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Mergers & Acquisitions

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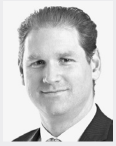

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

In New Zealand, ("**NZ**") M&A is regulated through several enactments:

- The Takeovers Regulations 2000 ("**Code**") and the Takeovers Act 1993 ("**Takeovers Act**"), regulated by the Takeovers Panel ("**Panel**"), regulate change of control transactions involving 'Code companies' (described below) above the 20% voting-control threshold. This includes the rules that must be adhered to for takeover offers for Code companies. The 'fundamental rule' under the Code prohibits any person from: (a) holding or controlling more than 20% of the voting rights in a Code company; or (b) increasing an existing holding or control of 20% or more of the voting rights in a Code company, without complying with the processes set out in the Code (such as Code-compliant offers, issuances of shares that have been approved by shareholders and 'creeping' within certain thresholds). The fundamental rule extends to parties acting jointly, in concert and/or as associates.
- The Companies Act 1993 ("**Companies Act**") permits takeovers to be conducted via a scheme of arrangement ("**scheme**"), rather than as a takeover offer under the Code. The High Court is the primary regulator of schemes; however, the Panel plays an advisory role to the Court in respect of schemes involving Code companies and also takes a general oversight role.
- The Financial Markets Conduct Act 2013 ("**FMCA**"), regulated by the Financial Markets Authority ("**FMA**"), regulates the way financial products are offered, promoted, issued and sold.
- The NZX Listing Rules govern securities listed on the Main Board of New Zealand's Stock Exchange ("**NZX**").
- The Commerce Act 1986, regulated by the Commerce Commission New Zealand ("**NZCC**"), prohibits mergers that substantially lessen competition in the market, unless they have been authorised by the NZCC.
- The Overseas Investment Act 2005 ("**OIA**") and associated regulations, enforced by the Overseas Investment Office ("**OIO**"), regulates inbound direct investment in NZ.
- Other sector-specific regulation may be relevant in the context of the transaction.

1.2 Are there different rules for different types of company?

The Code only applies to Code companies, being:

- companies incorporated in NZ that are listed on the NZX Main Board (or were within the previous 12 months); and
- companies that have 50 or more shareholders and 50 or more share parcels and meet the financial threshold for being at least 'medium-sized'.

1.3 Are there special rules for foreign buyers?

Yes, foreign buyers (defined as 'overseas persons' under the OIA) must comply with the OIA when investing in NZ. NZ's overseas investment regime is known as being one of the more complex on a global scale; however, in the majority of cases, well-advised and prepared bidders can generally expect to navigate it successfully.

The OIA regulates offshore and onshore M&A transactions that have a direct or indirect nexus with NZ. The regime seeks to ensure that overseas investors who directly or indirectly acquire a qualifying interest in sensitive NZ assets are suitable to do so, and, where interests in sensitive land are acquired, earn the right to do so by delivering commensurate "benefits" to NZ. It also seeks to protect NZ's national interest and national security by vetting transactions in certain sectors and by foreign government-related investors.

The core regime under the OIA is the 'consent' regime, which requires overseas investors to obtain consent from the OIO prior to giving effect to a transaction that results in the investor or its associate directly or indirectly acquiring (or increasing through certain control thresholds) a qualifying interest in either 'significant business assets' (an NZ business or NZ assets valued at greater then NZ$100 million) or 'sensitive land' (including large tracts of non-urban land, residential land, and land containing or adjoining other sensitive areas such as marine and coastal areas, lakes, conservation reserves and heritage sites). In the case of securities transactions, the threshold at which the consent requirement is triggered is a more than 25% ownership or control interest.

In all cases where OIO consent is required, the investor's controlling entities and individuals must satisfy the 'investor test', which requires those entities and individuals to meet certain 'character' and 'capability' requirements.

Where the investment includes sensitive land, the investor must also satisfy the 'benefit test', which requires the investor to satisfy the OIO that the investment will result in a net benefit to NZ. This is a stringent test (measured against seven categories of benefit) and requires the applicant to supply the OIO with a detailed investment plan and commit to delivering the benefits set out in that plan.

In cases where OIO consent is required for a transaction, a 'national interest test' will also mandatorily apply if the investor has significant foreign government-related ownership or the NZ assets are used in a 'strategically important business' (including suppliers of military or dual-use technology, critical direct suppliers to an intelligence or security agency, systemically important financial institutions and financial market infrastructure, key electricity generators, telecommunications services providers, port and airport operators, and significant media businesses). The national interest test may also be applied at the Minister's discretion to any other transaction that requires consent if the Minister determines that the investment poses a risk to NZ's national interest, based on certain factors set out in guidance.

Finally, investments that do not require OIO consent may still be subject to review under a national security and public order notification and call-in regime under the OIA, which applies to direct or indirect acquisitions of interests in a 'strategically important business' with no value thresholds and, in most cases, no ownership or control thresholds. Notification to the Minister (via the OIO) is mandatory for certain categories of strategically important business, and discretionary for other categories. Under this regime, the definition of what constitutes a strategically important business is expanded to include businesses that develop, produce, maintain, or otherwise have access to 'sensitive information', which includes certain categories of data relating to individuals and also official government information that is relevant to national security. In rare cases where a significant risk to national security or public order is identified in relation to a notified transaction, the Minister may call the transaction in for detailed review and ultimately block, impose conditions on, or, where relevant, unwind, the transaction.

1.4 Are there any special sector-related rules?

There are special sector-related rules that may apply in the context of a takeover transaction where the OIA applies to the transaction. For example, the national interest and national security regimes as discussed at question 1.3 above apply to 'strategically important businesses', which are defined by relevance to the nature of the underlaying business.

1.5 What are the principal sources of liability?

The Takeovers Act provides liability for breaches of the Code, including, for example, breaches of the fundamental rule, and providing false or misleading information for takeover offers and other change of control transactions regulated by the Code. The fair dealing provisions under the FMCA provide similar liability for schemes to the extent that the Code does not apply. Non-compliance with these regimes can give rise to civil liability, and sometimes also criminal liability depending on the circumstances. In addition, in respect of foreign investment, breaches of the OIA can also give rise to criminal and civil liability.

There are a number of remedies available to the Panel, the FMA, the OIO and the High Court in respect of any failures to comply with these provisions.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

As noted above, an offer can be implemented as a takeover offer to shareholders under the Code (takeover offer), or a court-approved scheme under the Companies Act:

(a) A takeover offer is made from the bidder directly to all shareholders, who each decide whether to accept or reject the offer. If the bidder does not already hold or control more than 50% of the voting rights, the offer must be subject to a minimum acceptance condition to achieve control of more than 50% of the voting rights. The threshold to compulsorily acquire outstanding securities (sometimes referred to as 'squeeze-out' provisions) is set at 90%. As a result, full takeover offers are commonly made conditional on receiving acceptances of 90% or more (which, if the bidder elects, can be waivable provided that a minimum 50% condition continues to apply).

(b) A scheme is required to be approved by both: (i) 75% or more of the votes cast in each interest class entitled to vote and voting; and (ii) a majority of the votes of all shareholders entitled to vote (irrespective of whether they do in fact vote).

2.2 What advisers do the parties need?

Other than the independent adviser's report that the target company is required to arrange for the target company's investors in a takeover offer or a scheme, there is no mandatory requirement for the parties to obtain advisers. However, it is customary that both the bidder and the target receive specialist advice regarding the transaction from:

- legal advisers;
- corporate finance advisers;
- accounting and tax advisers; and
- in some instances, public relations consultants.

Outside of a specific transaction, companies listed on the NZX are expected to have a policy in place (prepared with legal advisers) for navigating its response to a takeover proposal. In addition, potential targets should also have an up-to-date view of the company's value, which financial advisers may assist with.

2.3 How long does it take?

This depends on the structure used and other factors such as whether a competitive process is being run and what, if any, regulatory consents are required.

Takeover offers have specified timing requirements, whereas schemes can set and follow their own timing. Once made, a takeover offer must be notified for at least 10 working days and then the offer is to run for anywhere between one and three months (or potentially longer if regulatory conditions apply or there is late achievement of a minimum acceptance condition). Any compulsory acquisition of remaining securities is expected to take a least a month following this.

Whilst these same requirements do not apply to schemes, non-complex schemes generally tend to take three to four months to complete. However, if the transaction requires OIO consent or NZCC clearance/authorisation, this alone can take several months. Given the time this takes, schemes tend to be the preferred deal structure where OIO consent or NZCC clearance/authorisation is required, as the parties can set their own timeframes.

2.4 What are the main hurdles?

The key hurdles to making a takeover bid are, typically, as follows:

(a) Favourable recommendation from the target board – this carries significant weight with shareholders. In an agreed deal, the target board will usually agree to provide this subject to the caveat of the price being within or above the independent adviser's valuation range and no superior proposal emerging.

(b) Relevant regulatory consents/approvals – for example, NZCC merger clearance and OIO consent.

(c) Generally, financing conditions are not acceptable.

Whilst not necessarily a hurdle, bidders will usually look to increase the likelihood of a successful transaction from the outset. In addition to clearing the above hurdles, the bidder may wish to do the following:

(a) Obtain lock-up agreements (for a takeover offer) or voting commitments (for a scheme). These can be very valuable as they represent a contractual agreement to accept (or vote in favour of) the offer and they provide a signal to the remaining shareholders on how the offer has been received.

(b) Building a stake in the target – in short, under a takeover offer, fewer acceptances would be needed to reach the 90% threshold. However, the Code strictly limits the circumstances in which a person can increase their voting control in a Code company – see question 5.4 below.

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

Generally, there is greater flexibility in NZ compared with other jurisdictions regarding deal terms and prices; for example, there is no requirement to set the offer price *vis-à-vis* the price a bidder has recently paid to acquire target shares.

There are, however, some limitations when adopting a takeover offer structure:

- Equal treatment of shareholders – under a takeover offer, all shareholders belonging to the same class of equity securities must be offered the same terms and consideration.
- Last and final statements – any statements the offeror has made regarding deal terms and price can be expected to be strictly enforced under the prohibition against misleading or deceptive conduct.
- Conditions – conditions in a takeover offer that depend on the judgment of the offeror cannot be included, and an offeror may not allow the offer to lapse in unreasonable reliance on a condition or in reliance on a condition that restricts the target's ordinary activities.
- Consideration – once a takeover offer has been made, the consideration offered cannot be decreased.

Schemes, being a more flexible structure, potentially allow for unique mechanisms that would otherwise breach the Code. A previous example included a target negotiating for price reductions to be applicable within set parameters instead of including a standard material adverse change ("**MAC**") clause, resulting in greater completion certainty. This was against the background of the first scheme implementation agreement between the two parties being terminated following the invocation of the MAC clause. Due to the limitations discussed above, this would not have been possible under a takeover offer.

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

Cash is the preferred form of consideration, although it is possible to offer other forms. If scrip is being offered as consideration, the bidder must ensure that the relevant offer complies with the securities laws in the relevant jurisdiction where each target shareholder resides. For certain overseas shareholders, the Panel may grant an exemption allowing those shareholders to receive cash instead of the scrip given the costs of compliance involved. In addition, a product disclosure statement under the FMCA must be provided unless the FMA has granted an exemption. Unlike other jurisdictions, there is no standing exception for exchange offers.

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

This depends on the structure. Under a takeover offer, the same terms and consideration must be offered in respect of all securities in the same class. This is an important rule that the Panel rarely grants exemptions from.

Schemes, however, are a more flexible structure and it is possible for different terms and/or consideration to be offered to shareholders. However, depending on the circumstances, it may result in multiple interest classes being created for the purposes of voting on the 75% threshold. Generally, it is undesirable for multiple interest classes to be created, as this can provide the shareholders outside of the main interest class with a 'veto' over the scheme. For that reason, different consideration is very unusual unless there is good reason for it.

A recent example of a scheme involving differential consideration occurred earlier this year. Certain sophisticated fund investors were offered a lower price per share than the remaining shareholders. This differential consideration was offered (and approved by shareholders) following a failed scheme proposal at a lower price to all shareholders.

2.8 Are there obligations to purchase other classes of target securities?

Yes. If a bidder is making a full takeover offer, it must include offers for all classes of equity securities, irrespective of whether those classes are for voting or non-voting shares. Similarly, with schemes, it is common market practice to purchase all outstanding equity securities in the target or otherwise deal with other securities prior to the scheme being implemented (e.g. the target may buy back and cancel the securities in exchange for a cash payment or arrange for the securities to be converted into ordinary shares, prior to the implementation of the scheme).

2.9 Are there any limits on agreeing terms with employees?

Management incentive payments, agreed between the target and its employees, are relatively common in friendly deals. Details of these arrangements must be disclosed in the documentation provided to shareholders. The Code does not prohibit these payments, provided that they comply with the equal treatment rule and are therefore unrelated to the employee's shareholding (if any). A common example is where a payment is made to compensate managers for additional work carried out in respect of the transaction (i.e. a transaction bonus). A bidder would typically wait until after the scheme vote or completion of a takeover to offer incentive plans to management to ensure that the equal consideration rule is not breached.

2.10 What role do employees, pension trustees and other stakeholders play?

These stakeholders will only play a meaningful part in the takeover offer or scheme if they are shareholders in the target. In NZ, there is an opt-out superannuation scheme that is externally managed. As a consequence, input from NZ pension trustees is less common than in other jurisdictions.

2.11 What documentation is needed?

Takeover offer

Under a takeover offer, the bidder first issues a takeover notice setting out its intention to make an offer alongside the terms and conditions that the offer would be made on. Then, if the bidder decides to proceed, it issues the offer document, which opens the offer for acceptances. There is no 'put up or shut up' rule, so the bidder need not follow a notice with an offer and there is no stand-down period if a notice lapses.

In response to the offer, the target board issues a target company statement, which sets out its recommendation on whether to accept or reject the offer and includes a report prepared by an independent adviser on the merits of the offer.

Scheme

Under a scheme, the above information is provided to shareholders in the form of a scheme booklet. This serves as a notice of meeting and provides equivalent information to what shareholders would receive under a takeover offer.

2.12 Are there any special disclosure requirements?

The Code prescribes comprehensive disclosure requirements that must be provided by the bidder and the target under a takeover offer. Schemes also generally provide this same level of disclosure, although certain disclosure may need to be modified to better suit the alternative structure, where acceptable to the Panel.

Information provided by bidder

In summary, the bidder must disclose information relating to the offer, including offer terms, consideration, important dates and agreements to accept the offer. It must also disclose key information relating to the target, for example, whether it owns any target shares (and certain trading information related to this), and whether there are, and if so the particulars of, any arrangements with directors and senior managers of the target, and/or with the target itself.

Information provided by target

In summary, the target must disclose key financial information relating to ownership and trading of the target's shares, arrangements between the offeror and the target, details of payments being made to the directors and senior managers of the target in connection with the offer and the board's recommendation on the offer. In addition, the target must provide shareholders with an independent adviser's report on the merits of the transaction.

2.13 What are the key costs?

The key costs relate to advisory fees, any applicable application fees (such as those relating to OIO consent or any NZCC process), and other transaction costs.

Once the bidder has given notice of intention to make a takeover offer, it is required to reimburse the target for the costs the target properly incurs, irrespective of the outcome. This requirement does not apply to schemes.

Any break fees that have been negotiated between the parties may also be relevant if they are triggered.

2.14 What consents are needed?

If the bidder is an overseas person for the purposes of the OIA and the transaction triggers the thresholds discussed in question 1.3 above, OIO consent must be obtained.

In respect of competition issues, the NZCC works under a voluntary notification regime, meaning that there is no legal requirement for a bidder or a target to notify the NZCC in respect of a potential acquisition. However, notification is encouraged, especially when the relevant transaction could substantially lessen competition in a market. A bidder can apply to the NZCC either for clearance (that is, that the NZCC is satisfied the merger will not substantially lessen competition in the market) or a formal authorisation (allowing an acquisition even if it does substantially lessen competition in a market).

Whilst not a requirement in the case of a scheme, it is strongly recommended that a no-objection statement from the Panel is sought. This is an important factor that the High Court will consider when deciding whether to approve the scheme.

Other regulatory consents may be required where the target operates within a regulated industry.

2.15 What levels of approval or acceptance are needed?

Please refer to question 2.1 above.

2.16 When does cash consideration need to be committed and available?

The Code requires the bidder to confirm in the takeover notice and the offer document that resources will be available to it to pay the consideration and any debts incurred in connection with the offer. Other than this confirmation, no further details regarding what commitments are in place for the funding are required. In any event, target boards will generally want to satisfy themselves that the bidder has sufficient funding commitments in place to fund the transaction or, in the case of a hostile bid, the board may wish to draw any concerns it has about the bidder's ability to fund the transaction to shareholders' attention.

3 Friendly or Hostile

3.1 Is there a choice?

Takeovers can sit anywhere on the spectrum from friendly offers, where a term sheet or bid implementation agreement has been executed, to entirely hostile offers. The regulatory process is set up to enable shareholders to receive from both sides the information necessary to decide whether to accept or reject the offer.

However, as noted in question 2.11 above, under the scheme process, shareholders receive all information on the deal from the target board. As such, target board cooperation is crucial to this process. Despite this, a hostile scheme may be technically possible in NZ if active shareholders in the target put enough pressure on the board to engage with the bidder.

3.2 Are there rules about an approach to the target?

There are no specific rules governing an approach to a target. However, depending on the circumstances of the approach, the following may be relevant:

- If the target is listed on the NZX Main Board, it must comply with its continuous disclosure obligations under the NZX Listing Rules. Communications must be carefully navigated within this framework.
- The Code's restriction on the use of defensive tactics by the target can be triggered if the board has reason to believe a *bona fide* offer is imminent.
- The prohibition on misleading or deceptive conduct under the Code applies to conduct that is incidental or preliminary to a transaction or event that is likely to be regulated by the Code.

3.3 How relevant is the target board?

As noted in question 3.1 above, schemes require cooperation from the target board in order for a proposed scheme to be put before shareholders. However, under either structure, the target board must provide shareholders with its recommendation and reasons on whether to accept or reject an offer (or whether to vote for or against a proposed scheme). This recommendation is crucial for shareholders and typically carries significant weight.

3.4 Does the choice affect process?

Whether the bid is friendly or hostile will usually impact the structure used. The process will largely remain the same; however, in a friendly deal, the parties may agree to additional rights such as providing the bidder with access to due diligence and exclusivity rights.

4 Information

4.1 What information is available to a buyer?

The buyer will have access to any publicly available information, which will include the following:

- If the company is listed on the NZX Main Board, it must comply with the continuous disclosure obligations that require material information to be disclosed promptly and without delay unless one of the 'safe harbour' exceptions applies.
- Material available on the Companies Office website, which includes information such as constitutions (if applicable), details of shareholdings and annual returns.

The ability to complete due diligence may be offered to one or more potential bidders at the target's discretion, irrespective of whether access has been granted to a competing bidder.

4.2 Is negotiation confidential and is access restricted?

The NZX Listing Rules provide an exception to the continuous disclosure obligations for an incomplete proposal or negotiation, provided that the information is confidential (and this has been maintained) and a reasonable person would not expect the information to be disclosed. If there has been a possible leak of information relating to the deal, targets will need to carefully consider whether this exception remains applicable.

There are no restrictions on approaching shareholders or entering into agreements provided that the bidder does not acquire control over voting rights above 20%.

4.3 When is an announcement required and what will become public?

When the above-mentioned exception ceases to apply, the material information must be made public. In the context of an agreed deal, when the deal is no longer being negotiated or the proposal is complete, material information relating to the deal must be disclosed to the NZX. This will usually be in the form of the executed pre-bid agreement, or, if no such agreement has been reached, the takeover notice itself. Equally, if confidentiality has been lost, an announcement should be made setting out the material information. If voting or lock-up agreements have been executed in respect of a 'relevant interest' (as defined in the NZX rules) in securities of the target of 5% or more, this will constitute the bidder being a substantial product holder (as defined in question 5.3 below), requiring immediate disclosure to the market.

4.4 What if the information is wrong or changes?

It is important that shareholders are provided with accurate and timely information. If any information contained in the transaction documentation is incorrect, this should be corrected promptly. Depending on the transaction and details of the incorrect information, this may involve issuing an addendum to the documentation (such as the scheme booklet or independent adviser's report) or a letter to shareholders explaining the issue.

The misleading and deceptive regimes, discussed above, may also be triggered, and may result in enforcement action being taken by the relevant regulator.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Generally, yes, provided that the acquisition does not result in the offeror (together with any associates) increasing within the 'no-fly' zone of 20%–50% share ownership or control (unless the offer is unconditional) and other prescribed requirements are met. These requirements relate to the timing of the acquisition in relation to the offer, the disclosure that must be provided and other requirements of the offer and the acquisition.

Care should be taken with any purchases made outside of the offer process to ensure the insider trading provisions under the FMCA are not triggered. In the case of a scheme, any shares held or controlled by the bidder and/or their associates will be voted in a separate interest class. Accordingly, the consequences on voting and interest classes of additional shares purchased outside the scheme should be considered.

5.2 Can derivatives be bought outside the offer process?

Yes; the Code does not restrict the acquisition of derivatives. Derivatives over shares are disclosable under the substantial product holder regime.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Directors, senior managers and substantial product holders ("**SPHs**", being people who have a relevant interest of 5% or more) of listed companies must immediately disclose information about their holding to the market. Certain disclosure must be made by directors and senior managers relating to any relevant interest they hold in their company's quoted financial products. This includes any acquisitions under an employee share plan, dividend reinvestment plan, or share top-up plan.

SPHs must disclose specified particulars to the market at the following times:

- when they acquire a substantial holding;
- any movement of 1% or more in their holding;
- any change in the nature of their relevant interest; and
- if they cease to have a substantial holding.

The Code also requires particulars of shares and derivatives held or controlled by the offeror (and certain associates), all 5% or more holders, the target directors and senior managers (and any associates) to be disclosed in the transaction documentation. Trading information relating to certain of these holdings must also be disclosed. In addition, acceptances of the offer received that amount to 1% or more of the total issued equity must be disclosed during the offer.

5.4 What are the limitations and consequences?

The greatest limitation to stakebuilding applies to holding or controlling of voting rights within the 'no-fly' zone of more than 20%–50%. Any increases within this zone can only be made under a takeover, with shareholder approval or with an exemption from the Panel. Importantly, any such increases for the purposes of this rule are calculated together with any voting control held by associates, and there are further anti-avoidance provisions set out in the Code to capture conduct that might otherwise, on a more technical basis, fall outside this rule.

The consequences for breaching this rule will vary depending on the circumstances. The Panel may hold a formal enforcement meeting and, depending on the outcome, there are several remedies available to the Panel and the High Court.

6 Deal Protection

6.1 Are break fees available?

Yes, break fees are commonly included in pre-bid agreements. The Panel has issued guidance cautioning against excessively high break fees or break fees that are payable simply because shareholders do not approve the transaction.

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

Deal protection devices, such as 'no shop', 'no talk', 'no due diligence' and 'matching rights' are commonly agreed in friendly deals. In almost all cases, these devices are subject to a fiduciary-out clause, which would enable the board to consider and respond to a superior proposal, if one emerged.

The Panel has recommended that bidders think carefully before adopting overly restrictive or coercive deal protection devices early in a transaction. The Panel has also released a consultation paper seeking views from market participants as to the potential regulation of such devices.

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

This is generally prohibited by the rule against defensive tactics. This prohibition prevents a target board from acting in a manner that could result in an offer being frustrated or shareholders being denied the opportunity to decide the merits of an offer for themselves. The exceptions to this are where shareholders (or, in some circumstances, the Panel) provide prior approval or the board had already approved the issue or sale before it received the takeover notice or became aware that the offer was imminent.

6.4 What commitments are available to tie up a deal?

In addition to the deal protection devices referred to in question 6.2 above, the key shareholder can sign lock-up agreements (for a takeover offer) or voting commitments (for a scheme), and the board can give a favourable recommendation upfront.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

Takeover offers

The only prohibition on conditions in an offer are conditions that depend on the judgment of, or the fulfilment of which is under the control of, the offeror (or its associates). This prevents an offeror from having an option over the offer and requires all matters within the offeror's control to be finalised before the offer is made, such as receiving approval from its shareholders to proceed with the transaction (if that is required). To mitigate any risk of this, particularly in the case of conditions that refer to materiality (such as MAC clauses), it is often specified that an independent expert shall be appointed to determine satisfaction of the threshold.

In addition, the Code also prohibits an offeror allowing an offer to lapse in unreasonable reliance on a condition or in reliance on a condition that restricts the target's ordinary activities. This is designed to provide an extra layer of protection for the target company by promoting transaction certainty.

Further, as noted at question 2.1 above, an offer must include a minimum acceptance condition if the offeror does not already hold or control more than 50%.

Schemes

The restrictions discussed above do not apply to takeovers conducted via a scheme. As schemes are agreed deals, the target board is responsible for negotiating the terms of the scheme to be in the shareholders' best interests. Given the high level of flexibility under a scheme structure, a target board may, for example, decide to prioritise price over deal certainty or *vice versa*.

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

In agreed deals, the bidder can have significant control over the target, if this has been provided for in the pre-bid agreement. For example, the target may be required under the scheme implementation agreement to consult the bidder on drafts of material communications with regulators. A number of interim covenants are also commonly agreed in the scheme implementation agreement.

In takeover offers, a bidder's control is limited to relying on the prohibition on defensive tactics and imposing negative control conditions that prevent the target from acting in a particular way (provided that the condition does not depend on the judgment of the offeror). However, the offeror may not be able to rely on such conditions if it is unreasonable to do so or if such conditions restrict the target's activities in the ordinary course.

7.3 When does control pass to the bidder?

Under an offer, control of the voting rights passes from each shareholder to the offeror once the acceptance has been received and the offer has been declared unconditional. Under a scheme, control passes once the High Court has granted final orders approving the arrangement and that order has been filed with the Companies Register.

7.4 How can the bidder get 100% control?

Under a takeover offer, a bidder may compulsorily acquire the outstanding shares when it reaches the threshold of holding or controlling 90% or more. Equally, in the event that the bidder has elected not to compulsorily acquire the remaining securities, the outstanding shareholders may nevertheless require the bidder to purchase their shares.

Once approved, a scheme is binding on all the securities subject to the scheme, irrespective of how individual shareholders voted on the resolution.

8 Target Defences

8.1 What can the target do to resist change of control?

Defensive tactics by the target are prohibited under the Code (see question 6.3 above). As a result, a target is likely limited to one or more of the following:

- Criticising the offer to shareholders – the best approach to this messaging will depend on the relevant shareholder base but could involve providing shareholders with an expert report on the value of the company or material assets (distinct from the independent adviser's report that would otherwise need to be provided), providing persistent shareholder communications through a variety of mediums and targeting major shareholders specifically.
- Soliciting a superior proposal from a competing bidder.
- Issuing updated forecasts or asset valuations that may in turn encourage the bidder to increase its offer.

8.2 Is it a fair fight?

It is a relatively fair fight, although the NZ market is generally more favourable to bidders over targets compared with other jurisdictions. The regime is designed to enable shareholders to decide the merits of an offer for themselves. To this end, the Panel is not a 'merits' regulator, rather it is a regulator of the process – with a particular focus on disclosure. In agreed deals, this can place pressure on boards to negotiate the best deal for shareholders from the outset.

9 Other Useful Facts

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

Forming an agreed deal with the target board that will provide a favourable recommendation and will also actively promote the transaction to its shareholders is a significant influence on the success of an acquisition. The likelihood of achieving this will turn on a number of factors, including the attractiveness of the consideration offered, perceptions of the mid- to long-term prospects of the company, whether there are any other competing proposals and what, if any, regulatory consents are needed. The composition of the shareholder base and their reasons for the investment will also have a significant impact of the likely success of an acquisition.

9.2 What happens if it fails?

There are no restrictions on making a follow-on offer, including as to the timing of the offer and the terms and consideration offered. That being said, care should be taken with any unqualified 'last and final' statements made by an offeror about follow-on offers.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

Whilst it has generally been accepted that differential consideration is permitted under a scheme, the Panel has recently updated its guidance to emphasise that this may not always be the case. The Panel has stated that it may decline to issue a no-objection statement even where separate interest classes are created and all material information about the differential consideration has been disclosed to shareholders. This will be considered by the Panel on a case-by-case basis.

The Panel has also issued two consultation papers this year seeking submissions on the potential regulatory alignment between takeover offers and schemes, and on the potential regulation of deal protection devices. These papers address a number of key issues, including whether the quantum of break fees should be regulated and whether the current funding commitment confirmation is acceptable.

Cath Shirley-Brown is a corporate partner specialising in both public and private M&A, joint venture and shareholder arrangements, and general corporate and commercial law. She has experience advising clients across a wide range of industries and advising central and local government entities on corporate and commercial matters, and specific expertise in advising on cross-border transactions. Cath is recognised as a 'Notable Practitioner for M&A and Real Estate Acquisitions' by *IFLR1000*, as a 'Next Generation Partner' by *The Legal 500*, and is recognised by her peers in the *Best Lawyers* 2023 guide for M&A law (New Zealand).

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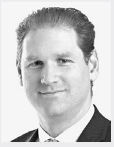

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