TAKEOVERS PANEL
TE PAE WHITIMANA

A BASIC GUIDE FOR SHAREHOLDERS

JULY 2024

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INTRODUCTION

This guide explains how takeovers, schemes of arrangement (**schemes**) and other kinds of transactions involving listed or larger widely-held companies are regulated by the Takeovers Code (the **Code**) and Companies Act in New Zealand.

This guide explains the types of companies to which the Code applies, how the Code works, and what this means for shareholders.

In particular, this guide will help shareholders in Code companies understand:

- how the Code and the Panel protect their rights;
- the Code's rules and the Panel's guidance when a person increases their level of ownership of the company (e.g., by way of a Code offer or scheme); and
- the Code company's obligations to shareholders when a change of control occurs.

The Takeovers Code

In a nutshell, the Code is a rule book regulating changes of control of Code companies. The Code ensures that all shareholders have the opportunity to participate in changes of control, and that all of the parties to the transaction have a level playing field.

What is a Code company?

A Code company is a New Zealand-registered company that is listed on the NZX or is a large, widely held unlisted company.

Transactions regulated by the Code

Some examples of transactions that require compliance with the Code (assuming that increases occur above the 20% threshold) are as follows.

Schemes of arrangement

A scheme is another way of increasing ownership of voting rights in a Code company above 20%. When a person wants to increase ownership of voting rights in a Code company, they can do so under the Code or they can undertake a scheme. A scheme is a procedure that allows a company to reorganise the rights and obligations of its shareholders. The reorganisation must be approved by the shareholders and the High Court.

Exemptions from the Code

The Panel has granted some class exemptions from compliance with the Code. Some of these class exemptions are subject to conditions that have to be complied with.

How does the Code affect small shareholders?

Shareholders in a Code company will usually participate in transactions that are regulated by the Code in three circumstances.

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Full takeover

In a full takeover, an offeror makes a takeover offer to all of the Code company's shareholders for all of the company's shares. The offeror has to get a minimum level of acceptances (which must be more than 50%, but can be up to 90%) for the takeover to succeed. If the offeror does not reach more than 50% of the company's voting rights (or any higher percentage required under the terms of the offer) before the offer period ends, then the takeover fails. Shareholders keep their shares, and everyone stays at the shareholding level they held before the offer lapsed.

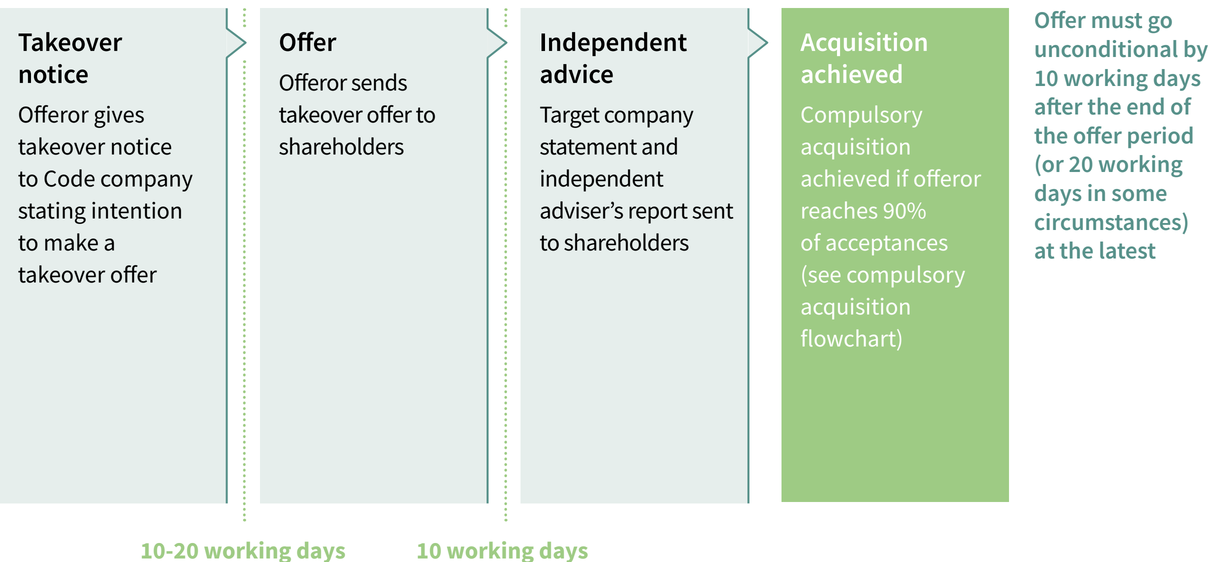
In order to help shareholders decide whether to accept the offer, the target company appoints an independent adviser approved by the Panel to prepare advice for the shareholders on the merits of the takeover offer. This is known as an independent adviser's report and is usually sent to shareholders at the same time as the target company statement.

When do shareholders get paid?

If the takeover succeeds, and the offer becomes unconditional before the end of the offer period, payment will be made within 5 working days of the latest of the date the offer goes unconditional, the date the shareholder accepted the offer, or the date that the offer closes.

If the offer did not go unconditional before the end of the offer period, payment will be made 5 working days after the offer goes unconditional.

Offer process



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Partial takeover

A takeover offer can also be made to all of the Code company's shareholders for just a portion of their shares. This is called a partial takeover. An offeror can make a partial takeover offer to get the offeror's shareholding to a specified percentage that is more than 50% of the voting rights (it is possible to specify less than 50%, but additional shareholder approval to do so is required). Like a full takeover, the offeror must get enough acceptances to satisfy the minimum acceptance conditions for the partial takeover offer to succeed. The target company must also appoint an independent adviser approved by the Panel to prepare an independent adviser's report on the merits of the partial takeover offer.

If the offeror gets more acceptances than are needed to get to the specified percentage, the acceptances will be scaled back proportionately across all shareholders who accepted the offer. The rules of the Code ensure that the scaling is done equitably across the acceptances.[2]

A partial takeover offer does not fail simply because the offeror does not receive enough acceptances to get to the specified percentage (although it will fail if it does not meet the minimum acceptance condition). Like in a full takeover offer, if a partial offer fails, the offeror cannot take up any shares, and everyone stays at the shareholding level they held before the offer was made.

For more information, see the Panel's
Guidance Note on Control and Association

The 'creep' rule

The Code has some built-in flexibility for shareholders who own more than 50% of the Code company's shares. A shareholder with more than 50% can buy more shares without having to comply with the Code's rules, so long as they do not buy more than 5% of the company's shares over any 12-month period.

For more information, see the Panel's
Guidance Note on Creeping Acquisitions

2. Scaling works as follows: A shareholder can accept the partial offer for as many of their shares as they wish. If the offer succeeds, the offeror must take up (and, consequently, the shareholder will sell) the lesser of either:
   (a) the number of the shareholder's voting rights that equates to the specified percentage as stated in the offer; or
   (b) the number of voting rights that the shareholder accepted into the offer.

   To the extent that the offeror does not receive, under the above formula, sufficient acceptances to reach the specified percentage of voting rights sought under the offer, the offeror must take up the further voting rights that it requires from shareholders with 'excess' acceptances. Shareholders with excess acceptances are those who accepted more of their shares into the offer than the specified percentage that was stated in the offer document. The offeror takes up the required number of voting rights from this 'pool' of excess acceptances, proportionately across the excess acceptances in the pool.

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Compulsory acquisition

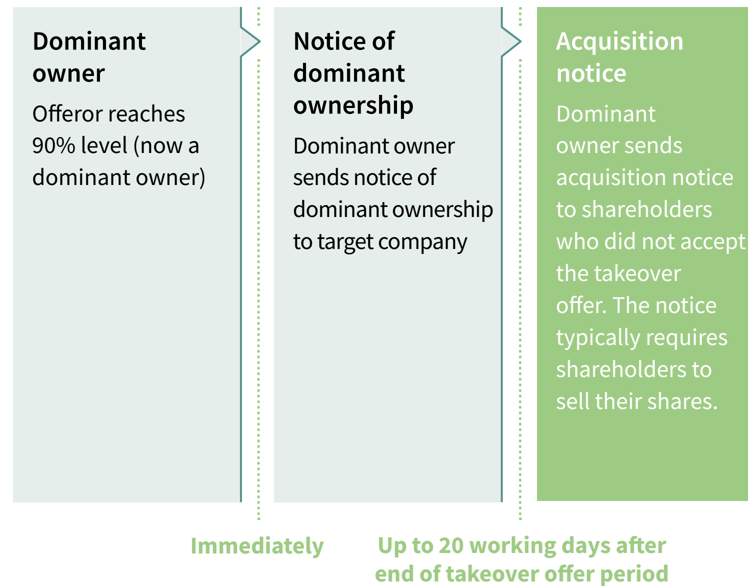
The Code includes rules for the compulsory acquisition of shareholders' shares.

Compulsory acquisition means that a shareholder, who reaches the 90% threshold in a Code company (a dominant owner), can (or must) buy all of the remaining shares. The Code has rules about the price that has to be paid for these shares.

The dominant owner has to make a choice to either undertake:

- a "**compulsory sale**", where the dominant owner requires the remaining shareholders to sell their shares to the dominant owner; or
- a "**voluntary sale**", where the remaining shareholders are asked if they want to sell their shares, and if they do want to sell their shares then the dominant owner must buy them. Voluntary sales are very rare.

Compulsory acquisition process



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If the 90% threshold is crossed during an offer, the compulsory acquisition price for the remaining shareholders' shares is usually the same as the price that was paid to the shareholders who accepted the offer.

For other types of transactions that get a shareholder to the 90% threshold, the compulsory acquisition price has to be a 'fair and reasonable' cash price. An independent expert who has been approved by the Panel must certify that the price is fair and reasonable.

The shareholders whose shares are compulsorily acquired can sometimes object to the price they are paid. In those cases, an independent expert who has been approved by the Panel is then appointed to determine the price.

Although some shareholders might feel disappointed if they are subject to a compulsory sale, these rules also benefit shareholders by ensuring that they do not have their share investment locked into a company with a 90% owner.

Without the compulsory acquisition rules, small shareholders might have no opportunity to sell their shares at a fair price.

When do shareholders get paid?

If the shareholder signs and returns the documents provided with the acquisition notice to the dominant owner, payment will be sent to the shareholder 5 working days after the dominant owner receives the signed documents. The dominant owner will then acquire the shareholder's shares.

If the shareholder did not sign and return the documents to the dominant owner, payment will be given to the target company to hold on trust for the shareholder 20 working days after the acquisition notice is sent.

For more information, see the Panel's **Guidance Note on Compulsory Acquisition**

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Shareholder meeting to approve an acquisition or allotment

An acquisition or allotment of shares may also be subject to the Code if they were to result in an increase in the percentage of voting rights held or controlled by a person (together with their associates) above 20%. In these transactions, Code company shareholders (excluding the acquirer/allottee and its associates) are given the right by the Code to approve or reject the increase in control.

The right to approve should be exercised by the relevant shareholders with care and on the basis of good advice. Accordingly, the Code requires the directors of the Code company to obtain an independent adviser's report on the merits of any proposed acquisition or an allotment to accompany the notice of meeting sent by the company. The independent adviser's report must have regard to the interests of those persons who are voting to approve or disapprove the acquisition or allotment.

The Panel has, however, granted a class exemption that can provide flexibility for shareholders increasing their voting control as result of a buyback or pro rata offer. See here for more information.

Shareholder meeting process

Independent advice

Code company appoints an independent adviser to prepare advice for shareholders on the merits of the transaction

Notice to shareholders

Notice of meeting and independent adviser's report sent to shareholders

Vote

Code company holds a meeting for shareholders to vote on resolution

At least 10 working days later

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Starting level of voting rights owned	Code compliant methods of increase
<20%	• No restrictions, increase by any means.
20% – 50% 'No-fly zone'	• A takeover offer, being: – a full offer conditional on reaching more than 50%; or – a partial offer conditional on reaching more than 50%; or – a partial offer to go to a lower percentage approved by shareholders. • An allotment of new shares, with shareholders' approval. • An acquisition of an existing parcel of shares, with shareholders' approval. • A buyback by the Code company of some of its own shares, with shareholders' approval.
50% – 90%	• A takeover offer, being: – a full offer; or – a partial offer. • An allotment of new shares, with shareholders' approval. • An acquisition of an existing parcel of shares, with shareholders' approval. • Acquisitions of up to 5% of the Code company's shares over any 12-month period ('creeping'). • A buyback by the Code company of some of its own shares, with shareholders' approval.
≥90%	• If a person becomes a dominant owner through a transaction under the Code, they must either: – compulsorily acquire all remaining shares; or – voluntarily acquire any shares of the remaining shareholders. • If already at 90% or more, by any means.

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VOTING THRESHOLDS

PROCESS FOR SCHEMES

SCHEME OF ARRANGEMENT PROCESS

Introduction

Although a scheme for a Code company is not subject to the Code, schemes which affect the voting rights of a Code company must be approved by shareholders and by the Court. The Court is the primary regulator of schemes as it makes orders which give effect to a scheme. However, the Panel has a regulatory role in relation to schemes affecting the voting rights of Code companies.

In practice, the Panel's primary function is to decide whether to issue a statement that the Panel does not object to the scheme under the Companies Act. The Panel will give that statement to the Court when it is satisfied that shareholders received the appropriate information they need in order to decide whether to approve the proposed scheme and that shareholder approval thresholds are set appropriately and are met. 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.

Voting thresholds

The scheme voting thresholds are different from the Code thresholds. First, a scheme must be approved by a resolution of a majority of 75% or more of the votes of the shareholders in each interest class entitled to vote and voting on the question. This is the same voting threshold that applies to other important actions a company may wish to take, such as amending the company's constitution, undertaking a 'major transaction' or commencing liquidation of the company's assets.

Importantly, if the acquirer already holds shares in the Code company, then the shares held by the acquirer (and any associates of the acquirer) will be voted in a separate interest class.

Other features of transactions may also lead to separate interest classes. If, for example, one group of shareholders was going to receive different consideration for their shares, then it is likely that those shareholders will be required to vote in a separate interest class.

The second approval required is a resolution approved by a simple majority of all of the company's voting rights. This means that the number of valid votes cast approving the scheme must equate to more than 50% of the Code company's total voting rights. The acquirer and its associates are included in this vote.

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Process for schemes

Prior to announcement

A scheme of arrangement process may begin when a Code company engages in confidential discussions with a potential acquirer. As part of these discussions, the Code company may enter into confidentiality and standstill agreements and allow the potential acquirer to conduct due diligence. Negotiations may continue and culminate in the Code company and the potential acquirer agreeing terms of the scheme and how it will be put to shareholders. This agreement will be recorded in a 'Scheme Implementation Agreement'. Once that agreement is signed, the transaction will be announced to shareholders.

High Court process

There are two Court hearings in the scheme process. At the first Court hearing, the Court will make orders setting out the process for holding a shareholder meeting to vote on the proposed scheme. After shareholders vote, there is a second Court hearing, where the Court approves (or rejects) the scheme.

The Court can only approve a Code company scheme if the shareholders vote to approve the scheme and either the Panel has provided a statement that it does not object to the scheme (a **No-objection Statement**), or the Court is satisfied that the shareholders will not be adversely affected by the use of a scheme rather than the Code for the transaction.

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Scheme of arrangement process

Engagement with party
Code company engages in discussions with potential acquirer

Entry into Scheme Implementation Agreement
Code company and potential acquirer agree to terms of the scheme by entering into agreement

Application to Panel
Panel considers application from the Code company for a letter of intention

Independent advice
Code company appoints an independent adviser approved by the Panel to prepare advice for shareholders on the merits of the scheme

Letter of intention
Panel issues the Code company with a Letter of Intention that the Panel intends to issue a No-objection Statement for the second Court hearing

First Court hearing
Court considers draft scheme documents and makes orders regarding holding the shareholder meeting

Notice to shareholders
(Including notice of meeting and independent adviser's report)

Vote
Shareholders vote for or against the resolution to approve the scheme

No-objection Statement
Panel issues No-objection Statement for Code company to give to Court for second hearing

Second Court hearing
Court considers whether it should exercise its discretion to approve the scheme and makes orders to implement the scheme

Within timeframe ordered by the Court

For more information, see the Panel's
Guidance Note on Schemes of Arrangement

WHAT DOES THIS MEAN FOR SHAREHOLDERS?

WHAT RESPONSIBILITIES DO CODE COMPANIES OWE THEIR SHAREHOLDERS?

WHAT SHOULD SHAREHOLDERS DO?

What responsibilities do Code companies owe their shareholders?

When a takeover offer is made, the Code company has to send detailed information about the offer to all shareholders in a target company statement.

It is similar for a control-change transaction such as a scheme or an acquisition or an allotment that requires the approval of the company's shareholders at a shareholders' meeting. For a scheme, a 'scheme booklet' accompanies the notice of meeting, which contains disclosures equivalent to Schedules 1 and 2 of the Code. For a shareholders' meeting, the Code company has to send detailed information about the transaction in a notice of meeting to all shareholders.

The information that is sent to shareholders will always include the advice of an independent adviser on the merits of the transaction. The independent adviser is appointed by the Code company with the approval of the Panel.

The directors of the Code company have to make a recommendation to shareholders about what the shareholders should do regarding the transaction. If the directors choose not to make a recommendation to the shareholders, they must give their reasons for not doing so.

GLOSSARY OF TERMS

Term	Definition
Acquisition	when someone buy some shares from a shareholder in a company
Allotment	when the company issues new shares to someone
Associate	a person who has some kind of relationship with a shareholder in the Code company, and the relationship likely involves some kind of influence over how their shares could be voted
Change of control or control-change	when someone increases their level of ownership to any level above 20% of the company's shares. A control-change transaction could be a takeover offer, scheme of arrangement or acquisition, etc.
Dominant owner	when a person (or two or more persons acting jointly or in concert) holds or controls 90% or more of the voting rights in the target company
Code or Takeovers Code	the Takeovers Code as set out in the schedule to the Takeovers Regulations 2000
Code company	a company that falls within the definition as set out in section 2A of the Takeovers Act and rule 3A of the Code
Code offer or takeover offer	an offer as defined in the Code, being an offer made under the Code for voting securities and any other financial products to which the offer is required to extend under the Code
Companies Act	the Companies Act 1993
Compulsory acquisition	when a shareholder with 90% of the company's voting rights can or must buy the shares from the remaining shareholders under the Code
Court	the High Court of New Zealand
No-objection statement	a statement from the Panel indicating that the Panel has no objection to a scheme under section 236A(2)(b)(ii) of the Companies Act
Offeror	a person who makes a takeover offer
Parcel of shares	the shares that a shareholder owns, as recorded in a company's share register
Resolution	the topic or question that the company's shareholders are asked to vote on at a meeting of the company's shareholders
Scheme or scheme of arrangement	a Court-approved procedure that allows the reorganisation of the rights and obligations of shareholders and companies under Part 15 of the Companies Act
Scheme Implementation Agreement	an agreement under which parties agree the terms of a scheme and how it will be implemented
Shareholder	a person who holds shares in the company
Standstill agreement	an agreement that restricts shareholders from selling their shares in the Code company during a scheme (other than to the offeror on implementation of the scheme or after the termination of the Scheme Implementation Agreement)
Takeover offer	when someone wants to buy all of a Code company's shares (full takeover offer) or wants to buy a proportion of a Code company's shares (partial takeover offer)
Voting right	the right to vote that is attached to a share. Shareholders with shares that have voting rights can vote at meetings of a company's shareholders

ABOUT THE PANEL

The Takeovers Panel is an independent Crown entity which regulates New Zealand's corporate takeovers market.

Its mandate is to strengthen investor confidence in New Zealand's capital markets by enforcing the Takeovers Code. The Code is aimed at ensuring that all shareholders, no matter their size or influence, have equal opportunity to participate in transactions involving Code companies.

If someone breaches the Code, the Panel can convene an enforcement hearing very quickly, especially when a takeover is involved. The Panel acts as a judicial tribunal at an enforcement hearing, and can issue summonses as well as take evidence on oath.

If the Panel finds that a person has breached the Code, it can make restraining orders to temporarily prevent certain actions from being taken. If necessary, the Panel can ask the Court to make permanent orders against a person.

Make a complaint to the Panel

There is no formal process required for making a complaint. Any person may phone or write to the Panel executive (written complaints are preferred) about a person who might not be complying with the Code.

The Panel is more likely to be able to investigate and take action if the person making the complaint can provide some evidence. The identity of the complainant may be kept confidential.

There is also a formal process under the Takeovers Act that has to be followed to request that the Panel holds an enforcement hearing (noting that a request to hold a meeting is distinct from making a complaint to the Panel). Legal advice should always be obtained before doing this.

What the Code and the Panel do not do

Neither the Takeovers Code nor the Takeovers Panel has any role in deciding on the merits of a transaction. The Panel does not have a role in determining what price should be offered by a person wanting to buy a parcel of shares or making a takeover offer. It is only in a compulsory acquisition that the Code has pricing rules.

Shareholders must decide for themselves whether to accept or reject an offer, or whether to vote for or against a resolution about a transaction at a shareholders' meeting.

The Code does not tell shareholders what decision they should make, or stop low or 'opportunistic' offers from being made.

The Panel does not take sides. It is impartial and it acts only to ensure compliance with the Code. The Panel's staff are available to help with general information about the Code and to receive and investigate complaints about breaches of the Code.

Seek advice

Directors of Code companies should seek expert advice about the costs and benefits of becoming a Code company from legal and financial advisers experienced with the Code and public mergers and acquisitions.

For more information on the Code, schemes of arrangement and the Panel, visit the Panel's website at www.takeovers.govt.nz.

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Disclaimer

This guide explains the Takeovers Code and aspects of schemes of arrangement in a simplified way. The guide avoids technical detail in order to provide a conceptual understanding of these matters for directors. The guide should not be relied upon as providing a legal explanation of the Code or schemes of arrangement. It does not give legal or financial advice. Directors should not rely on it for understanding their obligations under the Takeovers Code or under the Companies Act (in respect of a scheme of arrangement), and should seek legal advice from a qualified professional.

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