

# The International Comparative Legal Guide to: **Mergers & Acquisitions 2007**

**A practical insight to cross-border Mergers & Acquisitions**



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# New Zealand

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### 1 Relevant Authorities and Legislation

#### 1.1 What regulates M&A?

The main legislation regulating public company mergers and acquisitions in New Zealand is the Takeovers Code made under the Takeovers Code Approval Order 2000 (the **Code**), and the Companies Act 1993 (the **Companies Act**). There are also several other relevant statutes and regulations that we refer to below.

##### *The Takeovers Code and Takeovers Panel*

The Code (together with the Takeovers Act 1993), regulates and confers jurisdiction on the Takeovers Panel (the **Panel**) to regulate public takeovers using the rules of the Code. The Code creates a general rule known as the “fundamental rule” and provides various exceptions to that rule. The Code only applies to New Zealand companies that are “code companies”.

A code company is a company that is:

- party to a listing agreement with a registered exchange (essentially the New Zealand Stock Exchange (**NZSX**) or the New Zealand Alternate Exchange (**NZAX**), operated by New Zealand Exchange Limited (**NZX**)) and has securities that confer voting rights quoted on that registered exchange; or
- has 50 or more shareholders.

##### *The fundamental rule*

The fundamental rule (Rule 6 of the Code) states that a person (either solely or together with its “associates” (widely defined)) cannot either:

- become the holder or controller of more than 20% of the voting rights in a code company; or
- increase an existing holding of 20% or more of the voting rights in a code company,

without complying with the provisions of the Code.

##### *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 company 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 company) 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; and
- by means of a compulsory acquisition if the shareholder holds 90% or more of the voting rights in the code company.

It is not possible to contract out of the Code.

##### *The Companies Act*

The Companies Act is the primary regulator of company law in New Zealand. Relevant to takeovers, key provisions of the Companies Act include:

- directors duties;
- matters requiring shareholder approvals;
- amalgamations and schemes of arrangement (which are discussed in further detail below); and
- minority shareholder protections.

##### *Other statutes and regulations*

In addition to the Code and the Companies Act, certain other statutes and regulations will potentially impact on a merger or acquisition. These include the:

- Commerce Act 1986 (*Commerce Act*), in relation to antitrust/competition law;
- Overseas Investment Act 2005 (the **OIA**), in relation to foreign buyers acquiring certain business or land assets in New Zealand;
- Securities Markets Act 1988 (**SMA**), in relation to insider trading, the disclosure of relevant interests in public companies and continuous disclosure requirements; and
- Securities Act 1978 (the **Securities Act**), in relation to script offers.

Where either the bidder or target companies have shares listed on the NZSX or the NZAX, listing rules (which govern the NZSX and the NZAX) (together, the **NZX Listing Rules**), will apply. Particularly relevant are those in relation to continuous disclosure requirements, major transactions and related party transactions. Note also that NZX operates the New Zealand Debt Exchange (**NZDX**).

### 1.2 Are there different rules for different types of public company?

Yes. As noted above, the Code will apply to all companies that are traded on a “registered exchange” in New Zealand (i.e., NZSX or NZAX). The Code will also apply to any New Zealand registered private company that has 50 or more shareholders. The Code will not apply to any public or private overseas companies, although the Code does apply to “downstream” acquisitions of New Zealand companies (i.e., the acquisition of an overseas company that owns a New Zealand code company).

Companies that are publicly listed on an NZX exchange are obliged to comply with the listing rules of the relevant exchange. Unlisted companies are not bound by any listing rules.

The Companies Act applies equally to private and public New Zealand companies (and to a limited extent, companies registered in New Zealand as overseas companies). The question of whether the company is publicly traded is irrelevant.

The Commerce Act applies to New Zealand and overseas companies if the conduct in question affects competition in New Zealand. The question of whether the company is publicly traded is irrelevant.

### 1.3 Are there special rules for foreign buyers?

Where a foreign buyer proposes to:

- acquire or take control of 25% or more of the shareholding of a New Zealand company or increase an existing 25% or more shareholding or control interest of a New Zealand company; and
- the value of the securities or consideration provided, or the value of the assets of the target company (or the target and its 25% or more subsidiaries), exceeds NZ\$100 million (approximately US\$63 million),

the transaction will require the prior consent of the Overseas Investment Office (the OIO), under powers pursuant to the OIA. In addition, purchases involving “sensitive land” or companies who own or control sensitive land may also require consent.

### 1.4 Are there any special sector-related rules?

Many sectors, including, for example, aviation, banking, crown minerals (e.g., oil and gas), insurance and broadcasting, have their own particular restrictions, consents or procedures applicable to acquisitions in those sectors.

### 1.5 What are the principal sources of liability?

Each applicable legislation specifies various breaches and penalties. This may result in substantial civil liability, and in some instances criminal liability. A breach of any of the NZX Listing Rules may result in heavy fines, or in extreme cases, a de-listing of the company.

## 2 Mechanics of Acquisition

### 2.1 What alternative means of acquisition are there?

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

- a full or partial takeover offer of the shares in a public

company under the Code;

- an amalgamation; and
- a court-approved scheme of arrangement (a **Scheme**).

The Code may also have application to an amalgamation or Scheme.

In addition, the business and assets of a public company can also be acquired by private treaty asset purchase.

#### *Takeover offer*

A takeover offer is a formal offer permitted under the Code either through a full or partial offer (as described in question 1.1 above).

#### *Amalgamation*

Under the Companies Act, two or more companies incorporated in New Zealand can amalgamate and continue as one company. Amalgamations can only occur in friendly or recommended bids.

Under the amalgamation procedure, shareholders must approve the amalgamation proposal in a special resolution passed by 75% or more of votes cast (in person or by proxy).

Once an 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 a validly effected amalgamation proposal.

#### *Scheme of arrangement*

Under a Scheme, the High Court can give express orders detailing the structure and consequence of the arrangement, as well as any procedural matters relating to the arrangement. Schemes are generally only used in recommended or friendly deals.

To implement a Scheme, an application must be made to the High Court for initial orders setting down a range of procedural matters including how the requisite shareholder approvals (and sometimes creditors’ approvals) are to be obtained. Shareholder resolutions must be passed by a majority as fixed by the Court (usually a majority of 75% or more of the votes cast in person or by proxy). When all resolutions are passed by the requisite majority and other preconditions are satisfied, an application is made to the Court for the final orders approving the Scheme.

Before granting the final orders, the Court will take into account the considerations set out in the case of *Re C M Banks Limited* (including whether process has been followed, and whether an intelligent and honest person of business who was a member of the class concerned, would reasonably approve the Scheme). If the Court concludes that the Scheme is not fair or reasonable to all of the classes of shareholders and creditors concerned, the Court will not approve the Scheme. Once the final orders are made, the Scheme is binding on all parties (the company, shareholders and creditors).

In some circumstances, a Scheme may also be subject to the provisions of the Code.

The NZX Listing Rules will also apply if NZX listed companies are involved.

### 2.2 What advisers do the parties need?

Generally, most transactions will require investment bankers, legal advisers, accounting/financial advisers (which may also include auditors) and tax advisers (from both a legal and accounting perspective).

Full or partial takeover offers under the Code require the target board to obtain a report from an independent financial adviser on the “merits of the offer”. Where more than one class of securities

is to be acquired in an offer, the bidder is required to obtain a report from an independent financial adviser that the offer is fair and reasonable as between the different classes.

Obtaining independent reports may also be required under the NZX Listing Rules and is also common practice for the boards involved with amalgamations and Schemes.

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### 2.3 How long does it take?

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The timetable for any transaction will depend on the nature and structure of the transaction.

#### *Takeovers offers under the Code*

The timetable of a takeover bid under the Code begins on the date that the bidder gives the takeover notice to the target (the 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 known as the despatch date.

Once made, an offer must remain open for a minimum of 30 days and, generally, a maximum of 90 days. This time 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) by giving a written variation notice to all interested parties (with further notice and other requirements set out in the Code).

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

- a full offer; and
- not subject to a minimum acceptance condition (or where any minimum acceptance condition has been satisfied).

#### *Scheme of arrangement*

If a transaction is a Scheme to which the Code does not apply, the timing will be dictated by the time involved in preparing shareholder materials, convening shareholder meetings and obtaining any other necessary consents and approvals. Typically the process will take three to four months.

#### *Amalgamations*

The timing for amalgamations to which the Code does not apply will depend on how long it takes to prepare the relevant shareholder documentation, convene the shareholder meetings and obtain the other necessary consents and approvals. Typically the process will take three to four months.

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### 2.4 What are the main hurdles?

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The obstacles that arise in a transaction will depend on the nature, structure and complexity of the transaction. Generally, obtaining the approval of the target board (in a friendly bid) and obtaining shareholder acceptance/approval of the transaction are the most significant hurdles.

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### 2.5 How much flexibility is there over deal terms and price?

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There is considerable flexibility for a bidder to offer the terms it wishes in a transaction. However, the bidder must keep in mind that, under the Code, all securities holders in the target must be treated equally with others in their class (see question 2.7 below). In addition, for a takeover offer, the Code does contain thresholds where a mandatory offer will be required. This arises when a

bidder, together with its associates, holds or controls more than 20% of the voting rights in a code company (i.e., the fundamental rule).

It is possible to "lock-up" holdings by contracting to acquire significant stakes in excess of the Code's 20% threshold (see question 6.4 below). 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. The "equal treatment" requirement is particularly relevant to "lock-up" arrangements.

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### 2.6 What differences are there between offering cash and other consideration?

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

Where shares are offered as consideration, there are requirements under the Securities Act to register a prospectus with the Companies Office and distribute to target shareholders a prescribed short form prospectus (known as an "investment statement") with the offer. Listed companies may qualify for exemptions from several prospectus requirements but, in any case, a prospectus must be registered with the Companies Office before giving a takeover notice.

Other than the Securities Act requirements where securities are offered, there are no restrictions on the form of consideration that a foreign bidder can offer.

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### 2.7 Do the same terms have to be offered to all shareholders?

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Yes. Rule 20 of the Code provides that an offer must be made on the same terms and provide the same consideration for all securities belonging to the same class of equity securities under the offer. The Code intends to ensure equal treatment for all target shareholders.

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### 2.8 Are there any limits on agreeing terms with employees?

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A bidder for a NZ company must be aware of its obligations under NZ employment law, including the Employment Relations Act 2000, the Holidays Act 2003 and relevant common law principles.

Whether a transaction is structured as an asset sale or a share sale will have different implications. In a share sale, generally, no issues of redundancy of employees will arise and there will be no obligation to consult, as the identity of the employer does not change.

However, an asset sale will result in a change of employer to the target's employees, which will potentially give rise to a redundancy situation. Commonly the purchaser will be required to offer new employment on the same terms and conditions as the existing employment agreement. The employer (i.e., the target) may be required to consult with affected employees.

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### 2.9 What documentation is needed?

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#### *Takeover offer*

##### *The offer document*

The offer document to shareholders must contain, or be accompanied by, prescribed information, most importantly:

- all of the terms and conditions of the offer;
- details of the target's shares already held or controlled by the bidder;

- any agreements or arrangements entered into 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; and
- an escalation clause.

Importantly, the offer document must also include a certificate executed by the CEO and CFO (or equivalents) and two directors of the bidder certifying, amongst 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.

#### *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*

Under Rule 46 of the Code, the target company must provide a response statement, containing 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.

The target company may choose to prepare its response statement in time for the bidder to send it out with the takeover offer, or to send its statement directly to the shareholders, the bidder, the Panel, the NZX and the Registrar of Companies. There are differing timing requirements for either of these options, and so the time pressures of the target may dictate which route a target company wishes to take.

#### *Documents for the Panel*

Under the Code, both the bidder and the target are required to give the Panel copies of all documents and notices that they despatch.

#### *Amalgamations*

The Companies Act prescribes the documentation required to give effect to an amalgamation. These primarily consist of the shareholder meeting materials (including amalgamation proposal) and various board resolutions and certificates.

#### *Schemes of arrangement*

The key documents required to give effect to a Scheme include the shareholder meeting materials (including Scheme details) and various board resolutions. The Court documentation includes an originating application, an ex parte application for initial orders (supporting memorandum of counsel and affidavits) and an application for final orders (with supporting documentation).

#### *Foreign buyers*

If the bidder is a foreign buyer that needs consent from the OIO (see question 1.3 above), a comprehensive written application for consent to the transaction must be made.

### 2.10 Are there any special accounting procedures?

No special accounting procedures are required under the Code. Where the bidder's securities are offered as consideration, the Securities Act will usually require presentation of financial information relating to the bidder and in some cases the proposed target.

### 2.11 What are the key costs?

The key costs for any transaction (other than consideration paid for shares acquired and any financing costs) will generally be the fees and disbursements of professional advisors. These will include the fees for legal, accounting/financial, investment banking and other professionals. Printing and distribution costs for various documentation will also need to be considered.

### 2.12 What consents are needed?

The consents required will depend on the nature and detail of the transaction.

Commonly required regulatory consents include OIA consent for foreign buyers and Commerce Commission clearance (if there are any antitrust/competition law implications)

In addition, target company operating agreements, leases and licences may require third party consents for the change of control.

### 2.13 What levels of approval or acceptance are needed?

Rule 23 of the Code provides for minimum acceptance conditions to be inserted into offers. In a full offer, if on the date of the offer the bidder does not hold or control 50% or more of the voting rights of the target, then the offer must be conditional on the bidder receiving acceptances by target shareholders that will increase the bidder's voting rights to above 50%.

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

Schemes and amalgamations will generally require approval by a special resolution of shareholders (unless otherwise specified by the Court in the case of a Scheme). The Code may also apply in which case additional approvals may be required.

### 2.14 When is the consideration settled?

For a takeover offer, Rule 33 of the Code requires that an offer specifies a date by which the consideration must be sent to the target shareholders whose securities are taken up under the offer.

Such date must not be later than seven days after the later of:

- the date on which the offer becomes unconditional;
- the date on which an acceptance is received; or
- the end of the offer period first specified in the offer.

For amalgamations and Schemes, the consideration will generally be paid on the effective date, as specified in the terms of the amalgamation or Scheme.

## 3 Friendly or Hostile

### 3.1 Is there a choice?

Yes. Hostile bids are permitted and not uncommon in New Zealand. The legal requirements for hostile bids and recommended bids under the Code are the same.

### 3.2 How relevant is the target board?

The approval of a target board can be a factor crucial to the success

of an offer. If a target board recommends a bid, it is not uncommon for the parties to enter into merger agreements or arrangements preceding the offer.

Generally, Schemes and amalgamations can only be effected with the consent of the target board.

### 3.3 Does the choice affect process?

No. Requirements for hostile bids and recommended bids under the Code are the same. The same documents are sent to the target's shareholders, regardless of whether the bid is hostile or friendly.

## 4 Information

### 4.1 What information is available to a buyer?

Publicly available information

A reasonable amount of public information is available about NZX listed companies:

- annual and half-yearly reports reflecting results for the relevant period and certain other disclosures;
- a listed company has an obligation to publicly release any price-sensitive or otherwise material information it holds on a continuous basis (subject to various exemptions); and
- any person who holds a "relevant interest" (widely defined) in 5% or more of the shares in a listed company must disclose that interest.

In addition, certain corporate information (such as a share register, annual returns, constitutions etc.) is available online or can be requested from the company pursuant to the Companies Act.

*Non-public information*

A bidder in its discretion may wish to seek non-public information from the target. In a friendly bid, this may well be permitted. However, if it involves price-sensitive information, the parties should remain aware of the insider trading rules of the SMA and the continuous disclosure provisions of the NZX Listing Rules. A bidder should also be aware that access to such information may limit the bidder's ability to purchase shares on-market because of the risk of breach the insider trading rules of the SMA.

*Due diligence*

A bidder may want to undertake due diligence in relation to a target. However, the information available will depend on the matters discussed above. A bidder should be aware that a takeover offer cannot be made conditional on satisfactory due diligence being conducted by the bidder (Rule 25(1) of the Code). Accordingly, all due diligence undertaken by the bidder must be completed prior to the making of an offer.

### 4.2 Is negotiation confidential?

Parties to an acquisition are free to enter confidentiality arrangements or agreements in their discretion. See question 4.1 above in relation to continuous disclosure and insider trading obligations.

### 4.3 What will become public?

Both bidder and target have disclosure obligations under the Code (see question 2.9 above) which are intended to provide selected

information to target shareholders in their consideration of the bid. As referred to in question 4.1 above, the NZX Listing Rules (and the SMA) imposes a general requirement on every listed company to release any material information (e.g., price-sensitive information) relating to it, as soon as it becomes aware of such information. Accordingly, a notice of intention to make a takeover offer, whether received or given, must be disclosed.

### 4.4 What if the information is wrong or changes?

If information is wrong or changes, then a target (if a listed company) will need to consider whether it needs to disclose this fact pursuant to its continuous disclosure obligations. Parties to an acquisition may also have contractual obligations to each other that requires true and accurate information to be given.

## 5 Stakebuilding

### 5.1 Can shares be bought outside the offer process?

It is not uncommon for a bidder to build a stake before announcing a bid. A bidder can become the holder or controller of up to 20% of the target's voting rights before it needs to make a full or partial offer under Rule 6 of the Code. Unlike other jurisdictions, the price paid in the stakebuilding process does not have to match that offered in the subsequent takeover offer.

### 5.2 What are the disclosure triggers?

Acquiring stakes of greater than 5% of a publicly listed NZ company requires a bidder to comply with the disclosure requirements of NZ's substantial security holder laws (SMA and NZX Listing Rules). Under these laws, the acquisition of "relevant interests" (widely defined) in 5% or more of the voting securities of a listed company must be disclosed immediately to the company and to the NZX. Additional notices are required when the holder of a stake of at least 5% of the listed company acquires or disposes of at least 1% of its relevant interest in the public issuer.

### 5.3 What are the limitations?

If a bidder, together with its "associates", exceeds the 20% threshold prohibition set out in Rule 6 of the Code (see question 1.1 above), a mandatory bid must be made for all of the voting securities in that company. The term "associate" is widely defined in Rule 4 of the Code, and applies to a range of circumstances where the Code (as interpreted by the Panel) deems a person (the associate) and the bidder to be acting jointly or in concert.

## 6 Deal Protection

### 6.1 Are break fees available?

Break fees are not uncommon in New Zealand. When entering into a break fee arrangement, directors of target companies should give careful consideration to their director's duties under the Companies Act, and should also ensure that such an arrangement does not constitute a defensive action which is prohibited under Rule 38 of the Code.

## 6.2 Can the target agree not to shop the company or its assets?

A target should not enter into arrangements affecting the activities and operations of the company (such as agreeing to not shop the company or its assets) during a takeover offer without serious consideration of Rule 38 of the Code (see question 8.2 below). Directors also have director's duties to consider.

"No shop" provisions in merger agreements are usually negotiated and take these factors into account.

## 6.3 Can the target agree to issue shares or sell assets?

If a target agrees to issue further shares or sell assets during the period of a takeover offer, it should exercise considerable prudence to ensure it does not breach Rule 38 of the Code which prohibits defensive actions (see question 8.2 below).

## 6.4 What commitments are available to tie up a deal?

Bidders in New Zealand sometimes wish to enter into an agreement with existing shareholders to acquire their shares under a takeover offer. These are often referred to as "lock-up agreements". A lock-up agreement provides a bidder with certainty that its offer will be accepted by those shareholders who have committed to accept the offer. Lock-up agreements are most common between a bidder and the majority or a major shareholder of the target.

The Code does not prohibit lock-up agreements, as a lock-up agreement will not generally result in the bidder holding or controlling voting rights in a company until the bidder makes, and the shareholder accepts, a takeover offer under the Code (which must be made to all shareholders on the same terms).

However, the Panel has in the past held that parties to a lock-up agreement are "associates" for the purposes of the Code (for "associates" see question 5.4 above). This does not mean that lock-up agreements are unlawful or a breach of the Code. It does, however, mean that parties to a lock-up agreement must be particularly careful about acquiring any other securities in the target and to ensure the "equal treatment" requirements of the Code are not breached.

## 7 Bidder Protection

### 7.1 What deal conditions are permitted?

A full or partial takeover offer must have certain minimum acceptance conditions as required under the Code (see question 2.13 above).

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

It is common for offers to be conditional on obtaining regulatory consents (see question 2.12 above) 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.

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.

### 7.2 What control does the bidder have over the target during the process?

Generally the bidder will have no control over the target prior to an acquisition of the target. However, the bidder may have certain contractual entitlements if it enters into a merger agreement, or may have sufficient voting rights before obtaining control of the target, that will allow it to have some "negative" control over the target (e.g., the ability to block special resolutions).

### 7.3 When does control pass to the bidder?

Control will pass to a bidder when it obtains sufficient voting securities to control the board of the target. Although in privately held companies this will often mean over 50% or more of the voting rights, in publicly held companies or widely-held private companies 35% or less of the voting securities has previously been sufficient to take control of the target board. It will depend on the shareholder spread.

### 7.4 How can the bidder get 100% control?

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 purchase the outstanding minority shares compulsorily.

## 8 Target Defences

### 8.1 Does the board of the target have to tell its shareholders if it gets an offer?

The Code imposes requirements on a target board to respond to an offer and notify shareholders under a specified procedure (see question 1.1 above).

If the target is a listed company, the receipt of a formal takeover notice is also likely to be material information that will need to be released to the NZX and to the public as a part of its continuous disclosure obligations (see Section 4, "Information", above).

### 8.2 What can the target do to resist change of control?

In general, the ability of a target's board to take measures to defend a bid is subject to:

- the prohibitions in Rule 38 of the Code against "defensive actions" (post-bid); and
- their directors' duties (sections 131 - 138 of the Companies Act), and in particular, their duty to act in good faith and in the best interests of the company, and to act for a proper purpose.

Prior to a takeover offer, the Code has no application to any pre-bid circumstances unless a code company has reason to believe that a bona fide offer is "imminent".

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; or

- shareholders would be denied an opportunity to decide on the merits of the offer.

However, defensive actions are permitted in some circumstances, e.g., where the actions are approved by an ordinary resolution of the target's shareholders, or where existing contractual obligations require it.

Rule 38 does not prevent directors from encouraging bona fide competing offers from other bidders. 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.

### 8.3 Is it a fair fight?

The takeovers regime in New Zealand is generally consistent with the regimes of Australia, the United Kingdom, Hong Kong, Singapore and other similar jurisdictions.



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Andrew Abernethy is a partner in Bell Gully's Corporate/Commercial team. His areas of specialisation include mergers and acquisitions, securities offerings and corporate governance matters. Andrew acts for issuers of debt and equities, and for both purchasers and sellers in acquisition and disposition transactions, including stock and asset sales, recapitalisations, restructurings, joint ventures, partnerships, and other structured solutions. He has been involved with significant transactions such as Calgary Petroleum's sale of New Zealand oil and gas assets, Dominion Funds in relation to their takeover of Tri-City Properties, and numerous other mergers and acquisitions in New Zealand and internationally.

## 9 Other Useful Facts

### 9.1 What are the major influences on the success of an acquisition?

The commercial terms of an offer will be the most influential factor affecting the success of an acquisition. The assistance of the target board and shareholder approval/acceptance (where applicable) will also be important.

### 9.2 What happens if it fails?

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

There are no provisions preventing a further bid by the same bidder if the initial bid fails.



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Andrew Brown is a member of our Corporate and Commercial Department and has been a partner since 1991. His areas of specialisation include mergers and acquisitions, corporate governance, flotations and stock exchange matters, electricity and gas industry matters, joint ventures and company and commercial law.

Andrew has led the Bell Gully team on some of the most significant transactions in recent years that New Zealand has seen. Such transactions include the successful merger of INL and Sky TV in 2005, a deal that was recognised as New Zealand Deal of the Year at the 2006 ALB Australasian Law Awards, advising Contact Energy on its purchase of Pohokura gas in 2004 and on its proposed merger with Origin Energy in 2006 to name but a few.

## Bell Gully

Bell Gully is one of New Zealand's leading commercial law firms and one of the few firms in the country that still provides a full range of commercial legal services. Bell Gully is one of New Zealand's oldest law firms, and is proud of its 166-year history. The firm plays a central role in New Zealand's business and regulatory sectors, advising on many of the country's largest deals. The range of work and clients reflects its full-service principle. Bell Gully advises some of the largest corporates and major international clients on major deals and transactions, and also advises government and public sector organisations, as well as entrepreneurs and start-up companies on commercialising new technology and other initiatives. The firm has one of the country's strongest legal teams with experience and expertise in a wide range of business and government sectors. The firm combines leading corporate, commercial, financial and dispute resolution capability with a range of specialist practice areas.