



Australian Government

Takeovers Panel

MEMO

Date: 8 December 2023

To: Parliamentary Joint Committee on Corporations and Financial Services

From: Takeovers Panel

SUBJECT: RESPONSE TO QUESTION ON NOTICE

Question: Provide a high-level comparison of several approaches to regulation of public takeovers effected by takeover bid or scheme of arrangement.

1. The table below gives a high-level comparison¹ of several approaches to regulation of public takeovers effected by takeover bid or scheme of arrangement (scheme). The US and Canada are not included as the approach to regulation of takeovers in those jurisdictions is substantially different.²
2. Key differences between the jurisdictions in the table include:
 - (a) Australia & NZ use a 20% threshold³, whereas the UK and jurisdictions modelled on the UK Code (Code Jurisdictions) use 30%
 - (b) Australia & NZ use a “hard” prohibition threshold⁴, whereas crossing the threshold in Code Jurisdictions is permitted but triggers an obligation to make a mandatory bid
 - (c) Code Jurisdictions and New Zealand have a “no go zone” between the threshold (20/30%) and 50%, and Code Jurisdictions have greater freedom for a shareholder with over 50% to acquire shares.

¹ On selected issues, based on public information available to the Panel executive. The Panel executive has not consulted with the other jurisdictions and there may be nuances in the regulation of other jurisdictions that has not be captured. Differences in each jurisdiction’s corporate law, practice and culture will also have a significant impact on the operation and effectiveness of different regulatory approaches

² There is a level of complexity in the European Union jurisdictions which makes it difficult to compare them to our jurisdiction

³ Broadly the level of voting power/control at which takeovers regulation cuts in – this is set below the level that would usually confer effective control of the company

⁴ ie crossing the threshold is prohibited unless it occurs through a permitted exception (see below) eg a takeover bid or scheme

- (d) Code Jurisdictions place stricter constraints than Australia on proceeding with proposed takeovers once public (“put up or shut up”) and Code Jurisdictions and New Zealand have a less flexible bid timetable
- (e) Australia has the most generous “creep” exception, allowing shareholders to acquire up to 3% in six months, noting also that New Zealand’s creep exception only applies to a shareholder who already has over 50%
- (f) The other jurisdictions give Takeover Panels a greater role in scrutinizing/regulating schemes than Australia. The UK and NZ Takeover Panels are independent takeovers regulators with arguably the broadest role. Hong Kong (**HK**) and Singapore have Panels that are established by or part of the corporate/securities regulator (ie the ASIC equivalent). Australia divides takeover bids between ASIC (regulation) and the Panel (dispute resolution) and divides takeovers effected by scheme between Courts, ASIC (reviewing documentation and giving “no objection” statements to the Courts) and the Panel (dispute resolution but generally only before the first Court hearing).
- (g) All jurisdictions include a concept of association/acting in concert to deal with the risk that shareholders may attempt to get around a takeovers threshold by acting in concert in secret. In the UK, Hong Kong and Singapore, there are certain rebuttable presumptions in relation to acting in concert, based on certain relationships between persons (for example between spouses). Such presumptions do not exist in the Australian and NZ systems.

PART A - BASIC REGULATORY STRUCTURE

Feature	Australia	UK	NZ	HK	Singapore
Threshold - %	20%	30%	20%	30%	30%
Threshold - prohibition ⁵ / mandatory bid ⁶	prohibition	mandatory bid	prohibition	mandatory bid	mandatory bid
Key exceptions to threshold ⁷	<ul style="list-style-type: none"> - Takeover bid - Scheme - Capital management - 3% in 6 months creep - Shareholder approval 	<ul style="list-style-type: none"> - Takeover bid - Scheme - Capital management - Shareholder approval 	<ul style="list-style-type: none"> - Takeover bid - Scheme - Capital management - 5% in 12 months creep above 50% - Shareholder approval 	<ul style="list-style-type: none"> - Takeover bid - Scheme - Capital management - 2% in 12 months creeper - Shareholder approval 	<ul style="list-style-type: none"> - Takeover bid - Scheme - Capital management - 1% in 6 months creep - Shareholder approval
Association (acting in concert)/ concert parties presumptions	No	Yes eg companies in same group, their directors and their immediate family	No ⁸	Yes eg bidder's spouse and children <18yrs, related trusts, corporations in which it controls 1/3 of voting rights	Yes eg directors of a company during an offer period

⁵ If crossing the threshold is prohibited unless it occurs through a permitted exception (see below) eg a takeover bid or scheme

⁶ If the threshold is crossed, a cash bid (unconditional except for mandatory >50% acceptance) must be made to all shareholders (Mandatory Bid). In the UK a Mandatory Bid must offer at least the highest price paid by the bidder in the previous 12 months. In Hong Kong and Singapore, a Mandatory Bid must offer at least the highest price paid by the bidder in the previous 6 months

⁷ Crossing the takeovers threshold by means of an exception is permitted

⁸ However, the New Zealand Code defines an associate as including persons who "have a business relationship, personal relationship, or an ownership relationship such that they should, under the circumstances, be regarded as associates"

PART B – REGULATORY COMPARISON OF SOME ISSUES IN TAKEOVERS AND SCHEMES

Feature	Australia		UK		NZ		HK		Singapore	
	Bid	Scheme	Bid	Scheme	Bid	Scheme	Bid	Scheme	Bid	Scheme
Type/source of rules	Statute ⁹ Ch6-6C (modified by ASIC)	Statute s411	City Code ¹⁰ (statutory backing)	City Code & Statute	NZ Code (delegated legislation)	Statute & NZ Code	HK Code ¹¹ & Statute	HK Code & Statute	Singapore Code ¹² & Statute	Singapore Code (but SIC ¹³ may exempt) & Statute
Main regulators	ASIC & Panel	Courts & ASIC	UK Panel	UK Panel & Courts	NZ Panel	Courts & NZ Panel	SFC ¹⁴ / HK Panel ¹⁵	SFC / HK Panel & Courts	MAS ¹⁶ & SIC	MAS & SIC & Courts
Main dispute resolution forum	Panel Courts (rare since 2000 ¹⁷)	Courts Panel (pre 1 st Court hearing)	UK Panel	Courts UK Panel	NZ Panel	Courts & NZ Panel	SFC / HK Panel	SFC / HK Panel & Courts	SIC	SIC & Courts
Compulsory acquisition of minority	At 90%	If 75% of votes cast in favour	At 90%	If 75% of votes cast in favour	At 90%	If 75% of votes cast in favour	At 90%	If 75% of votes cast in favour and ≤10% disinterested shares vote against	At 90%	If 75% of votes cast in favour

⁹ Corporations Act 2001 (Cth)

¹⁰ The Code is made by the Panel, and strictly had no legal force until an EC Directive required that it be given statutory backing (See Chapter 1 of Part 28 of the UK Companies Act 2006)

¹¹ The Code is issued by the Securities and Futures Commission (SFC) in consultation with the Takeovers and Mergers Panel

¹² The Code is issued by the Monetary Authority of Singapore ("MAS"), Singapore's main securities regulator, and is administered and enforced by the Securities Industry Council (SIC)

¹³ Securities Industry Council

¹⁴ Securities and Futures Commission

¹⁵ The Takeovers and Mergers Panel is established and appointed by the SFC, which delegates functions to the Panel

¹⁶ Monetary Authority of Singapore

¹⁷ Prior to 2000 takeovers were heavily litigated. In 2000 the CLERP reforms (adopting proposals of the previous government's Simplifications Task Force) made the Panel the main forum for resolving takeover disputes

Feature	Australia		UK		NZ		HK		Singapore	
	Bid	Scheme	Bid	Scheme	Bid	Scheme	Bid	Scheme	Bid	Scheme
Mandatory minimum acceptance condition	No	N/A	Yes - >50%	N/A	Yes - >50%	N/A	Yes - >50%	N/A	Yes - >50%	N/A
“Put up or shut up”	No	No	Yes – broadly, if deal leaks, bidder must either “put up” (announce takeover) or “shut up” (not consider bid for 6 months)		No	No	Yes – broadly, if deal leaks, target must announce progress of takeover talks at end of each month until bidder announces firm intention to make an offer or that it does not intend to make an offer		Yes – broadly, if deal leaks, a holding announcement must be made and target could request the SIC to impose a deadline for bidder to clarify whether it intends to make an offer or not (in which case it will require approval to make an offer within 6 months)	
Restrictions on further offers?	No – subject to “truth in takeovers” ¹⁸	No	Yes – unsuccessful offeror and its concert parties are prohibited (except with Panel consent) from announcing/triggering a further offer within 12 months		No	No	Yes – unsuccessful offeror and its concert parties are prohibited (except with Panel consent) from announcing/triggering a further offer within 12 months		Yes – unsuccessful offeror and its concert parties are prohibited (except with SIC consent) from announcing/triggering a further offer within 12 months	

¹⁸ The Panel may consider that unacceptable circumstances may arise if, “after making a no increase statement, the bidder (or an associate) announces another bid (or a scheme) within 4 months after the bid closes and offers increased consideration (unless that is contemplated by a clear qualification to the no increase statement)”, see [Panel Guidance Note 1: Unacceptable Circumstances](#), footnote 39