does not require separate interest classes.

(b) The Panel expects that all shareholders should be provided with all material information about any differential consideration in respect of a scheme. Generally, the Panel will expect relevant particulars to be included in the Scheme Booklet and covered in the independent adviser's report.

(c) The Panel may still decline to issue a No-objection Statement even where it is proposed that recipients of differential consideration vote in separate interest classes and the disclosure will be as anticipated in paragraph 5.33(b). This reflects that, as noted above, differential consideration under a scheme is a significant departure from what the Code permits.

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[11] Differential consideration can include differences in the nature or amount of consideration under the scheme. It may also include effective increased or reduced consideration which is provided via collateral arrangements.

5.34 Market participants are strongly encouraged to engage with the Panel as early as possible where differential consideration is proposed.

Treatment of equity securities (other than shares) in schemes

5.35 If a Code company has existing equity securities other than shares, the Panel considers that the scheme promoters must take into consideration those interests and outline to the Panel the proposed treatment of those equity securities.

5.36 Accordingly, the Panel will likely take into account the relevant protections afforded to equity security holders (other than shareholders) during a Code-regulated transaction. However, each application will be considered on a case-by-case basis.

5.37 The protections which are appropriate for equity security holders (other than shareholders) will likely vary from case to case. However, the Panel may consider whether:

(a) the information provided to those equity security holders in relation to:

(i) approving a scheme;

(ii) accepting an offer for their equity securities which is connected to the scheme; or

(iii) otherwise responding or taking any action in relation to a scheme,

is of the same standard as the information provided to shareholders; and

(b) it is appropriate to provide those equity security holders with supplemental information in addition to what is provided to shareholders, including advice from an independent adviser.

Offers of scrip

5.38 Where the scheme involves securities as consideration, shareholders should be provided with sufficient information about the securities to allow them to decide how they will vote on the resolutions put before them. The independent adviser's report will need to consider the merits of the scrip consideration, and may include a valuation, particularly if the scrip offered is not listed and frequently traded. The Panel would expect to review drafts of any disclosure documents for the scrip consideration at the time a No-objection Statement is applied for.[12]

Unclaimed consideration

5.39 The Panel will consider how a scheme treats unclaimed consideration when assessing whether to issue a Letter of Intention or No-objection Statement. Specifically, the Panel will consider whether the proposed approach provides broadly equivalent protections to shareholders as would be provided under the Code.

5.40 In a Code offer, rule 61 of the Code deals with unclaimed consideration by providing that, if a shareholder does not return an instrument of transfer and the consideration is or includes cash, the dominant owner must pay the cash to the Code company, which must deposit it in an interest-bearing trust account and hold it until it is claimed (the **Unclaimed Monies Requirement**). While the Panel has recommended reform to the Unclaimed Monies Requirement, the current position is that funds must be held on trust subject only to the Unclaimed Money Act 1971. Broadly, this allows Code companies to transfer the unclaimed consideration to Inland Revenue after six years.[13] Importantly, such a transfer does not extinguish the former shareholder's claim entirely – instead of a claim against the company, the former shareholder will have a claim against the Inland Revenue.

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[12] In a scrip takeover undertaken as a scheme, where some shareholders receive scrip and others the cash equivalent via a nominee process, the common law principle that separate interest classes should not be unnecessarily identified may apply even though shareholders have different legal rights as against the company. This was the approach taken in *Michael Hill International Ltd* [2016] NZHC 1393.

[13] This time period can be reduced if the company ceases trading.

5.41 In light of the Panel's proposed reforms to the Unclaimed Monies Requirement, the Panel does not consider that the current Code requirements need to be fully reflected in a scheme. Rather, the Panel considers it sufficient for the SIA to provide that unclaimed consideration will be held on trust for target shareholders for a specified period (a **Trust Period**). Although the appropriate duration of a Trust Period may vary depending on circumstances, the Panel is likely to consider a Trust Period of 24 months (or more) to be adequate. After the Trust Period:

(a) Subject to (b), the Panel is generally comfortable with any remaining unclaimed consideration being able to be disbursed to and/or utilised by the target company.

(b) Notwithstanding any distribution to, or use of, the unclaimed consideration by the target after the Trust Period, any shareholder who did not receive the consideration should retain a claim against the target for any unclaimed consideration (albeit as an unsecured creditor).

Third parties

5.42 Some schemes are part of transactions that depend on the actions of third parties. For example, scheme consideration may be issued by an entity that is not otherwise a party to the scheme.

5.43 The Panel would expect that third parties in these situations should be made legally bound to fulfil their obligations. For example, the Panel may request that a third party becomes contractually bound to provide the relevant benefits.

5.44 Depending on the significance of the third-party arrangements to the scheme, the scheme Applicant or promoter may need to submit relevant documentation to the Panel for its consideration and, in certain cases, explain the arrangements in the Scheme Booklet.

Dealings during a scheme

5.45 The Code restricts dealings by the offeror and its associates during takeover offers. Under the Code, a bidder is restricted from selling shares in a target during an offer or buying them on market at more than the offer price. This policy assists in ensuring that shareholders are treated fairly.

5.46 An offeror in a scheme might cause mischief by acquiring and/or disposing of securities in the target before the shareholder vote. There are two key examples of this practice:

(a) After announcement of a scheme, the offeror acquires shares at more than the scheme price. This might occur if the bidder perceives that there are shareholders that would vote against the scheme. The bidder agrees to purchase their shares above the scheme price. While the bidder would vote those shares in a separate interest class, it would reduce the number of votes against the resolution in the main interest class. If this were permitted, different consideration would be provided to some shareholders by the bidder during the course of the scheme.

(b) After announcement of the scheme, the offeror or its associate disposes of shares it holds 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. The bidder effectively "buys" votes in the main interest class by selling shares on market (therefore anonymously) at a discount to the scheme consideration knowing the only likely purchasers are looking for an arbitrage opportunity to vote in favour of the scheme. For a cost, the bidder would therefore "shift" votes from the bidder's separate interest class to the main interest class, increasing the chance that the main interest class approves the resolution.

5.47 As to how these matters are dealt with:

(a) The deed poll which offerors are required to sign restricts conduct of the type referred to in paragraph (b) above.

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

(c) The Panel notes that actions of this type could also be caught by insider trading restrictions.

APPENDIX A
Information Required for No-objection Statement Application

1 General

Scheme Documents should be provided to the Panel forthwith after execution.

An application for a No-objection Statement should include the following information:

(a) who is applying;

(b) the anticipated filing dates for initial Court orders and final Court orders;

(c) the names of any Panel members who may be conflicted in relation to the application;

(d) the classes of shares (and any other equity securities) in the Code company and a summary of their terms;

(e) an overview of the terms of the proposed scheme and its effects on the holders and controllers of voting securities in the subject Code company;

(f) if there are any equity securities (other than shares) in the Code company, an explanation of how they will be dealt with under or in connection with the scheme;

(g) copies of all Scheme Documents (whether executed or in draft), company constitutions, shareholders' agreements, etc. (to the extent not already provided);

(h) the criteria and the date for determining:

 (i) the persons who are to participate in the scheme;

 (ii) the persons who are entitled to vote at the meeting(s) of scheme participants;

 (iii) the division of shareholders into interest classes, and the reasons for the division(s); and

 (iv) the persons who will be bound by the scheme if it is approved by the Court;

(i) a draft Scheme Booklet containing:

 (i) a notice of meeting (see 2, below);

 (ii) a draft explanatory memorandum (see 3, below):

 (iii) the disclosures contained in Schedules 1 and 2 and rules 15 and 16 of the Code that would apply, whether in whole or in part, and 'modified' as necessary, to the scheme;

 (iv) a report from an independent adviser who is approved by the Panel for the purpose of writing the report;

 (v) if applicable, any securities law disclosure document; and

(j) a list identifying the location in the Scheme Booklet of the disclosures referred to in paragraph 1(i)(iii), above.

2 Notice of meeting

The Panel would expect the notice of meeting sent to shareholders to fairly and clearly inform the recipients by including:

(a) the proper business of the meeting;

(b) the scheme proposed for each class of security that is subject to the scheme; and

(c) if applicable, a deed poll declaring the voting intentions of the promoter and its associates, in the form set out in Appendix B of this Guidance Note.

3 Explanatory memorandum

The Panel would expect the explanatory memorandum for shareholders to contain the following information:

(a) a clear introduction;

(b) a summary of the transaction;

(c) a proposed timetable for completion of the scheme;

(d) a summary of all material conditions to the scheme;

(e) the reasons for the scheme being undertaken;

(f) a statement regarding whether a No-objection Statement from the Panel has been applied for;

(g) identification of the independent directors, and if there are none, a statement to that effect;

(h) the information described in section 1(i) above;

(i) particulars of the key documents relating to the scheme, including any conditions that need to be met for the scheme to take effect;

(j) a clear description of the statutory voting thresholds;

(k) the rights of shareholders to object to the scheme;

(l) disclosure of any voting agreement relating to the scheme, for each shareholder party to the agreement (if entered into before finalising the Scheme Booklet), any deed poll, and any public statements of voting intention; and

(m) the inclusion of the following statement:

> ***Role of Takeovers Panel and High Court***
>
> *The fact that the Takeovers Panel has provided a letter of intention indicating that it does not intend to object to the scheme (or subsequently issues a no-objection statement in respect of the scheme), or that the High Court has ordered that a meeting be convened, does not mean that the Panel or the Court:*
>
> *(a) has formed any view as to the merits of the proposed scheme or as to how shareholders should vote (on this matter shareholders must reach their own decision); or*
>
> *(b) has prepared, or is responsible for the content of, the Scheme Booklet or any other material.*

4 Additional material

An application for a No-objection Statement should carefully explain any complex or novel issues, or areas of uncertainty, concerning the scheme or its impact on shareholders (or any other equity security holders). Any difficult or novel questions of law, or other matters on which expert advice has been obtained, that may be relevant to the Panel's consideration of the application for a No-objection Statement should also be included.

The better the Panel understands the issues, the more readily it will be able to decide whether or not it objects to the scheme.

5 Final stage in application

Before giving a No-objection Statement, the Panel requires the following (assuming it issued a Letter of Intention):

(a) Marked-up versions showing all changes to the Scheme Booklet (including to any report by an independent adviser who has been approved by the Panel in relation to the scheme) as between the draft documents, provided to the Panel at the issuing of the Letter of Intention, and the final documents the shareholders (and any other equity security holders) received.

(b) Assurance that all material information, including any additional, or changed, voting agreements entered into after finalising the Scheme Booklet, has been communicated in writing to the shareholders entitled to vote on the scheme (and any other equity security holders).

(c) Evidence that the relevant shareholder voting thresholds were met. This has commonly taken the form of a certificate from the Code company's share registrar or auditor who administered the vote.

Depending on the circumstances, the Panel may require additional materials. This may include copies of any evidence or submissions that the Applicant proposes to submit to the Court.

APPENDIX B
Template Form of Deed Poll

[Template subject to amendment by the Panel relating to the particular scheme. This deed poll may be given in favour of the target company as well as the Panel, noting that: (a) the Panel must be able to enforce the deed poll independently of the target; and (b) the target must, to the extent applicable, comply with the Takeovers Code (Voting Agreements for Schemes of Arrangement) Exemption Notice 2020 and the substantial product holder disclosure obligations in the Financial Markets Conduct Act 2013).]

This DEED POLL is made on the [DD] day of [month] 20[YY]

BY **[Promoter]** (**short name**)

[Associate of Promoter] (**short name**)

IN FAVOUR OF THE TAKEOVERS PANEL

BACKGROUND

This deed poll is made in relation to a proposed scheme of arrangement or amalgamation made under Part 15 of the Companies Act 1993 (the **Companies Act**) involving [the acquisition of all of the shares in [name of Code company] (the **Company**) by the Promoter which the Promoter does not already own] as contemplated by the [Scheme Implementation Agreement between the Promoter and the Company] dated [date] (the **Proposed Scheme** and the **SIA** respectively).

[Short name of promoter] is the promoter of the Proposed Scheme. [[Short name of associate of promoter] is associated with [short name of promoter] for the purposes of the Takeovers Code.]

[Short name of promoter or associate] holds [x number] shares in the Company which carry voting rights (such shares, or such number of shares as the Promoter holds as at the date of the vote in respect of the Proposed Scheme being the **Relevant Shares**).

If a promoter of a scheme wishes to receive a "no-objection statement" from the Takeovers Panel, the Takeovers Panel requires promoters and any of their associates which hold or control shares in the Code company to commit, by way of a deed poll, enforceable by the Panel, that they will continue to hold such shares and vote them in favour of the Proposed Scheme.

BY THIS DEED POLL [Short name of promoter or associate] agrees that:

(a) it will cast all of the votes attached to the Relevant Shares (or procure that they are cast) in favour of the Proposed Scheme at any meeting of shareholders of the Company called to consider and approve the Proposed Scheme; and

(b) on and from the date of this deed to and including the earlier of either:

   (i) the date on which the Proposed Scheme is implemented; or

   (ii) the date on which the SIA is terminated,

   it will not dispose of, encumber or deal in any way with any of the Relevant Shares, except to transfer the Relevant Shares to the Promoter under the Scheme.

The provisions of this document constitute promises intended to confer benefits on the Takeovers Panel, pursuant to the Contract and Commercial Law Act 2017.

Notwithstanding any other provision of this deed poll, this deed poll may be varied or revoked by agreement between [short name of promoter or associate] and the Takeovers Panel, without the approval of any other person on whom this deed poll confers a benefit.

[Note: The provision above is to be summarised in the meeting materials so as to ensure compliance with section 15 of the Contract and Commercial Law Act 2017.]

This deed is governed by and shall be construed in accordance with New Zealand law.

SIGNED AS A DEED POLL

[Short name of promoter or associate] hereby acknowledges the terms of this deed poll and agrees to be bound by them.

Signed by:

___________________________ Signature of Director

___________________________ Name of Director

___________________________ Signature of Director

___________________________ Name of Director

APPENDIX C
Template Letter of Intention

[Takeovers Panel letterhead]

Proposed Scheme of Arrangement in Respect of [Company Name] – Letter of Intention

We refer to the proposed scheme of arrangement between [company name] and its [shareholders / equity security holders / specify particular class of shareholders or other equity security holders] [Insert further details of the scheme of arrangement if necessary] (the **Scheme**).

The Takeovers Panel has formed an initial view, based on the information that has been provided to the Panel, that it intends at this stage to issue a statement that it has no objection to an order being made in respect of the Scheme under section 236(1) of the Act (being a statement referred to in section 236A(2)(b)(ii) of the Companies Act 1993 (the **Act**)) prior to the second Court hearing in respect of the Scheme (a **No-objection Statement**), assuming that:

(a) the Scheme is approved by the relevant majorities of shareholders; and

(b) no additional information comes to the Panel's attention or circumstances change such that the proposed disclosure is misleading, or it would otherwise be inappropriate for the Panel to issue a No-objection Statement in respect of the Scheme.

The Panel expresses no view on the merits of the Scheme.

This advice is given having regard to the Panel's policy on schemes of arrangement as set out in the Panel's *Guidance Note on Schemes of Arrangement*, dated [date of current version].

Yours faithfully

[Signature]

APPENDIX D
Template No-objection Statement

Proposed Scheme of Arrangement in Respect of [Company Name] – No-objection Statement

We refer to the proposed [scheme of arrangement] between [company name] and its [shareholders / equity security holders / specify particular class of shareholders or equity security holders] approved by shareholders on [DD Month YYYY] [Insert further details of the scheme of arrangement if necessary] (the **Scheme**).

Based on the information that has been provided to the Takeovers Panel, the Panel has no objection to an order being made under section 236(1) of the Companies Act 1993 (the **Act**) in respect of the Scheme (this letter being a statement of the type referred to in section 236A(2)(b)(ii) of the Act).

This no-objection statement is provided on the condition that the Panel is informed of any material changes to the Scheme or any related matters between the date of the shareholder meeting on [DD Month YYYY] and the date of final orders.

The Panel is satisfied that:

(a) all material information relating to the Scheme has been disclosed to shareholders;

(b) the standard of disclosure to shareholders has been equivalent to the standard that would be required by the Code in a Code-regulated transaction (or is otherwise appropriate in all of the relevant circumstances);

(c) the interest classes of shareholders have been composed appropriately;

(d) the protections available to shareholders (and other equity security holders) under the Code and/or the Takeovers Act 1993 (or equivalents to those protections) have been provided for under or in connection with the scheme; and

(e) there are no other factors which the Panel considers to be applicable in the relevant circumstances bearing in mind the respective roles of the Panel and the Court.

The Panel expresses no view on the merits of the Scheme.

This advice is given having regard to the Panel's policy on schemes of arrangement as set out in the Panel's *Guidance Note on Schemes of Arrangement*, dated [date of current version].

Yours faithfully

[Signature]