December 1st 2023

NZSA and NZX response to Takeovers Panel Consultation
Regulatory Alignment of Schemes and Code Offers

The NZ Shareholders' Association ("NZSA") and NZX Limited ("NZX") appreciate the opportunity to present this submission on the proposals contained within the Consultation Paper prepared by the Takeovers Panel on the *Regulatory Alignment of Schemes and Code Offers* on September 18th 2023 ("Consultation Paper").

Specifically, the contents of this submission relate to the Takeovers Panel ("Panel") proposals to be made to the Minister relating to further regulatory alignment between takeovers implemented via a Scheme of Arrangement ("Scheme") and those made under the Takeovers Code ("Code"). We note that this topic does not form part of current regulatory reform plans for the Minister.

NZSA and NZX representatives would welcome the opportunity to speak to our submission with the Panel or other stakeholders as required.

Context

The purpose of this section is to provide external readers of this document with context to support understanding of the positions discussed within this submission response.

1. The Panel's consultation document is available at this link.
2. This follows recommendations for technical amendments to the Takeovers Act made by the Panel to the Minister in April 2022, following a consultation paper in June 2021. NZSA had made a submission on that paper in August 2021 (NZSA Submission).
3. Those recommendations included amendments to the definition of a Code company, inclusion of payments and funding commitments for Code offers and a clarification of the documents required to be shared with the Panel.
4. The Panel recognises the fundamentally different structures of takeovers implemented via Schemes and Code offers. The current review (to which this submission relates) is focused on improving alignment between the two methods while for each mechanism preserving the beneficial aspects, maintaining protections for shareholders, and avoiding 'over-regulation'.

5. The Panel notes in the Consultation Paper that Schemes offer inherently more flexibility than offers under the Code, which "*should not be unnecessarily limited.*" However, a Scheme requires the agreement of the Target's Board, which is not required under Code offers.

6. The Panel notes that the objectives for the review mirror the statutory objectives for the Code, namely:

    a. encouraging the efficient allocation of resources;
    b. encouraging competition for the control of Code companies;
    c. assisting in ensuring that the holders of financial products in a takeover are treated fairly;
    d. promoting the international competitiveness of New Zealand's capital markets;
    e. recognising that the holders of financial products must ultimately decide for themselves the merits of a takeover offer; and
    f. maintaining a proper relation between the costs of compliance with the Code and the benefits resulting from it.

7. The Panel notes that in recent years, Offerors have more frequently utilised Schemes as a way of implementing a change in control, as compared with a Code offer.

    NZSA and NZX note that the last use of the Code for an unlisted company was that of Blue Sky Meats by Southern Lamb Investments in March 2022, while the last use of a Code offer for a listed issuer was in June 2020 (Augusta Capital by Centuria Holdings).

	Takeover	**Scheme**
2023	-	2
2022	2	1
2021	1	1
2020	2	5
2019	1	4

NZSA and NZX Overall Submission on Consultation Document

1. NZSA and NZX support the general principle and objectives of this review, to seek improved alignment between takeovers implemented through Schemes and via Code offers (as per the submission made by NZSA in August 2021).

2. The NZSA Takeovers Policy notes (section 4.2) that "*In general, NZSA will advocate for solutions that 'level the playing field' between Takeover offers made under the Takeover Code or via a Scheme of Arrangement.*"

3. We also note, however, that there may be some scope for differences in regulation given the structural differences between the two mechanisms.

4. NZSA continues to advocate for the preservation of protections for shareholders, as per our Briefing Papers of October 2022 provided to the then Minister (Rt Hon Duncan Webb) and Opposition spokesperson (Rt Hon Andrew Bayly).

5. NZSA and NZX have no desire to disproportionately reduce shareholder protections in either Code or Scheme-based takeovers. We note and support the Panel's commentary in section 34 of the Consultation Paper: "*The focus of this paper is whether there are any inappropriate*

inconsistencies (or gaps) in how change of control transactions are regulated which mean that schemes do not provide shareholders with equivalent levels of transparency and equity (i.e., fairness towards shareholders, target companies and offerors) as compared to Code offers and, if so, whether regulatory change is appropriate."

6. NZSA and NZX are supportive of appropriate Takeover mechanisms. Takeovers are the ultimate arbiter of company performance and market value.

7. However, we also believe that the required approval thresholds under Code and Scheme are a significant factor in influencing Offeror preferences. NZSA and NZX support a more comprehensive review of thresholds that will create settings leading to improved equalisation in the choice of Takeover mechanisms. This may result in an increase in the acceptance and/or voting threshold compared with the current requirement or a reduction in the level of Code acceptance (or a combination of both).

8. NZSA and NZX believe that the Takeovers Panel has under-estimated the impact of passive funds and their impact on Offeror's preferences when selecting a change of control mechanism. Please see our more detailed commentary on this in our responses to questions 19-21 of this submission.

9. We recognise that Schemes offer more flexibility for Offerors (timelines, payment mechanisms, etc) - and sometimes, this flexibility manifests as a benefit for shareholders (we note the recent Scheme Implementation Agreement for Pushpay Holdings that resulted in higher differential price for retail shareholders).

10. Nonetheless, the combination of Offeror flexibility, the impact of passive funds and a lower threshold requirement (in most cases) is likely to incentivise Offerors to use Schemes as a 'first preference' in most takeover situations.

11. The lower approval threshold at which a Scheme may be undertaken (compared to a Code offer) may also result in the success of a Scheme-based takeover at lower consideration that that which is likely to be attained with a higher threshold requirement.

Rule 64 – Misleading or Deceptive Conduct

The consultation document sets out the nature of Rule 64 in the Code (governing Code offers) and the equivalent legislation governing Schemes, being section 19 of the Financial Markets Conduct Act 2013 ("FMC Act"). A summary of the core provision applying to Code and Scheme offers (as determined by NZSA and NZX) is set out below:

	Schemes	Code Offer
Governing Law	FMC Act s.19, s.262	Code Rule 64
Test	"misleading and deceptive" **OR** "amount to an unsubstantiated representation"	"misleading and deceptive conduct"
Implication	Harder test – all statements (opinions) require evidence	Allows expression of opinion
Scope	Listed issuers (s. 19.2, s.262) Unlisted issuers where commentary is made by someone "in trade" (s. 19.1)	Listed and Unlisted issuers (medium-sized)

The Panel has recommended that Rule 64 of the Code should apply to Schemes.

NZSA and NZX Response to Consultation Questions

1. Do you favour applying rule 64 to schemes? Please give reasons.

Neither NZSA nor NZX favour the application of Rule 64 of the Takeovers Code to Schemes, on the basis that section 19 of the FMC Act is tailored to ensure that the prohibitions under the Code and FMC Act are equivalent.

NZSA and NZX support the removal of the 'in trade' limitation in section 19 of the FMC Act as it applies to Schemes. This is particularly relevant when it comes to Schemes of Arrangement for Unlisted Targets. Under the current legislation, it appears there is no enforcement mechanism available for misleading or deceptive conduct where it is undertaken in a manner that is **not** 'in trade'.

This would have the effect of aligning the scope of the prohibition on misleading and deceptive conduct across both Schemes and Code offers.

Unsubstantiated Representation

Section 23 of the FMC Act prohibits unsubstantiated representations from being made "in trade" in relation to financial products - this prohibition applies whether or not statements are misleading or deceptive.

In paragraph 44(a)(iii) of the Consultation Paper, the Panel has recommended that under the Dual Regulatory Approach the restriction on unsubstantiated representations should be disapplied from Schemes.

We support the prohibition on unsubstantiated representations continuing to be applied to Schemes under the FMC Act.

The Panel has suggested that there is "*a lack of rational basis for differentiation*" between a change of control effected through a Scheme, compared to a change of control effected through a Code offer, recommending that there should be consistency in removing the restriction on "*unsubstantiated representations*" from Schemes.

We consider that there are differences that justify a different regulatory approach.

The key basis for differentiation is the **opportunity for interaction between the Offeror and Target Board in the context of a Scheme**. This allows an Offeror access to more information (through due diligence) than it would achieve under a Code offer, allowing a greater opportunity to substantiate its claims. Similarly, a Scheme offer will allow the opportunity for the Target Board to access more information about the Offeror.

Given the opportunity for engagement, we consider that the retention of the prohibition on unsubstantiated representations strengthens the quality of the information made available to shareholders and investors in relation to the Scheme.

This interaction between the Target and the Offeror does not need to occur under a Code offer – meaning that both parties have less information about each other, with which to make substantiated claims. We accept that in a Code offer there is a greater onus on shareholders to exercise judgement on the validity of claims made, given that the Code does not prohibit unsubstantiated representations. However, the availability of honest expressions of opinion enables shareholders to better assess the merits of the Offer.

We note that the 'harder' test associated with Scheme offers does not appear to have dampened enthusiasm for their use.

Dual Track Offers

We do not believe that "dual track offers", as outlined by the Panel, are disadvantaged through maintaining differential legislation. In this case, both Offeror and Target will be subject to the stricter test associated with a Scheme. However, as a Scheme requires the support of a target Board, each party would have access to information to substantiate any statements or representations made.

Information for shareholders

NZSA and NZX would not desire change that negatively affects the provision of materials relevant for shareholders - including the provision of independent reports to support valuation and other relevant materials.

2. What problems or benefits are there with applying rule 64 to schemes that are not identified in this paper?

As noted above, we support tailoring the FMC Act test to reflect rule 64, rather than the application of rule 64 through the Code to Schemes.

We believe that applying rule 64 in its current form to Schemes (while concurrently removing the requirement of Section 23 of the FMC Act) would result in a reduced standard of information disclosure for shareholders within the context of a Scheme offer.

3. **If rule 64 is applied to schemes, do you prefer the Single Regulatory Approach or the Dual Regulatory Approach? Alternatively, is there a better option? Please give reasons.**

NZSA and NZX favour the dual regulatory approach outlined by the Panel in its Consultation Paper.

As per Question 1, we support the tailoring of the FMC Act prohibition on misleading and deceptive conduct so that it applies to Schemes on the same basis as the rule 64 prohibition applies to Code offers. This approach preserves neutrality between the different offer structures, while enabling better clarity between the role of each regulator.

We also consider that this approach would avoid ambiguity and ensure that change in control transactions for non-code companies are appropriately regulated.

In this context, a dual regulatory approach preserves the existing roles of the Panel and the Financial Markets Authority ("FMA") as front-line regulators. This means the FMA considers and enforces conduct relating to Schemes in the context of section 19 of the FMC Act while the Panel considers and enforces the Code in the context of rule 64 of the Takeovers Code.

We note the comments in the Consultation Paper that the FMA and Panel work collaboratively together under a memorandum of understanding, enabling the Panel to leverage the FMA's prosecutorial expertise and resources, while allowing the FMA to leverage the Panel's expertise in relation to takeover transactions.

This clearly delineates the scope and enforcement responsibility between the Panel and FMA.

We note that if other Code rules are extended to Schemes, such as Rule 25 (as recommended by the Panel later in the consultation document), then we expect that the Panel would consider and enforce Code rules that apply to Schemes. This still offers clarity in terms of regulation.

NZSA and NZX consider it important to **avoid joint regulation** of Code or Scheme-based takeovers. We also note and support the existing role of the Court in regulating Schemes of Arrangement.

We note that there is no obligation for Offerors to engage with the Panel when undertaking a Scheme of Arrangement (although a Code company must notify the Panel when an application to the Court is filed). In practice, however, we consider that the Panel – as the centre of expertise for takeovers in New Zealand - retains significant influence in any Court regulation of a Scheme (through submissions, no-objection statements, etc).

4. **If the Dual Regulatory Approach is adopted, are there any other changes which should be made to avoid the potential for conflict between the two regimes?**

We do not believe further changes are required if the NZSA and NZX position is accepted.

However, there may be a requirement for further review should Rule 64 be applied to Schemes as per the Panel's recommendation.

Disclosure documents to panel

The consultation document sets out the rights of the Panel to require documents under a Code offer and to assist the Court in a takeover via a Scheme of Arrangement.

While a Scheme applicant is required to notify the Panel when an application is filed to the Court (see Question 3), there is no obligation for the Offeror to provide further information.

NZSA and NZX Response to Consultation Questions

5. **Do you agree that there should be an obligation to provide scheme documents and information to the Panel? Please give reasons (if different to those set out above).**

   Yes.

   Such documentation should include substantiated evidence for any claims or statements made (reviews, assessments, independent reports etc).

   We note the Takeover Panel's comments in section 55 (b) of the consultation document that third parties are under no compulsion to supply evidentiary information – NZSA contends this has the potential to result in unsatisfactory outcomes for shareholders.

6. **Do you agree with the proposed documents and information to be provided to the Panel? Are there any other documents or information which should be required to be provided, or are there any which should not be required to be provided?**

   We agree with the proposed documentation as set out in section 58 of the consultation document.

   However, we believe that the Panel should retain the right to request additional relevant documentation that it may require, through a general "call-in" power.

   We believe that this addition would strike an appropriate balance between regulatory certainty and appropriate provision of information. This requirement is also likely to cater for (unknown) future evolution of offer structures, consideration and documentation forms.

Disclosure documents to shareholders

The consultation document sets out the consequence of non-disclosure of information to shareholders. A Scheme offer has no "prescription" in terms of information provided to shareholders. For a Code offer, the Panel receives draft information prior to any release.

NZSA and NZX Response to Consultation Questions

7. Do you favour requiring the Relevant Disclosures in schemes? Please give reasons.

Yes.

NZSA and NZX believe that given the criticality of the decision for shareholders, there should be a high standard associated with the provision of information to shareholders.

We believe that this is particularly important for the shareholders of **unlisted** target companies. We believe that there is a greater likelihood that shareholders in these companies have significantly less information upon which to base their decisions.

We also note that the Panel's comment in the Consultation Paper, that the prescriptive disclosure requirements that apply to Code offers effectively create strict liability for omissions. We consider it appropriate for equivalent protections to apply in a Scheme context where it is equally important that shareholders, investors and other stakeholders have an appropriate level of information by which to assess the merits of the Scheme offer.

8. If Relevant Disclosures were required for schemes, do you think that the Panel should have the ability to waive disclosure requirements by notice rather than by a formal exemption? Would either provide sufficient flexibility?

NZSA and NZX would support the power for the Panel to effect a waiver by notice rather than exemption, as a means of reducing timeframes and costs. However;

a. We believe that any such notice should be subject to public disclosure on the Takeover Panel's website (maintained within the Transactions Register, albeit with a required amendment to show current transactions).

b. We contend that such a regime would benefit by having clearly defined criteria or principles, highlighting to Offerors the standards under which such a notice would be granted.

9. Do you agree with the proposed required disclosures? If not, what should (or should not) be required?

We support the Panel's recommendation to require Code-equivalent disclosures for Schemes.

We note that this would include a requirement to disclose incentives or inducements made to Directors or Executives of the Target company. We consider this a particularly relevant disclosure for a Scheme given the opportunity for interaction between the Offeror and Target Board and the Offeror's need to obtain the Target Board's approval to proceed with the Scheme.

As per our comments in Question 6, we believe that the Panel should retain the right to request additional relevant documentation that it may require, through a general "call-in" power.

We believe that this addition would strike an appropriate balance between regulatory certainty and appropriate provision of information. This requirement is also likely to cater for (unknown) future evolution of offer structures, consideration and documentation forms.

Disposals and Acquisitions in a Code Offer

The Panel notes that the disposal and acquisition of shares is prevented by the Offeror during the period of a Code offer. However, there is no such restriction in the context of a Scheme, with the Panel noting that a Scheme offeror can "*cause mischief*" and advantage to the Offeror by trading shares (sale or purchase) before the shareholder vote.

Currently, the Panel requests a deed poll as part of a no-objection statement to prevent Offerors from selling shares to aligned parties and thereby influencing a vote. However, the Panel does not request this when it comes to acquiring shares.

NZSA and NZX Response to Consultation Questions

10. Do you agree with applying the Code rules on acquisitions and disposals to schemes? Please give reasons.

Yes.

We support the arguments made by the Panel in the consultation document. The current 'deed poll' process applying to Scheme's seems to be an imperfect and incomplete workaround designed to (as much as possible) mimic the Code.

The lack of any restriction on the further acquisition of shares by a Scheme Offeror prior to a shareholder vote could be problematic in some situations, although may also make it harder for a Scheme to succeed (based on the proportion of vote within each shareholder class).Regardless, we support alignment between Code and Scheme offers to prevent 'gaming' behaviour by the Offeror.

An alignment of these requirements, thereby removing the need for a deed poll is likely to result in reduced compliance costs for offerors, general process simplification at the Panel and improved clarity for shareholders.

11. Are there any problems or benefits with either the current approach or the proposed reforms that are not identified in this paper?

We note that the consultation document uses the term "*cause mischief*" when it comes to Offeror conduct that has the potential to influence the success of a proposed Scheme.

We believe that there are additional elements of **conduct** that should be considered for regulation, guidance and/or Panel consideration in the context of a Scheme.

In particular, the opportunity for interaction between the Offeror and Target Board in a Scheme allows potential for undue influence to be exerted by the Offeror on a Target company's Board or to create perception that undue influence has occurred.

This extends beyond the acquisition or disposal of shares to influence a shareholder vote.

NZSA has set out clear expectations of Offeror conduct in its Takeovers Policy as a means of setting expectations that maintain the independent consideration of a Scheme Proposal by the target company's independent directors, for the benefit of shareholders.

We believe that the scope for such conduct is reduced under a Code offer, as an approach can be made without engagement of the Target Company's Board. A Scheme is dependent on such engagement. While (potentially) beneficial, this creates scope for undue influence that requires further consideration by the Panel.

In this regard, we note our support for the inclusion of a requirement for disclosure of inducements paid to the Target Board in Scheme documents).

Conditions

Conditions under a Code offer are governed by Rule 25, which state that offer conditions must be outside the control of the Offeror and that the Offeror cannot restrict the Target's business. For a Scheme, conditions are negotiated with the Target Company's Board and may remain within the control of the Offeror or restrict the target company's business.

The Consultation Paper notes that the Target company may lack leverage in Scheme negotiations. The Panel also specifically notes the impact of 'leaks' as a means of impacting negotiating leverage and the role of independent directors, noting that there may be no independent directors in an unlisted Target company.

The Panel notes that other jurisdictions apply common condition rules to Schemes and Code takeovers.

NZSA and NZX Response to Consultation Questions

12. Do you favour reform in this area? Please give reasons.

Yes.

Similar to our comments in Question 11, we share the concern expressed by the Takeovers Panel as to the potential for 'mischief' caused by the conduct of the Offeror and the associated impact on the Target's Board.

For listed issuers, the consultation paper has expressly highlighted leaks (and resultant market pressure) as a means of exacting undue leverage – NZSA and NZX agree with the Panel that this is a significant issue.

As per NZSA's Takeovers Policy, NZSA also consider approaches by the Offeror to independent third parties who are providing independent analysis of the offer and requests by the Offeror to

receive independent third party information prior to release to shareholders a further concern. NZSA believes that this has occurred in numerous circumstances in recent Schemes. NZSA is also wary of pressure being exerted by Offeror's on banking arrangements associated with Targets.

Ultimately, the Boards of Target companies may be in a position where they have little influence on the conduct of an Offeror.

NZSA would consider the (Covid-impacted) Scheme of Arrangement for Metlifecare to be an example where third parties influenced the conditions negotiated and applied, to the ultimate detriment of shareholders. In this Scheme, the application of a Material Adverse Condition (MAC) was disputed. This halted the Scheme, but did not terminate the agreement. Should this have gone to Court for resolution, NZSA considers that the Target company would have faced an elongated timeline that maintained restrictions on their business.

It is common for negotiated conditions within a Scheme arrangement to included restrictions on capital and operational expenditure.

For a Target's Board, there may an unintended consequence to the conditions they have negotiated – should a Scheme take longer, there is more pressure on the Target to agree to demands to an Offeror.

Ultimately, NZSA and NZX recognise the important role of directors independent form the Offeror in assessing the value of any Code or Scheme offer (on behalf of the target) and negotiating in an appropriate manner.

Last, we note and agree that the negotiation of conditions with a target company Board and their disclosure is likely to be more problematic for unlisted issuers.

13. If there is to be reform, do you agree with the potential approach set out above? Please explain any concerns you have with it which are not set out above.

We are surprised that the Panel has "*not formed a view on whether there ought to be reform in this area*".

Nonetheless, we support the approach of the Panel in applying rule 25 of the Code to Schemes, with the ability for the Panel to effect a waiver by notice. As per Question 8, however, we believe that any such notice should be subject to public disclosure on the Panel's website.

Again, this supports the over-riding principle of alignment between the regulatory settings that apply to a Code offer and a Scheme.

14. Would an ability to waive rules in relation to schemes be sufficient to maintain flexibility in relation to schemes?

Yes – as per Question 13.

15. Are there any issues with the status quo or potential reform which are not identified in this paper or in your other responses?

No

16. Are there any other options that the Panel should consider in relation to scheme conditions? Please explain the rationale for any such option.

On the basis that rule 25 of the Code is extended to apply to Schemes, no.

Committed financing and payment of consideration

In its 2022 recommendations, the Panel recommended changes to the Takeovers Code to include a requirement that an Offeror must have (and disclose) sufficient committed funding in place to complete a takeover transaction.

This is not currently a disclosure requirement in Code or Scheme-based takeovers. The Panel notes that in a Scheme, the Target Board is in a better position to assess the credibility of offeror. It also notes that the nature of a Scheme (with settlement on a single date) means that a deal would not complete if payment did not occur.

From the Panel's perspective, the issue is the potential for inconsistency if the 2022 recommended change to the Takeovers Code is adopted.

NZSA supported the Panel's approach in its submission to the Takeovers Panel in August 2021.

NZSA and NZX Response to Consultation Questions

17. Do you agree with the Panel's approach? Please give reasons.

Yes.

Similar to the Panel, NZSA and NZX considers the lack of a disclosure requirement for committed funding a significant omission within the Code. Note that the NZSA supported the Takeover Panel's preferred option in its August 2021 consultation response.

In the interests of alignment between Scheme and Code, we believe that the inclusion of such a requirement within the Takeovers Code should also apply to Schemes.

We note the practice of Scheme Offerors utilising low-value or special purpose 'shelf companies' to implement a Scheme, limiting the liability of the Offeror in the event of a failed Scheme.

18. Is there a better case for applying some of the financing/payment obligations to schemes than others? Please explain your reasoning.

Possibly.

The inherent flexibility in Schemes compared with offers under the Code may increase the level of disclosure required for a Scheme, particularly for Schemes that involve part-payment in shares or

equity-related securities, debt instruments, contractual supply obligations or time-based payments.

What should NOT be applied to Schemes?

The Panel has considered a range of Code provisions that they recommend should not apply to Schemes. In the main, the Panel's recommendations are based on the premise that application of the Code rules would fundamentally alter the structure of a Scheme.

The Code Rules that should not apply (in the Panel's view) are set out in section 111 of the consultation document.

Voting and Acceptance Thresholds

On the matter of Voting thresholds, the Panel notes that the differential between the 90% acceptance level for compulsory acquisition under the Code and the 75% threshold (with 50% of shares voted) for each shareholder class in a Scheme is not necessarily a problem and that it is "too simplistic" to compare the two regimes.

It also notes that increasing the 75% threshold for a Scheme is problematic as this is also the level where a business and its assets can be sold.

The Panel believes the popularity of Schemes is mainly driven by their flexibility (not thresholds) and the increase in the level of passive funds in shareholder structures.

NZSA and NZX Response to Consultation Questions

19. Do you agree with the Panel's analysis as to the Code rules and Takeovers Act sections which should not be applied to schemes?

Broadly. However, we disagree with two matters raised in the consultation paper:

Reimbursement of Costs

Section 48 & 49 of the Takeovers Act 1993 allows for reimbursement of costs in relation to a Code offer. We consider that this is an area for further alignment between Schemes and Codes.

Anecdotal evidence suggests a high cost for the Target Board in a Scheme in the process of negotiating and (then) implementing a Scheme offer. In the Consultation Paper, the Panel notes in clause 94 that "*Targets may only have the **opportunity** to negotiate*" (your emphasis) and that negotiations are subject to the perceived leverage held by the Target Board.

While this will result in some increased costs for the offeror, this is to the benefit of shareholders in the target, who currently bear the cost of any Scheme proposal.

We ask the Panel to apply this this Code Rule to Schemes as part of the recommendation to the Minister for regulatory alignment between Code and Scheme takeovers.

Voting Thresholds

NZSA and NZX considers this the **single most important factor** in most Offerors preferring Schemes over the Code to implement Takeover transactions.

While we recognise the Panel's comments in paragraph 113(a) of the Consultation Paper that it is too simplistic to directly compare the voting thresholds, we believe that the Panel has not placed enough emphasis on the popularity of Schemes as being influenced by flexibility, the impact of passive funds in achieving a voting threshold and the "lock-up" of funds for shareholders associated with accepting a Code offer (refer to paragraph 114).

Flexibility and the lack of "lock-up" are structural features of a Scheme that, at this stage, NZSA and NZX believe should be preserved as inherent features of a 'Scheme vs Code' choice for an Offeror.

However, the increasing dominance of **passive funds** was unlikely to have been fully foreseen at the time the Takeovers Code was implemented. Therefore, we believe that the approval thresholds should be reviewed in light of the evolution of passive funds in the current market.

NZSA and NZX believe that the thresholds, impacted by passive investors, remains the key factor in influencing an Offeror's choice as to how a Takeover is implemented. We therefore believe that the Takeovers Panel has under-estimated the impact of passive funds and their impact on Offeror's preference for the use of a Code offer.

Section 3.4 of NZSA's Takeover Policy (commentary only) notes that:

> *3.4 The nature of passive or index funds means that achieving a 90% target under the Takeovers Code has become extremely difficult, if not impossible, for Offerors.*
>
> *a) These types of funds are generally not mandated to vote in any form of Takeover, with the scale of passive or index funds such that they often form a shareholding greater than 10% of the Target Company shares.*
>
> *b) NZSA also notes that every company is likely to have a differing level of investment by passive or index funds, with some smaller companies likely to have no such shareholders.*
>
> *c) NZSA believes that it is possible for Offerors to structure a Takeover Code offer with a level of acceptances to allow for the presence of index or passive funds, with those funds then mandated to sell as underlying liquidity reduces. However, there is no incentive for Offerors to structure an offer under the Takeovers Code in this manner while it is relatively easy to undertake an SoA.*

NZSA and NZX favour a more comprehensive review of the threshold settings for both the Takeovers Code and Schemes of Arrangement, leading to improved equalisation in the choice of takeover mechanisms.

The current combination of Offeror flexibility, the impact of passive funds and a lower threshold requirement (in most cases) is likely to incentivise Offeror's to the use of Schemes as a 'first preference' in most takeover situations.

We also note that a lower threshold may result in the success of a Scheme-based takeover at lower consideration that that which is likely to be attained with a higher threshold requirement.

There may be a variety of options to create a 'more level playing field' between Schemes and the Code as part of the recommendations made to the Minister subsequent to this consultation. While NZSA and NZX have no definitive view on a preferred option, we advocate for further consideration:

i) An exclusion of passive fund holders in calculating the 90% threshold requirement under the Takeovers Code. This effectively would result in a company-specific threshold requirement (set by a standard formula) for each Code company.

   This would require a definition of "passive fund" to be included within the Takeovers Code. It would also offer some alignment with Schemes in that a shareholder class ('passive fund') would be explicitly recognised.

ii) An increase in the thresholds required for a scheme of arrangement (eg, 75% of shares in class in favour, at a 75% threshold of total shares voted, compared with the existing 50%).

   While the Panel notes some issues with departing from a 'special resolution' threshold for the sale of business assets, we believe that this could be resolved with appropriate expertise and review.

iii) Adjustment of the Code threshold from 90% to a lower threshold.

iv) A combination of all or some of the above.

Last, NZSA and NZX note the concern of the Panel to align with international markets. However, there are many nuances in each market – including New Zealand. We believe that New Zealand's takeover settings should reflect the conditions within New Zealand's own public and unlisted markets.

Takeover threshold settings should be calibrated to ensure that New Zealand markets are able to maintain a range of investment opportunities to support the needs of local investors.

20. Should any of the identified Code rules or Takeovers Act sections apply to schemes? If so, why?

See Question 19

21. Do you think the current Dominant Ownership Threshold remains appropriate? Please give reasons.

No - See Question 19

Enforcement – extension of Panel enforcement powers

The Panel offers some consultation views on the enforcement of Code provisions that would be extended to Schemes. The Panel believes that the current framework applying to Codes in the Takeovers Act could be applied to Schemes – without 'cutting across' the Court's jurisdiction.

NZSA and NZX Response to Consultation Questions

22. Do you agree with the approach to the Panel's jurisdiction vis-à-vis the Court's?

Yes.

23. Do you agree with the Panel's approach to amendments to the Takeovers Act, FMCA and Companies Act to address regulatory overlap between them? If not, please explain.

Yes – NZSA and NZX encourage an approach that improves regulatory clarity for issuers and shareholders alike.

24. Have you identified any additional issues that could arise from applying Code rules to schemes that are not set out in this paper? If so, please explain.

No, although this may be dependent on what alignment mechanisms (between Code and Schemes) are implemented.

25. Are there any other enforcement powers under the Takeovers Act that should be amended if certain Code rules were to apply to schemes? Are the suggested amendments to the enforcement powers appropriate? Are there any limitations which should be incorporated?

NZSA and NZX do not hold appropriate expertise to provide feedback on this matter.

We expect that a change in Code Rules to apply to Schemes may require some minor amendments to the Takeovers Act.

26. Regarding criminal misleading or deceptive conduct:

- **(a) should such conduct be regulated by the FMCA and the Takeovers Act (with an added clarification that there cannot be two sanctions for the same conduct); or**
- **(b) should such conduct be regulated by only one regime and, if so, which regime?**

As noted in Question 3, NZSA and NZX would prefer a **dual regulatory approach** (a). Under this approach, we note that Scheme arrangements would still be considered by expert capability at the Takeover Panel, an important factor for us in reaching this conclusion.

Thank you for the opportunity to present this submission. We would welcome further discussion and/or engagement on the points raised by NZSA and NZX in this joint submission. Please contact the following should further clarification be required:

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December 1st 2023

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