New Zealand Shareholders Association Inc.

NZSA®

Many Investors, One Voice

August 12th 2021

Submission to Take Overs Panel - Proposed amendments to the Takeovers Act, Takeovers Code, and related legislation

NZSA is the only body that represents retail shareholders in New Zealand. We make this submission on behalf of our members.

Please contact ceo@nzshareholders.co.nz for further clarification or questions.

Section One: Substantive Amendments

Definition of Code company: 12-month 'look-back' period

1.1 Is Option 1, Option 2, or Option 3 your preferred option? Please give reasons.

We agree with the Panel that Option 3 is the best options for the reasons set out in the consultation paper.

1.2 What problems or benefits are there with either Option 1, Option 2 or Option 3 that are not identified in this paper or in your other responses?

We believe the Panel has identified the benefits and problems adequately.

1.3 What voting threshold (if any) do you consider to be appropriate for opting out of the 12-month look-back period?

We agree the voting threshold should be (a) 75% of the votes of the shareholders entitled to vote on the resolution; and (b) would support 75% of the shareholders entitled to vote on the resolution.

This is in line with the NZSA's recently developed Takeover Policy, available on our website.

The higher suggested thresholds reflects concern for situations where holders with a large percentage of shares may wish to elect out for their own purposes and then have a greater chance of imposing this wish on other minority holders in the absence of a higher threshold.

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Update to rule 64 to reflect the FMCA

2.1 Do you consider that there is a sound basis for not having a restriction on unsubstantiated statements in the Code? If so, please explain your reasons.

We do not consider there is a sound basis for not having a restriction on unsubstantiated statements in the Code. There is clearly a misalignment between the FMCA and the Code.

2.2 Is Option 1 or Option 2 your preferred option? Please give reasons.

We believe Option 2 is the best option for the reasons set out at para 50.

2.3 What problems or benefits are there with either Option 1 or Option 2 that are not identified in this paper or in your other responses.

We believe the Panel has adequately identified the problems and benefits in both Options.

Court's power to grant mandatory injunctions

3.1 Is Option 1 or Option 2 your preferred option? Please give reasons.

We believe Option 2 is the appropriate option. It appears that at present there could be a lack of jurisdiction for a Court to make orders that could well be appropriate. Option 2 gives the court wider discretion to ensure that actions and commitments are followed up and met.

3.2 What problems or benefits are there with either Option 1 or Option 2 that are not identified in this paper or in your other responses?

We believe the Panel has identified the problems and benefits in both Options.

Making non-payment of consideration a breach of the Code

4.1 What other problems and/or benefits are there with either Option 1 or Option 2 that are not identified in this paper or in your other responses?

While not currently aware of a situation where this has occurred, the potential for this problem arising is clear.

4.3 Is Option 1 or Option 2 your preferred option? Please give reasons.

We believe Option 2 is the best option as it improves investor protection. Our members would mostly fall into the category of shareholders for whom the cost of litigation would be a problem.

Financing of offers

5.1 Is Option 1 or Option 2 your preferred option? Please give reasons. In particular, please state your preference for Option 1 or Option 2 and explain why.

We believe Option 2 is the best Option as it increases investor protections. While it may modestly change the required timing of financing arrangements being confirmed, it should not prove onerous to those offerors who are genuinely in a position to proceed with the offer.

5.2 What problems or benefits are there with either Option 1 or Option 2 that are not identified in this paper or in your other responses?

We believe the Panel has identified all the problems and benefits in both Options.

5.3 What disclosure requirements do you consider would be appropriate in a New Zealand context?

The disclosures outlined in the example of the Australian regime appear appropriate for New Zealand.

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Section Two: Lower Policy Content Amendments

Part 7 of the Code – Unclaimed monies

6.1 What other problems and/or benefits are there with either Option 1 or Option 2 that are not identified in this paper or in your other responses?

The issue presumably comes about almost entirely due to long standing holdings. Generally, most holders will have lodged bank account details and in these circumstances there shouldn't be a problem. Since cheques have almost been phased out, it will only be a few long-standing unmanaged holdings where payment is difficult to arrange.

Where dividends are paid, the same holders who have dividends held in trust (due to cheques not being cashed or closed bank accounts) will presumably be the ones affected by an acquiror being unable to complete a payment for shares. While the number affected should continue to reduce over time, the problem with having to run a trust account continues when there are any who are affected.

For Code companies, alignment with the approach taken for companies acquired under an SOA seems reasonable.

6.2 Do you agree with the 12-month period in Option 2? If not, what period do you consider appropriate?

We believe that a 24 month period would be more appropriate than 12 months for funds to be held in trust. Some of the issues may for example arise for the estates of recently deceased persons – and estate issues can take some time to be concluded

6.3 Should shareholders have any preference over unsecured creditors in respect of unclaimed compulsory acquisition consideration after expiry of the 12-month period?

If 24 months was used as the period in trust, it would seem reasonable for shareholders after this period to be treated on equal terms with other unsecured creditors.

6.4 To your knowledge, how many claims are made on unclaimed compulsory acquisition consideration once it has been transferred to the Code company? In what period are such claims normally made?

NZSA has no comment on this matter.

6.5 Is Option 1 or Option 2 your preferred option? Please give reasons

We believe Option 2 is the best option. It is aligned with the schemes process as well as with the way listed companies deal with unclaimed dividends.

Derivative disclosures

7.1 Is Option 1 or Option 2 your preferred option? Please give reasons.

We believe Option 2 is the best option. It balances the cost of compliance whilst still requiring meaningful disclosures.

7.2 What other problems and/or benefits are there with Option 1 and Option 2 that are not identified in this paper

NZSA would prefer to include "associates" in Option 2, alongside both the offeror and the directors and senior managers.

Amendments to the Personal Property Securities Act 1999 (PPSA)

8.1 Do you agree with the suggested solution?

We agree with the suggested solution.

8.2 What other problems and/or benefits are there with the suggested solution that are not identified in this paper?

We do not believe there are any other problems/and or benefits that are not identified in the paper.

Rule 47(4) of the Code

10.1 Is Option 1 or 2 your preferred option? Please give reasons.

We believe Option 2 is the best option, although would prefer to see more stringent requirements.

NZSA has had examples of its members being targeted by offerors in cold calling campaigns where the cold call has contained incorrect or misleading information. We would recommend that the Panel consider accessing the scripts of cold calls particularly in hostile takeovers to ensure targeted shareholders are not being misled or worse.

10.2 What problems or benefits are there with Option 1 and Option 2 that are not identified in this paper

We believe the Panel has identified all the problems or benefits in both Options.

NZSA recognises that the Panel does not wish copies of all communications. However, the implication of this is that in the absence of a complaint, the Panel will not be aware of any inappropriate communications that are occurring.

Smaller and less sophisticated shareholders may be subjected to "push calling" without realising that the call has crossed a boundary.

Requiring all communications or records of communications to be lodged with the Panel will provide an audit trail for communications, including any deviations from the 'call script' that may occur to advance an outcome or to counter concerns of call recipients.