

# New Zealand

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## MARKET AND REGULATION

### 1. Please give a brief overview of the public M&A market in your jurisdiction. (Has it been active? What were the big deals over the past year?)

Announced M&A activity in New Zealand in 2006 amounted to US\$14.2 billion (about EUR10.7 billion), a 10.6% increase from 2005.

The number of transactions rose 27% to 456. The most significant transactions for 2006 were:

- Rank Group's US\$2.1 billion (about EUR1.6 billion) challenging tender offer to acquire the entire ordinary share capital of SIG Holding.
- Rank Group's US\$1 billion (about EUR758 million) completed tender offer to acquire the remaining stake in Burns Philp.
- Hancock Natural Resource Group's US\$992.3 million (about EUR766 million) acquisition of Carter Holt Harvey Ltd – Forest.
- Cereal Partners' US\$669.5 million (about EUR507 million) acquisition of Uncle Tobys.
- Transpacific's US\$579.3 million (about EUR439 million) acquisition of Waste Management NZ.
- John Fairfax Holdings' US\$492.8 million (about EUR373 million) acquisition of Trade Me.
- GE Commercial Finance's US\$436.9 million (about EUR337 million) acquisition of Custom Fleet (NZ).
- Shareholders' US\$395.6 million (about EUR305 million) acquisition of Tower Ltd.

### 2. What are the main means of obtaining control of a public company? (For example, public offer, legal merger, scheme of arrangement and so on.)

The three principal means of obtaining control of a public company are:

- A takeover offer.

- Amalgamation.
- A court approved scheme of arrangement (scheme).

#### Takeover offer

A takeover offer is an offer made under the Takeovers Code, as approved by the Takeovers Code Approval Order 2000 (Code), to acquire part of or all of the voting rights in a company. A takeover offer can be mandatory or voluntary (*see Questions 4 and 16*).

#### Amalgamation

Two or more companies incorporated in New Zealand can amalgamate and continue as one company, which can be one of the amalgamating companies or a new company (*Companies Act 1993 (Companies Act)*). Amalgamations can only occur in recommended bids.

Under the amalgamation procedure, the shareholders must approve the amalgamation proposal in a special resolution passed by a majority of 75% or more of votes cast. Related companies (that is, where one company directly or indirectly wholly owns one or more other companies) can amalgamate, if the amalgamation has been approved by the directors of each related company.

Following this approval, and after the requisite filings and certifications have been made, an amalgamation certificate is issued and the amalgamation becomes effective. The amalgamated company takes over all property, rights, powers and privileges of each amalgamating company, as well as all of their liabilities and obligations.

All shareholders are bound by the amalgamation proposal, but a minority shareholder who votes against it can require the amalgamated company to purchase its shareholding.

#### Scheme

While similar to an amalgamation proposal, a scheme has the advantage that the High Court gives express orders detailing the consequences and structure of the transaction, and sequencing the timing of such consequences and structure. Schemes are generally only used in recommended offers.

To implement a scheme, an application must be made to the High Court for orders to convene meetings of each class of shareholder and for several procedural orders. Resolutions must be passed by a majority as fixed by the court (usually a majority of 75% or more of the votes cast). When all resolutions are passed by the requisite majority, an application must be made to the court for the final orders approving the scheme.

Before granting the orders, the court must ensure that at least all of the following criteria have been satisfied:

- The Companies Act and preliminary orders have been followed.
- The arrangement has been fairly put to the shareholders.
- The shareholders who attended and voted have acted in good faith and did not coerce the minority.
- The arrangement was such that an intelligent and honest businessperson might reasonably approve it.

Once the final orders are made, the scheme is binding on all shareholders. There is no minority buyout mechanism.

The Takeovers Panel (Panel) (*see box, The regulatory authorities*) recognises that schemes are allowed under takeover law, but if, as a result of the scheme, there is a breach of the fundamental rule of the Code (*see Question 4*), then the scheme will be subject to the Code. In these circumstances, an exemption from the Code must be obtained from the Panel in order to implement the scheme.

However, the Panel has limited the scope for exemptions in these situations. In particular, while the voting requirements for schemes are usually less than the 90% acceptance level required for a compulsory acquisition of shares under the Code, the Panel often imposes conditions on any exemption to ensure that the acceptance levels are the same as those applicable under the Code.

In one approved scheme, voting rights attached to shares were removed for a short time and therefore took the scheme outside the Code. The court was satisfied that this mechanism had no practical effect on shareholders' rights in the context of approving the scheme. This method therefore represents, in appropriate circumstances, a way to remove the technical application of the Code. However, recently the Panel sought a variation to the orders made by the court in relation to shareholder meetings for a scheme. This application was denied (in the Court of Appeal) but orders requiring the Panel to be advised of the outcome of the shareholder meetings to enable it to be heard on the application for final orders were made. This reflects the Panel's much greater interest in schemes.

The Panel also unsuccessfully sought to have the applicable provisions in the Companies Act relating to schemes amended in relation to Code companies.

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### 3. Are hostile bids allowed? If so, are they common? If they are not common, why not?

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Hostile bids are permitted and not uncommon. The requirements for hostile bids and recommended bids under the Code are the same.

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### 4. How are public takeovers and mergers regulated and by whom?

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Public takeovers are regulated by the Panel under the Takeovers Act 1993 and the Code. The scheme of the Code is to create a general rule, known as the "fundamental rule", and then to provide various exceptions to that rule (*see below, Fundamental rule*).

Offers can be made in accordance with the Code for voting securities in Code companies (*see below*). A voting security is an equity security that confers a right to vote at a meeting of shareholders (that is, a voting right). It does not include debt or other non-voting securities, even if they are convertible into voting securities.

A Code company is a New Zealand company that either:

- Is listed on the New Zealand Stock Exchange (NZSE), or was listed on it in the 12 months before the takeover.
- Has 50 or more shareholders. (The asset threshold was removed with effect from 25 October 2006.)

However, the Code does not apply to listed entities that are not companies (such as listed managed investment schemes). Takeovers of those entities continue to be governed by the relevant provisions of the NZSE Listing Rules (Listing Rules). The NZSE is operated by New Zealand Exchange Limited (NZX) (*see box, The regulatory authorities*).

#### Fundamental rule

The fundamental rule states that a person (either solely or together with its associates (*see Question 8*)) cannot either:

- Become the holder or controller of more than 20% of the voting rights in a Code company.
- Increase an existing holding of 20% or more of the voting rights in a Code company.

#### Exceptions to the fundamental rule

The Code sets out a number of exceptions to the fundamental rule, allowing voting rights to be purchased or acquired:

- Under a full takeover offer (an offer for all of the voting rights in the target not already held by the bidder) in accordance with the Code.
- Under a partial takeover offer (an offer for a specified percentage of the voting rights in the target) in accordance with the Code.
- Under an acquisition approved by an ordinary resolution of the Code company in accordance with the procedure set out in the Code.
- Under an allotment approved by an ordinary resolution of the Code company in accordance with the procedure set out in the Code.

- Under a “creeping” acquisition, which allows a shareholder who already holds between 50% and 90% of the voting rights in a Code company to acquire up to an additional 5% in a 12-month period.
- By means of a compulsory acquisition if the shareholder holds 90% or more of the voting rights in the Code company (see *Question 19*).

It is not possible to contract out of the Code.

### Enforcement powers and remedies

The Panel has wide enforcement powers including temporary and permanent restraining orders. Changes to the enforcement powers and new penalties and remedies were recently introduced.

In addition to the Code, certain other statutes and regulations will potentially impact on a takeover offer. These include the:

- Commerce Act 1986 (Commerce Act), in relation to competition law (see *Question 25*).
- Overseas Investment Act 2005 and Overseas Investment Regulations 2005, in relation to investment in New Zealand assets by overseas persons.
- Securities Markets Act 1988 (SMA), in relation to insider trading.

## PRE-BID

### 5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

#### Due diligence conditions

An offer cannot be subject to any conditions that depend on the judgement of the bidder, or where the fulfilment of the condition is in the power, or under the control, of the bidder (see *Question 13*). Therefore, a takeover offer cannot be made conditional on satisfactory due diligence being conducted by the bidder.

All due diligence undertaken by a bidder must be completed before making an offer.

#### Recommended bid

A bidder, on a recommended bid, may be permitted by the target to obtain non-public information from a target. If that information includes price-sensitive information, the target must ensure that the bidder enters into an appropriate confidentiality agreement, and must monitor the situation closely to make sure it meets its continuous disclosure obligations under the Listing Rules.

Although due diligence can be undertaken confidentially, the risk of a leak of the proposed bid is significantly increased by the due diligence process. A leak can result in a requirement to announce the bid earlier than anticipated (see *Question 6*). For this reason, a bidder may decide not to undertake due diligence, preferring instead to rely on publicly available information, so that it can

control the timing of an announcement. If so, the bidder must consider the timing advantage against the risks associated with not undertaking due diligence.

#### Hostile bid

In a hostile bid, the bidder is generally left to rely on public domain information and in particular annual reports and audited financial statements. If the target has been the subject of a previous bid, the target's statement will provide useful information on the target's assets.

#### Public domain

A reasonable amount of public information is available about New Zealand listed companies, as:

- Any person who holds a relevant interest (as defined in section 5 of the SMA) in 5% or more of the shares of a company listed on the NZSE must disclose that interest.
- A listed company has a continuing general obligation under the Listing Rules to release any price-sensitive information publicly.
- All companies are required to provide, to the New Zealand Companies Office, certain information and documents that will then be accessible to the public. These include:
  - details of the number of shares issued (*section 43, Companies Act*);
  - details of the company's directors (*section 159, Companies Act*) and major shareholders in the company's annual return (*section 214, Companies Act*); and
  - copies of the company's constitution (equivalent to articles of association).
- A member of the public can request certain information from a New Zealand incorporated company, including details of its share register (*section 215, Companies Act*).
- Shareholders can inspect minutes of all meetings and resolutions of shareholders, copies of written communications to shareholders, certificates given by directors and the company's interests register (*section 216, Companies Act*).

The following documents are also generally available to the public in relation to listed Code companies (and also some unlisted Code companies, namely foreign-owned companies):

- Constitutions.
- Annual reports.
- Audited financial statements.

#### Bidder's own due diligence

The takeover offer must contain detailed information about the bidder and the offer (see *Question 12*). This is particularly important if the bidder is making a share (scrip) offer. A bidder should therefore conduct any necessary due diligence on itself before

announcing the offer, to ensure that the information contained in its offer document is accurate.

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**6. Are there any rules as to maintaining secrecy until the bid is made?**

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The rules relating to maintaining secrecy are principally contained in the Listing Rules and in the insider trading prohibitions set out in the SMA.

Once a listed company becomes aware of any information that a reasonable person would expect to have a reasonable effect on the price or value of its shares, it must release that information to the NZX (*Listing Rule 10.1*). A notice of intention to make a takeover offer, whether received or given, is covered by this rule (*see Question 12*).

However, this information does not have to be released if all the following apply:

- A reasonable person would not expect the information to be disclosed.
- The information is confidential.
- Its confidentiality is maintained.
- One or more of the following applies:
  - the release of information would be a breach of law;
  - the information concerns an incomplete proposal or negotiation;
  - the information consists of matters of supposition or is insufficiently definite to warrant disclosure;
  - the information is generated for the internal management purposes of the issuer; or
  - the information is a trade secret.

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**7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?**

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Agreements of this nature between key shareholders are permitted under the Code. They are commonly known as lock-up agreements.

Previously, the Panel was of the view that lock-up agreements would not necessarily make the parties “associates”. However, in a reversal of that position, the Panel now takes the view that lock-up agreements, by their very nature, will make the parties associates. Of itself, that does not make them illegal. However, it does mean that the parties’ holdings must be aggregated for the purposes of the fundamental rule (*see Question 4*).

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**8. If the bidder decides to build a stake in the target before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there any circumstances in which shareholdings of associates could be aggregated for these purposes?**

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It is not uncommon for a bidder to build a stake before announcing a bid. Unlike other jurisdictions, the price paid in the stake-building process does not have to match that offered in the subsequent takeover offer. However, any person who holds a relevant interest in 5% or more of the shares of a company listed on the NZSE must disclose that interest.

In addition, if a bidder (together with its associates) exceeds the 20% threshold prohibition (*see Question 4*), a mandatory bid must be made (*see Question 16*). A person is an associate of the bidder if any of the following apply:

- The person and the bidder are acting jointly or in concert.
- The person acts, or is accustomed to act, in accordance with the wishes of the bidder.
- The person and the bidder are related companies.
- The person and the bidder have a business relationship, personal relationship, or an ownership relationship such that they should, under the circumstances, be regarded as associates.
- The first person is an associate of a third person, who is an associate of the bidder (under any of the methods described in the bullet points above) and the nature of the relationships between the first person, the third person, and the bidder (or any of them) is such that, under the circumstances, the first person should be regarded as an associate of the bidder.

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**9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?**

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It is not common to have merger agreements, but takeovers have been announced where certain aspects of the proposed bid have clearly been extensively discussed between the bidder and the target. There is no legal requirement in relation to their content and, if entered into, they will usually reflect the parties’ commercial discussions. There is no prohibition on a target board agreeing not to solicit offers or recommending other offers. However before agreeing to such provisions, the target board would have to consider the offer to be in the best interests of the shareholders.

However, any agreements or arrangements of this nature, whether legally enforceable or not, must be disclosed in the takeover notice (*see Question 12*).

**10. Is it common on a recommended bid for the target to agree a break fee if the bid is not successful? If so, please explain the circumstances in which the fee is likely to be payable and any restrictions on the size of the payment.**

There are no legal impediments to break fees. In addition, there are no limits or restrictions on where they can be used or on their size.

There have been no instances, on a recommended bid, where a break fee has been agreed in relation to a takeover offer made under the Code.

**11. Is committed funding required before announcing an offer?**

Any takeover offer must contain confirmation by the bidder that sufficient resources will be available to meet the consideration to be provided on full acceptance.

The Panel has indicated that firm financing arrangements need to be in place at the time that the offer is made. The ability to terminate the arrangements must reside with the financiers, to avoid breaching the prohibition on conditions that are within the control of the bidder (see *Question 13*).

## ANNOUNCING AND MAKING THE OFFER

**12. Please explain how (and when) the bid is made public (highlighting any relevant regulatory requirements) and set out brief details of the offer timetable. (Consider both recommended and hostile bids.) Is the timetable altered if there is a competing bid?**

### Announcing a takeover offer

The bidder starts the takeover process by giving the target notice of its intention to make an offer (takeover notice). The takeover notice must also be given to the Panel and the NZX.

The takeover notice is not an offer and the Code does not require an offer to be made just because a takeover notice has been given.

The takeover notice must contain, or be accompanied by, the matters set out in Schedule 1 to the Code. The takeover notice is usually in the form of a letter with the intended offer documents attached.

The Code requires the offer to be made on the same terms and conditions as set out in the takeover notice, except for any of the following:

- Conditions that have been satisfied or waived.
- Consequential amendments.
- Changes to terms that have been approved in writing by the target's directors.

Therefore, all the terms and conditions of the takeover offer should be finalised before the takeover notice is given.

Immediately on receipt of the takeover notice, the target must inform the market (if it is listed), or its shareholders (if it is not listed), of the fact that a takeover notice has been received.

### Offer timetable

The timetable of a takeover bid begins on the date that the bidder gives the takeover notice to the target (notice date). The offer (if made) must be sent to the target's shareholders at least 14 days, but no more than 30 days, after the notice date. This is the despatch date.

Once made, an offer must remain open for a minimum of 30 days and, generally, a maximum of 90 days. This period runs from when the offer is dated (offer date), which can be up to three days before the offer is despatched.

Once the offer period is set, it can be extended (but not beyond the maximum 90-day period, except in limited circumstances (see *below*)) by giving a written variation notice to all of the following:

- The target's shareholders.
- The target.
- The NZX.
- The Panel.

This variation notice must, except in limited circumstances, be given at least 14 days before the end of the existing offer period.

The offer can be extended for 60 days beyond the usual 90-day maximum period (giving a 150-day offer period in total) if the offer is both:

- A full offer.
- Not subject to a minimum acceptance condition (or where any minimum acceptance condition has been satisfied).

If the offer is unconditional and the variation only relates to the offer period, the notice extending the offer period does not have to be sent to shareholders who have already accepted the offer.

The offer must remain open for at least 14 days after a variation notice has been sent, except in certain limited circumstances.

### Offer document

The offer document must contain, or be accompanied by, the matters set out in Schedule 1 to the Code, the most important of which are:

- All of the terms and conditions of the offer.
- Details of the target's shares held or controlled by the bidder.

- Any agreements or arrangements (whether legally enforceable or not) entered into, or proposed to be made, in connection with the offer between the bidder and the target, or the bidder and the target's directors and officers.
- Details of any material changes likely to be made to the business of the target by the bidder.
- Details of any agreements or arrangements (whether legally enforceable or not) under which any existing or prior shareholder will or may receive (in relation to, or as a consequence of, the offer) any additional consideration or other benefit over and above the consideration set out in the offer.

Importantly, the offer document must also include a certificate (executed by the chief executive officer (CEO) and the chief financial officer (CFO) of the bidder (or persons in equivalent roles) and two directors on behalf of the board of directors) certifying, among other things, that, to the best of their knowledge and belief, the information in the offer document is true and correct, and not misleading, in all material respects. Those officers must, therefore, be satisfied as to the accuracy of the statements made in the offer document. A formal due diligence or verification process may be seen as necessary to achieve this.

#### Identifying shareholders

The takeover offer must be sent to persons who are registered as the target's shareholders on the record date (*see below*). The bidder can also choose to send the offer to persons who became shareholders after the record date.

The bidder must give written notice to the target of the record date it has chosen for the offer. This notice must be given after the notice date, but before despatching the takeover offer, and at least two days before the record date.

Within two days of the record date, the target must provide the bidder with a copy of its share register in electronic form (or in any other form that the target and bidder agree).

The record date cannot be more than ten days before the date of the offer.

#### Despatch notice

Immediately after sending its offer to the shareholders, the bidder must give a despatch notice, confirming it has done so, and copies of the offer to the target, the Panel, the NZX and the Registrar of Companies.

#### Target's response

The target can choose to send its statement either directly to its shareholders or to the bidder (who then sends it to the shareholders). The target's statement must be sent to those shareholders who are registered as the target's shareholders on the record date (*see above, Identifying shareholders*). The target's statement must contain, or be accompanied by, the matters set out in Schedule 2 to the Code (principally being the directors' recommendations, financial information and other price information), and must include an independent adviser's report.

**Option 1: bidder.** The target prepares its statement in time for the bidder to send it out with the takeover offer. If this option is chosen, the target's statement must be provided to the bidder within 14 days of the notice date (unless a later date is agreed with the bidder) (*Code*). In this way, the shareholders receive the offer, the target's statement and the independent adviser's report at the same time.

**Option 2: shareholders.** The target sends its statement directly to the shareholders, the bidder, the Panel, the NZX and the Registrar of Companies. It must do this within 14 days of receiving the despatch notice from the bidder. If the offer is despatched to the target's shareholders on the earliest possible day, this option gives the target at least 28 days from the notice date to prepare its statement and have the independent adviser complete its report. It is advisable for the target to inform the shareholders when its documents will be sent and to recommend that shareholders wait until those documents are available before making a decision.

An important consideration when choosing between these two options is that the time limits are different. In addition, the option a target chooses is likely to depend on the degree of co-operation between the target and the bidder (that is, whether the takeover is recommended or not), and the time it takes to prepare the target's statement and the independent adviser's report.

#### Documents for the Panel

The bidder and the target are both required to give the Panel copies of all documents and notices that they despatch (*Code*).

#### Withdrawal or lapse of offer

An offer (as distinct from a takeover notice) can be withdrawn only with the consent of the Panel. Where consent is given, a bidder must immediately send a written notice that the offer is withdrawn, or has lapsed in accordance with the terms of the offer, to the target, the Panel and the NZX.

#### Key dates in the timetable

- **Day 1.** The bidder sends takeover notice (notice date). Target must inform the market (if listed) or its shareholders (if not listed) of receipt of the takeover notice.
- **Day 3.** The earliest date for bidder to give target written notice of record date (if earliest possible record date adopted).
- **Day 5.** The bidder's earliest possible record date.
- **Day 7.** The latest date for target to send bidder the share register (if earliest possible record date adopted).
- **Day 12.** The bidder's earliest possible offer date.
- **Day 14.** The target's last date to send its statement to bidder (Option 1 (*see above, Target's response*)).
- **Day 15.** The bidder's earliest possible date to send offer to shareholders (despatch date). Bidder must send despatch notice to target, Panel, NZX and Registrar of Companies immediately.

- **Day 29.** The last date for target to send the statement to shareholders (Option 2 (*see above, Target's response*)) (if earliest possible despatch date adopted).
- **Day 31.** The bidder's latest possible offer date and despatch date.
- **Day 41.** The bidder's earliest possible closing date if the earliest possible offer date is adopted.
- **Day 45.** The bidder's earliest possible closing date if the offer date is also the despatch date. This is also the target's last date to send statement to shareholders (Option 2) (if latest possible despatch date adopted).
- **Day 60.** The bidder's earliest possible closing date if the latest possible offer date is adopted.
- **Day 101.** The bidder's latest possible closing date (without extension, Day 161 with extension) if earliest possible offer date is adopted.
- **Day 120.** The bidder's latest possible closing date (without extension, Day 180 with extension) if latest possible offer date is adopted.

Where any action to be taken falls on a day other than a working day, that action should be taken on the next working day.

The timetable is not automatically altered if there is a competing bid.

There is nothing precluding the directors from co-ordinating the time periods if notice of a competing bid is given.

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**13. What conditions are usually attached to a takeover offer (in particular, is there a regulatory requirement that a certain percentage of the target's shares must be offered/bid)? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?**

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A full offer must be conditional on acquiring more than 50% of the voting rights (*Code*). In the case of a partial offer, the offer can be for a lesser percentage agreed to by the target's shareholders.

No conditions can be included in an offer which depend on the judgment of the bidder, or any associate of the bidder (*see Question 8*), or where the fulfilment of the condition is in the power, or under the control, of the bidder or any associate of the bidder (*Rule 25(1), Code*).

It has been common for offers to contain conditions relating to Commerce Act clearances, and foreign investment consents and finance conditions (which the Panel has said must be bona fide to protect the lender and not just a device to provide an exit mechanism to the bidder). Some takeover offers have included extensive conditions relating to the ordinary course of business of the target during the offer period.

If conditions are included in a takeover offer, a date by which the conditions must be satisfied must also be stated. If the conditions are not satisfied by that date, the offer lapses (*see Question 12*). When all conditions have been satisfied, notice must be given to the Panel, the target and the NZX.

No condition can have a date by which it is to be satisfied in excess of 14 days (or 30 days for statutory consents) after the end of the offer period, excluding any part of the offer period that is extended. (*See also, Key dates in the timetable, above.*)

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**14. What documents do the target's shareholders receive on a recommended and hostile bid? (Please briefly describe their purpose and main terms, and which party has responsibility for each document.)**

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The same documents (set out below) are sent to the target's shareholders, regardless of whether the bid is hostile or recommended.

**From the bidder**

The target's shareholders receive the offer document. The CEO, the CFO and two directors on behalf of the bidder's board of directors must certify the accuracy of the information contained in the offer document (*see Question 12*).

If shares are offered as consideration, the offer must also contain, or be accompanied by, a registered prospectus and an Investment Statement. The bidder's directors have civil and criminal liability for inaccurate, fraudulent or misleading statements made in the registered prospectus and the investment statement.

**From the target**

The target's shareholders receive the target's statement (*see Question 12*). Certifications are again required (by the CEO, the CFO and two directors on behalf of the target's board) on the accuracy of the information.

In a recent takeover, a successful takeover offer was declared void on the basis of serious omissions from the target's statement. The omissions related to the value of the target's assets where more up-to-date valuations revealed a higher value which would have resulted in a substantially higher price per share valuation. The case serves as a reminder that the information requirements and the certifications play a vital part in ensuring shareholders are appropriately informed and that the company personnel who are required to give the certificates are subject to a high standard of care in doing so.

The target's directors must obtain an appraisal report on the "merits of the offer" from an independent adviser (*Code*), which must also be sent to the target's shareholders (*see Question 12*).

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**15. Are there any requirements for a target's board to inform or consult its employees about the offer?**

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There are no requirements for a target's board to inform or consult its employees about the offer.

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**16. Is there a requirement to make a mandatory offer? If so, when does it arise?**


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The mandatory offer requirement arises when a bidder, together with its associates, holds or controls more than 20% of the voting rights in a Code company (see *Question 4*).

It is possible to “lock-up” holdings by contracting to acquire significant stakes in excess of the Code’s 20% threshold. In doing so, the bidder must complete the acquisition through an offer that complies with the Code and must not acquire voting control until after the takeover offer (see *Question 7*).

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**CONSIDERATION**


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**17. What form of consideration is commonly offered on a public takeover?**


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Cash or a combination of cash and shares are the most common forms of consideration offered under public takeovers. Shareholders can be given a choice.

Where shares are offered as consideration, there are requirements under the Securities Act 1978 to register a prospectus and provide an investment statement with the offer (see *Question 14*). As a result of an exemption granted under the Securities Act, the prospectus requirements have been significantly reduced, but the prospectus must still be registered before giving the takeover notice.

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**18. Are there any regulations that provide for a minimum level of consideration? If so, please give details.**


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There are no regulations which require a minimum level of consideration. Unlike other jurisdictions, the consideration paid by a bidder when building a pre-bid stake does not have to be matched in the offer.

However, it is a fundamental principle under the Code that an offer must be made on the same terms and provide the same consideration for all shares belonging to the same class of equity securities under offer. In addition, the Panel has indicated that an offer can provide for variable pricing provided that all shareholders receive the same consideration. For example, an offer can provide for a price of, say, US\$1.50 (about EUR1.1) per share if a 5% acceptance is received and US\$1.20 (about EUR0.9) per share if a 90% acceptance is received.

A bidder can only vary its offer to do one of the following (*Code*):

- Increase an existing component or components of the consideration.
- Add a cash component.
- Include a cash alternative (if the target’s directors have given their prior written approval).

- Extend the offer period, but not beyond the maximum permitted period.

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**19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders? If so, please give details.**


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There are no restrictions on the form of consideration that a foreign bidder can offer to shareholders, except that the registered prospectus and the Investment Statement requirements under the Securities Act must be complied with if shares in the bidder are offered (see *Question 14*).

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**POST-BID**


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**20. Can a bidder compulsorily purchase the shares of remaining minority shareholders? If so, please give details.**


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Once a bidder becomes the holder or controller of 90% or more of the voting rights in a Code company (the dominant owner), the compulsory acquisition provisions under Part 7 of the Code can be used to compulsorily purchase the outstanding minority shares (whether voting or non-voting).

**Compulsory acquisition procedure**

On becoming the dominant owner, the owner has 30 days to give notice to the remaining shareholders. The notice must be accompanied by a share transfer form and must state all of the following:

- That the dominant owner controls 90% of the voting rights in the Code company.
- That the remaining shareholders either:
  - must sell their shares to the dominant owner; or
  - have the right to sell their shares to the dominant owner.
- The consideration to be provided.
- The outstanding shareholders’ rights under Part 7 of the Code.
- The date on which the notice is sent.
- The return address for the signed transfer.

The Code specifies the consideration to be paid (which must, under certain circumstances, be certified by an independent adviser). Where shareholders owning 2% or more of a class of equity securities, or 10% or more of the outstanding shares of a class, object to that certified amount, the consideration must be determined by another independent expert appointed by the Panel.

### 21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

There are no provisions preventing a further bid by the same bidder if the initial bid fails. If the bidder holds between 50% and 90% of the target, the bidder is able to acquire up to an additional 5% in a 12-month period under "creeping-acquisition" provisions of the Code.

### 22. What action is required to de-list a company?

A listed issuer can apply by giving at least one month's prior written notice to the NZX to be de-listed (*Listing Rules*).

In the case of compulsory acquisition following a takeover offer, the NZX generally suspends quotation of the shares five business days after it receives a copy of the acquisition notice given under Rule 54 of the Code.

## TARGET'S RESPONSE

### 23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

In general, the ability of directors to take measures to defend a bid is subject to:

- Their directors' duties (*sections 131 to 138, Companies Act*) and, in particular, their duty to act in the best interests of the company.
- The prohibitions in Rule 38 of the Code (*see below, Post-bid*).
- The Listing Rules.

#### Pre-bid

The Code has no application to pre-bid circumstances unless a Code company has reason to believe that a bona fide offer is imminent (*see below, Post-bid*).

#### Post-bid

Rule 38 of the Code prohibits the target's directors from taking or permitting any defensive action after a takeover notice is received, or the target believes that a bona fide offer is imminent, if either the:

- Action could effectively result in an offer being frustrated.
- Shareholders would be denied an opportunity to decide on the merits of the offer.

However, defensive action is allowed where any of the following apply:

- The action is approved by an ordinary resolution of the

target's shareholders (shareholder approval cannot be given retrospectively).

- Existing contractual obligations require or permit the action.
- The action is taken for reasons unrelated to the offer with the prior approval of the Panel.

In addition, the rule does not prevent directors from encouraging bona fide competing offers from other persons.

New provisions have been introduced into the Code which prohibit misleading or deceptive conduct in a broad range of circumstances. The previous provisions of the Code did not permit the Panel to deal with such conduct which occurs outside the actual takeover offer documents. These new provisions deal with that and permit the Panel to exercise its enforcement powers in relation to such conduct.

While these provisions have been enacted, they are yet not operative, but are anticipated to become operative in mid 2007.

Failing to comply with conditions imposed by a bidder in the offer has been held by the Panel not to breach Rule 38 of the Code.

## TAX

### 24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in your jurisdiction? Can payment of transfer duties be avoided?

No stamp or other transfer duties are payable on the sale of shares in a company that is incorporated in New Zealand.

## OTHER REGULATORY RESTRICTIONS

### 25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable (for example, do the approvals delay the bid process, at what point in the timetable are they sought and so on)?

#### Merger control

The acquisition of assets of a business or shares is prohibited if the acquisition would have, or would be likely to have, the effect of substantially reducing competition in a market (*section 47, Commerce Act*). The Commerce Act also applies to an acquisition outside New Zealand, which affects a New Zealand market.

The Commerce Commission (Commission) (*see box, The regulatory authorities*), the statutory body responsible for enforcing the Commerce Act, can give an acquisition:

- Clearance, if it is satisfied that a substantial lessening of competition will not occur.
- Authorisation, if (despite a substantial lessening of competition) the acquisition will or is likely to result in such a benefit to the public that it should be permitted.

The Commission has issued guidelines explaining the approach it takes for clearance applications.

First, the Commission defines relevant markets in terms of five dimensions:

- The goods or services supplied and purchased.
- The geographic area from which goods or services are obtained.
- The level of the parties in the production or distribution chain.
- The time frame or timing within which the market operates.
- The different customer types within a market.

Having defined the relevant market affected by the acquisition guidelines set out certain “safe harbours”. If the acquisition falls within these safe harbours, the Commission is unlikely to find that there is a substantial lessening of competition. These safe harbours apply in either of the following situations:

- The three largest entities in the market will have less than a 70% share of a market between them and the merged entity will have less than about a 40% share of that market.
- The three largest entities in the market will have more than a 70% share of a market (a “concentrated market”) and the merged entity will have less than about a 20% share of that market.

Market shares for this purpose are aggregated between interconnected or associated persons.

The Commission investigates three possible outcomes from an acquisition:

- Unilateral market power: where the merged entity has the ability to raise prices or reduce outputs profitably, regardless of competitors.
- Non-co-ordinated market power: where the merged entity and its competitors can, independently, raise prices or reduce output profitably.
- Co-ordinated market power: where the merged entity and its competitor can tacitly or explicitly collude to raise prices or restrict outputs.

The indicative level of price rises or output restriction for these purposes is 5% to 10%.

In considering whether the acquisition will result in any of these outcomes and, therefore, in a substantial lessening of competition, the Commission has regard to various aspects of existing and potential competition in the market concerned, including:

- Market concentration.
- Market entry and barriers to entry.
- Competition from imports.

- The elimination of a vigorous and effective competitor.
- The countervailing power of buyers and suppliers.
- The scope for efficiencies within the market from existing or potential participants.

Where a transaction may breach section 47 or for any other reason the parties want certainty of outcome a clearance can be sought from the Commission under section 66 of the Commerce Act. A clearance can be given on condition that certain assets are divested.

The Commission has said that applications for clearance will generally be determined within 30 to 40 working days of receipt of the application, but this will depend on the complexity of the clearance being considered. (Authorisations will take much longer, and may take many months.)

It is not mandatory to notify the Commission of an acquisition. However, parties to a merger, who consider that the transaction does not breach section 47 of the Commerce Act may notify the Commission of the transaction informally.

If parties choose to proceed with an acquisition without seeking clearance and the Commission considers that the transaction will contravene section 47, it (or a third party) can seek an injunction to prevent the acquisition proceeding. If the transaction has been completed, the Commission can seek injunctions, penalties and divestment orders. Additional remedies of cease and desist orders are available.

There is no obligation to suspend the offer pending clearance. However, because clearance cannot be sought for a completed acquisition, where clearance is applied for, the offer is usually conditional on clearance being obtained.

Approval for a change of significant influence of a registered bank is also required from the Reserve Bank of New Zealand under the Reserve Bank of New Zealand Act 1989.

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**26. Are there restrictions on foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?**

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Where a foreign person proposes to establish a business, acquire or take control of 25% or more of the shareholding of a New Zealand company, or business or non-land assets which in any case involves assets worth more than NZ\$100 million (about US\$70 million), or if they propose to expand on an existing interest of over 25%, the transaction requires the prior consent of the Overseas Investment Office (acting under the authority of the Minister of Finance and the Overseas Investment Act 2005) (*see box, The regulatory authorities*). In addition, purchases by foreign persons of non-urban land over five hectares or land greater than 0.2 hectares which is or adjoins foreshore or 0.4 hectares which is or adjoins, seabed or lakeshore, or where the land is being purchased is over 0.4 hectares and adjoins land also over 0.4 hectares which is subject to a heritage order, also requires consent.

## THE REGULATORY AUTHORITIES

## Takeovers Panel (Panel)

**Head.** John King (Chairperson) until March 2007 and from March 2007 to March 2011 David Jones

**Address.** Level 8, Unisys House  
56 The Terrace  
PO Box 1171  
Wellington  
New Zealand  
**T** +64 4 471 4618  
**F** +64 4 471 4619  
**E** [takeovers.panel@takeovers.govt.nz](mailto:takeovers.panel@takeovers.govt.nz)  
**W** [www.takeovers.govt.nz](http://www.takeovers.govt.nz)

**Main area of responsibility.** The Panel's main role is to enforce the Code and grant exemptions from it. In addition, the Panel has a policy role, reviewing legislation relating to takeovers, and makes recommendations to the Minister. Finally, it is responsible for promoting public understanding of the law and practice relating to takeovers.

**Contact for queries.** Kerry Morrell (Senior Executive Officer) on +64 4 471 7654.

**Obtaining information.** See e-mail and website above.

## New Zealand Exchange Limited (NZX)

**Head.** Simon Allen (Chairman)

**Address.** 9th Floor, ASB Tower  
2 Hunter Street  
PO Box 2959  
Wellington  
New Zealand  
**T** +64 4 472 7599  
**F** +64 4 496 2893  
**E** [data@nzx.cominfo@nzx.com](mailto:data@nzx.cominfo@nzx.com)  
**W** [www.nzx.com](http://www.nzx.com)

**Main area of responsibility.** The NZX operates New Zealand's only registered national stock exchange.

**Contact for queries.** See e-mail and website above.

**Obtaining information.** See e-mail and website above.

Under the Overseas Investment Act there is also a right of first refusal in favour of the Crown over foreshore, seabed, lakebed and riverbed. The offer and any subsequent purchase follow a set procedure under the Act.

At present, decisions relating to land assets (including under the Crown's right of first refusal) are made by the Minister of Finance and also the Minister of Land Information.

**27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies? If so, please give details.**

## Commerce Commission (Commission)

**Head.** Paula Rebstock

**Address.** 44-52 The Terrace  
PO Box 2351  
Wellington  
New Zealand  
**T** +64 4 924 3600  
**F** +64 4 924 3700  
**W** [www.comcom.govt.nz](http://www.comcom.govt.nz)

**Main area of responsibility.** The Commission enforces legislation that promotes competition in New Zealand markets and prohibits misleading and deceptive conduct by traders.

**Contact for queries.** See website above.

**Obtaining information.** See website above at [www.comcom.govt.nz/Inquiries/contactus.aspx](http://www.comcom.govt.nz/Inquiries/contactus.aspx).

## Land Information New Zealand Overseas Investment Office (OIO)

**Head.** Minister of Finance

**Address.** 160 Lambton Quay  
PO Box 5501  
Wellington  
New Zealand  
**T** +64 4 462 4490  
**F** +64 4 460 0111  
**E** [oio@linz.govt.nz](mailto:oio@linz.govt.nz)  
**W** [www.oio.linz.govt.nz/index.htm](http://www.oio.linz.govt.nz/index.htm)

**Main area of responsibility.** The OIO administers the New Zealand government's foreign investment policies. The core work of the OIO is to assess applications for consent from foreign investors who intend to make substantial investments in New Zealand under delegated authority from the Minister of Finance.

**Obtaining information.** See e-mail and website above.

There are no restrictions on the movement of funds in or out of New Zealand, or the repatriation of profits.

**28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?**

There are no restrictions or disclosure requirements imposed on persons, such as brokers, who deal in securities of the parties to the bid. However, as noted at *Question 4*, any person who is a substantial security holder must disclose a change in their

relevant interest in the voting securities of a listed company under the Security Markets Act. In addition, a target company is required to disclose in its target company statement specified information regarding trading in its equity securities by:

- Each director or senior officer of the target and their associates.
- Any other person holding or controlling more than 5% of the class to the knowledge of the target.

## REFORM

### 29. Please summarise any proposals for the reform of takeover regulation in your jurisdiction.

A number of technical amendments to the Code have been proposed by the Panel. The Minister of Commerce, has considered the proposed changes and made recommendations to the Cabinet Economic Development Committee.

The main changes that have been recommended are as follows:


- The offer period for an offer that is unconditional from the outset will be changed to a maximum of 90 days rather
  - there has been no takeover offer; or
  - an offer was made and it was not for cash or had no cash alternative and acceptances were below 50%.

than the 150 days currently possible.

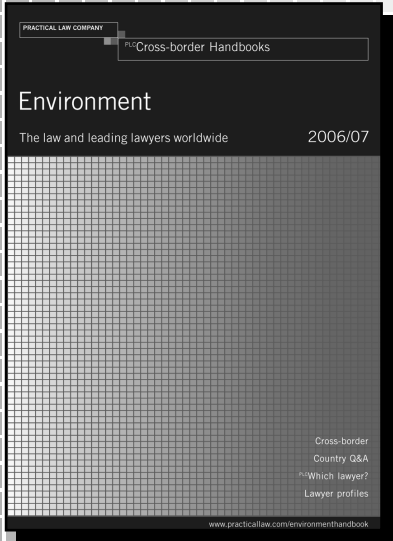
- In the case of a scrip offer, the offeror will be required to send with the takeover notice a registered prospectus and/or investment statement, and any other documents normally required to accompany the prospectus when it is provided to the relevant regulatory body, as required under the securities laws of New Zealand or any other jurisdiction in which the scrip offer is to be made.
- The regime for disclosing ownership of, or trading in, the securities of the target will be much more extensive under the proposed changes.
- Under the current provisions relating to compulsory acquisition, outstanding shareholders have no choice as to the consideration provided. The Minister has recommended that they be given the choice where the takeover offer contained a choice of consideration.
- The Minister has also recommended that a independent adviser's report under Rule 57(1) of the Code is only required where:

- there has been no takeover offer; or
- an offer was made and it was not for cash or had no cash alternative and acceptances were below 50%.

Country Q&A



# Environment



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