Recommendations to the Minister of Commerce and Consumer Affairs

AMENDMENTS TO THE TAKEOVERS CODE AND RELATED LEGISLATION

April 2022

TAKEOVERS PANEL
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www.takeovers.govt.nz

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1 Introduction

Introduction

1.1 The Takeovers Panel's (the **Panel**) functions include keeping under review the law relating to takeovers of Code companies and recommending to the Minister of Commerce and Consumer Affairs (the **Minister**) any changes to that law that the Panel considers necessary.

1.2 The Takeovers Code (the **Code**) came into force on 1 July 2001. The Panel has administered the Code since then and from time to time becomes aware, through its interaction with the market, of issues that leave the Code less efficient and effective than it could be.

1.3 Most of the recommendations in this paper relate to amendments to the Code and may be implemented by regulations made by way of an Order-in-Council. However, a small number of the proposals would require amendments to the Takeovers Act 1993 (the **Takeovers Act**) and the Personal Properties Securities Act 1999 (the **PPSA**).

Summary of recommendations

1.4 In summary, the recommendations set out in this paper are as follows:

(a) **Definition of Code company – the 12-month look back period:** The Code currently applies to a listed company for 12 months after the company ceases to be listed. The 12-month 'look back' does not apply to unlisted Code companies.

The Panel proposes to amend the definition of "Code company" to:

(i) remove the lookback period where a listed Code company is taken private;

(ii) apply the lookback period to unlisted Code companies if their size or shareholder number drops below the Code thresholds; and

(iii) allow unlisted Code companies to opt out of the look back period by shareholder vote.

(b) **Providing the Court with the power to grant mandatory injunctions:** The Takeovers Act provides that the Court may grant injunctions restraining parties from taking actions. The Panel proposes to amend the Act to ensure that the Court can grant injunctions requiring parties to take a positive action.

(c) **Making failure to make payments when due a breach of the Code:** Currently, it is not a breach of the Code to not make payment of offer consideration when due. The Panel proposes to amend the Code so that non-payment is a breach of the Code.

(d) **Requiring offerors to have committed funding and associated disclosure:** Currently, the Code does not expressly require offerors to have the resources available to pay shareholders. Nor does the Code require disclosures relating to the funding. The Panel proposes to amend the Code to impose this obligation and to require disclosures of this type.

(e) **Changing how unclaimed consideration is dealt with:** The Code currently requires that if a shareholder cannot be found so that they can be paid offer consideration, the consideration must be held indefinitely until it is dealt with under the Unclaimed Monies Act. The Panel proposes to amend this requirement to align with how companies deal with dividend payments to shareholders.

(f) **Removing unnecessary derivative disclosures:** The Panel proposes to amend disclosure requirements to remove unnecessary and complex disclosures regarding certain derivative interests.

(g) **Providing unencumbered title to shares:** The Panel proposes that the PPSA be amended to ensure that shares acquired in a scheme of arrangement are treated the same as in a takeover offer.

(h) **Clarification of rule 47**: The Panel proposes to amend the Code to clarify that communications to individual shareholders do not need to be supplied to the Panel and to require parties to keep records of calling campaigns and to provide these to other relevant parties.

1.5 Of the recommendations, the recommendations summarised in paragraphs (a) – (d) are the higher priority amendments. The amendments summarised in paragraphs (e) – (h) are lower priority.

Process and consultation

1.6 The Panel's process of consideration and public consultation was as follows:

(a) During late 2020 and early 2021, the Panel considered advice from the Panel executive and considered whether law reform might be appropriate. Where the Panel considered that law reform was, or might be, appropriate, the Panel sought market feedback through a consultation process.

(b) The Panel published a consultation document on 29 June 2021. A copy of this document has previously been provided, and is available here: Technical Amendments Consultation.

(c) In addition to publicly announcing the consultation, the Panel sought submissions from the major corporate law firms in New Zealand best positioned to comment on the proposals.

(d) The closing date for submissions was initially set as 27 August 2021, but extensions were granted to accommodate COVID-19 alert level changes and to allow time for interested parties to complete their submissions.

(e) In total, eight submissions were received. Six of those submissions were from major New Zealand corporate law firms. Submissions were also received from the New Zealand Shareholders' Association and one individual shareholder.

(f) The Panel considered the submissions and advice from the Panel executive on 19 October 2021.

(g) Draft recommendations were considered and approved by the Panel on 7 December 2021. A period of consultation with officials from the Ministry of Business, Innovation and Employment followed. Final recommendations have now been approved.

Approach of this paper

1.7 This paper sets out the Panel's final recommendations following consideration of submissions. Because of the technical nature of the proposed amendments, the Panel has included detailed drafting suggestions to aid understanding of the proposed amendments.

1.8 The Panel notes that the Parliamentary Counsel Office is the body responsible for drafting legislative amendments and, accordingly, the final form of the amendments may differ from that set out in this paper.

Regulatory impact

1.9 The Panel is committed to having the Code work well. To this end, the Panel has undertaken a 'low policy content' review of the Code and related capital markets legislation, mostly to address technical anomalies. The review did not extend to the fundamental policy underlying the Code.

Compliance costs

1.10 The public consultation undertaken by the Panel indicated that the proposed amendments would result in reduced compliance costs, no additional compliance costs or marginal increases in compliance costs. To the extent that there would be an increase in compliance costs, the Panel believes that the benefits of the proposed amendments will exceed any increases in compliance costs.

Recommendation

1.11 The Panel recommends to the Minister, under section 8(1)(a) of the Takeovers Act, that the Code, the Takeovers Act and the PPSA be amended as proposed in this paper.

Carl Blanchard
Acting Chair
Takeovers Panel
22 April 2022

2 Definition of Code company – 12-month look-back period

The problem

Introduction

2.1 The definition of "Code company" captures companies that have financial products that confer voting rights quoted on a licensed market, currently the NZSX (**Listed Code Companies**). If a Listed Code Company delists, that company will remain a Code company for 12 months after delisting (the **12-month Look-back Period**).

2.2 The 12-month Look-back Period was included in section 2A(1)(b) of the Takeovers Act as an anti-avoidance measure to stop listed companies from delisting and then immediately undertaking a control-change transaction.

2.3 Conversely, the 12-month Look Back Period does not apply to Code companies which are not listed Code companies (**Unlisted Code Companies**).

2.4 While the anti-avoidance rationale for the 12-Month Look-back Period is sound, there are several issues with how the 12-month Look-back Period operates in practice.

No "take private" exception

2.5 Successful full takeover offers or schemes of arrangement for listed Code companies result in all the voting rights in the Code company being held by one shareholder (or two or more shareholders acting jointly or in concert).

2.6 Even though the company is privately owned by one or a small number of shareholders after such a transaction, the 12-month Look-back Period applies, and for the next 12 months the company will remain a Code company.

2.7 In these circumstances there are no minority shareholders who would benefit from the Code's protections but nevertheless share sales in the 12 month Look-back Period need to be done in a Code compliant manner. Giving effect to a Code compliant sale can add material cost and delay to a transaction without any benefit to shareholders.

2.8 An example of the compliance obligations arose when the Panel has granted an individual exemption to address issues created by the 12 month Look-back Period – see the Takeovers Code (Finzsoft Solutions Limited) Exemption Notice 2020. Individual exemptions can be granted on a case-by-case basis, but this is inefficient and costly. This is because exemption applicants must pay their own lawyers to prepare an application and the Panel's charges for considering the application. There is also an associated delay to the transaction.

2.9 For completeness, the Panel notes that the other (less common) delisting scenario is where a company's listing agreement with NZX is terminated, even though the company's shares continue to be widely held. In these cases the company is likely to remain an Unlisted Code Company by virtue of its financial size and number of shareholders. In addition, the Panel notes that NZX requires shareholder approval for delistings of this type.

12-month Look-back Period does not apply to Unlisted Code Companies

2.10 The 12-month Look-back Period does not apply to Unlisted Code Companies, even though it is possible for Unlisted Code Companies to move in and out of Code company status:

(a) Code companies can restructure their shareholdings so that they cease to be Code companies. For example, in the past companies have used a nominee that holds shares on trust for a number of beneficial owners, bringing the total number of shareholders and/or share parcels under 50 (a **Nominee Structure**). The Panel considers there may be good reasons for Nominee Structures, and they should be permitted subject to appropriate safeguards.

(b) Companies may move in and out of Code company status depending on their financial performance or position if they cross the metrics required to be "medium-sized". This is a necessary corollary of having a financial threshold.

2.11 While some movement in and out of Code company status is inevitable, the Panel has concerns that this may be administratively cumbersome and open to avoidance tactics (such as using a Nominee Structure to avoid the Code immediately prior to a control-change transaction).

"Opt-out" of 12-month Look-back Period

2.12 In some cases, the 12-month Look-Back Period may not be appropriate. The 12-month Look-back Period may cease to be appropriate where:

(a) a Listed Code Company voluntarily delists (other than as a result of completion of a takeover or scheme of arrangement) and does not otherwise meet the definition of Code company once it has become unlisted – in this case the company's shareholders may not wish for the company to remain a Code company; or

(b) an unlisted Code company ceases to either have 50 or more shareholders and 50 or more share parcels or meet the definition of medium-sized – in this case it may be uneconomic for the company to remain as a Code company.

2.13 In these cases, it may be appropriate to dispense with the 12-month Look-back Period if shareholders approve this by an appropriate majority.

Assessment and analysis

Panel's initial proposal

2.14 In the Consultation Document, the Panel indicated that its preference was to:

(a) remove the 12-month Look-back Period for companies that delist after a 'take private' transaction;

(b) apply the 12-month Look-back Period to Unlisted Code Companies; and

(c) provide an opt out of the 12-month Look-back Period, subject to a shareholder vote of

(i) 75% of the votes of the shareholders entitled to vote and voting on the resolution; and

(ii) a simple majority of the votes of those shareholders entitled to vote.

Results of consultation

2.15 Submitters supported the Panel's proposals, although there were disagreements around the details.

2.16 In summary:

(a) **Delisting Exception:** All submitters agreed that there should be a 'take private' exception. One submitter suggested that the Panel should go further and provide an automatic exception for all delistings, whether 'take private' or not.

(b) **12-month Look-back Period for Unlisted Code Companies:** There was majority support for applying the 12-month Look-back Period to Unlisted Code Companies. However:

(i) One submitter thought the 12-month Look Back Period should not apply to Unlisted Companies.

(ii) Some submitters thought the 12-month Look-back Period should apply only if Code companies ceased to meet the 50 shareholder / share parcel requirement (the **Number Test**). They considered that the 12-month Look-back Period should not apply if a company ceased to be a Code company because it ceased to meet the financial threshold to be medium sized (the **Medium Size Test**).

(c) **Opt out of the 12-month Look Back Period:** There was support for an ability to opt-out of the 12-month Look-back Period. There were some differences of view as to how this should operate:

(i) Some submitters supported the Panel's proposal.

(ii) Some submitters supported more exacting standards – either raising the approval threshold or focusing on the votes of minority shareholders.

(iii) Several submitters commented on the appropriate prescribed disclosure which should be provided to shareholders considering whether to vote to opt out.

Panel's analysis

2.17 Consistent with the Panel's initial views and submitter's comments, the Panel considers that the 12-month Look-back Period should be removed for companies that delist after a 'take private' transaction.

2.18 The Panel considers that 12-Month Look-back Period should apply to Unlisted Code Companies. The Panel's view is that it is not desirable for companies operating on the fringe of Code company status to move frequently in and out of the Code. Stability of the regulatory regime is preferable. The Panel acknowledged that there were valid concerns with the Code applying where it was not appropriate, but considers that this is addressed by including an ability to opt out with shareholder approval.

2.19 The Panel considers there should be an ability to opt out of the 12-month Look-back Period. The Panel considers that its proposed voting thresholds are appropriate. As to disclosure, the Panel considers that the notice of meeting should be provided to the Panel for review and approval. The Panel's reasoning was:

(a) The opt-out voting threshold was based on the schemes of arrangement threshold without any 'interest class' voting requirement. After considering submissions, the Panel thought that interest classes would likely be unwieldy in a delisting context as it might not be clear how an interest class should be composed or who should be excluded from voting. Given that a special resolution majority of shareholders could put a Code company into liquidation, the Panel thought that the proposed voting threshold was sufficiently robust.

(b) Shareholder disclosures could be difficult to prescribe given that the circumstances could vary significantly, but the notice of meeting would need to meet the threshold of being not misleading or deceptive.

(c) Accordingly, the best approach was to require relevant Code companies to provide the Panel with a copy of the relevant notice of meeting. This would allow the Panel to review the notice of meeting to ensure it was not misleading or deceptive (and therefore breach rule 64 of the Code).

Proposed law reform

2.20 The Panel recommends that the definition of Code company in the Takeovers Act and in the Code be amended to address each of the issues set out above. The Panel's recommendation is illustrated in the following proposed amendments to the definition of Code company:

2A Meaning of Code company

(1) ***Code company*** *means a company –*

(a) that is a listed issuer that has financial products that confer voting rights quoted on a licensed market; or

~~*(b) that was within paragraph (a) at any time during the period specified in the takeovers code (being a period not exceeding the period of 12 months before any date or the occurrence of any event referred to in this Code); or*~~

(~~c~~b) that –

(i) has 50 or more shareholders and 50 or more share parcels; and

(ii) is at least medium-sized~~.~~; or

(c) that, subject to sections 2A(2) and (3), was within paragraph (a) or (b) at any time during the preceding 12 months.

(2) ~~[Repealed]~~ A company which is a Code company only as a result of section 2A(1)(c) shall cease to be a Code company if:

(a) a resolution to such effect is approved by:

(i) 75% of the votes of the shareholders entitled to vote and voting on the resolution; and

(ii) simple majority of the votes of those shareholders entitled to vote.

(b) the notice of meeting in respect of the meeting at which such resolution is to be considered is provided to the Panel at the same time at which it is sent to shareholders.

The date on which the Code company shall cease to be a Code company shall be the date specified in such resolution and must be no earlier than the day after the resolution is duly passed in accordance with the requirements of this section 2A(2).

(3) If, as a result of a takeover in accordance with this Code or a scheme of arrangement approved in accordance with section 236 of the Companies Act 1993, all of the voting rights in a Code company become held or controlled by:

(a) one person; or

(b) two or more persons acting jointly or in concert,

that company shall cease to be a Code company at the time at which such person (or persons) become the holder or controller of those voting rights.

(~~3~~4) In this section, shareholder means a shareholder holding a financial product that confers a voting right.

(~~4~~5) In this section, a company is at least medium-sized if –

(a) the company has completed 1 or more accounting periods and either or both of the following are true:

(i) on the last day of the company's most recently completed accounting period, the total assets of the company and its subsidiaries (if any) are at least $30 million:

(ii) in the most recently completed accounting period, the total revenue of the company and its subsidiaries (if any) is at least $15 million; or

(b) the company has not completed its first accounting period and on the last day of the most recently completed month the total assets of the company and its subsidiaries (if any) are at least $30 million.

3 Court's power to grant mandatory injunctions

The problem

3.1 The Panel considers that there is a gap in the manner in which compliance with the Code may be enforced, because the Takeovers Act does not clearly grant the Court jurisdiction to issue mandatory injunctions.

3.2 In summary:

(a) If the Panel considers that a person may not have acted or may not be acting or may intend not to act in compliance with the Code, the Panel may convene a meeting under section 32 of the Takeovers Act. Following the section 32 meeting, the Panel may make a determination of non-compliance.

(a) Once such a determination is made, the Panel may apply to the High Court for an injunction (section 33F), a civil remedy order (section 33I), a compensation order (section 33K) or a pecuniary penalty order (section 33M). Other parties referred to in section 35(1) of the Takeovers Act may also apply to the Court for such orders (other than a pecuniary penalty), subject to certain limitations.

(b) Section 33F of the Takeovers Act states:

> *The court may, on application by any person in accordance with section 35, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute a contravention of the takeovers code.*

(c) It is not clear that the Court has the jurisdiction to grant a "mandatory injunction" under section 33F. The inclusion of the word "restraining" in section 33F suggests that it confines the Court to making a "prohibitory injunction" rather than a "mandatory injunction". Sim's Court Practice defines these terms as follows:

> ***Prohibitory injunction:*** *Restrains the person to whom it is addressed from doing something.*
>
> ***Mandatory injunction:*** *Orders the person to whom it is addressed to do something in the nature of a positive act.*

(d) Accordingly, it is clear that the Court has the power to grant an injunction ordering a person to stop or to prevent a person from engaging in particular conduct that contravenes or may contravene the Code, but may not have the power to order a person to take a positive action.

3.3 Practically, this might pose issues for how the "truth in takeovers" regime might operate. In broad terms, the Code requires participants in a takeover to act consistently with their public statements. In New Zealand the regime rests on rule 64, which prohibits misleading or deceptive conduct in respect of an offer. If the Court does not have the jurisdiction to grant a mandatory injunction, there is no ability to require a person to act consistently with their statements.

3.4 An example is where a shareholder publicly states (unconditionally) that they will accept an offer, but subsequently refuses to do so. In this case, punitive action may be available in respect of the misleading or deceptive statement. However, the most appropriate remedy may be to require the shareholder to act in accordance with their statement given other shareholders may have acted in reliance on the person's statements.

Assessment and analysis

3.5 In the Consultation Document, the Panel indicated that its preference was to amend the Takeovers Act to provide the Court with the jurisdiction to grant mandatory injunctions.

<u>Results of consultation</u>

3.6 All but one submitter supported the proposed amendment.

3.7 The one submitter opposing the amendment effectively disagreed with the "truth in takeovers" doctrine. In the Panel's view rules prohibiting misleading or deceptive conduct in a takeover are fundamental to ensuring protection of shareholders.

3.8 One submitter suggested that there should be certain express limits on the Court's discretion.

Panel's analysis

3.9 The Panel proposes that the Takeovers Act be amended to give the Court the power to issue mandatory injunctions.

3.10 The Panel does not recommend any limit on the power to issue a mandatory injunction. The Panel considers the better approach would be to leave the matter to the Court's discretion so that the Court can assess matters which come before it on a case-by-case basis in accordance with established law. The Panel considers it appropriate for the remedy to be discretionary – i.e., the Court will consider whether or not the injunction is appropriate in the circumstances.

Proposed law reform

3.11 The Panel recommends that section 33F of the Takeovers Act be amended to give the Court the power to issue mandatory injunctions. The Panel's recommendation is illustrated in the following proposed amendments:

The court may, on application by any person in accordance with section 35, grant an injunction:

(a) restraining a person from engaging in conduct that constitutes or would constitute a contravention of the takeovers code; or

(b) requiring a person to take any action which the Court considers appropriate to:

(i) prevent that person from engaging in conduct which would constitute a contravention of the takeovers code; or

(ii) remedy a contravention of the takeovers code.

4 Failure to make payments when due should be a breach of the Code

The problem

4.1 The Code provides that an offer must specify when the consideration for the offer must be sent to shareholders that accept the offer. However, the obligation to make payment is purely contractual as between the offeror and the target shareholders.

4.2 Instead of imposing a direct obligation to make payment, the Code provides a withdrawal right for shareholders if an offeror does not send the consideration within the period specified in the offer. Mechanically, the process works as follows:

(a) If payment has not been made when due, the relevant shareholder may give written notice to the offeror of their intention to withdraw their acceptance of the offer.

(b) The notice initiates a 5 working day cure period, within which the offeror may pay the consideration without breach of the offer terms. If payment is made within this period, no further consequences arise under the Code.

(c) At the expiry of the cure period (i.e., 5 working days after giving notice to withdraw) the relevant shareholder may give written notice to the offeror withdrawing acceptance of the offer.

4.3 It is common for the provisions described above to be incorporated in the terms of an offer, making them also a contractual obligation. Shareholders may be able to enforce this contractual obligation through the Court.

4.4 Outside of this remedy, non-payment of consideration to a shareholder is not a breach of the Code. It is possible that failure to pay consideration may give rise to other breaches of the Code (e.g., misleading or deceptive conduct under rule 64 of the Code). However, non-payment is not a breach of the Code in and of itself.

Issues with the current regime

4.5 Given the critical nature of the payment obligation, the current position may not adequately protect shareholders or adequately address broader concerns related to market integrity:

(a) In a public transaction, where shareholder bases are diffuse, significant practical issues would likely arise with suing for failure to pay offer consideration. For example, litigation may not be an economic alternative for smaller shareholders despite the aggregate amount at stake being greater. Currently, the Panel has limited tools to assist shareholders as the failure to pay is contractual.

(b) A failure to pay consideration would undermine confidence in the market as a whole.

(c) A failure to pay could also present significant practical difficulties:

(i) The shares could be transferred to the purchaser before the shareholder seeks to withdraw their acceptance. It is unclear how such a share transfer would be unwound.

(ii) Further, unwinding share transfers could be problematic – if a transfer is unwound, this has implications for the broader transaction and other acceptances which may have been submitted in the interim. In particular, if the offeror had become the holder of 90% of the voting rights in a Code company, then the compulsory acquisition provisions of Part 7 of the Code would be engaged. It is not clear what would happen if acceptances were subsequently unwound.

(d) At a more basic level, a failure to make payment would be a significant issue for the functioning of an efficient takeovers market. Completing payment is a key obligation and offerors that do not meet it should be at risk of punitive sanction and other remedies.

Assessment and analysis

Panel's initial proposal

4.6 The Panel proposed to amend rule 33 to provide that the consideration should be paid when due. This would mean that a failure to pay when due would breach the Code, triggering the enforcement provisions of the Takeovers Act.

Submissions

4.7 Most submitters agreed with the Panel's proposal.

4.8 One submitter argued that an offeror should not be in breach of the obligation to make payment if its debt financing was not provided. The submitter suggested that the offeror might have committed finance, but the finance was not provided through no fault of the offeror. They pointed to the 2008 failure of Lehman Brothers as a circumstance where this might have occurred (had an offeror been depending on Lehman Brothers to provide finance).

Panel's analysis

4.9 The Panel's starting point is that payment of consideration is a fundamental part of a public takeover transaction. The Panel sees no compelling argument to outweigh the issues with the current regime referred to above.

4.10 The Panel also considers that scenarios such as the Lehman Brothers example can be dealt with by the offer terms and need not be legislated for.

Proposed law reform

4.11 The Panel recommends amending rule 33 as follows:

33 Offer to specify date for payment of consideration

(1) The offer must specify a date by which the consideration for the offer must be sent to the persons whose financial products are taken up under the offer.

(2) The consideration for the offer must be sent on or before the date specified in accordance with rule 33(1).

(~~2~~3) The date referred to in subclause (1) must be within 5 working days after the latest of—

(a) the date on which the offer becomes unconditional; or

(b) the date on which an acceptance is received; or

(c) the end of the offer period first specified in the offer under rule 24(2).

5 Committed funding for offers and requiring associated disclosure

The problem

Introduction

5.1 Most offerors will not launch a takeover offer with the relevant cash consideration immediately available in a bank account. This would be an inefficient use of resources, particularly with the large amounts typically involved in public takeovers. Rather, offerors are more likely to have finance available from a variety of sources. These could include cash reserves, equity commitments from investors and bank or other debt finance. The nature and composition of these arrangements will vary significantly depending on circumstances.

5.2 Currently, the Code does not:

(a) place a direct obligation on an offeror to have the resources available to pay the consideration to be provided under the offer (or other related amounts); or

(b) require any disclosure of the offeror's financing arrangements so that target shareholders can understand the counterparty / completion risk to which they are exposed.

5.3 Instead, the Code requires that an offeror include a confirmation in its offer document that the resources will be available. Clause 9(1) of Schedule 1 to the Code states that an offeror must provide:

> *Confirmation by the offeror that resources will be available to the offeror sufficient to meet the consideration to be provided on full acceptance of the offer and to pay any debts incurred in connection with the offer (including the debts arising under sections 47 to 53 of the [Takeovers] Act).*

5.4 If the offeror does not in fact have adequate resources, then rule 64 of the Code (which prohibits misleading or deceptive conduct) may be breached. In addition, the persons who certify the disclosure is accurate may have committed an offence under the Takeovers Act. However, there are uncertainties in applying rule 64 in these circumstances and offences under the Takeovers Act require intent in addition to other evidential hurdles.

Issues with the current regime

5.5 A failure to make payment to complete a takeover offer would be a significant issue for the functioning of an efficient takeovers market and would undermine confidence in the market as a whole.

5.6 Accordingly, regulatory settings should seek to minimise the prospect of a transaction failing to settle because of lack of finance – offerors are best placed to manage this risk, so should be incentivised to eliminate or minimise it. In addition, to the extent there is finance risk, this should be disclosed so that shareholders can assess it (and target company boards can factor it into their advice to shareholders).

5.7 The Panel also notes that the New Zealand regime provides significantly less assurance to shareholders than comparable jurisdictions (for example, Australia and the United Kingdom).

Assessment and analysis

Panel's initial proposal

5.8 The Panel proposed to amend the Code to:

(a) place a direct obligation on the offeror to have sufficient committed funding in place to meet its commitments under the offer and in respect of any liabilities incurred in respect of the offer; and

(b) require specific disclosures regarding the offeror's funding arrangements.

Submissions

5.9 Overall, submitters supported the Panel's proposal, but there were various points of detail:

(a) Regarding the obligation to have committed funding:

(i) One submitter suggested that there should only be an obligation to have committed funding in place when an offer is made and should not be required to issue a takeover notice.

(ii) Various submitters pointed to the difficulties of arranging unconditional finance and how the conditions which would commonly be present in financing documents might need to be reflected in offer terms.

(iii) Various submitters made comments to the effect that while there should be a strong degree of certainty as to funding, it should not need to be unconditional if this could be reflected in the offer conditions.

(iv) One submitter suggested that offerors should not be able to declare an offer unconditional if there were material conditions to the funding which remained outstanding.

(b) Regarding disclosure:

(i) Submitters took different approaches as to the detail of what disclosure should contain. However, in the Panel's view, there was a strong degree of consensus on the following points:

(A) shareholders should be able to evaluate the creditworthiness of offerors;

(B) target boards should be able to assess offerors' creditworthiness to assist them in forming their recommendations to shareholders;

(C) the current level of disclosure was inadequate for these purposes; and

(D) notwithstanding this, disclosure should not be excessive – for example, disclosure of the amount of funding could result in disclosure of commercially sensitive information and the disclosure of the funder's identity may unnecessarily dissuade funders providing finance.

(ii) Various submissions were made as to the level of disclosure. Some submitters favoured detailed disclosure. Some favoured disclosure to the independent adviser not shareholders. Others favoured minimal disclosure.

(iii) There was general agreement that independent advisers should comment on the offeror's funding. Some submitters went further and suggested that independent advisers should review the funding documents.

Panel's analysis

5.10 The Panel considers that offeror should not need to have committed finance to issue a takeover notice. An offeror should, however, have certainty of funds before making an offer. The Panel acknowledges that this might come from one or more sources.

5.11 To the extent that the consideration is to be debt funded, the debt funding should be committed. As to what constitutes committed finance:

(a) To the extent that the offeror expects to rely on or use debt financing, there should be a binding contractual agreement with the relevant financier to provide the relevant funding. This does not necessarily have to take the form of a fully agreed facility agreement (or similar). However, at a minimum, the offeror should be party to a committed term sheet for the provision of funding in which the terms of the commitment are agreed in all material respects.

(b) The financing does not need to be unconditional. However, if there are conditions to the financing, the offer terms should be structured so that they operate in lock-step with any material financing conditions. If a condition to the financing results in finance not being provided, the offeror should also be able to rely on a corresponding condition in the offer terms.

(c) One consequence of this approach is that the terms of the financing will be restricted as the Code places limitations on the conditionality which can be included in an offer (see rule 25).

(d) The same requirements should apply to any equity finance for the offeror – i.e., it should be committed and can be conditional, but the conditions to the equity finance should operate in lock-step with the offer terms. Any shareholder approvals required for the offeror to raise the relevant money (e.g., shareholder approval for a capital raising) must be obtained in advance of the offer being made.

5.12 Regarding disclosure, the Panel considers that the offer document should include a statement that the relevant requirements are met. This ensures that shareholders are aware of finance risk and puts the persons who sign the offer at risk of personal liability if the statement is not correct (and the other evidential standards in the Takeovers Act for misstatements are met).

5.13 As to disclosure of the terms of the financing, the Panel considers that relatively minimal further disclosure is sufficient. Detailed disclosure is difficult to prescribe as the terms of arrangements will likely differ significantly. As to the contents of this disclosure, please see below in the proposed law reform.

Proposed law reform

5.14 In order to provide an obligation to have committed finance in place, the Panel recommends that the Code be amended to include a new rule 34A along the following lines:

34A Financing of offers

(1) An offeror must not send a takeover notice unless:

(a) to the extent the consideration is cash, the offeror believes, on reasonable grounds, that it will have sufficient financial resources to pay the consideration to offerees in accordance with this code and the offer terms; and

(b) to the extent the consideration is other than cash, the offeror believes, on reasonable grounds, that it will have the full right, title and ability to transfer such consideration to the offerees in accordance with this code and the offer terms; and

(c) the offeror has sufficient financial resources to pay any debts incurred in connection with the offer (including the debts arising under sections 47 to 53 of the Act) in accordance with this code.

(2) An offeror must not send or vary an offer unless:

(a) to the extent the consideration is cash, the offeror has sufficient financial resources to send the consideration in accordance with this code and the offer terms; and

(b) to the extent the consideration is other than cash, that the offeror has the full right, title and ability to send such consideration in accordance with this code and the offer terms.

(3) For the purposes of this rule 34A, in order for financial resources to be sufficient:

(a) The financial resources must be greater than the amount which the offeror might be required to pay to offerees or other relevant person in accordance with this code, the Act and the offer terms.

(b) The offeror must have satisfied itself, on reasonable grounds, that the relevant funds are not, and will not become, subject to any availability restrictions.

(c) If and to the extent the financial resources comprise debt or equity funding, any such funding must be provided under a funding agreement which is:

(i) a binding written agreement to which the offeror is a party, or is otherwise entitled to enforce, entered into on or before the date of the offer;

(ii) not subject to any unacceptable financing conditions; and

(iii) enforceable by the offeror against a party which the offeror reasonably believes has sufficient financial resources to meet their obligations under those agreements when due.

(4) If an offeror's financial resources for completing the offer include any debt or equity funding, the offeror must not waive any offer condition, or declare an offer condition to be satisfied, if that offer condition reflects a condition in the debt or equity funding agreements if that corresponding condition has not been waived or satisfied or otherwise might be relied on by the funding provider to withhold the relevant funds. For the avoidance of doubt, an offeror shall not be prevented from declaring one or more conditions to an offer satisfied if the debt or equity funding is still conditional on conditions which:

(a) are administrative conditions; or

(b) require a certain level of acceptances to be achieved, provided that the relevant level of acceptances will be achieved through:

(i) acceptances which the offeror has already received; and

(ii) acceptances which one or more shareholders will be required to provide under binding contractual commitments within 2 working days of the offer being declared unconditional (or unconditional as to the relevant conditions).

*(5) In this clause 34A and in Schedule 1, **financial resources** means one or more of, bank deposits, future revenues, debt funding, further equity funding or contributions and/or other means of obtaining relevant funds.*

*(6) In this clause 34A and in Schedule 1, **funding agreement** means an agreement under which financial resources are to be provided to the offeror (and includes a committed term sheet for the provision of funding, provided that the terms of that commitment are agreed in all material respects).*

*(7) In this clause 34A and in Schedule 1, **availability restrictions** means, in respect of any funds which are to be used as financial resources:*

(a) any security interests, rights of set off or other analogous arrangements of any type; or

(b) requirements (or anticipated requirements) from other group operations,

which, in each case, might adversely affect the offeror's ability to use such funds to pay consideration in respect of an offer in accordance with this code and the offer terms.

*(8) In this clause 34A and in Schedule 1, an **unacceptable financing condition** means any condition to a funding agreement (or the performance of obligations under a funding agreement) except for:*

(a) administrative conditions; or

(b) a condition which is only capable of non-satisfaction where:

(i) a corresponding offer condition would also not be satisfied; and

(ii) the offeror would be permitted to allow the offer to lapse as a result of non-satisfaction of the offer condition (while acting in accordance with rule 25 and any other applicable rule of this code).

*(9) In this clause 34A and in Schedule 1, an **administrative condition** means any condition which is either:*

(a) administrative in nature and the satisfaction of which is within the offeror's control; or

(b) a usual documentary or administrative condition to the availability of finance that is outside the control of the offeror but which the offeror, after due inquiry, reasonably considers will be satisfied.

5.15 In order to amend the disclosures regarding financing, the Panel recommends amending Schedule 1 to the Code as follows:

9 Arrangements to pay consideration

(1) In the case of a takeover notice, cConfirmation by the offeror that:

(a) to the extent the consideration is cash, the offeror will have sufficient financial resources to pay all such consideration (including any increase in consideration) in accordance with this code and the offer terms; and

(b) to the extent the consideration is other than cash, that the offeror will have the full right, title and ability (as is applicable) to transfer such consideration (including any increase in consideration) in accordance with this code and the terms of the offer.resources will be available to the offeror sufficient to meet the consideration to be provided on full acceptance of the offer and to pay any debts incurred in connection with the offer (including the debts arising under sections 47 to 53 of the Act).

(2) In the case of an offer document:

(a) confirmation that the offeror has access to sufficient financial resources to send the consideration when due in accordance with this code and the offer terms;

(b) a summary of the relevant financial resources and confirmations regarding their relevant details, including:

(i) a description of the types of funding (debt, equity etc);

(ii) a confirmation that the relevant funds are not, and will not become, subject to any availability restrictions;

(iii) the process by which the offeror satisfied itself that the funds would not be subject to any availability restrictions;

(iii) to the extent that the relevant financial resources include debt or equity funding, a confirmation that, in respect of such financial resources:

(A) the offeror is a party to, or is otherwise entitled to enforce, a funding agreement entitling it to obtain such financial resources;

(B) the agreement is not subject to any unacceptable financing conditions; and

(C) the agreement is enforceable by the offeror against a party with sufficient financial resources to meet their obligations under those agreements when due; and

(v) such other details as the offeror considers is appropriate in order for shareholders to assess whether the offeror will be able to send the consideration in accordance with rule 24 or the merits of the offer more generally,

but need not identify the provider or amount of any funding (although this shall not limit the operation of clause 2(2)(b) of this Schedule 1).

(23) A statement setting out the rights of the offeree under rule 34.

6 Updating the treatment of unclaimed consideration

The problem

Introduction

6.1 Once a person becomes a dominant owner of a Code company (i.e., the holder or controller of 90% or more of the voting rights), they have a right to compulsorily acquire the outstanding shares. This involves sending a "compulsory acquisition notice" to all remaining shareholders and making payment to shareholders who return an instrument of transfer.

6.2 There is the residual issue of what to do about shareholders who do not return an instrument of transfer – most commonly, shareholders who do not return an instrument of transfer will be "gone no address shareholders". Rule 61 of the Code outlines what steps must be taken in respect of such shareholders (**Outstanding Shareholders**).

6.3 Under rule 61, if the consideration is or includes cash, then the dominant owner must pay the cash to the Code company, which must deposit it in an interest-bearing trust account with a registered bank and hold it in trust for the Outstanding Shareholders until it is claimed (the **Unclaimed Monies Requirement**).

6.4 The only limit on the Unclaimed Monies Requirement is the operation of the Unclaimed Money Act 1971 (the **Unclaimed Money Act**). Under the Unclaimed Money Act, Code companies are permitted to transfer the unclaimed consideration to Inland Revenue after six years (or six months if the company ceases trading).

Issues with the current regime

6.5 The Panel has received feedback from several major law firms that their experience has been that:

(a) the Unclaimed Money Act procedure is difficult to use in practice;

(b) the Unclaimed Monies Requirement requires money to be kept in trust for longer than is reasonably necessary, and that such a long period creates inappropriate administrative difficulties with former Code companies being unable to be wound up (because of the cash it holds) and bank accounts needing to be maintained; and

(c) the Unclaimed Monies Requirement is out of step with analogous market practices relating to schemes of arrangement and unclaimed dividend payments (under these arrangements companies are generally required to hold the cash on trust for a period of between 6 months and 2 years, with the company being able to use the cash for its own purposes after that point).

Assessment and analysis

Panel's initial proposal

6.6 In the Consultation Document, the Panel proposed two options (without expressing a preference):

(d) **Option 1:** maintain the status quo.

(e) **Option 2:** amend rule 61 as follows:

(i) Dominant owners continue to be required to transfer any unclaimed cash consideration to the Code company to be held on trust on behalf of the Outstanding Shareholders.

(ii) The cash consideration must be held for a period of 12 months, after which the target company would be permitted to use the unclaimed cash consideration for the benefit of the target company and to mingle those funds with its other funds.

(iii) The Outstanding Shareholders would retain a claim against the target company as an unsecured creditor.

Submissions

6.7 All but one submitter favoured Option 2. Submitters did, however, acknowledge that the problem was likely to become less acute given the move to payment by direct credit.

6.8 In summary, the arguments in favour of Option 2 were:

(a) The monies belong to shareholders and their property should not be taken.

(b) Practically, target companies are often broken up or otherwise restructured following takeover transactions, reducing the value of a claim against the target.

(c) If the Unclaimed Money Act is administratively burdensome, then that legislation that should be amended.

6.9 As to points of detail:

(a) One submitter suggested that there should be an obligation on offerors to find current addresses for shareholders.

(b) Regarding the claims period (during which the funds would be held in trust), submitters argued for different periods, ranging from 6 to 24 months. A majority of submitters favoured 12 months for consistency with the market standard periods used in relation to schemes of arrangement (one submitter argued that a 6-month period could also be justified on this basis). The submitter who favoured 24 months pointed to the potential benefit of a longer period for estates which were being wound up.

(c) The submitters in favour of reform generally agreed that there was no need for shareholders to have preferential claims after the claims period.

Panel's analysis

6.10 The Panel concluded that reform was, on balance, preferable. The discontinuance of cheques was likely to reduce the amount of money which might be held in trust, and as a result, these obligations would likely apply in respect of lesser amounts. Therefore, the cost of the current regime was difficult to justify.

6.11 The Panel considered that there were alternatives for the period during which consideration should be held in trust. Ultimately, the Panel considered the best approach was to be conservative (bearing in mind incremental costs may not be high) and settled on 24 months as the appropriate period. The Panel thought that the additional 12 months would provide a worthwhile safeguard to shareholders.

6.12 The Panel's conclusions were:

(a) The offeror should be required to use reasonable endeavours to find up to date shareholder details.

(b) Dominant owners should continue to be required to transfer any unclaimed cash consideration to the Code company to be held on trust on behalf of the Outstanding Shareholders.

(c) The cash consideration should be held for a period of 24 months, after which the target company would be permitted to use the unclaimed cash consideration for the benefit of the target company and to mingle those funds with its other funds.

(d) The Outstanding Shareholders would retain a claim against the target company as unsecured creditors.

Proposed law reform

6.13 The Panel recommends amending rule 61 of the Code as follows:

61 Payment of consideration if documents not returned

(1) If an outstanding security holder does not return to the dominant owner the documents referred to in rule 59, then, in the case of a compulsory sale, the dominant owner must, within 5 working days after the expiry of the 15-working-day period referred to in rule 59,—

(a) deal with in accordance with subclause (2) or (3) (whichever applies)—

(i) the consideration specified in the acquisition notice; or

(ii) if rule 56A applies, the consideration that is payable under that rule; and

(b) send to the code company an instrument of transfer for the outstanding securities, executed on behalf of the outstanding security holder by the dominant owner or its agent.

(2) If the consideration is, or includes, cash, the dominant owner must pay the cash to the code company. Where cash is paid to the code company in accordance with this clause, which must—

(a) The code company must immediately deposit such cash it in an interest-bearing trust account with a registered bank.; and

(b) The code company must continue to hold such cash (and interest paid on such cash) hold it in such a trust account for the outstanding security holder until it is claimedfor a period of not less than 24 months (unless claimed earlier).

(c) During such 24-month period, the code company must make reasonable endeavours to contact outstanding security holders and advise them of their entitlement.

(d) After the expiry of such 24 month period, the code company may use any remaining principal and interest for its own purposes and mingle such funds with its other funds, provided that the outstanding security holder shall maintain a claim against the code company (as an unsecured creditor) for the consideration which was payable to them and any interest which was accrued and paid on that amount while it was held on trust. Any such entitlement shall be paid to the relevant shareholder within 5 working days of the Code company receiving a from the outstanding security holder:

(i) a request for payment; and

(ii) reasonably satisfactory evidence of the outstanding security holder's entitlement.

(4) If the consideration is, or includes, financial products, the dominant owner must—

(a) vest the financial products in the outstanding security holder; and

(b) send written notice to the outstanding security holder and the code company that this has been done.

(5) Subclause (1) applies whether or not there has been a reference to expert determination under rule 57(3).

7 Removal of unnecessary derivative disclosures

The problem

7.1 The Financial Markets Conduct Act 2013 (the **FMCA**) requires various disclosures of derivative interests in relation to listed Code companies. These disclosures are made on an ongoing basis and may indicate when a party has an interest in pursuing a takeover or other control-change transaction.

7.2 Schedules 1 and 2 to the Code require disclosure of certain derivative interests:

(a) Clauses 7A and 7B of Schedule 1 require an offeror to disclose its own, its associates', and any substantial product holders' derivative interests in the target company.

(b) Clauses 6A and 6B of Schedule 2 require a target company to disclose the derivate interests of its directors and senior managers (and their associates), as well as those of any substantial product holders.

7.3 The Code disclosures can be of limited benefit in takeover documents (as opposed FMCA disclosures prior to when a takeover is commenced) and they can be difficult to prepare.

Assessment and analysis

Panel's initial proposal

7.4 The Panel proposed two options:

(a) **Option 1:** Maintain the status quo.

(b) **Option 2:** Amend Schedules 1 and 2 to the Code to remove the requirement to disclose derivative interests of substantial product holders in order to simplify disclosures made by offerors and target companies.

Submissions

7.5 All submissions on the issue preferred Option 2. One submitter went further and suggested eliminating the target's disclosure of derivative interests of associates of the directors and senior managers.

Panel's analysis

7.6 The Panel agrees with submitters and recommends that the Code be amended to remove the requirement to disclose derivative interests of substantial product holders so that:

(a) offerors would only be required to disclose the derivative interests of the offeror and its associates; and

(b) target companies would only be required to disclose derivative interests of directors and senior managers and their associates.

Proposed law reform

7.7 The Panel recommends amending Schedule 1 of the Code as follows:

7A Composition of non-derivative and derivative holdings

(1) This clause applies if—

*(a) a person (**A**) referred to in clause 6(1)(a) to (d) has a relevant interest in a derivative as referred to in clause 6(3); or*

*(b) a person (**B**) referred to in clause 6(1)(a) to (d) has, during the 6-month period referred to in clause 7(3), acquired or disposed of a relevant interest in a derivative as referred to in clause 7(4).*

7.8 The Panel recommends amending Schedule 2 of the Code as follows:

6A Composition of non-derivative and derivative holdings

(1) This clause applies if a person (A) referred to in clause 5(1)(a)—

(a) has a relevant interest in a derivative as referred to in clause 5(2A); or

(b) has, during the 6-month period referred to in clause 6(1), acquired or disposed of a relevant interest in a derivative as referred to in clause 6(4).

8 Providing unencumbered title to shares

The problem

Introduction

8.1 There is a lack of clarity as to whether shares acquired under a scheme under the Companies Act 1993 or compulsory acquisition under Part 7 of the Code are transferred to the offeror free from any existing security interests.

8.2 Section 97 of the Personal Property Securities Act 1999 (the **PPSA**) states that the interest of a purchaser in an investment security has priority over a perfected security interest in the investment security (which includes shares in a listed company) if the purchaser:

(a) gave value for the investment security;

(b) acquired the investment security without knowledge of the security interest; and

(c) took possession of the investment security.

Issues with the current regime

8.3 It is possible that under a scheme or compulsory acquisition process, no transaction has taken place that meets one of the methods of purchase provided in the definition of "purchase" under the PPSA. Accordingly, in a scheme or compulsory acquisition, it is not clear that the protections in section 97 apply.

8.4 The difficulty with the current position is that an offeror might acquire title to shares which is subject to existing security interests. This is an impractical position – in a compulsory acquisition or scheme an offeror must complete the transaction even if the offeror becomes aware of a security interest. It not reasonable that, in such circumstances, the offeror should have to take the relevant securities subject to a security interest.

Assessment and analysis

Panel's initial proposal

8.5 The Panel proposed recommending that the PPSA be amended to ensure that investment securities acquired by way of a scheme under section 236A of the Companies Act 1993 and the compulsory acquisition process under the Code will be free from existing security interests, absent knowledge of a security interest.

Submissions

8.6 All submitters supported the Panel's proposed amendment.

8.7 In addition, three submitters noted that there is a further issue of whether the PPSA should be amended to remove the requirement for absence of knowledge of security interests in respect of either a scheme or on compulsory acquisition. Two of these submitters argued that the Panel should go further and remove the knowledge requirement. The arguments advanced in support of this position were (in summary):

(a) If an offeror reaches 90% it may wish to undertake compulsory acquisition as it is entitled to do under the Code (and an outstanding security holder can force the offeror to acquire their shares). The offeror must pay the price prescribed by the Code to the outstanding security holder even if it obtains knowledge of a security interest. There is no mechanism to withhold any part of the purchase price to pay the secured creditor or to require the outstanding security holder to obtain a release of the security interest.

(b) Even if the offeror has knowledge of a security interest, it is not clear what it can do about it in practice.

(c) Essentially the same considerations apply in relation to schemes, albeit that there is not the same direct restriction on differential consideration.

(d) This is consistent with the position in Australia.

Panel's analysis

8.8 The Panel considers that its initial analysis is correct and agrees with the points raised by submitters (as set out above).

8.9 Accordingly, the Panel recommends that the PPSA should be amended to allow offerors to take clear interest on compulsory acquisition or on completion of a scheme of arrangement (irrespective of whether the offeror had knowledge of any pre-existing security interest).

Proposed law reform

8.10 The Panel recommends that the PPSA be amended as follows:

97A Priority of purchaser of investment security under part 7 of the takeovers code or a scheme of arrangement

The interest of a purchaser of an investment security in a Code company has priority over a perfected security interest in the investment security if the purchaser—

(a) acquires the investment security under an offer made under part 7 of the Takeovers Code or in accordance with the terms of part 7 of the Takeovers Code; or

(b) acquires the investment security under the terms of a scheme of arrangement approved under section 236(1) of the Companies Act 1993.

9 Clarification of documents to be sent to Panel

The problem

9.1 Rule 47 of the Code requires that certain documents must be sent to the Panel (or may be required by the Panel) during a takeover.

9.2 The Consultation Paper identified several issues with rule 47(4):

(a) A lack of clarity as to the application of rule 47(4) to call scripts, shareholder presentations and similar documents. While it has become market practice to provide these documents to the Panel, it is not clear, on the drafting of the legislation, that this is in fact a requirement and the Panel is aware that some practitioners also consider the point to be open to debate.

(b) A lack of clarity as to whether rule 47(4) applies to communications with individual shareholders. Some practitioners have taken the view that responses to shareholder queries need to be provided to the Panel under this requirement. The Panel does not have the resources to review all of these responses, most of which are requests for information or clarity from shareholders.

(c) A lack of ability for one party to a takeover to review and respond to the other's call scripts. The Panel has in the past received complaints that calling campaigns have been misleading or deceptive. However, these arguments are difficult to resolve as the complainant has only his or her recollection of a call and sometimes second-hand information about what was said to others. Further, the Code broadly proceeds on a basis whereby when one party makes a statement the other may respond to it – effectively this creates a marketplace of ideas. This would be undermined if one party could not understand the statements another party was making. In order for an obligation of this type to function, there needs to be an obligation on parties running calling campaigns to keep an accurate record of what was said, whether through use of a call script or otherwise.

Assessment and analysis

<u>Panel's initial proposal</u>

9.3 The Consultation Paper described two options, but the Panel expressed no preference:

(a) **Option 1:** Maintain the status quo.

(b) **Option 2:** Amend rule 47(4) to:

(i) clarify that communications with one shareholder (or a small group of shareholders) will not be required to be provided to the Panel unless requested by the Panel;

(ii) require that, in respect of call scripts, a final version of the call script is provided to:

(A) the Panel; and

(B) the other party (i.e., the offeror or the target, as applicable).

<u>Submissions</u>

9.4 A majority of submitters favoured Option 2, but points of detail were raised:

(a) There is likely no need to include a right to require production of documents as the Panel has existing powers under the Takeovers Act.

(b) There should be some clarification as to what call scripts should be disclosed and whether "Q & A" sections would be included.

Panel's analysis

9.5 The Panel prefers Option 2. In response to the additional points raised:

(a) the Panel considers that there is no need to provide (in rule 47) that the Panel may request shareholder communications (this can be done under the Panel's existing powers); and

(b) the drafting should clarify that "Q & A" sections should be disclosed.

Proposed law reform

9.6 The Panel recommends amending rule 47 as follows:

47 Documents that must be sent to Panel or that Panel may require

…

(4) An offeror or target company or person acting on behalf of any of them who, in relation to an offer or a takeover notice publishes or sends to any group of offerees which might contain one or more retail investors any statement or information that is not required to be published or sent by the rules of this code must, at the same time that the statement or information is published or sent, also send a copy of it to the Panel.

(5) An offeror or target company or person acting on behalf of any of them who, in relation to an offer or a takeover notice makes unsolicited telephone calls to any group of shareholders which might contain one or more retail investors in respect of a transaction which is regulated by this code must:

(a) keep an accurate record of what was communicated to such shareholders, either by using a call script or keeping a full and accurate record of the communication;

(b) if there is a call script:

(i) provide a full version of that call script to the Panel and any relevant counterparty immediately before the communication (or series of communications) commences; and

(ii) provide any amendments to the call script to the Panel and any relevant counterparty within 24 hours of such amendments being made; and

(c) to the extent that there is not a call script, or the call script does not contain a full and accurate record of what was communicated to such shareholders, provide the full and accurate record of the communications to the Panel and any relevant counterparty within 24 hours of any such communication.

*(6) In this clause 47, **retail investor** has the meaning set out in the Financial Markets Conduct Act 2013.*

*(7) In this clause 47, **call script** means any set of instructions and prepared information to be used when communicating with shareholders (including any prepared sets of questions and answers).*

*(8) In this clause 47, **relevant counterparty** means, in the case of a communication relating to a takeover notice or takeover offer, the target company or the offeror (as applicable).*