Regulatory Impact Statement

Technical amendments to the Takeovers regime to reduce compliance costs on industry, and improve the operational efficiency of the Takeovers Panel.

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Economic Development.

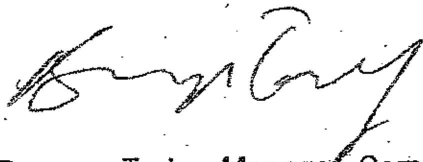
This RIS provides an analysis of options to fix inefficiencies with the scope and operation of the takeovers regime. The regime is currently broader in scope than it needs to be to give effect to policy. Because of this unnecessarily broad scope some companies are required to meet the cost of complying with the takeovers regime when the number of voting shareholders in the company (who the takeovers regime is designed to protect) is very small.

These costs are incurred on a transaction by transaction basis and do not occur frequently. These costs are not significant to the economy as a whole but are to the parties involved in the relevant transaction.

Because of a lack of mechanism to collect data it is unknown how many companies are affected by this problem.

The proposals do not impose any additional costs on government, business or impair or override property rights and common law principles. The proposals do reduce costs to business and clarify regulation.

The Ministry of Economic Development confirms that the proposal will have the effect of reducing the compliance burden upon business and certifies that the proposal is consistent with the Government Statement on Regulation.



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Status quo and Problem Definition
There are a range of discrete problems with the Takeovers regime; each problem is set out below.

The policy intent of the Takeovers Code is to provide a clear process for acquisitions of Code companies, protect the rights of minority shareholders and promote market confidence. The Takeovers Code applies only to companies listed on a registered exchange or those with 50 or more shareholders (Code companies), and is primarily concerned with fair procedures that protect the rights of the shareholders of the Code company. The Code allows shareholders to judge for themselves the merits of a change of control of the company they own shares in.

However, the scope of the Code extends to even relatively small companies with relatively few shareholders, and shareholders who do not hold voting rights. The number of such companies is unknown. Takeovers transactions involving such companies represent a very minor risk to vote-holding shareholders who, in such closely held companies, are in a position to already understand the merits of a transaction. The cost of compliance with the Code for these companies is relatively substantial while the benefit to shareholders is nominal. Currently, to comply with the Code, companies have to call a meeting of the voting shareholders and provide them with a report prepared by an independent adviser, on the merits of the proposed transaction, even if the proposed transaction is to trade their voting shares between themselves.

There are also instances during transactions when it is uncertain if the Code applies or not. Currently, the drafting of the definition of 'Code company' creates some doubt because it is silent on the issue of whether a company still meets the definition of Code company if it ceases to have 50 or more shareholders midway through a Code regulated transaction or event. As a consequence a problem arises in that the rights and positions of the buyer of the business, and of the shareholders in the business, become uncertain, as do the Takeovers Panel's powers to intervene in and supervise a takeover or compulsory acquisition.

Furthermore the Takeovers Panel's decision making is unnecessarily hindered causing operational inefficiency. Currently, decisions by divisions of the Panel cannot be made by written resolution. This limitation is inconsistent with like bodies and results in logistical problems causing unnecessary procedural costs and delays.

An additional decision making problem is that the Panel has no power to take into consideration aspects of international comity, such as decisions by overseas regulators (a consideration that is desirable during upstream acquisitions[19]). This results in a procedural impediment as the Panel may have to consider issues such as whether the upstream acquisition is a bona fide and otherwise lawful and appropriately regulated takeover.

Objectives

The list below outlines the objectives which were used to make an assessment of regulatory options. They reflect the objectives in the Takeovers Act 1993.

[19] An upstream acquisition is, where a takeover, in New Zealand or overseas, results in an upstream acquirer controlling voting rights in a New Zealand Code company because the upstream target holds or controls voting rights in that Code company.

- Encouraging the efficient allocation of resources.
- Encouraging competition for the control of specified companies (i.e., Code companies).
- Assisting in ensuring that the holders of securities are treated fairly.
- Promoting the international competitiveness of New Zealand's capital markets.
- Recognising that the holders of securities must ultimately decide for themselves the merits of an offer.
- Maintaining a proper relation between the compliance costs and the benefits resulting from the existence of a Takeovers Code.

Regulatory Impact Analysis

The preferred option is to make amendments to the Takeovers Act 1993, and the Takeovers Code. No other options were considered because business, the Panel and officials believe these proposals are necessary to reduce compliance costs and improve the Panel's processes. The amendments are:

> To clarify that transactions or events that start out under the Code must be completed under the Code. The drafting of the definition of 'Code company' currently creates some doubt about this as it is silent on the issue of whether a company still meets the definition of Code company if it ceases to have 50 or more shareholders midway through a Code regulated transaction or event.[20] Certainty is needed so that dominant owners (i.e., companies which acquired 90% of the shares of a Code company business) do not lose their rights under the Code such as being able to compulsorily acquire the last few share parcels of the business. Companies incur significant costs to reach the 90% threshold to compulsorily acquire a company. If their position was not recognised these dominant owners would have to incur additional costs dealing with individual minority shareholders and may not be able to acquire 100% of the business. Other benefits are that minority shareholders do not lose their Code protections, and the Panel does not lose its powers to intervene in and supervise a takeover or compulsory acquisition;
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> That the '50 or more shareholders' definition of 'specified company' and 'Code company' be amended to clarify that this does not include shareholders holding securities that do not confer voting rights. The Code is concerned only with changes of control of voting rights, and including non-voting shareholders has the effect of including companies in the definition of Code company that were not intended to be included. These companies tend to be closely held by the owning shareholders (i.e., by the voting shareholders) but have more than 50 investors holding non-voting shares. The compliance obligations these companies currently have to meet under the Code include having to call a

[20] This issue may arise in relation to any kind of transaction or event that can occur under the Code, where the number of shareholders in the company is close to the 50 threshold. The most obvious situation is where a takeover bidder is approaching, or has already achieved, the 90% threshold necessary for compulsorily acquiring the remaining 10% of shares in the target company, and the takeover has resulted in there being fewer than 50 shareholders left in the company.

meeting of the voting shareholders and provide them with a report prepared by an independent adviser, on the merits of the proposed transaction, even if the proposed transaction is to trade their voting shares between themselves. The costs of these obligations are significant to the smaller companies which this proposal will exclude from the takeovers regime, and the benefits to the voting shareholders minimal. The number of these kinds of companies is unknown;

That the '50 or more shareholders' definition of 'Code company' be amended so that the threshold at which a company becomes a Code company is increased to '50 or more shareholders and 50 or more share parcels'. A quite small company might have a number of joint shareholders (e.g. holding as trustees of a family trust) and these are all currently counted in the '50 or more shareholders' definition. The proposal would result in the compliance burdens (but also the shareholder protections) associated with the Code, residing with only larger companies. The Capital Market Development Taskforce endorsed this proposal in its final report. As with the above proposal this proposal will result in costs savings to businesses which will no longer come within the scope of the Code and have to meet obligations such as providing an independent report to shareholders;

That the schedule to the Takeovers Act be amended to enable divisions of the Panel to make decisions by way of written resolution. Such a written resolution would have to be agreed by all of the Panel members who are members of the division. The amendment allows for more efficient and quicker decision making and would be broadly consistent with the decision making powers of the Securities Commission. This proposal will benefit companies as they will spend less time waiting for decisions to be made by the Panel. Such decisions may relate to individual exemptions or enforcement decisions; and

That the objectives of the Takeovers Code set out in section 20 of the Takeovers Act be amended to enable the Panel to take into consideration 'international comity' (i.e. recognise the validity and effect of the takeovers laws of other jurisdictions). At present there is nothing in the Takeovers Act that addresses or facilitates foreign upstream acquisitions[21]. The amendment would ensure that where the upstream acquisition is a bona fide and otherwise lawful and appropriately regulated takeover offer for an upstream foreign body corporate it is not impeded. This proposal will benefit foreign and domestic companies as the Panel will be able to more easily accommodate proposed international transactions, when considering exemptions. This should reduce the complexity and costs of such exemption applications made to the Panel by acquirers.

Conclusions and Recommendations

Officials recommend making amendments to the Takeovers Act and Takeovers Code. This option will reduce costs on businesses involved in takeovers transactions, clarify the takeovers regime, improve the operational efficiency of the Takeovers Panel and meet the policy objectives of the Takeovers regime.

[21] An upstream acquisition is, where a takeover, in New Zealand or overseas, results in an upstream acquirer controlling voting rights in a New Zealand Code company because the upstream target holds or controls voting rights in that Code company.

More specifically, this approach will:

- provide greater certainty so that shareholders do not lose their Code protections, dominant owners (i.e., who already have 90% of the shares) do not lose the ability to compulsorily acquire the last few share parcels, and the Panel does not lose its powers to intervene in and supervise a takeover or compulsory acquisition;
- result in the compliance burdens (but also the shareholder protections) associated with the Code, residing with only larger companies;
- allow for more efficient decision making by the Takeovers Panel in a way that is broadly consistent with the decision making powers of the Securities Commission; and
- ensure that New Zealand's regulatory requirements do not impose excessive uncertainty, costs, and obstacles on transactions involving foreign and domestic businesses, unless there is a clear need for New Zealand investor protection

Implementation

These amendments are proposed to be included in the Regulatory Reform Bill.. The amendments do not require any form of substantial transitional arrangements. The amendments will be brought into force once the Bill is enacted. The Bill is proposed to be passed by December 2010.

To aid effective implementation the Panel will inform the market of the amendments though various means of publication including its website and newsletter.

Monitoring, Evaluation and Review

Section 8 (1) (a) of the Takeovers Act 1993 sets out the functions of the Takeovers Panel. One of the Panel's functions is to keep under review the law relating to takeovers of specified companies and to recommend to the Minister any changes to that law that it considers necessary. Accordingly the Panel will monitor the effect of the changes along with the Act as a whole.

Consultation

Note that these recommendations were the result of policy proposals recommended by the Panel. The Panel consults industry through open and regular dialogue which includes regular discussion sessions. The Panel confirms that through this consultation the Panel has received general support from industry for the proposals.

In October 2009 the Capital Market Development Taskforce met with the Takeovers Panel to discuss proposals to improve the Takeovers regime. The Taskforce and the Panel have a consensus to improve the takeovers regime in particular the narrowing of the scope of the regime so as to reduce unnecessary costs on business.

The following agencies have been consulted on the RIS: the Treasury, the Ministry of Justice, the Securities Commission and the Takeovers Panel. These agencies supported the proposals.