CONSULTATION PAPER

Civil Enforcement under the Takeovers Act

February 2025

TAKEOVERS PANEL
TE PAE WHITIMANA

Glossary

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

Civil Enforcement Regime	has the meaning set out in paragraphs 18-20 below
civil remedy order	an order made by the Court under section 33I of the Takeovers Act
compensatory order	an order made by the Court under section 33K of the Takeovers Act
Code	the Takeovers Code as set out in the schedule to the Takeovers Regulations 2000
Code company	has the meaning set out in section 2A of the Takeovers Act and rule 3A of the Code
Code offer	an "offer", as defined in the Code, being an offer to which the Code applies for voting securities and any other financial products to which the offer is required to extend under the Code
Commerce Act	the Commerce Act 1986
declaration of contravention	a declaration made by the Court under section 33M of the Takeovers Act
FMCA	the Financial Markets Conduct Act 2013
Law Commission Report	Law Commission *Guidance for Legislative Design* (NZLC R133) (2014)
LDAC Guidelines	Legislative Design and Advisory Committee *Legislation Guidelines* (2021 Edition)
Limitation Act	the Limitation Act 2010
management ban	an order made by the Court under section 44F of the Takeovers Act
NZBORA	the New Zealand Bill of Rights Act 1990
NZX	NZX Limited
Official Information Act	the Official Information Act 1982
OIA	the Overseas Investment Act 2005
offeror	an offeror or a potential offeror
Panel	the New Zealand Takeovers Panel
pecuniary penalty	a non-criminal monetary penalty imposed by the Court in civil proceedings
Privacy Act	the Privacy Act 2020
section 32 meeting	a meeting held under section 32 of the Takeovers Act, following which the Panel may make a determination that it is or is not satisfied that a person has acted or is acting or intends to act in compliance with the Code
Takeovers Act	the Takeovers Act 1993

Introduction

The Civil Enforcement Regime under the Takeovers Act

1 In 2022, the High Court imposed the first pecuniary penalty under the Takeovers Act when it ordered New Image Limited (**New Image**) to pay a penalty of $1.5 million in respect of breaches of the Code.[1] This was the first time that the Civil Enforcement Regime had been tested in Court.

2 Following the resolution of the New Image matter, the Panel conducted a review of the Civil Enforcement Regime. While the Panel considers the Civil Enforcement Regime is broadly fit for purpose, the Panel has identified aspects of the regime that may benefit from an update. Specifically, the Panel has concluded that it may be appropriate to:

(a) strengthen the current enforcement regime – for example, by increasing the maximum pecuniary penalty so that the quantum of the penalty will be appropriate for larger transactions and reflect comparable New Zealand regimes;

(b) address technical matters – for example, by clarifying the factors that the Court should consider in setting an appropriate pecuniary penalty; and

(c) modernise aspects of the regime – for example, by removing automatic management bans and clarifying how the Civil Enforcement Regime interacts with the criminal regime to avoid the potential for double jeopardy.

3 The Panel has prepared this paper to seek the views of market participants so that it can take these views into account when deciding what (if any) next steps it should take, including whether to make any recommendations for law reform.

Scope and process of this consultation

4 This paper relates to the Civil Enforcement Regime under the Takeovers Act, as described in more detail below. This consultation is being undertaken at the initiative of the Panel and is not a part of a Government work programme.

5 The Panel expects that the key steps following publication of this paper would be as follows:

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

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

(i) MBIE and potentially other Government agencies would analyse the law reform recommendations;

(ii) the Minister/Cabinet would decide whether to progress any law reform recommendations;

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

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

[1] *Takeovers Panel v New Image Group Limited* [2022] NZHC 1504. See also a press release on the matter on the Panel's website here.

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

7 In July 2024, the Panel provided the Minister with recommendations for law reform that would bring the Panel's regulation of Code offers and Code company schemes of arrangement into greater alignment (the **Recommendations**).[2]

8 The Panel considers that, if the Recommendations are implemented, the reforms proposed in this consultation paper would apply equally to Code company schemes as they would to Code offers. Accordingly, if the Recommendations are implemented, the Civil Enforcement Regime as amended would also apply to Code company schemes. However, even if the Recommendations are not implemented, the Panel considers that there is inherent benefit in reforming the Civil Enforcement Regime for Code offers only.

Policy objectives

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

(a) encouraging the efficient allocation of resources;

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

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

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

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

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

Request for comments on this paper

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

11 The closing date for submissions is **Friday, 18 April 2025**.

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

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

Ruth Wright
Associate
ruth.wright@takeovers.govt.nz

Discussions regarding the proposals

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

[2] See the Recommendations paper here.

The Official Information Act and the Privacy Act

14 Any submissions received by the Panel are subject to the Official Information Act. The Panel may make submissions available upon request under that Act.

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

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

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

The Panel's background reasoning

Introduction – the current enforcement regime

18 Part 3, Subpart 2 of the Takeovers Act provides a range of Court-ordered enforcement measures which may be taken in response to potential breaches of the Code. These include:

(a) injunctions;

(b) civil remedy orders under section 33E(1)(b);

(c) compensatory orders; and

(d) pecuniary penalty orders.

19 In addition:

(a) the enforcement measures referred to above can lead to management bans; and

(b) the Panel has the ability to accept and enforce undertakings.

20 Together, these provisions are referred to in this paper as the **Civil Enforcement Regime**.

Context – the current regime

21 The Civil Enforcement Regime sits alongside:

(a) the broader criminal liability regime set out in Part 3, Subpart 3 of the Takeovers Act (generally the offences relate to intentional misleading or deceptive conduct); and

(b) the Panel's enforcement and investigative powers set out elsewhere in Part 3.

22 In summary, the broader regime is structured as follows:

(a) *Subpart 1 – Investigation and enforcement by the Panel:* This subpart sets out the powers of the Panel to investigate potential Code breaches.[3] Subpart 1 includes the Panel's section 32 meeting function, where it may make a determination as to whether a person may not have acted, may not be acting or may intend not to act in compliance with the Code. The Panel's enforcement powers include the ability to accept undertakings,[4] and to make confidentiality orders,[5] temporary restraining orders[6] and compliance orders.[7]

(b) *Subpart 2 – Enforcement by the Court:* Subpart 2 enables the Court to make a range of "civil remedy orders" in relation to contraventions of the Code. The Court may order:

(i) an injunction;[8]

[3] Including, for instance, the powers to require the production of documents for inspection, receive evidence, and summon witnesses (sections 31A, 31L and 31N). Refusal to comply with these powers can amount to an offence (section 31F).
[4] Breach of which enables the Panel to apply to the Court for various orders – see section 31U and paragraphs 56 to 74 below.
[5] Section 31X.
[6] Sections 32(2) and 32(4).
[7] Sections 32(4) and 33AA.
[8] Sections 33F and 33G.

(ii) a civil remedy order (such as an order to restrain the exercise of rights attached to financial products, or to vary or cancel contracts that are in contravention of the Code);[9]

(iii) a compensatory order;[10] and/or

(iv) a pecuniary penalty of up to $500,000 for an individual and $5,000,000 for a body corporate for each contravention.[11]

(c) *Subpart 3 – Criminal offences:* Subpart 3 sets out the main criminal offences provided under the Takeovers Act:[12]

(i) *False, misleading or contravening dealings with the Panel:* Under section 44 it is an offence to knowingly have false or misleading dealings with the Panel or to refuse to do certain things when summoned.[13]

(ii) *False or misleading statement or information:* Where a person has actual knowledge that a statement or information is materially false or misleading, it is an offence to make that statement or disseminate such information if it would be likely to affect a Code transaction or event in some way.[14]

(d) *Subpart 4 – Other Court orders:* This subpart enables the Court to make the following orders:

(i) a management banning order against a person who has been convicted of certain Takeovers Act offences, or has had a pecuniary penalty ordered against them, or while acting as a director of a body persistently contravened the Takeovers Act, Code, FMCA and/or related legislation (noting that a five-year automatic management ban[15] is imposed on persons convicted of certain Takeovers Act offences or following a pecuniary penalty order being made against them);[16] and

(ii) orders to preserve assets to satisfy claims under the Takeovers Act.[17]

(e) *Subpart 5 – General provisions:* This subpart covers some additional aspects of the regime, such as the ability for the Court to order persons to pay the Panel's costs and expenses in bringing proceedings,[18] and a presumption that a person had knowledge of matters if their employee or agent knew of the matter.[19]

23 The purposes of the regime are to deter potential contraventions of the Code and provide remedies, where appropriate, if contraventions occur. To achieve these purposes, the Takeovers Act Part 3 enforcement regime reflects the commercial context of Code-regulated transactions. While the Part 3 regime includes some

[9] See section 33J for the full list of civil remedy orders available to the Court.
[10] Sections 33K and 33L.
[11] Only one pecuniary penalty order may be made for the same conduct. See sections 33M – 33R and paragraphs 32 to 55 below.
[12] Several additional offences are set out in other subparts and encompass offences for refusing to adhere to the Panel's investigatory powers (section 31F), contravening management banning orders (section 44H), breaching an automatic management ban (section 44J) and contravening an order to preserve assets (section 44P).
[13] On conviction a person is liable to a fine not exceeding $300,000, and if the offence is a continuing one, to a further fine not exceeding $10,000 per day or part of a day during which the offence is committed.
[14] Sections 44B and 44C. On conviction an individual is liable to imprisonment for up to 5 years or a fine not exceeding $300,000, or both, while body corporates are liable to a fine not exceeding $1,000,000.
[15] Section 44J.
[16] Section 44F. An order may apply permanently or for a specified period (section 44G), and must be notified in the *Gazette* (section 44K(1)). It is an offence to act in contravention of a management banning order (sections 44H and 44J(3)). On conviction a person is liable to imprisonment for a term not exceeding three years or to a fine not exceeding $100,000, or to both. See paragraphs 75 to 79below for further discussion of these provisions.
[17] Section 44L; it is an offence to contravene such an order (section 44P).
[18] Section 44R.
[19] Section 44W.

criminal offences, the primary focus is on civil enforcement. This approach recognises that breaches of the Code are most likely civil/commercial matters where criminal liability is less appropriate.

Why is the Panel reviewing the Civil Enforcement Regime?

24 The Panel's consultation was prompted in part by the New Image matter in 2022. In summary, the Panel's views of the operation of the pecuniary penalty regime following the New Image matter were as follows:

(a) The Panel was comfortable that the quantum of the pecuniary penalty was satisfactory to punish and deter the relevant conduct in that case.

(b) However, as the Court noted in the New Image judgment, the offer was "a relatively small transaction by comparison to other takeovers conducted under the Code".[20] A penalty of this amount may not be material in the context of larger transactions.[21]

(c) Accordingly, the current pecuniary penalty provisions may not always provide a satisfactory penalty or an effective deterrent.

25 While reviewing the Takeovers Act's pecuniary penalties regime, it also became apparent to the Panel that there were a number of other potential issues with the broader Civil Enforcement Regime.

26 Notably, key aspects of the Civil Enforcement Regime were first inserted into the Takeovers Act in 2006,[22] and underwent minor amendments in 2010[23] and 2013[24], but the Civil Enforcement Regime has not undergone comprehensive review by the Panel since its introduction. It therefore appeared to the Panel that now would be an appropriate time to conduct a review of the provisions, following their first application in Court.

The Panel's resulting approach to this consultation

27 In addition to the objectives of the Code and the analysis above, the Panel has taken the following guidance into consideration in preparing this paper:

(a) the Legislation Design and Advisory Committee's *Legislation Guidelines: 2021 Edition* (the **LDAC Guidelines**) – in particular, chapters 22 to 27 on compliance and enforcement; and

(b) the Law Commission's 2014 report *Pecuniary Penalties – Guidance for Legislative Design* (the **Law Commission Report**).

28 In line with the Law Commission Report, the Panel has conducted a dedicated review identifying and assessing the relevant legal principles and theories, evidence and factors that may be relevant in considering pecuniary penalties.[25]

29 The Panel also considers that the Takeovers Act should take a consistent approach to enforcement with other related legislation. This assists in delivering consistency and predictability in the law and provides a useful cross check as to what may be appropriate. In particular, the Panel has focused on the FMCA, Commerce Act and OIA.

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[20] New Image Holdings Limited, the Code company in this case, was valued at the time at $61 million and the value of the shares that were subject to the offer under this transaction was $14.6 million – see *Takeovers Panel v New Image Group Ltd*, above n1, at [70].
[21] Examples of recent higher-quantum Code company transactions include the $1.63 billion takeover of Pushpay Holdings Limited in 2023 (detailed here) and the $1.24 billion takeover of Arvida Group Limited in 2024.
[22] Under the Takeovers Amendment Act 2006.
[23] Under the Takeovers Amendment Act 2010.
[24] Under the Financial Markets (Repeals and Amendments) Act 2013.
[25] Law Commission Report at [16.8].

30 The Panel has also kept the NZBORA in mind (and, in particular, section 5 which provides that the rights and freedoms in NZBORA may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society) when considering the Civil Enforcement Regime.

The Panel's current approach to enforcement of the Code

31 The Panel would also like to emphasise that the imposition of pecuniary penalties (or other Part 3 enforcement measures) is not its main focus. The Panel considers its approach of seeking to address issues intra-transaction is sound, including by proactively enforcing the Code on a day-to-day basis, engaging in dialogue with market participants and seeking to encourage or (if necessary) require them to take appropriate remedial steps. The Panel wishes to maintain this approach and this consultation does not reflect any intention of the Panel to depart from it.

Question: The Panel's background reasoning	
1	Do you agree with the Panel's approach described above? Do you consider that there are any other general considerations that the Panel should bear in mind? Please explain your reasoning.

Pecuniary penalties for breaches of the Code

Seriousness Standard

Problem identification

Current approach

32 Section 33M(c) sets out the criteria which must be met for the Court to make a pecuniary penalty order. It provides that the Court may only order a person to pay a pecuniary penalty where it is satisfied that:

(a) the person has contravened the Code;

(b) the person knew or ought to have known of the conduct that constituted the contravention; and

(c) the contravention:

(i) materially prejudices the interests of offerees, the Code company, the offeror or acquirer, competing offerors, or any other person involved in or affected by a transaction or event that is or will be regulated by the Code, or that is incidental or preliminary to a transaction or event of that kind; or

(ii) is likely to materially damage the integrity or reputation of any of New Zealand's financial markets; or

(iii) is otherwise serious,

(the criteria in paragraphs 32(c)(i) - 32(c)(iii) above being the **Seriousness Standard**).

33 The Seriousness Standard is unusual in requiring that a contravention of the Code be sufficiently "serious" before a pecuniary penalty order can be made. Comparable pecuniary penalty regimes only factor the seriousness of the breach into consideration of the **amount** of the pecuniary penalty.

Limitations of the current approach

34 By way of background, pecuniary penalties are an effective and efficient means of deterring breaches in the corporate context – they are often strong incentives for compliance by financially-driven corporate actors.[26]

35 The Panel considers that there are a number of issues with the Seriousness Standard:

(a) *Nebulous standard:* As noted in the Law Commission Report, the Seriousness Standard is vague and uncertain.[27] The drafting of the Seriousness Standard provides little guidance on what conduct may or may not cross the threshold or whether the focus should be on the consequences of the contravention, the intention of the person causing the contravention, or both. There is also a lack of relevant case law. The Panel has only sought a pecuniary penalty once, which was in relation to New Image, where the Seriousness Standard was, in the Panel's view, clearly met.

(b) *Potential to dissuade the Panel from seeking pecuniary penalties:* The Seriousness Standard adds another factual matter to prove in seeking to enforce the Code, which can disincentivise the Panel from pursuing a pecuniary penalty. While the Panel considers that it should have to establish how serious an offence is to

[26] Law Commission Report, at [5.29].
[27] At [16.59].

assist the Court in determining the quantum of a pecuniary penalty, that is less of a disincentive than having to meet a nebulous standard to determine whether a penalty can be imposed at all. As the Law Commission Report notes, if there is a legitimate reason for only serious contraventions to be punished, it would be more appropriately incorporated into the elements of the breach itself rather than the question of whether a penalty should be imposed at all.[28]

(c) *Potential to dissuade Panel from obtaining a declaration of contravention:* Further to (b), the Seriousness Standard may also reduce the chances of a declaration of contravention being made. To explain, a declaration of contravention acts as conclusive evidence of the matters stated within it, removing the need for applicants for a civil remedy order or a compensatory order to independently prove the underlying contravention.[29] However, the only way for the Panel to apply for a declaration of contravention is to apply for a pecuniary penalty. Matters which dissuade the Panel from seeking a pecuniary penalty may therefore also impact the potential for a declaration of contravention to be made and complicate related claims.

(d) *Repetition of seriousness assessment:* Seriousness is also factored into the assessment of the quantum of a penalty, which requires the Court to have regard to "the likelihood, nature, and extent of any damage to the integrity or reputation of any of New Zealand's financial markets because of the contravention".[30] As such, some aspects of the Seriousness Standard are considered more than once in the pecuniary penalty assessment.

(e) *Misalignment with key comparable pecuniary penalty regime:* There is no Seriousness Standard attached to the FMCA's pecuniary penalties regime, placing the current approach out of step with a key comparable regime. This limits the potential for case law from each regime to be used in other pecuniary penalty assessments, reducing the potential predictability of outcomes. Absent a reason for the difference, the Panel considers that it would be beneficial for the law to be consistent.

Potential reform

36 The Panel proposes to address the issues outlined above by removing the Seriousness Standard from section 33M(c). This reform would address the current issues while continuing to factor seriousness into the quantum of a penalty. Specifically:

(a) This would remove an element of uncertainty in seeking a pecuniary penalty. It would avoid certain disincentives to seeking a pecuniary penalty and increase the chances of declarations of contravention being sought.

(b) The reform aligns more closely with the approach to pecuniary penalties in a key comparable regime, improving consistency and predictability.

37 The potential reform does not remove the consideration of seriousness entirely – it would remain a factor in assessing the appropriate quantum of the penalty under section 33Q.

Conclusions

38 The Panel considers that there are strong arguments for the proposed reform to address the problems defined above. Accordingly, the Panel currently favours potential reform to remove the Seriousness Standard in

[28] Law Commission Report, at [16.60].
[29] Section 33N of the Takeovers Act.
[30] Section 33Q(c).

section 33M(c).

Questions: Seriousness Standard	
2	Do you favour the potential reform? Please give reasons.
3	What problems or benefits are there with the potential reform that are not identified in this paper?

Maximum penalty

Problem identification

Current approach

39 Section 33P of the Takeovers Act sets the maximum pecuniary penalty that can be imposed for a contravention of the Code at $500,000 for an individual and $5,000,000 for a body corporate.

40 For context, the Panel notes that, the quantum of the pecuniary penalty that is imposed is ordinarily lower than the maximum amount. The maximum amount provides an upper threshold starting point from which the Court will apply relevant discounts. As such, the maximum amount itself may be significantly more than the actual penalty imposed once the relevant discounts are applied.

41 The Panel agrees with the Law Commission's view that the maximum pecuniary penalty should be reflective of current times and set at a level that sufficiently deters the classes and sizes of participants within New Zealand's corporate takeovers market.[31] Such penalties should also be fair and proportionate to the maximum level of harm that could be caused by the non-compliance.

42 The Panel considers the current maximum penalties may be out of date:

(a) There has been a significant increase in the value of Code transactions since the pecuniary penalty regime was introduced as a natural result of increases in the value of companies over time and inflation. The Panel considers that a reasonable indication may be provided by the market capitalisation of NZX-listed Code companies between 25 October 2006 (when the pecuniary penalties regime was introduced under the Takeovers Act) and 5 November 2024. As shown in the table below, there has been a significant increase in the value of listed Code companies:

NZX-listed Code company market capitalisation			
	25 October 2006 ($)	**5 November 2024 ($)**	**Change (%)**
Listed Code companies			
Mean	598,700,000	1,361,700,000	127.4
Median	110,100,000	191, 500,000	73.9

[31] Law Commission Report at [16.10].

NZX-listed Code company market capitalisation			
	25 October 2006 ($)	**5 November 2024 ($)**	**Change (%)**
Top 50 listed Code companies			
Mean	1,456,500,000	3,044,200,000	109.0
Median	643,700,000	1,717,700,000	166.8

(b) There have been updates to comparable regimes since the Takeovers Act's pecuniary penalties regime was introduced. As a cross-check for what maxima might be appropriate, the Panel surveyed the maxima set out in the FMCA, OIA and Commerce Act. The key points which the Panel has taken from this exercise are:

(i) The FMCA, and relevant provisions of the Commerce Act and OIA, currently apply a variable approach to determining the maximum pecuniary penalty that can be imposed. Section 83 of the Commerce Act and section 48 of the OIA also impose higher fixed maximum penalties of $10,000,000 for body corporates (compared to the Takeovers Act fixed maximum of $5,000,000).

(ii) The FMCA, being the most closely analogous regime, was instructive. Section 490(1) of the FMCA provides that the maximum amount of a pecuniary penalty for a contravention or involvement in a contravention of a civil liability provision is the greatest of:

(A) the consideration for the transaction that constituted the contravention (if any); and

(B) if it can be readily ascertained, three times the amount of the gain made, or the loss avoided, by the person who contravened the civil liability provision;[32] and

(C) $1,000,000 in the case of a contravention, or involvement in a contravention, by an individual or $5,000,000 in any other case.

Limitations of the current approach

43 Accordingly, the Panel considers that there are some limitations within the Takeovers Act's approach to the maxima of pecuniary penalties that may warrant potential reform:

(a) *Time since pecuniary penalty levels were set:* Unlike comparable regimes, section 33P has not been reviewed or updated since its insertion into the Takeovers Act in 2006. Given inflation and the increase in the value of larger companies, the pecuniary penalty levels under the Takeovers Act are lower than penalty levels of other comparable regimes.

(b) *Deterrent provided by fixed approach:* A fixed pecuniary penalty regime may not set an effective deterrent for all cases. For example, a maximum penalty amount of $5,000,000 may not be enough to deter contraventions of the Code in a high value transaction. The Law Commission Report notes that it is inevitable that higher maximum penalties may be required to adequately deter the wealthiest potential contraveners.[33]

[32] Section 491 of the FMCA provides guidance for the Court on how to determine gains made or losses avoided for this purpose.
[33] Law Commission Report, at [7.35].

(c) *Penalty fixed regardless of deal size:* It is difficult to set an appropriate maximum under a fixed approach as deal sizes vary, risking an overly severe sanction in relation to smaller transactions if a fixed amount is set based on what might be appropriate in the largest transactions.

(d) *Misalignment with comparable pecuniary penalty regimes:* As discussed above, section 33P differs from comparable regimes which have been updated more recently. The Panel considers that there is a benefit in comparable regimes being broadly similar.

(e) *Undermining of the objectives of the Code:* The current approach ineffectively achieves the Code's objective of promoting the international competitiveness of New Zealand's capital markets. Insufficient pecuniary penalties run the risk of failing to appropriately punish and deter contraventions of the Code. This, in turn, may harm the integrity of New Zealand's capital markets and the promotion of competition for the control of Code companies relative to comparable jurisdictions.

44 Accordingly, the Panel considers that reform may be appropriate.

45 The Panel is conscious that a variable approach based on the gain or loss may lead to a very substantial maximum penalty. However, the Panel considers that this is outweighed by the factors outlined above. Further, the Court must always set the amount of the penalty. The Panel considers that the Court's discretion provides an important safeguard against the risk of the regime operating in an unfair manner.

Potential reform

46 The Panel proposes to address the limitations outlined above by amending section 33P so that it more closely aligns with section 490(1) of the FMCA. This would involve the following changes:

(a) The maximum pecuniary penalty in respect of a body corporate would be set at the greatest of the following (to the extent they are applicable):

(i) if the contravention related to a transaction (or a transaction which was part of a group of related transactions), the aggregate consideration for that transaction (or group of related transactions); and

(ii) if the gain made or loss avoided by the person who contravened the Code can be readily ascertained, three times the amount of such gain or loss (provided that if the gain or loss is ascertainable as being within a band, the gain or loss shall be the midpoint of that band); and

(iii) $10,000,000 in any other case.

(b) The maximum pecuniary penalty that can be imposed on an individual would be the same as that for a body corporate (i.e., variable), except that the fixed amount would be set at $1,000,000.

47 The Panel also proposes to include a deeming provision, similar to section 491 of the FMCA. This would provide that:

(a) a person must be treated as:

(i) making a gain if they acquire a financial product for less than its value; and

(ii) avoiding a loss if they dispose of a financial product for more than its value;

(b) the gain made or loss avoided will be the difference between the consideration paid or received and the value the financial product would have had at relevant times (had the contravention not occurred); and

(c) the above guidance does not:

(i) limit the circumstances in which the Court might find that a person has made a gain or avoided a loss; or

(ii) prevent it from finding that the amount of the gain made or the loss avoided, was greater than the amount calculated under this deeming provision.

48 As to the rationale for the proposed approach, this reform would:

(a) set penalties at a level that is proportionate to the level of harm that could be caused by a contravention or the gain which might be made;

(b) provide a more effective deterrent against potential contraventions of the Code;

(c) avoid the need to regularly review a fixed penalty amount to ensure it is set at an appropriate level as transaction values change over time;

(d) align more closely with the approach to pecuniary penalties in comparable regimes; and

(e) better uphold the Code's objective of promoting the international competitiveness of New Zealand's capital markets.

49 The Panel also considered other metrics for setting a maximum pecuniary penalty but concluded that these options were less preferable. They were:

(a) *Portion of the revenue of Code company:* While this approach is used in the Commerce Act, this is an unusual metric in Code-regulated control transactions, which typically centre around the value of the company rather than its turnover.

(b) *Market capitalisation of Code company:* While market capitalisation can often work as a good proxy for value, it may not be relevant to the value of the particular transaction (e.g., where a purchaser already owns the majority of a Code company) and would be inapplicable for unlisted Code companies.

Conclusion

50 The Panel favours reform to amend section 33P so that it aligns with sections 490(1) and 491 of the FMCA as described above.

Questions: Maximum penalty	
4	Do you consider that increasing the fixed maximum penalty to $1,000,000 for individuals and $5,000,000 for bodies corporate under the proposed reform is appropriate? Please give reasons.
5	Do you support the variable approach to determining maximum penalties under the proposed reform? Is it appropriate to apply this to both bodies corporate and individuals? Please give reasons.
6	Do you agree with the proposed mechanisms for setting the maximum variable pecuniary penalty amounts? Are there better ways in which this might be done?

Considerations for Court in determining pecuniary penalty

Problem identification

Current approach

51 Section 33Q of the Takeovers Act sets out factors that the Court must have regard to in setting a pecuniary penalty. It provides:

> ***Considerations for court in determining pecuniary penalty***
>
> *In determining an appropriate pecuniary penalty, the court must have regard to all relevant matters, including—*
>
> *(a) the principles contained in the [Code]; and*
>
> *(b) the nature and extent of the contravention; and*
>
> *(c) the likelihood, nature, and extent of any damage to the integrity or reputation of any of New Zealand's financial markets because of the contravention; and*
>
> *(d) the nature and extent of any loss or damage suffered by a person referred to in section 33M(c)(i) because of the contravention; and*
>
> *(e) the circumstances in which the contravention took place; and*
>
> *(f) whether or not the person in contravention has previously been found by the Court in proceedings under [the Takeovers Act] to have engaged in any similar conduct.*

52 The factors in section 33Q are not exclusive. As noted by the Court in the New Image judgment, other factors that have been considered relevant when determining pecuniary penalties under similar regulatory regimes can be relevant to determining the appropriate penalty under the Takeovers Act.[34]

Limitations of the current approach

53 While section 33Q allows the Court to look at other factors, the Panel considers that section 33Q has fallen out of step with other comparable legislation. Also, because any factors which are not listed are not mandatory, the Court may not take account of them. This would not be appropriate if the factors are sufficiently important. Specifically, section 492 of the FMCA provides that the Court must have regard to additional factors (not referred to in section 33Q), including:

(a) gains made (or losses avoided) by the person in contravention or who was involved in the contravention, that were made (or avoided) because of the contravention or involvement in the contravention;

(b) whether or not a person has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the contravention; and

(c) prior findings by the Court in proceedings under the FMCA, **or any other enactment**, that the person in contravention has engaged in any similar conduct,

(the **Additional Penalty Amount Factors**).

[34] *Takeovers Panel v New Image Group Ltd*, above n1, at [51].

54 The Panel considers that the Additional Penalty Amount Factors should be added to section 33Q. Its reasoning is as follows:

(a) It could be argued that the gains made or losses avoided should not be considered because section 33Q expressly refers to the extent of any loss or damage suffered by a person because of the contravention. Alternatively, the Court may consider it should focus on the loss or damage, rather than the gains made or losses avoided. The Panel considers it important that the gains made or losses avoided are always considered, and that may be more relevant in this context than the damage or loss suffered:

(i) The gains which might be made, or losses which might be avoided, by a breach of the Code may be a key motivation for a person to breach the Code. As such, they should be factors used in calculating the amount of the pecuniary penalty to ensure there is a sufficient disincentive to breaching the Code.

(ii) The gains made/losses avoided factor is the most relevant factor from the point of view of the person in contravention. Accordingly, it might be the most appropriate consideration in arriving at a penalty which focuses on punishing the contravener. The amount of a penalty should reflect its punitive purpose.

(iii) Section 31U(2)(b) enables the Court to make an order, where a person has breached a term of an undertaking given under section 31T, to pay the Crown up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach. It would be inconsistent not to consider gains made or losses avoided in determining an appropriate pecuniary penalty when such a factor is considered for other misconduct under the Takeovers Act.

(iv) The LDAC Guidelines note that any financial gain made, or loss avoided, from the breach should be a factor for the Court to consider.[35]

(b) There is currently no requirement to consider whether the person in contravention has taken actions or steps to avoid or mitigate any actual or potential adverse effects post-contravention. The Panel considers this to be a relevant factor. Inclusion of this factor may also encourage parties to take active steps to rectify breaches of the Code.

(c) Section 33Q(f) requires the Court to consider only previous proceedings under the Takeovers Act. The Panel thinks this is inappropriately restrictive. The Panel prefers the approach in section 492(f) of the FMCA, which requires consideration of whether the person has previously been found by the Court in proceedings under the FMCA *or any other enactment* to have engaged in any similar conduct. The Panel considers it odd that Takeovers Act proceedings could be relevant in future FMCA proceedings, but the reverse would not apply.

(d) The potential reform aligns more closely with the approach to pecuniary penalties applicable in a key comparable regime (the FMCA), improving the consistency and predictability of the law.

[35] LDAC Guidelines, at [26.6].

Conclusion

55 The Panel favours potential reform to amend section 33Q to include equivalents to the Additional Penalty Amount Factors.

Questions: Considerations for Court in determining pecuniary penalty	
7	Do you agree with including equivalents to the Additional Penalty Amount Factors as considerations under section 33Q? If not, please state which of the additional considerations you consider should not be added. Please give reasons.
8	Are there any other considerations you think should be included under section 33Q in addition to equivalents to the Additional Penalty Amount Factors?

Pecuniary penalties for breach of an Undertaking

Problem identification

Current approach

56 Under section 31T of the Takeovers Act, the Panel may accept a written undertaking given by or on behalf of a person in connection with a matter in relation to which the Panel is exercising any of its powers or performing any of its functions under the Takeovers Act or any other Act (an **Undertaking**).[36]

57 Currently, if the Panel considers that a person has breached a term of an Undertaking, the Panel may apply to the Court for the following orders:[37]

(a) an order directing the person to comply with the term;

(b) an order directing the person to pay to the Crown an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach (a **Payment Order**);

(c) any order that the Court thinks appropriate directing the person to compensate any other person who has suffered loss, injury or damage as a result of the breach; and/or

(d) an order for any consequential relief that the Court thinks appropriate.

Problems with the current approach

58 The Panel considers that further consequences should be available for a breach of an Undertaking:

(a) Often the Panel will use Undertakings as a way of making sure that a person acts, or will act, in a Code compliant manner where it appears they might not otherwise do so, or to address conduct which appears to have breached the Code. When Undertakings are given in these circumstances, they may result in the Panel not taking further enforcement action because compliance with the Undertakings would effectively address the issue.

(b) Accordingly, the Panel considers that breach of an Undertaking is a discrete and serious wrong. A meaningful punitive sanction should be available where a person breaches an Undertaking.

(c) While section 31U does provide for consequences following a breach of an Undertaking, those consequences may be of limited effectiveness in practice where the Undertaking simply requires a person to take the steps needed to comply with the Code. There might be a punitive sanction for breaching the Code, but no additional sanction for breaching the Undertaking.

(d) The New Image matter was an example of this – during the offer, the Panel formed the view that there was an appreciable possibility that the offeror had made a differential offer in breach of rule 20 of the Code. However, the Panel decided not to convene a section 32 meeting on the basis that an acceptable Undertaking was provided. Following the Undertaking being provided, the offeror then either continued the differential offer or made a new one, breaching rule 20 of the Code. While it was not established in the proceedings that the Undertaking had been breached, there was some evidence that this may have occurred. In prosecuting this matter, the Panel did not take enforcement action in

[36] Under section 31T(2), the person giving the Undertaking may withdraw or vary the Undertaking with the consent of the Panel.
[37] Section 31U.

relation to the potential breach of the Undertaking because there may not have been any additional consequences beyond the pecuniary penalty sought for the Code breach itself. The Panel considers it unsatisfactory that the potential breach of an Undertaking in such circumstances, if proved, would be likely to have little impact on the level of penalty imposed.

(e) In the Panel's view, a Payment Order does not provide a sufficient deterrent – the maximum sum payable is limited to no more than the breacher's financial benefit "reasonably attributable" to its breach. This minimises the incentive for bad actors to comply with an Undertaking – financially, they could never be worse off in aggregate for choosing to breach the Undertaking.

(f) Both the Commerce Act and the OIA enable the Court to impose a pecuniary penalty where a person contravenes an enforceable undertaking.[38]

59 In summary, if the enforcement tools available to uphold Undertakings are insufficient, their usefulness in helping resolve matters expeditiously is reduced.

60 As a related matter, the Panel considers that the Panel's and Court's enforcement powers (e.g., in relation to section 32 meetings) should extend to a potential breach of an Undertaking. Again, the New Image matter showed this to be an issue – the potential breach of the Undertaking was intertwined with the breach of rule 20 but the Panel could not directly consider whether the Undertaking had been breached. The Panel considers that focusing enforcement only on the Code breach, to the exclusion of breach of an Undertaking, artificially narrows the potential enquiry.

Potential reform

61 At a high level, the Panel considers that potential reform would involve:

(a) applying a pecuniary penalty regime to breaches of Undertakings; and

(b) extending the enforcement powers of the Panel and the Court to breaches of Undertakings in the same way they extend to breaches of conditions to exemptions (see section 2(2) of the Takeovers Act).

General operation

62 The Panel considers that a pecuniary penalty order for this type of breach should be imposed by the Court on the application of the Panel. This reflects both the LDAC Guidelines and Law Commission Report and established practice within the Takeovers Act and other enforcement regimes.[39]

63 The Panel does not consider any mens rea element to be appropriate for the imposition of a penalty for this conduct. A strict liability approach provides strong incentive for persons to adopt compliance processes so that they adhere to an Undertaking and the anticipated regulatory response to a breach is clear.

Maximum amount of a pecuniary penalty for breach of an Undertaking

64 The Panel considers the penalty for breach of an Undertaking should be a fixed maximum penalty, rather than a variable maximum penalty, mirroring the approach taken in the Commerce Act and the OIA.[40]

[38] See section 85A of the Commerce Act and section 46F of the OIA.
[39] See LDAC Guidelines at chapter 26, Law Commission Report at guideline G10, section 33M of the Takeovers Act and, for instance, section 489 of the FMCA.
[40] Section 85A(3) of the Commerce Act and section 46F(2)(a) of the OIA.

65 The reasoning for this approach is as follows:

(a) While the wrongdoing behind each penalty for a Code breach will vary depending on the circumstances, for a breach of Undertaking the underlying wrong remains largely the same – the person has reneged on an enforceable promise made to a regulator.

(b) It may be more challenging to determine the financial consequences of the breach of the Undertaking (as opposed to the loss or gain derived from conduct breaching a Code rule).

66 The Panel proposes the fixed penalty maximum be set at $500,000 in respect of each act or omission.

67 The Panel considers that this sum would provide both a sufficient deterrent effect and would also provide for an appropriate sanction in the worst classes of case, without being disproportionately severe.

68 In accordance with the LDAC Guidelines, the Panel also proposes that the Takeovers Act provide guidance to the Court on how to determine the penalty amount.[41] The Panel proposes that this would broadly mirror the proposed approach set out in paragraph 55 above regarding factors to be taken into account in setting a pecuniary penalty for Code breaches.

69 The Panel also proposes that the Takeovers Act clarify that a person may not be liable to more than one pecuniary penalty in respect of the same conduct (although if a person breaches an Undertaking and the Code by the same conduct, separate pecuniary penalties could be imposed in respect of each matter, and one would not affect the other).

70 Additionally, the Panel proposes introducing a provision reflecting section 85C of the Commerce Act, to provide that the Court must not take into account:

(a) whether it was appropriate for the Panel to accept the Undertaking;

(b) whether the Undertaking is still necessary or desirable;

(c) whether any of the terms of the Undertaking are still necessary or desirable; and

(d) whether the breach of the Undertaking also involved a breach of the Code.

71 The addition of this provision would reflect the policy underpinning a pecuniary penalty for breach of an Undertaking – i.e., that a breach of a written commitment to a regulator is a discrete and serious wrong.

72 Finally, the Panel notes that this pecuniary penalty regime would operate alongside the other remedies under section 31U, which would continue to be available.

73 For completeness, the Panel notes that:

(a) The Panel considers that the availability of a pecuniary penalty in this context is not at odds with the principle that legislation should avoid "double jeopardy" (punishing persons twice for the same conduct) highlighted in the LDAC Guidelines and the Law Commission Report.[42] This is because the entering into and subsequent breach of an Undertaking represents conduct that is distinct from the conduct involved in breach of specific Code rules.

[41] LDAC Guidelines, at [26.6].
[42] See LDAC Guidelines at [26.7] and Law Commission Report, at chapter 10.

(b) The Panel has considered whether any specific defences should be introduced for the proposed new pecuniary penalty. In the Panel's view, no additional provisions regarding defences are necessary.

Conclusion

74 The Panel favours reform as described in paragraphs 6162-7073.

Questions: Pecuniary penalties for breach of an Undertaking	
9	Should pecuniary penalties be available for breach of an Undertaking? If not, why not?
10	If pecuniary penalties were introduced for breach of an Undertaking, do you consider that the Panel's outlined proposed regime would be appropriate? Are there any aspects that you consider should be amended? If so, please provide reasons and an alternative approach.
11	Do you consider that the maximum pecuniary penalty for breach of an Undertaking proposed by the Panel would provide an appropriate penalty and deterrent while not being excessive? Is there another amount which would strike a better balance?

Management bans

Current position under the Takeovers Act

75 Currently, management bans may be ordered against a person under the Takeovers Act, effectively banning them from being a director, promotor or taking part in the management of a company for a period of time (or on a permanent basis). They are punitive, but also serve to protect against future misconduct.[43]

76 Sections 44F and 44G allow for the imposition of management bans on a case-by-case basis. Section 44J provides for the imposition of automatic management bans in certain circumstances.

Issues and proposed reforms

77 The Panel sees three issues with the current approach to management bans in the Takeovers Act:

(a) *Automatic bans:* Under section 44J, the Takeovers Act provides that, in certain circumstances, a management banning order is to be imposed automatically, rather than being considered on a case-by-case basis. If a person is convicted of an offence under sections 44 or 44C or has a pecuniary penalty award made against them, an automatic management ban of five years must be imposed. There is no judicial discretion (except that a Court may grant leave from the ban under section 44J(2) – essentially, the onus falls on the person who was subject to the automatic ban to seek the leave of the Court). The Panel's concerns with this approach are as follows:

(i) If a management banning order is to be made against a person, it should be at the Court's discretion, having taken account of all of the relevant factors.

(ii) An automatic ban risks being arbitrary in its effect. It is inconsistent if the Court can have discretion in setting the amount of a fine or pecuniary penalty but no discretion in imposing a management ban. Management bans should be reserved for serious misconduct where a proper assessment of all factors can be made.

(iii) The severity of an automatic consequence may affect the decision-making of the Court or the Panel in imposing or seeking pecuniary penalties or convictions where a management ban would be excessive.

(b) *Replacement approach if automatic bans are removed:* At present, the automatic ban means a single serious breach of the Code cannot result in a management ban (where a pecuniary penalty is imposed). Following on from the recommendation to remove the automatic bans, a single breach of the Code could result in a management ban.

(c) *Narrow set of prescribed factors:* The Panel is concerned that the factors which the Takeovers Act requires to be applied in determining whether to issue a management ban are too narrow and do not capture all conduct which might justify a management ban.

[43] As management bans serve this protective function, they may be imposed upon a person alongside other criminal sanctions for an offence without violating the aspect of the "double jeopardy" principle in criminal law which considers that a person should not have multiple punishments imposed on them for the same crime.

78 The Panel's proposed approaches to address these and certain other issues are as follows:

(a) *Repeal of section 44J to remove automatic management bans:* The Panel proposes to repeal section 44J.

(b) *The persistent failure standard:* At present, the Takeovers Act allows for the imposition of management bans on directors of entities where:[44]

(i) the director has "persistently contravened" the Code or other related legislation; or

(ii) the entity has breached the Code, and the director has "persistently failed to take all reasonable steps" to obtain compliance with the Code or related legislation.

The Panel considers both limbs of this test to be problematic. In the Panel's view:

(iii) The Panel considers that any reference to "persistence" is confusing in the context of a Code transaction. It could be argued that "persistent" implies that breaches have occurred across a number of transactions. The Panel notes that while a "persistence" requirement may make sense in the context of the FMCA (where, for example, a debt issuer might issue debt securities over a longer period of time), in a Code context target companies may go through one control-change transaction and acquirers will use multiple acquisition vehicles, with none of them completing more than one transaction. Accordingly, the Panel considers that a better expression of this standard would be "multiple times" or similar, and this should replace the "persistent" standard.

(iv) Any persistent or repeated contravention standard is too narrow. If repeated minor breaches allow the imposition of a ban, then a single serious breach should do so as well.

(v) Similarly, a persistent or repeated failure to take all reasonable steps is not the only thing which might justify a management ban on an individual. If there has been a serious failure to comply with the Code, then the Panel considers it should be sufficient that the director failed to take all reasonable steps to ensure compliance. In this regard, the Panel notes that, due to the nature of Code transactions, it is likely that almost all breaches of the Code will be by bodies corporate. If management bans are to be meaningful, there needs to be an effective "look through" to the relevant individuals.

(c) *Serious breaches:* The Court should have a discretion to impose a management ban where the breach, or multiple breaches, was serious.

Conclusion

79 The Panel proposes:

(a) to repeal section 44J;

(b) to provide that the Court, in its discretion, could impose a management ban on a person if a person:"

(i) committed a serious breach of the Code or committed a number of breaches of the Code which, together, were serious; or

(ii) was a director of an entity which committed a serious breach of the Code or committed a number of breaches of the Code which, together, were serious, and that person failed to take all reasonable

[44] Section 44F of the Takeovers Act.

steps to prevent such breach or breaches.[45]

Questions: Management bans	
12	Do you agree with the proposed amendments to the management ban provisions? Please give reasons.
13	Are there other changes which should be made to the management ban provisions?

[45] The Panel notes that members of the board may be conflicted and not form part of the Independent Directors Committee. In this situation, the Panel considers the "reasonable steps" requirement will protect that director – i.e., given their conflict there may not have been reasonable steps that the director could take.

Limitation periods

Problem identification

80 The limitation periods for civil remedies under the Takeovers Act have fallen out of step with a changing approach to limitation periods in comparable regimes and may be shorter than appropriate.[46]

Introduction – What are limitation periods?

81 Limitation periods provide a time within which legal proceedings must be initiated. In general terms, limitation periods for civil matters typically comprise some or all of the following:

(a) *Finite Period:* A period starting from the date the matter giving rise to the cause of action occurred.

(b) *Discoverability Period:* A period starting from the date on which facts giving rise to the matter became "reasonably discoverable" (or similar).

(c) *Longstop Date:* Where there is a Discoverability Period, there is usually a date after which a claim cannot be brought even if the Discoverability Period has not ended. The Longstop Date will usually be set at a certain time after the cause of action arose.

82 The standard limitation rules for money claims are set out in the Limitation Act and apply as a default position for monetary claims. However, where a relevant statute sets out bespoke limitation periods it will apply instead of the default Limitation Act rules.

Current position under the Takeovers Act

83 Section 43C of the Takeovers Act sets out the limitation period for civil remedies – i.e., pecuniary penalties, civil remedies and injunctive relief (the **Section 43C Periods**). Section 43C provides:

> ***Time limit for applying for civil remedies***
>
> *(1) An application for a civil remedy order under section 33I or a pecuniary penalty order under section 33M may be made at any time within 2 years after the date on which the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.*
>
> *(2) The usual time limits apply to all applications for other civil remedy orders.*
>
> *(3) However, an application for a compensatory order in respect of a contravention may be made at any time within 6 months after the date on which a declaration of contravention is made, even if the usual time limit has expired.*

84 In summary, the Section 43C Periods provide a bespoke regime for most civil claims which might be brought under the Takeovers Act:

(a) There is a principal two-year Discoverability Period (without a Longstop Date). This period applies to most of the key orders and sanctions which might be made under the Takeovers Act, including pecuniary penalties and the civil remedy orders that a Court might make.

[46] For clarity, the Panel does not consider that any change needs to be made to the approach to limitation periods for commencing criminal proceedings (which is the general approach in the Criminal Procedure Act 2011, with some exceptions in relation to management bans). The focus of this section is solely in relation to civil remedies.

(b) Section 43C(3) provides a six month period within which shareholders or other aggrieved parties can seek a compensatory order following a declaration of contravention made by the Court under section 33M(b) (the **Coattail Period**). The rationale is that the Panel must have concluded pecuniary penalty proceedings in order for the Court to make a declaration of contravention. Accordingly:

(i) the limitation period for a compensatory order can only start once the declaration of contravention is made; and

(ii) the principal two-year Discoverability Period still limits when compensatory orders can be bought.

85 For civil remedy orders other than those referred to above, the Limitation Act periods set out below will apply. This will generally cover instances where an individual seeks a compensatory order where the Panel has not sought a pecuniary penalty or, separately, claims for injunctive relief.[47]

Current position under the Limitation Act

86 In summary, while the Limitation Act periods operate differently to those in the Takeovers Act, they are generally materially longer than those under the Takeovers Act. Part 2 of the Limitation Act relates to "defence to money claims" and applies to "money claims" under the Takeovers Act to the extent the Takeovers Act does not provide a bespoke regime. Section 11 provides:

Defence to money claim filed after applicable period

(1) It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based (the claim's primary period);

(2) However, subsection (3) applies to a money claim instead of subsection (1) (whether or not a defence to the claim has been raised or established under subsection (1)) if—

(a) the claimant has late knowledge of the claim, and so the claim has a late knowledge date (see section 14); and

(b) the claim is made after its primary period.

(3) It is a defence to a money claim to which this subsection applies if the defendant proves that the date on which the claim is filed is at least—

(a) 3 years after the late knowledge date (the claim's late knowledge period); or

(b) 15 years after the date of the act or omission on which the claim is based (the claim's longstop period).

87 There is also a fraud exception to the fifteen-year longstop under section 48 of the Limitation Act. It provides that the longstop period does not apply to a claim where the claimant did not know (or could not have reasonably known) of various matters because of fraud by or on behalf of the defendant.

LDAC Guidelines and Law Commission Report

88 The LDAC Guidelines provide that the limitation periods in Part 2 of the Limitation Act should apply to pecuniary penalties unless there is good reason to depart from this approach (the **Standard Approach**).[48]

[47] Section 43C(2) of the Takeovers Act and section 9 of the Limitation Act.
[48] LDAC Guidelines, at [26.3].

89 The LDAC Guidelines set out the relevant considerations for policymakers in deciding whether to depart from the Standard Approach. They include the following:[49]

(a) the time period within which breaches of the regulatory regime ought to be discoverable;

(b) the time period within which enforcement agencies ought to be able to make a decision to bring proceedings;

(c) fairness to potential defendants in relation to knowing whether or not proceedings will be commenced; and

(d) the public or market expectations of prompt prosecutorial action.

90 In addition to these guidelines, the Law Commission Report provides that:

(a) Pecuniary penalty statutes should generally adopt a limitation period of three years after reasonable discoverability of the contravention, with a ten-year longstop, subject to a fraud exception as provided in section 48 of the Limitation Act (the **Model Approach**).[50]

(b) The Limitation Act should be an alternative option for pecuniary penalties where there is a specific policy justification. Where there is a justification for the Limitation Act to apply, the legislation should specifically set out how it interacts with any pecuniary penalty provisions.[51]

91 Essentially, the Law Commission's position recognises that regulators have specific monitoring powers and resources to pursue proceedings, placing these proceedings in a different category to those brought by "ordinary" litigants.[52]

Analysis

92 The Panel's analysis of the appropriate approach under the Takeovers Act is as follows:

(a) The Standard Approach provides a helpful starting point. However, the Panel's active monitoring of the takeovers market and engagement with market participants should in most cases lead to breaches being discoverable and the Panel should not unreasonably delay decisions on bringing proceedings. A six-year fixed period risks being inappropriately long.

(b) Balanced against this is the fact that a breach of the Code or Takeovers Act may not always be immediately discoverable, as demonstrated in the New Image matter. As such, the Panel considers that there is merit in retaining a Discoverability Period.

(c) As to the length of a Discoverability Period, there are steps that need to be taken prior to filing proceedings:

(i) An investigation needs to be undertaken, including an allowance of time for gathering and analysing evidence.

(ii) There will generally need to be a section 32 meeting. Time needs to be allowed for appropriate notice and preparation of submissions by parties, the meeting to be held and a determination to be

[49] Ibid.
[50] Law Commission Report, at guideline G20.
[51] Law Commission Report, at [18.7] and [18.65].
[52] Law Commission Report, at [18.36].

prepared. This adds a step over and above what other analogous regulators must take before they can bring proceedings and suggests that a longer period might be appropriate.

(iii) Once reasons for the determination have been published, they will then need to be considered. The Panel will likely need to assess the amount of the loss (a precise assessment is unlikely to be relevant before this point). This may require expert evidence, which can take some time to produce.

(iv) The Panel would then need to make prosecutorial decisions.

All of the above suggests that the current two-year limitation period can be a tight timeframe. This could be exacerbated where a party looks to use delaying tactics or the Panel's resources are otherwise pressured.

(d) Despite the timing pressures referred to above, the current lack of a Longstop Date creates open ended liability, which may not be appropriate. Further, the Panel has doubts that a fifteen-year Longstop Date would sufficiently address these concerns. The Panel considers that there is a benefit to incentivising prompt regulatory investigation and action.

(e) Comparable regulatory regimes generally have longer limitation periods than the Takeovers Act. However, those regimes have taken different approaches:

(i) The FMCA adopts the Standard Approach by providing in section 508 that the Limitation Act applies to pecuniary penalties and other claims for relief under the subpart (other than monetary or declaratory relief).[53]

(ii) The Commerce Act discoverability model is largely similar to the Model Approach – i.e., it provides a three-year discoverability period with a ten-year longstop (however, there is no fraud exception).[54]

(f) The Panel considers that the current Coattail Period is short and may not allow sufficient time for claimants to organise themselves and bring a claim. Potential litigants would need to (at least):

(i) consider the Court's decision and the facts proven in court before commencing proceedings;

(ii) establish what loss they might be able to prove, which may involve obtaining expert advice which would likely only be able to be prepared after the Court makes factual findings as to the breaches of the Code; and

(iii) instruct counsel, potentially through some form of class action.

The Panel considers that a longer period is not unfair on the person who breached the Code when the principal claim will have been brought within ordinary limitation periods.

Potential reform

93 Having regard to the above analysis, the Panel considers there is a case for reforming section 43C. The Panel has identified two options:

(a) *Option 1*: A modification of the Standard Approach – i.e.:

(i) The Limitation Act would apply, but the Coattail Period would be retained and extended to one year.

[53] Section 508(2) ensures that the same limitation periods apply to other forms of civil remedies not expressly provided for in the Limitation Act.
[54] Sections 80 and 80B of the Commerce Act.

(ii) A specific provision similar in form to section 508(2) of the FMCA would be included to ensure that, as under the current regime, the same limitation period would apply to all enforcement orders the Panel may seek (i.e., any civil remedy orders under section 33I of the Takeovers Act).

(b) *Option 2*: A modification of the Model Approach – i.e.:

(i) A Discoverability Period would be retained for pecuniary penalties and civil remedy orders under section 33I, but it would be increased from two years to three years.

(ii) The Coattail Period would be retained but would be extended from six months to one year.

(iii) A Longstop Date of ten years (with a fraud exception) would be introduced for all claims (other than claims brought in the Coattail Period, where it applies), balancing the extended Discoverability Period.

(iv) The Limitation Act would apply to all other claims.

94 In either case:

(a) Should pecuniary penalties be introduced for breaches of Undertakings (see paragraphs 56 to 74 above), the limitation regime would also apply to them.

(b) The Discoverability Period would be effectively reset where a person gives an Undertaking to the Panel (or proposes to take other corrective action) to resolve a potential contravention of the Code but ultimately continues to act in contravention of it. This is intended to ensure that where the Panel has been led to believe that a matter has been resolved and cannot reasonably discover that the person has continued to act in contravention, the Panel would not be time-barred from seeking a declaration of contravention for the original contravention of the Code.

95 The Panel notes that should Option 2 be adopted, section 43C(2) of the Takeovers Act would be retained. Effectively, section 11 of the Limitation Act would apply to compensatory claims brought by a person other than the Panel, resulting in different limitation periods for the Panel and other defined litigants. Weighed against this inconsistency, the Panel has more resources than the ordinary litigant, justifying a shorter limitation period. Furthermore, the Coattail Period would limit instances where the different limitation periods would result in concurrent claims.

Conclusion

96 For the reasons above, the Panel's preference is Option 2. However, the Panel considers that the matter is not clear cut, and there are arguments for Option 1 – e.g., it would ensure that the Takeovers Act aligns with equivalent provisions of the FMCA, promoting consistency in financial markets. Despite this, the Panel considers that overall it is more important to ensure that the approach taken is appropriate in all of the circumstances. As such, the Panel is hesitant to suggest that the longer Limitation Act periods are necessary.

97 Ultimately, the Panel considers that this issue involves balancing competing imperatives. Accordingly, the Panel is keen to hear the market's views on this issue.

Questions: Limitation periods	
14	Do you agree that the current Section 43C Periods should be updated?
15	Which of Option 1 and Option 2 is your preferred option? Please give reasons.

16	Do you have an alternative preferred option for reform? If so, please summarise it and explain the rationale.

Additional updates

98 There are several additional minor changes to the Court's enforcement powers which the Panel considers should be made. These are set out below.

Application of Takeovers Act to Crown corporations

99 The Law Commission Report states that it is not sufficient for an Act to provide only that "this Act binds the Crown" where pecuniary penalties under the relevant Act are to apply to the Crown or Crown-controlled body corporates. Rather, the legislation should specifically set out that pecuniary penalties may be imposed on the Crown or Crown-controlled bodies corporate.[55]

100 The Panel agrees. Accordingly, the Panel proposes for the Takeovers Act to provide that pecuniary penalties and other civil remedies shall apply to the Crown and Crown-controlled bodies corporate. As to how this might appear in drafting, the Panel expects the form would be similar to section 6 of the Commerce Act, which provides:

> ***Application of Act to Crown corporations***
>
> *(1) This Act applies to everybody corporate that is an instrument of the Crown in respect of the Government of New Zealand engaged in trade.*
>
> *(2) Notwithstanding any enactment or rule of law, proceedings under Part 6 may be brought against a body corporate referred to in subsection (1).*

Clarification that the Panel can apply for a pecuniary penalty / declaration of contravention

101 Currently, section 33M of the Takeovers Act provides for a declaration of contravention to be granted only where the Panel has sought a pecuniary penalty order. The potential issue with this is that the Panel might consider a pecuniary penalty is not appropriate, but that a declaration of contravention is. Declarations of contravention are relevant to compensatory orders (which may be sought by aggrieved persons under section 33K) because section 33N enables persons seeking a compensatory order to rely on a declaration of contravention without the need to independently prove that a contravention of the Code has occurred.

102 While the Panel could apply for a pecuniary penalty but then ask the Court to make a nominal award or to not impose one (given that the Court has a discretion to impose a pecuniary penalty), this approach would be artificial. The Panel considers that the better approach would be for the drafting of section 33M to expressly allow the Panel to seek a pecuniary penalty *or* a declaration of contravention (or both).

Protection against double jeopardy

103 The LDAC Guidelines and Law Commission Report provide that an Act should include an explicit prohibition against double jeopardy, setting out that a person cannot be subject to both criminal and pecuniary penalty proceedings for the same conduct. Furthermore, once criminal proceedings have been determined (whether resulting in a conviction or not) there should be no pecuniary penalty proceedings based on the same conduct or vice versa.[56]

[55] Law Commission Report, at [19.31].
[56] LDAC Guidelines, at [26.7] and Law Commission Report, at guideline G7.

104 Section 44X of the Takeovers Act provides a level protection against double jeopardy, stating:

> ***No pecuniary penalty and fine for same conduct***
>
> *A person cannot be ordered to pay a pecuniary penalty and be liable for a fine under this Act for the same conduct.*

105 This addresses the basic issue of not having concurrent liability for both a pecuniary penalty and a fine for criminal liability. However, it does not address issues such as the potential for the Panel to commence proceedings for a pecuniary penalty after it has attempted (but failed) to secure a criminal conviction for the same conduct. The Panel proposes to amend section 44X to address this issue. An example of how this might be done is found in section 107C of the Credit Contracts and Consumer Finance Act 2003:

> ***Relationship between pecuniary penalties and criminal liability***
>
> *(1) Once criminal proceedings against a person for an offence under this or any other Act are determined, the High Court may not order the person to pay a pecuniary penalty under this subpart in respect of the conduct, events, transactions, or other matters that were the subject of the criminal proceedings.*
>
> *(2) Once civil proceedings against a person for a pecuniary penalty under this subpart are determined, the person may not be convicted of an offence under this or any other Act in respect of the conduct, events, transactions, or other matters that were the subject of the civil proceedings.*
>
> *(3) Any uncompleted proceedings for an order under this Act that a person pay a pecuniary penalty must be stayed if criminal proceedings are started or have already been started against the person for the same act or omission, or substantially the same act or omission, in respect of which the pecuniary penalty order is sought.*

Questions: Additional updates	
17	Do you agree with the proposed amendments set out in this section? Please give reasons.
18	Are there any other amendments to the Court's enforcement powers which the Panel should consider?

Schedule 1: Table of consultation questions

Consultation questions: Civil enforcement under the Takeovers Act	
The Panel's background reasoning	
1	Do you agree with the Panel's approach described above? Do you consider that there are any other general considerations that the Panel should bear in mind? Please explain your reasoning.
Seriousness Standard	
2	Do you favour the potential reform? Please give reasons.
3	What problems or benefits are there with the potential reform that are not identified in this paper?
Maximum penalty	
4	Do you consider that increasing the fixed maximum penalty to $1,000,000 for individuals and $5,000,000 for bodies corporate under the proposed reform is appropriate? Please give reasons.
5	Do you support the variable approach to determining maximum penalties under the proposed reform? Is it appropriate to apply this to both bodies corporate and individuals? Please give reasons.
6	Do you agree with the proposed mechanisms for setting the maximum variable pecuniary penalty amounts? Are there better ways in which this might be done?
Considerations for Court in determining pecuniary penalty	
7	Do you agree with including equivalents to the Additional Penalty Amount Factors as considerations under section 33Q? If not, please state which of the additional considerations you consider should not be added. Please give reasons.
8	Are there any other considerations you think should be included under section 33Q in addition to equivalents to the Additional Penalty Amount Factors?

Consultation questions: Civil enforcement under the Takeovers Act	
Pecuniary penalties for breach of an Undertaking	
9	Should pecuniary penalties be available for breach of an Undertaking? If not, why not?
10	If pecuniary penalties were introduced for breach of an Undertaking, do you consider that the Panel's outlined proposed regime would be appropriate? Are there any aspects that you consider should be amended? If so, please provide reasons and an alternative approach.
11	Do you consider that the maximum pecuniary penalty for breach of an Undertaking proposed by the Panel would provide an appropriate penalty and deterrent while not being excessive? Is there another amount which would strike a better balance?
Management bans	
12	Do you agree with the proposed amendments to the management ban provisions? Please give reasons.
13	Are there other changes which should be made to the management ban provisions?
Limitation periods	
14	Do you agree that the current Section 43C Periods should be updated?
15	Which of Option 1 and Option 2 is your preferred option? Please give reasons.
16	Do you have an alternative preferred option for reform? If so, please summarise it and explain the rationale.
Additional updates	
17	Do you agree with the proposed amendments set out in this section? Please give reasons.
18	Are there any other amendments to the Court's enforcement powers which the Panel should consider?