

Guidance Note

# LIMITED PARTNERSHIPS

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**TAKEOVERS  
PANEL**  
TE PAE WHITIMANA

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This Guidance Note sets out the Panel's views on the control of voting rights in a Code company that are held by a limited partnership. This guidance only relates to New Zealand-registered limited partnerships, but the principles may apply to limited partnerships registered in other jurisdictions.

## 1 Introduction

- 1.1 Limited partnerships are increasingly common in New Zealand, including as investment vehicles that acquire or otherwise hold or control shares in Code companies. This material in this Guidance Note is from the article “*Limited Partnerships and Control of Code Company Voting Rights*” in *CodeWord 50*. It outlines the Panel's general views about who controls the voting rights in a Code company that are held by a limited partnership. *CodeWord 50* updated the Panel's position on limited partnerships as described in *CodeWord 30*.
- 1.2 Further, the question of control will turn on the relevant facts and circumstances of each particular case. Factors that might cause the Panel to form a different view from the general views set out below include (but are not limited to):
- (a) the terms of the partnership agreement or other arrangements between the parties; and
  - (b) how the limited partners, the general partner and their related parties act and relate to each other in practice.

Accordingly, advisers should turn their minds to how the Code applies in each particular case. The [Panel executive](#) is available to discuss any questions in relation to Code compliance.

## 2 Control of Code Company Voting Rights

- 2.1 Set out below is a summary of the Panel's general views on who controls the voting rights in a Code company that are held by a limited partnership (the **Code Company Voting Rights**).

### The Limited Partnership

- 2.2 Typically, the Code Company Voting Rights will be held and/or controlled by the limited partnership itself. To explain:
- (a) the limited partnership may hold the Code Company Voting Rights directly (and therefore control the Code Company Voting Rights); or
  - (b) the Code Company Voting Rights may be held through a subsidiary of the limited partnership. In such cases the limited partnership will still control the Code Company Voting Rights, but will not hold them directly.

### The general partner and upstream controllers of the general partner

- 2.3 The general partner may also control the Code Company Voting Rights. This is because the general partner, being, by law, responsible for the management of the limited partnership, will typically be the decision-maker in relation to the exercise of the Code Company Voting Rights.
- 2.4 The upstream owner of an incorporated general partner may also control the Code Company Voting Rights, depending largely on the degree of the upstream owner's control over the general partner. Assessing whether this is the case will require fact-specific analysis.
- 2.5 In general, an upstream owner of a company is likely to have “effective control” of that company if:<sup>1</sup>
- (a) the upstream owner controls more than 50% of the voting rights in the company; or

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<sup>1</sup> For more information on “effective control”, see [CodeWord 43](#).



(b) the upstream owner controls less than 50% of the company but has the power to effect changes in the company (such as the power to appoint and remove directors).

- 2.6 In addition, the Panel is conscious that (particularly in private equity groups), there may be an investment committee or manager providing advice or direction to the limited partnership, the general partner and/or its controllers. If the investment committee or manager provides such directions, it may be a controller of the Code Company Voting Rights. Further, it is possible that the Panel will consider “advice” given by an investment committee or manager to be, in fact, a direction that confers control over Code Company Voting Rights. In determining whether an investment committee or manager provides direction or advice, the Panel will take a substance-over-form approach.
- 2.7 In any situation, advisers should consider entities as far upstream as is necessary to identify who, in fact, has control over the Code Company Voting Rights.
- 2.8 In addition, related companies of the limited partnership (or other controller of the Code Company Voting Rights) may be associates of that entity. Accordingly, there may be Code implications for members of the controller’s group, even if control over Code Company Voting Rights does not rest with the ultimate holding company of the group.

### **Treatment of limited partners generally**

- 2.9 If a limited partner has only an economic interest in the limited partnership, then the limited partner does not control the Code Company Voting Rights, even where the limited partner’s economic interest is significant.<sup>2</sup>
- 2.10 However, it is possible that a limited partner might participate in the management of a limited partnership (even though this means it may lose its limited liability status). If a limited partner participates in management, it may have control over the Code Company Voting Rights.
- 2.11 Further, because “control” under the Code and “management” under the Limited Partnerships Act 2008 are not identical concepts, it is possible that a limited partner’s participation in one or more of the “safe harbour” activities set out in the Limited Partnerships Act might amount to control over the limited partnership and/or the general partner, and therefore control over the Code Company Voting Rights (even though the limited partner does not participate in “management” for the purposes of the Limited Partnerships Act).<sup>3</sup> Accordingly, if the limited partner has something more than an economic interest in the limited partnership, the question of whether or not it has control over the Code Company Voting Rights will require factual analysis.

### **Associations of limited partners**

- 2.12 In some cases, a question may arise as to whether limited partners are associates of the limited partnership or the general partner. If such association exists, then the ability of the limited partner and its associates to acquire shares in the relevant Code company could be restricted.
- 2.13 In general, a limited partner’s simple investment in a limited partnership as one of several limited partners is unlikely to result in an association with the general partner (and the general partner’s wider group). However, a limited partner and a general partner may be associates if they share common upstream owners, through the application of rule 4(1)(c) or 4(1)(e) of the Code.

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<sup>2</sup> This may be the case even where the limited partner’s economic interest amounts to a control interest under the Limited Partnerships Act 2008. The concept of a control interest under the Limited Partnerships Act is generally wider than the concept of control over voting rights for the purposes of the Code (e.g., a control interest can be economic in nature).

<sup>3</sup> The “safe harbour” provisions in Schedule 1 to the Limited Partnerships Act set out activities that do not constitute taking part in the management of a limited partnership.



- 2.14 Other circumstances may also indicate association, for example where:
- (a) the limited partner or its related companies have an ownership interest in the general partner. Such ownership interest may not amount to effective control of the general partner, but could still result in association; or
  - (b) members of the limited partner's wider corporate group habitually invest with members of the general partner's wider corporate group.
- 2.15 The list above is not exhaustive, and the presence of one or more of those circumstances is not determinative, but it will likely increase the chances of association existing.
- 2.16 In addition, depending on the relationships between the limited partner and the limited partnership, the limited partner may be an associate of the limited partnership. The question of association in all cases will be fact specific.
- 2.17 For further general information about control and association, see the [Guidance Note on Control and Association](#). The Panel also encourages early engagement with the [Panel executive](#).

### **3 Disclosure in offer documents of who controls the offeror**

- 3.1 Under clause 2(2)(b) of Schedule 1 to the Code, if the person making an offer for voting securities in a Code company is not an individual, the offer document must disclose the name of every person who will become a controller of an increased percentage of voting securities in the target company as a result of the acquisition under the offer.
- 3.2 Accordingly, if a limited partnership (or its wholly owned subsidiary) makes an offer for voting securities in a Code company, the offer document will likely be required to disclose the names of:
- (a) the limited partnership;
  - (b) the general partner;
  - (c) if the general partner is subject to upstream control, the person or persons who have ultimate effective control over the general partner; and
  - (d) any other person who would also become a controller of an increased percentage of the voting securities in the target.