

Guidance Note

SECTION 32 OF THE TAKEOVERS ACT 1993

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**TAKEOVERS
PANEL**
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“Section 32 meetings” are meetings of inquiry held by the Takeovers Panel under section 32 of the Takeovers Act 1993 to determine whether a person has breached the Takeovers Code. This Guidance Note sets out an overview of the Panel’s process before, during and after a section 32 meeting.

1 Introduction

1.1 Section 32 of the Takeovers Act 1993 (the **Act**) empowers the Takeovers Panel to hold a meeting of inquiry to determine whether a person has breached the Takeovers Code.

1.2 Section 32(1) of the Act states that:

The Panel may at any time, if it considers that a person may not have acted or may not be acting or may intend not to act in compliance with the Takeovers Code, after giving that person such written notice of the meeting as the Panel considers appropriate in the circumstances, but in no case exceeding 7 days, hold a meeting for the purpose of determining whether to exercise its powers under this section.

1.3 This guide sets out an overview of the Panel’s process before, during and after a section 32 meeting.

2 Procedure leading up to a section 32 meeting

Initial meeting of the Panel

2.1 Upon becoming aware of possible non-compliant behaviour, or upon receipt of a third party request for a meeting, the Panel convenes an initial meeting (or meetings) of its Members to consider whether the threshold for holding a section 32 meeting has been met.

2.2 This requires an assessment by the Panel as to whether, on the information before it, the Panel considers there is a reasonable possibility that a person may not have acted or may not be acting or may intend not to act in compliance with the Takeovers Code.

2.3 This initial meeting (or meetings) is not a formal inquiry and the Panel will not make a determination of compliance or non-compliance at this stage. Compliance or non-compliance is a matter to be determined in the section 32 meeting, if convened.

2.4 The Panel may seek information or evidence from the parties involved before deciding whether the threshold to hold a section 32 meeting has been met. Information or evidence may be requested from parties directly, or may be sought by way of search and seizure or by summons in accordance with sections 31A or 31N of the Act.

Notice of meeting

2.5 If the Panel decides to convene a section 32 meeting, notice of the meeting is given in writing to all relevant parties. No special form of service of the notice is required. The Panel may use whatever means are appropriate to ensure the parties receive the notice.

2.6 The notice states the issues which will be before the Panel and the matters the Panel wishes to investigate at the section 32 meeting.

2.7 Under section 31V of the Act, all persons to whom notice of the meeting is given have a right to be heard and have legal representation at the section 32 meeting. In practice, the Panel is likely to summons, pursuant to section 31N, all those persons to whom notice of the meeting is given. Their attendance at the meeting to give evidence will then be mandatory.

2.8 The Panel can also grant leave to be heard and represented to any other person who, in the opinion of the Panel, ought to be heard or will assist the Panel in its consideration of the matter before it.



Public statement

- 2.9 If the Panel decides to convene a section 32 meeting it will usually make a public statement to that effect. One of the reasons for this is to ensure other interested parties who may wish to apply for leave to appear at the meeting are informed. If a temporary restraining order is made, this is also made public.
- 2.10 Once a statement has been made that a section 32 meeting is to be held, further media comment on the specific proceedings by the Panel or Panel staff is unlikely.

Summons

- 2.11 Those persons who are summonsed in accordance with section 31N must appear before the Panel in accordance with the terms of that summons. If a person summonsed is a corporate entity, individual directors and officers may be summonsed as well as the entity itself.
- 2.12 Under section 31N(3), a summons may be served personally on the person summonsed, but it is sufficient if the summons is left at the usual place of residence or business of the person at least 24 hours before their attendance is required. If the legal representatives of a person being summonsed advise the Panel that they are authorised to accept service, then usually a summons will be sent electronically to the legal representative and the originals sent by courier or post.
- 2.13 In addition to a summons to appear to give evidence, the Panel may summons a person to provide documents or information that are in the person's possession or control that are relevant to the matter to be considered at the section 32 meeting. A summons of documents or information is likely to require delivery of the documents or information to the Panel prior to the section 32 meeting so that the Panel can review and consider it prior to the meeting. A person may therefore receive two summonses – one to provide documents or information prior to the section 32 meeting and one to appear and give evidence at the meeting.
- 2.14 Any documents or information provided to the Panel under a summons (or otherwise) are for the Panel's use to assist the Panel's inquiry. As the Panel's section 32 meetings are inquisitorial in nature, the parties to the meeting may not be provided with copies of the documents or information.

Temporary restraining orders under section 32(2)

- 2.15 At the same time as the Panel decides to give notice of the section 32 meeting, it may make temporary (interim) restraining orders. The types of temporary orders the Panel can make are set out in section 33. Temporary restraining orders are intended to maintain the status quo at the time the restraining order is made while the Panel considers whether the Code has been complied with. A temporary restraining order expires at the close of the second day after the date of the section 32 meeting (unless revoked earlier by the Panel).

Submissions

- 2.16 The Panel is likely to request written legal submissions from parties in advance of the section 32 meeting on the matters to be considered by the Panel at the meeting. Written legal submissions will be copied to other parties to the meeting. The Panel may allow a right of reply to submissions in advance of the meeting (if time permits), otherwise replies may be made at the meeting itself.

Timing

- 2.17 The Panel gives such notice of a section 32 meeting as it considers appropriate in the circumstances, but under section 32(1) the notice period must not exceed seven days. While the notice period can be shorter than seven days, the time required for parties to file and circulate written submissions and for the Panel to deal with any applications means that a shorter notice period is given only when urgency requires it.



2.18 The usual seven days' notice period would be as follows:

| | |
|--------------|--|
| Day 1 | The Panel gives notice that it will hold a meeting on day 9 and may issue section 32(2) temporary restraining orders and section 31N summonses. The Panel makes a press release, and NZX announcement if applicable. |
| 2 | |
| 3 | |
| 4 | |
| 5 | 7 clear days (maximum notice permitted under section 32(1)) |
| 6 | |
| 7 | |
| 8 | |
| 9 | Meeting held |
| 10 | |
| 11 | Temporary Restraining Orders expire at midnight |

Adjournments

- 2.19 The time frame for convening a section 32 meeting is short. For meetings that involve a large number of parties or particularly complicated evidence, the Panel may convene the meeting and then adjourn for such time as the Chairperson directs while evidence is gathered or logistics are organised.
- 2.20 Where the Panel anticipates that it will adjourn a section 32 meeting, for example to deal with procedural matters at a reconvened meeting, or organise logistics, etc., it may consult with the parties for input. The Panel is unlikely to adjourn a section 32 meeting if it has issued temporary restraining orders, since these orders cannot be extended without the Panel making a determination of non-compliance with the Code under section 32(3)(b).

Third party requests for a section 32 meeting

- 2.21 Any person can request the Panel to hold a section 32 meeting. A fee of \$1,000 plus GST is payable to the Panel for the request. The Panel is under no obligation to hold such a meeting.
- 2.22 No form of request is prescribed, but the Panel prefers the request in writing (electronically is acceptable) with reasons why the person considers such a meeting should be held. If the requester has evidence supporting those reasons, it should also be given to the Panel in writing.
- 2.23 In addition to the \$1,000 fee, the person who requests a section 32 meeting may be liable for some or all of the Panel's costs incurred in respect of the meeting (including for its time spent in the lead-up to the meeting and in the completion of all elements of the section 32 process) under the Takeovers Regulations 2000. The Panel's Administrative Guidelines set out how the Panel determines who will be liable for its costs if it makes costs orders.



3 Procedure at the section 32 meeting

Purpose and principles

- 3.1 The purpose of a section 32 meeting is for the Panel to make a determination whether it is satisfied or not satisfied that a person (or persons) has acted or is acting or intends to act in compliance with the Code.
- 3.2 The Panel has the power to regulate its own procedure and may decide on each occasion how meetings are to be run. However, in the exercise of its functions and powers, the Panel must comply with the principles of natural justice. The rules of natural justice generally require that:
- (a) the procedure is fair;
 - (b) a person who might be adversely affected has the right to know the case against them and the right to be heard; and
 - (c) the adjudicators of the issue are free from bias.

Who will make the determination?

- 3.3 Although the full Panel may convene to consider Code compliance matters, it is likely that a section 32 meeting will be considered by a division of the Panel. A division is usually constituted by four Panel Members, but in all cases a quorum of three Members must be present. The division usually includes at least one lawyer. The Act requires that an experienced New Zealand or Australian lawyer or barrister of not less than seven years' practice attend the meeting – that person need not be on the division, nor even a Panel Member.
- 3.4 Participants are usually informed in advance of the meeting of the names of the Members who will comprise the Panel division.

Conflicts of interest

- 3.5 The Panel has a robust conflicts policy and no conflicted Member sits on a division for any matter, including for section 32 meetings.

Attendance at the meeting

- 3.6 As noted in paragraphs 2.7 to 2.14 above, the Panel usually summons all those persons to whom notice of the meeting is given to appear before the Panel to give evidence at the section 32 meeting. In the absence of a summons, any person to whom a notice of meeting is sent may apply to the Panel for leave to be heard and be represented.
- 3.7 Other interested parties can apply to the Panel to give evidence at a section 32 meeting in accordance with section 31V(2). The Panel may grant leave if the Panel considers that the party ought to be heard, or that its appearance or representation will assist the Panel.

Submissions and evidence

Evidence on oath

- 3.8 Section 31MA of the Act allows the Panel to receive evidence on oath. The Panel usually requires evidence at a section 32 meeting to be given on oath. The Panel may receive evidence via audio-visual communication, if the Panel and the person giving evidence agree.

Submissions

- 3.9 The Panel usually hears legal submissions from the parties, or if they are represented by a lawyer, from their lawyers, on the matters under consideration at the section 32 meeting. However, the Panel's procedure is not



adversarial and the Panel may allow each party to give only a brief summary of submissions in order to allow sufficient time for questioning witnesses, as section 32 meetings rarely last longer than one day.

Giving evidence and cross-examination

- 3.10 Witnesses are usually entitled to listen to the legal submissions, but during the giving of evidence are required to leave the meeting room until called to give their own evidence.
- 3.11 The Panel acts as an inquisitorial body and questioning of witnesses will be led by the Panel and its counsel.
- 3.12 The Panel does not allow cross-examination of witnesses by other parties, but may allow limited additional questions to be put to a witness through the Chairperson of the Panel division.
- 3.13 Once a witness has given their evidence, they are usually allowed to remain in the meeting room. However, if the Panel deems it appropriate, a witness may be asked to leave the room while another witness gives evidence.

Privilege

- 3.14 There is no privilege against self-incrimination at a section 32 meeting. A witness cannot elect not to answer any question or to produce any document on the grounds that to do so might incriminate the witness (section 33B).

Other documents

- 3.15 Section 31M of the Act gives wide powers to the Panel to receive statements or documents in evidence if, in its opinion those statements or documents will assist it to deal effectively with any matter before it, whether or not those statements or documents would be admissible in a court of law.

Meeting records

- 3.16 The practice of the Panel is to have a transcript of the section 32 meeting made. Copies of the transcript are made available to parties as soon as possible after the meeting.

Public or private meeting

- 3.17 The Panel can decide to hold any part of a section 32 meeting in public or private (section 31W). The practice of the Panel is to make the fact of the meeting public, but to hold it in private.

Offences under the Act

- 3.18 If a person knowingly furnishes false or misleading information to the Panel or its staff, tries to mislead the Panel or its staff or contravenes a confidentiality order of the Panel made under section 31X, that person commits an offence (section 44).
- 3.19 If a person is summoned to a Panel meeting and refuses or fails to appear, refuses to take an oath or affirmation, or refuses to answer any question or to produce documents or information as required, that person commits an offence (section 44).

4 Determinations and procedure following a section 32 meeting

No determination

- 4.1 Section 32(3) of the Act provides that following the meeting, the Panel may make a determination as to compliance with the Code. It is possible that the Panel may decide not to make any determination. If it makes no determination then the Panel cannot make a restraining order.
- 4.2 If a meeting was requested in terms of section 35(3) and the Panel does not make a determination within 14 days after the request, then any of the persons specified in section 35(3) may make application to the court under any of sections 33F (for an injunction), 33I (for a civil remedy) or 33K (for a compensatory order).



The Panel's determination on whether satisfied or not satisfied of compliance

- 4.3 Usually, following the section 32 meeting the Panel makes a determination either that it is satisfied that a person has acted or is acting or intends to act in compliance with the Code, or that it is not so satisfied.

Restraining orders

- 4.4 If the Panel makes a determination at its meeting that it is not satisfied of Code compliance, it may then make temporary restraining orders under section 32(4). The restraining orders may be in place for up to 21 days. The Panel may also make a permanent compliance order (section 32(4)(c)) and extend a takeover offer period (section 32(4)(d)).

Application for Court order

- 4.5 If the Panel makes a determination that it is not satisfied about compliance with the Code, it may make an application to the court under section 35 for an order under sections 33F, 33I or 33K.

Undertakings

- 4.6 In addition to the powers granted to the Panel in respect of restraining orders, the Panel also has the ability to accept undertakings under section 31T from any person in connection with a matter considered at a section 32 meeting (or indeed any matter before it, whether or not a section 32 meeting has been called). In some cases the ability of the Panel to accept such undertakings means it may be able to avoid calling a section 32 meeting or imposing its own temporary restraining orders or applying for permanent orders. Undertakings may be accepted by the Panel in conjunction with restraining orders.

Publishing determinations

- 4.7 The practice of the Panel is to make a press statement as soon as practicable regarding the outcome of a section 32 meeting, and to publish its determination on the Panel website.
- 4.8 The Panel is required to give written notice of its reasons for its determination to the persons the determination concerns as soon as reasonably practicable. In practice, the statement of reasons may take a number of weeks to prepare, and is published as soon as it has been provided to the affected persons.

Appeal

- 4.9 The Panel's determination at a section 32 meeting is final. There is no right of appeal against a Panel determination. However:
- (a) the Panel's decisions may be judicially reviewed in the High Court; and
 - (b) pursuant to section 35, where the Panel makes a determination under section 32(3)(b) (that it is not satisfied that a person has acted or is acting or intends to act in compliance with the Code) the High Court has independent jurisdiction through sections 33F, 33I and 33K to grant injunctions and to make compensatory orders.