

Guidance Note

SECTION 32 OF THE TAKEOVERS ACT 1993

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**TAKEOVERS
PANEL**
TE PAE WHITIMANA

www.takeovers.govt.nz



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

This Guidance Note has been updated to clarify the Panel’s approach to determining whether to exercise its discretion to call a section 32 meeting.

1 Introduction

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

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

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

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

2 Procedure leading up to a section 32 meeting

Initial Division Meeting

Introduction

2.1 Upon becoming aware of possible non-compliance with the Code, the Panel may convene an initial division meeting to consider whether to hold a section 32 meeting in respect of the relevant conduct (an **Initial Division Meeting**).

2.2 An Initial Division Meeting is not a formal inquiry and the Panel will not make a determination of compliance or non-compliance at this stage. Compliance or non-compliance is a matter to be determined in the section 32 meeting, if convened.

2.3 This process applies in all circumstances, irrespective of whether the Panel became aware of the possible non-compliance through its market monitoring activities or following a complaint (including where the complainant formally requested that the Panel convene a section 32 meeting).

Administrative matters

2.4 The timing of Initial Division Meetings will vary depending on the circumstances. In live transactions, they may be held very rapidly after the Panel becomes aware of the possible non-compliance. In relation to historic matters, the Panel may allow more time for information to be gathered.

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

2.6 In addition to deciding whether or not to call a section 32 meeting, the Panel will, at an Initial Division Meeting, consider and determine the scope of the matters to be considered at any section 32 meeting which is called.



Approach to determining whether to call a section 32 meeting

- 2.7 At an Initial Division Meeting, the Panel will consider whether the threshold for holding a section 32 meeting has been met.
- 2.8 The first step to determine whether the Panel should exercise its discretion to call a section 32 meeting is determining whether there is a reasonable possibility that a person may not have acted, may not be acting, or may intend not to act in compliance with the Code (the **Threshold Test**). To satisfy the Threshold Test the Panel need only consider that there is a reasonable possibility of non-compliance with the Code.
- 2.9 If the Threshold Test has been satisfied, the Panel may, but is not required to, call a section 32 meeting. The factors the Panel will consider in exercising its discretion will vary depending on the circumstances. However, some factors which the Panel has considered in the past in deciding whether to call a section 32 meeting include the following:
- (a) *The severity of the breach* – If the breach was minor or technical in nature, that may weigh against calling a section 32 meeting. If the breach is of a more substantive rule that will likely weigh in favour of calling a section 32 meeting. The effect of the breach on any relevant party will likely be relevant, so an identifiable loss or gain as a result of the potential breach of the Code will weigh in favour of calling a meeting.
 - (b) *Remedies* - If there is a breach, are the potential remedies serious? Or would the potential remedies be considered minor or of little impact? If the Panel would be unable to impose or seek any effective remedies, for example, because of limitation issues, this may weigh against calling a section 32 meeting.
 - (c) *Potential for inconclusive outcome* – If it is apparent that it will be difficult for the Panel to reach any definitive views on the matter due to a lack of, or difficulties in obtaining, evidence, this may weight against calling a section 32 meeting.
 - (d) *Public interest* – If there is an important or novel point of law or issue which may benefit from a determination, or if a determination is otherwise in the public interest, that may weigh in favour of calling a section 32 meeting.
 - (e) *Tactical complaints* – As the Panel stated in *CodeWord 22*, the Panel does not wish to be drawn into a takeover contest through tactical complaints. Complainants in a hostile or contested takeover may have to do more than merely complain to the Panel. Similarly, the Panel does not wish to be drawn into private disputes which have ancillary issues relating to control interests. Complainants may have to convince the Panel that its resources would be properly used if it were to act on the complaint. To the extent a complaint is tactical, it may weigh against the Panel calling a section 32 meeting. The Panel may take account of any delay in bringing a complaint.
 - (f) *The availability of other options* – In certain circumstances, a matter may be able to be resolved without the need for a section 32 meeting. For example, in appropriate circumstances the Panel might not call a section 32 meeting if the Panel receives an enforceable undertaking or a party applies for an exemption from the Code.
 - (g) *Whether the breach was historic* – In addition to limitation issues, historic breaches can present greater difficulties in obtaining evidence, as documents may not be available and witnesses' recollections may not be as sharp. However, a breach being historic will not prevent the Panel from calling a section 32 meeting.
 - (h) *Whether a section 32 meeting is an effective use of the Panel's resources* – This will depend on a range of factors including other activities of the Panel and its priorities.
 - (i) *Whether a complaint was received* – Receipt of a complaint may weigh in favour of calling a section 32 meeting as this tends to indicate public interest in the matter.
 - (j) *Whether a meeting was requested* – Under the Takeovers Regulations 2000, the Panel may order costs against a person who requests a section 32 meeting. This raises the presumption that a party requesting a section 32 meeting considers the matter to be serious. In addition, this may mean the Panel's potential costs are reduced



or mitigated and therefore favour calling a section 32 meeting. The reduction or mitigation of the Panel's costs may be less relevant, however, if the party requesting a section 32 meeting is perceived to be a credit risk.

- (k) *Whether the Panel should obtain further information before reaching a view* – In some circumstances it may be appropriate for further investigation to be carried out before the Panel reaches a view on whether to call a section 32 meeting.

Notice of meeting

- 2.10 If the Panel decides to convene a section 32 meeting, notice of the meeting is given in writing to all relevant parties. No special form of service of the notice is required. The Panel may use whatever means are appropriate to ensure the parties receive the notice.
- 2.11 The notice states the issues which will be before the Panel and the matters the Panel wishes to investigate at the section 32 meeting.
- 2.12 Under section 31V of the Act, all persons to whom notice of the meeting is given have a right to be heard and have legal representation at the section 32 meeting. In practice, the Panel is likely to summons, pursuant to section 31N, all those persons to whom notice of the meeting is given. Their attendance at the meeting to give evidence will then be mandatory.
- 2.13 The Panel can also grant leave to be heard and represented to any other person who, in the opinion of the Panel, ought to be heard or will assist the Panel in its consideration of the matter before it.

Public statement

- 2.14 If the Panel decides to convene a section 32 meeting it will usually, but is not required to, make a public statement to that effect. One of the reasons for this is to ensure other interested parties who may wish to apply for leave to appear at the meeting are informed. If a temporary restraining order is made, this is also made public.
- 2.15 Once a statement has been made that a section 32 meeting is to be held, further media comment on the specific proceedings by the Panel or Panel staff is unlikely, although the Panel may announce that the meeting has concluded and indicate likely next steps.

Summons

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



Temporary restraining orders under section 32(2)

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

Submissions

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

Timing

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

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

Adjournments

- 2.24 The time frame for convening a section 32 meeting is short. For meetings that involve a large number of parties or particularly complicated evidence, the Panel may convene the meeting and then adjourn for such time as the Panel directs while evidence is gathered, submissions are prepared and/or logistics are organised.



- 2.25 Where the Panel anticipates that it will adjourn a section 32 meeting, it may consult with the parties for input. The Panel is unlikely to adjourn a section 32 meeting if it has issued temporary restraining orders, since these orders cannot be extended without the Panel making a determination of non-compliance with the Code under section 32(3)(b).

Third party requests for a section 32 meeting

- 2.26 Any person can request the Panel to hold a section 32 meeting. A fee of \$1,000 plus GST is payable to the Panel for the request. The Panel is under no obligation to hold such a meeting.
- 2.27 No form of request is prescribed, but the Panel prefers the request in writing with reasons why the person considers such a meeting should be held. If the requester has evidence supporting those reasons, it should also be given to the Panel in writing.
- 2.28 In addition to the \$1,000 fee, the person who requests a section 32 meeting may be liable for some or all of the Panel's internal and external costs incurred in respect of the meeting (including for its time spent in the lead-up to the meeting and in the completion of all elements of the section 32 process) under the Takeovers Regulations 2000. These costs may be significant, so it is recommended that a person wishing to request a section 32 meeting engages with the Panel at an early stage to discuss potential costs.

3 Procedure at the section 32 meeting

Purpose and principles

- 3.1 The purpose of a section 32 meeting is for the Panel to make a determination whether it is satisfied or not satisfied that a person (or persons) has acted or is acting or intends to act in compliance with the Code.
- 3.2 The Panel has the power to regulate its own procedure and may decide on each occasion how meetings are to be run. However, in the exercise of its functions and powers, the Panel must comply with the principles of natural justice. The rules of natural justice generally require that:
- (a) the procedure is fair;
 - (b) a person who might be adversely affected has the right to know the case against them and the right to be heard; and
 - (c) the adjudicators of the issue are free from bias.
- 3.3 The Panel will generally regulate the procedure of section 32 meetings in the manner set out in this section 3. However, the Panel may depart from this procedure, provided that it complies with the principles of natural justice. To this end, the Panel may make determinations as to matters of procedure during the course of the section 32 meeting as it sees fit.

Who will make the determination?

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

Conflicts of interest

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



Attendance at the meeting

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

Submissions and evidence

Evidence on oath

- 3.9 Section 31MA of the Act allows the Panel to receive evidence on oath. The Panel usually requires evidence at a section 32 meeting to be given on oath. The Panel may receive evidence via audio-visual communication.

Submissions

- 3.10 The Panel usually hears legal submissions from the parties, or if they are represented by a lawyer, from their lawyers, on the matters under consideration at the section 32 meeting. However, the Panel's procedure is not adversarial and the Panel may allow each party to give only a brief summary of submissions in order to allow sufficient time for questioning witnesses, as section 32 meetings rarely last longer than one day.

Giving evidence and cross-examination

- 3.11 Witnesses are usually entitled to listen to the legal submissions, but during the giving of evidence are required to leave the meeting room until called to give their own evidence.
- 3.12 The Panel acts as an inquisitorial body and questioning of witnesses will be led by the Panel (including through its counsel).
- 3.13 The Panel does not allow cross-examination of witnesses by other parties. However, once the Panel has finished the examination of a witness, the Panel may ask parties whether there are additional matters that the Panel should consider putting to the witness. The Panel (with assistance from counsel) will consider whether such matters and any related questions should be put to the witness. Any such questions shall be put to the witness by the Panel (including through its counsel).
- 3.14 Once a witness has given their evidence, they are usually allowed to remain in the meeting room. However, if the Panel deems it appropriate, a witness may be asked to leave the room while another witness gives evidence.

Privilege

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

Other documents

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

Meeting records

- 3.17 The practice of the Panel is to have a transcript of the section 32 meeting made. Where a transcript is taken, copies of the transcript will be made available to parties as soon as possible after the meeting.



Public or private meeting

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

Offences under the Act

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

4 Determinations and procedure following a section 32 meeting

No determination

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

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

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

Publishing determinations

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

Restraining orders

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

Application for Court order

- 4.7 If the Panel makes a determination that it is not satisfied about compliance with the Code, it may make an application to the court under section 35 for an order under sections 33F (injunctions), 33I (civil remedy orders), 33K (compensation orders) or 33M (pecuniary penalty orders and declarations of contravention).



Undertakings

- 4.8 In addition to the powers granted to the Panel in respect of restraining orders, the Panel also has the ability to accept undertakings under section 31T from any person in connection with a matter considered at a section 32 meeting (or indeed any matter before it, whether or not a section 32 meeting has been called). As discussed above, provision of an undertaking may mean that the Panel does not need to call a section 32 meeting. Further, provision of an undertaking may remove the need for the Panel to impose temporary restraining orders or applying for permanent orders. Undertakings may be accepted by the Panel in conjunction with restraining orders.

Appeals and further rights of parties

- 4.9 The Panel's determination at a section 32 meeting is final. There is no right of appeal against a Panel determination. However, the Panel's decisions may be judicially reviewed in the High Court.
- 4.10 In addition to judicial review, certain parties may have rights to bring proceedings under the Takeovers Act. As noted, if the Panel makes a determination that it is not satisfied of Code compliance the Panel has the right to apply for certain Court orders. In addition, certain parties may have rights to apply to the Court for orders under sections 33F (injunctions), 33I (civil remedy orders) or 33K (compensation orders) of the Takeovers Act.¹ These rights arise where:
- (a) The Panel makes a determination that it is not satisfied of Code compliance; and:
 - (i) the Panel consents to the party's application to the Court; or
 - (ii) the person requested in writing that the Panel make an application to the Court and the Panel did not do so within 10 days of that request.
 - (b) A request was made to the Panel to hold a section 32 meeting, and the Panel did not, within 14 days, make a determination.

¹ Only the Panel may apply for a pecuniary penalty order and declaration of contravention under section 33M.