



Takeovers Amendment Act 2006

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Commencement see section 2

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Takeovers Amendment Act 2006.

2 Commencement

- (1) This Act comes into force on the day after the date on which it receives the Royal assent.
- (2) However, the following provisions only come into force on a date to be appointed by the Governor-General by Order in Council:
 - (a) new sections 44B, 44C, 44D, and 44E of the Takeovers Act 1993 as inserted by section 24:

- (b) section 29.
- (3) For the purposes of subsection (2), 1 or more orders may be made bringing different provisions into force on different dates.

3 Principal Act amended

Sections 4 to 25 amend the Takeovers Act 1993.

4 Interpretation

- (1) The definition of **company** in section 2(1) is repealed and the following definition substituted:

“**company** has the same meaning as in section 2(1) of the Companies Act 1993”.

- (2) The definition of **specified company** in section 2(1) is repealed and the following definition substituted:

“**specified company** means a company that—

“(a) is a party to a listing agreement with a registered exchange and that has securities that confer voting rights quoted on the registered exchange’s market; or

“(b) was within paragraph (a) at any time during a period specified in the takeovers code (being a period not exceeding 12 months before any date or the occurrence of any event referred to in the code); or

“(c) has 50 or more shareholders”.

- (3) Section 2(1) is amended by inserting the following definitions in their appropriate alphabetical order:

“**quoted**, in relation to securities of a person, means securities of the person that are approved for trading on a registered exchange’s market (and, for the avoidance of doubt, securities do not cease to be quoted merely because trading in those securities is suspended)

“**voting right** means a currently exercisable right to cast a vote at meetings of shareholders of a company, not being a right to vote that is exercisable only in 1 or more of the following circumstances:

“(a) during a period in which a payment or distribution (or part of a payment or distribution) in respect of the security that confers the voting right is in arrears or some other default exists:

- “(b) on a proposal that affects rights attached to the security that confers the voting right:
 - “(c) on a proposal to put the company into liquidation:
 - “(d) on a proposal for the disposal of the whole, or a material part, of the property, business, and undertaking of the company:
 - “(e) during the liquidation of the company:
 - “(f) in respect of a special, immaterial, or remote matter that is inconsequential to control of the company.”
- (4) The definition of **public issuer** in section 2 is repealed.
- (5) Section 2 is amended by adding the following subsection:
- “(2) In sections 32, 33, and 33AA and in subpart 2 of Part 3 (which contain the enforcement powers of the Panel and the Court), unless the context otherwise requires, **contravene the takeovers code** or **not act in compliance with the takeovers code** includes—
- “(a) a contravention of the takeovers code or a term or condition of an exemption from the takeovers code; or
 - “(b) an attempt to contravene the takeovers code or a term or condition of an exemption from the takeovers code; or
 - “(c) aiding, abetting, counselling, or procuring any other person to contravene the takeovers code or a term or condition of an exemption from the takeovers code; or
 - “(d) inducing, or attempting to induce, any other person, whether by threats or promises or otherwise, to contravene the takeovers code or a term or condition of an exemption from the takeovers code; or
 - “(e) being in any way, directly or indirectly, knowingly concerned in, or a party to, the contravention by any other person of the takeovers code or a term or condition of an exemption from the takeovers code; or
 - “(f) conspiring with any other person to contravene the takeovers code or a term or condition of an exemption from the takeovers code.”

5 Object of this Act

Section 4 is amended by inserting the following paragraph after paragraph (c):

- “(ca) provide criminal liability for false or misleading statements or information in relation to takeovers of specified companies:”.

6 Delegation of certain powers by Panel

Section 14(1) is amended by inserting “31A,” after “sections”.

7 New section 15B inserted

The following section is inserted after section 15A:

“15B Sharing of information with Commerce Commission

“(1) The Panel may communicate to the Commerce Commission any information that the Panel—

“(a) holds in relation to the exercise of the Panel’s powers, or the performance of its functions and duties; and

“(b) considers may assist the Commerce Commission in the exercise of the Commerce Commission’s powers, or the performance of its functions and duties, in respect of the Fair Trading Act 1986.

“(2) The Panel may use any information communicated to it by the Commerce Commission under section 48A of the Fair Trading Act 1986 in the Panel’s exercise of its powers, or the performance of its functions and duties.

“(3) This section applies despite anything to the contrary in any enactment, contract, deed, or document.”

8 New heading inserted

The heading “Subpart 1—Investigation and enforcement by Panel” is inserted after the Part 3 heading.

9 New sections 31L to 31MA substituted

Sections 31L and 31M are repealed and the following sections substituted:

“31L Who may receive evidence

“(1) The Panel may receive evidence through a member, officer, or employee of the Panel, or any 2 or more of them.

“(2) However, if a person who is summoned to give evidence under section 31N requests that the evidence be received at a meeting of the Panel, then—

“(a) subsection (1) does not apply, and the evidence must be received at a meeting of the Panel; and

“(b) the meeting must not be held by a method under clause 8(b) of Schedule 5 of the Crown Entities Act 2004 except with the consent of the person summoned.

“31M Admissibility of evidence

The Panel may receive in evidence, whether admissible in a court of law or not, any statement, document, information, or matter that,—

- “(a) in the opinion of the person receiving it, may assist the Panel in dealing effectively with any matter before it; or
- “(b) the Panel may receive under section 31P.

“31MA How evidence may be given

“(1) The Panel may receive evidence—

- “(a) given on oath:
- “(b) given not on oath:
- “(c) if the person receiving the evidence permits it, given by a written statement:
- “(d) if the person receiving the evidence thinks it is appropriate, given by a written statement verified on oath:
- “(e) given by audio-visual communication, if the Panel and the person giving the evidence agree.

“(2) A member, officer, or an employee of the Panel may administer an oath for the purpose of a person giving evidence on oath.”

10 Power to summon witnesses

(1) Section 31N is amended by repealing subsection (1) and substituting the following subsection:

“(1) A member of the Panel may issue a summons to a person requiring that person to appear (in the case of a body corporate, to appear by its authorised representative) before the Panel, or a member, officer, or employee of the Panel, in relation to any matter before the Panel and to do any of the following things:

- “(a) give evidence:
- “(b) give evidence under oath:
- “(c) provide any documents or information that are in the person’s possession or control and that are relevant to the matter.”

(2) Section 31N(2)(c) is amended by omitting “he or she” and substituting “the person”.

(3) Section 31N is amended by repealing subsection (3) and substituting the following subsection:

- “(3) A summons may be served,—
- “(a) in the case of a natural person, by delivering it personally to the person summoned or by leaving it at his or her usual place of residence or business at least 24 hours before his or her attendance is required;
 - “(b) in the case of a body corporate, by leaving it at the body corporate’s usual place of business at least 24 hours before its attendance is required.”

11 Panel’s powers in respect of compliance with takeovers code

- (1) Section 32(2) is amended by inserting “temporary” before “restraining”.
- (2) Section 32 is amended by inserting the following subsection after subsection (3):

“(3A) If the Panel makes a determination under subsection (3), the Panel must, as soon as reasonably practicable, give written notice of its reasons for the determination to the person the determination concerns.”
- (3) Section 32(4) is amended by inserting “temporary” before “restraining” wherever it occurs.
- (4) Section 32(4) is amended by adding the following paragraphs:
 - “(c) make a permanent compliance order (relating to the non-compliance with the takeovers code);
 - “(d) if it makes any order under this subsection, also make an order extending, for a reasonable time, the period for which a takeover offer must remain open.”
- (5) Section 32 is amended by inserting the following subsection after subsection (4):

“(4A) If the Panel makes an order under this section, the Panel—

 - “(a) must immediately give written notice to the person to whom the order is directed of the terms and conditions of the order; and
 - “(b) must, as soon as is reasonably practicable, also give that person written notice of the reasons for the order; and
 - “(c) may also give notice to any other person of those matters.”
- (6) Section 32(5) is amended by omitting “A restraining order” and substituting “An order”.

- (7) Section 32(6) and (7) is amended by omitting “restraining” in each place where it occurs.

12 Restraining orders

- (1) The heading to section 33 is amended by omitting “**Restraining**” and substituting “**Temporary restraining**”.
- (2) Section 33 is amended by inserting “temporary” before “restraining” in the first place where it appears.
- (3) Section 33 is amended by repealing paragraph (d) and substituting the following paragraph:
- “(d) restraining a person from taking any action (including from making any statement or distributing any document) that is or that may reasonably be expected to constitute a contravention of the takeovers code (*see* section 2(2) for the definition of contravention of the takeovers code):”.

13 New section 33AA inserted

The following section is inserted after section 33:

“33AA Permanent compliance orders

For the purposes of section 32, a permanent compliance order is an order for one or more of the following:

- “(a) prohibiting or restricting a person from making any statement or distributing any document that is or that may reasonably be expected to constitute a contravention of the takeovers code (*see* section 2(2) for the definition of contravention of the takeovers code):
- “(b) directing a person to disclose in accordance with the order information for the purpose of securing compliance with the takeovers code:
- “(c) directing a person to publish, at the person’s own expense, in the manner and at the times specified in the order corrective statements that are specified in, or are to be determined in accordance with, the order:
- “(d) for the purpose of securing compliance with any of those orders, an order directing a person to do or refrain from doing a specified act.”

14 New section 33C substituted

Section 33C is repealed and following section substituted:

“33C Restrictions on use of self-incriminating statements obtained by summons

- “(1) A self-incriminating statement made orally by a person summoned under section 31N (whether or not the statement is recorded in writing) in the course of answering any question before, or providing any information or document to, the Panel, or a member, officer, or employee of the Panel,—
- “(a) subject to paragraph (b), is not admissible in—
 - “(i) criminal proceedings against that person; or
 - “(ii) proceedings under this Act, the Securities Act 1978, or the Securities Markets Act 1988 for a pecuniary penalty order against that person; but
 - “(b) is admissible against that person in any proceeding in respect of the falsity of the person’s testimony, for example, in a prosecution for perjury or for an offence under section 44(1).
- “(2) In addition,—
- “(a) a refusal or failure to answer a question or provide information or a document or comply with any other requirement may be used in evidence against that person in proceedings for an offence under section 44(1) arising from that refusal or failure; and
 - “(b) the answering of a question in a way that is false, deceptive, or misleading or the providing of information or a document that is false, deceptive, or misleading may be used in evidence against that person in proceedings for an offence under section 44(1) arising from that act.”

15 Heading above section 33E and sections 33E and 34 repealed

The heading above section 33E and sections 33E and 34 are repealed.

16 New subpart 2 inserted

The following subpart is inserted before section 35:

“Subpart 2—Enforcement by Court

“Overview of enforcement powers and civil remedies

“33E Overview of enforcement powers and civil remedies

- “(1) The following enforcement orders and remedies (**civil remedy orders**) are available under this subpart for a contravention of the takeovers code:
- “(a) an injunction:
 - “(b) a civil remedy order under section 33I:
 - “(c) a compensatory order:
 - “(d) a pecuniary penalty order and declaration of contravention (on application by the Panel only).
- “(2) *See* section 2(2) for the definition of contravention of the takeovers code in this subpart.
- “(3) This section is a guide only to the general scheme and effect of this subpart.

“Injunctions

“33F What Court may injunct

The Court may, on application by any person in accordance with section 35, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute a contravention of the takeovers code.

“33G When Court may grant injunctions and interim injunctions

- “(1) The Court may grant an injunction restraining a person from engaging in conduct of a particular kind if—
- “(a) it is satisfied that the person has engaged in conduct of that kind; or
 - “(b) it appears to the Court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind.
- “(2) The Court may grant an interim injunction restraining a person from engaging in conduct of a particular kind if in its opinion it is desirable to do so.

- “(3) Subsections (1)(a) and (2) apply whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind.
- “(4) Subsections (1)(b) and (2) apply whether or not—
- “(a) the person has previously engaged in conduct of that kind:
 - “(b) there is an imminent danger of substantial damage to any other person if that person engages in conduct of that kind.

“33H Undertaking as to damages not required by Panel

- “(1) If the Panel applies to the Court for the grant of an interim injunction under this subpart, the Court must not, as a condition of granting an interim injunction, require the Panel to give an undertaking as to damages.
- “(2) However, in determining the Panel’s application for the grant of an interim injunction, the Court must not take into account that the Panel is not required to give an undertaking as to damages.

“Various civil remedy orders

“33I When Court may make various civil remedy orders

The Court may, on application by any person in accordance with section 35, make 1 or more of the civil remedy orders described in section 33J if the Court is satisfied on reasonable grounds that a person has contravened or is contravening or intends to contravene the takeovers code.

“33J Terms of various civil remedy orders

A civil remedy order under section 33I may—

- “(a) restrain the exercise of rights attaching to securities or declare an exercise of those rights to be void and of no effect:
- “(b) restrain the issue or allotment of securities or restrain any distribution due in relation to securities:
- “(c) restrain the acquisition or disposal of securities or of interests in or rights relating to them or restrain the registration of any transfer or transmission of securities:
- “(d) direct the disposal of securities or of interests in or rights relating to them (including the person or class of

- persons to which they must, or must not, be disposed of) and direct the payment of the proceeds of any disposal:
- “(e) require securities to be forfeited and require the public issuer to cancel the forfeited securities:
 - “(f) cancel an agreement for the acquisition or disposal of securities or interests in or rights relating to them:
 - “(g) vest securities or interests in or rights relating to them in a trustee for sale on the terms and conditions the Court thinks fit:
 - “(h) declare an agreement for the acquisition of securities or interests in or rights relating to them to be voidable at the option of the person from whom the securities or interests or rights were acquired:
 - “(i) if a contract is entered into in contravention of the takeovers code, or a contract contains a provision which, if given effect to, would contravene the takeovers code,—
 - “(i) vary the contract, in such manner as the Court thinks fit:
 - “(ii) cancel the contract:
 - “(iii) require any person who is a party to the contract to make restitution or pay compensation to any other person who is a party to the contract:
 - “(j) prohibit or restrict a person from making any statement or distributing any document that is or that may reasonably be expected to constitute a contravention of the takeovers code:
 - “(k) direct a person to disclose in accordance with the order information for the purpose of securing compliance with the takeovers code even though the time for doing so may have expired:
 - “(l) direct a person to publish, at the person’s own expense, in the manner and at the times specified in the order corrective statements that are specified in, or are to be determined in accordance with, the order:
 - “(m) require a person to comply with any provision of the takeovers code even though the time for doing so may have expired.

“Compensatory orders

“33K When Court may make compensatory orders

- “(1) The Court may make a compensatory order, on application by any person in accordance with section 35, if the Court is satisfied that—
- “(a) there is a contravention of the takeovers code; and
 - “(b) a person (the **aggrieved person**) has suffered, or is likely to suffer, loss or damage because of the contravention.
- “(2) The Court may make a compensatory order whether or not the aggrieved person is a party to the proceedings.

“33L Terms of compensatory orders

If section 33K applies, the Court may make any order it thinks just to compensate an aggrieved person in whole or in part for the loss or damage, or to prevent or reduce that loss or damage, including an order (without limitation) to—

- “(a) direct the person in contravention to pay to the aggrieved person the amount of the loss or damage:
- “(b) direct the person in contravention to refund money or return property to the aggrieved person:
- “(c) if a contract has been entered into between the person in contravention and the aggrieved person,—
 - “(i) vary the contract or any collateral arrangement as specified in the order and, if the Court thinks fit, declare the contract or arrangement to have had effect as so varied on and after a date before the order was made, as specified in the order:
 - “(ii) cancel the contract and, if the Court thinks fit, declare the cancellation to have had effect on and after a date before the order was made, as specified in the order:
 - “(iii) require the person in contravention to take any action the Court thinks fit to reinstate the parties as near as may be possible to their former positions.

“Pecuniary penalty orders and declarations of contravention

“33M When Court may make pecuniary penalty orders and declarations of contravention

If the Panel applies for a pecuniary penalty order against a person under this Act in accordance with section 35, the Court—

- “(a) must determine whether the person has contravened the takeovers code; and
- “(b) must make a declaration of contravention (*see* sections 33N and 33O) if satisfied that the person has contravened the takeovers code; and
- “(c) may order the person to pay a pecuniary penalty that the Court considers appropriate to the Crown (*see* sections 33P and 33Q) if satisfied that the person has contravened the takeovers code, that the person knew or ought to have known of the conduct that constituted the contravention, and that the contravention—
 - “(i) materially prejudices the interests of offerees, the specified company, the offeror or acquirer, competing offerors, or any other person involved in or affected by a transaction or event that is or will be regulated by the takeovers code, or that is incidental or preliminary to a transaction or event of that kind; or
 - “(ii) is likely to materially damage the integrity or reputation of any of New Zealand’s securities markets; or
 - “(iii) is otherwise serious.

“33N Purpose and effect of declarations of contravention

- “(1) The purpose of a declaration of contravention is to enable an applicant for a civil remedy order under section 33I or a compensatory order under section 33K to rely on the declaration of contravention in the proceedings for that order, and not be required to prove the contravention.
- “(2) Accordingly, a declaration of contravention is conclusive evidence of the matters that must be stated in it under section 33O.

“33O What declarations of contravention must state

A declaration of contravention must state the following:

- “(a) the court that made the declaration; and
- “(b) the provision of the takeovers code to which the contravention relates or, if the contravention is of an exemption, both the term or condition contravened and the takeovers code provision to which the exemption relates; and
- “(c) the person in contravention; and
- “(d) the conduct that constituted the contravention and, if a transaction constituted the contravention, the transaction; and
- “(e) the specified company to which the conduct related.

“33P Maximum amount of pecuniary penalty

The maximum amount of a pecuniary penalty is \$500,000 for an individual and \$5,000,000 for a body corporate, for each contravention.

“33Q Considerations for Court in determining pecuniary penalty

In determining an appropriate pecuniary penalty, the Court must have regard to all relevant matters, including—

- “(a) the principles contained in the takeovers code; and
- “(b) the nature and extent of the contravention; and
- “(c) the likelihood, nature, and extent of any damage to the integrity or reputation of any of New Zealand’s securities markets because of the contravention; and
- “(d) the nature and extent of any loss or damage suffered by a person referred to in section 33M(c)(i) because of the contravention; and
- “(e) the circumstances in which the contravention took place; and
- “(f) whether or not the person in contravention has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct.

“33R Court must order that recovery from pecuniary penalty be applied to Panel’s actual costs

If the Court orders that a person pay a pecuniary penalty, and the proceedings were brought (in whole or in part) by the

Panel, the Court must also order that the penalty must be applied first to pay the Panel's actual costs in bringing the proceedings.

“General”.

17 Persons who may apply

- (1) Section 35(1) is amended by omitting “section 34 of this Act” and substituting “section 33F, 33I, or 33K”.
- (2) Section 35(3) is amended by omitting “section 34 of this Act” and substituting “section 33F, 33I, or 33K”.
- (3) Section 35 is amended by repealing subsection (4) and substituting the following subsection:
“(4) If the Panel makes a determination under section 32(3)(b) (a determination that the Panel is not satisfied that a person has acted or is acting or intends to act in compliance with the takeovers code), the Panel may make an application to the Court under section 33M.”

18 Sections 36 and 37 repealed

Sections 36 and 37 are repealed.

19 Court may have regard to determinations and recommendations by Panel

- (1) Section 38(1) is amended by omitting “section 34 of this Act” and substituting “this subpart”.
- (2) Section 38(2) is amended by omitting “section 36 of this Act” and substituting “section 33I or 33K”.

20 Sections 39 and 40 repealed

Sections 39 and 40 are repealed.

21 New section 41 substituted

Section 41 is repealed and the following section substituted:

“41 Court may excuse contravention

- “(1) If the Court is satisfied that a person has, by any act or omission, contravened the takeovers code, but that the contravention ought to be excused, the Court may (by order) declare that the act or omission was not a contravention of the code.

- “(2) In considering whether the contravention should be excused, the Court may have regard to—
- “(a) inadvertence or mistake on the part of the person concerned:
 - “(b) whether the person was aware of a relevant factor or circumstance:
 - “(c) circumstances beyond that person’s control:
 - “(d) any other matters that the Court thinks fit.
- “(3) The order has effect according to its tenor.”

22 Court may require person to give evidence or produce documents relating to interests in securities

- (1) Section 42(1) is amended by omitting “section 34 of this Act” and substituting “this subpart”.
- (2) Section 42(2) is amended by omitting “section 34 of this Act” and substituting “this subpart”.

23 New sections 43 to 43C substituted

Section 43 is repealed and the following sections substituted:

“43 More than 1 civil remedy order may be made for same conduct

The Court may make a civil remedy order of one kind against a person even though the Court has made another civil remedy order of a different kind against the person for the same conduct.

Examples

The Court may make a compensatory order and a pecuniary penalty order for the same conduct.

The Court may make a civil remedy order requiring forfeiture of securities and declaring a previous exercise of voting rights attaching to those securities to be void.

“43A Only 1 pecuniary penalty order may be made for same conduct

If conduct by a person constitutes a contravention of 2 or more provisions of the takeovers code, proceedings may be brought against that person for the contravention of any one or more of the provisions, but no person is liable to more than one pecuniary penalty order for the same conduct.

“43B Standard of proof for civil remedies

The proceedings under this subpart are civil proceedings and the usual rules of the Court and rules of evidence and procedure for civil proceedings apply (including the standard of proof).

“43C Time limit for applying for civil remedies

- “(1) An application for a civil remedy order under section 33I or a pecuniary penalty order under section 33M may be made at any time within 2 years after the date on which the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.
- “(2) The usual time limits apply to all applications for other civil remedy orders.
- “(3) However, an application for a compensatory order in respect of a contravention may be made at any time within 6 months after the date on which a declaration of contravention is made, even if the usual time limit has expired.”

24 New heading and subparts 3, 4, and 5 substituted

Section 44 is repealed and the following heading and subparts substituted:

“Subpart 3—Offences*“General offences***“44 General offences**

- “(1) A person must not—
- “(a) furnish information, produce a document, or give evidence to the Panel or a member, officer, or employee of the Panel knowing it to be false or misleading; or
- “(b) attempt to deceive or knowingly mislead the Panel or a member, officer, or employee of the Panel in relation to any matter before it.
- “(2) A person who has been summoned to appear before the Panel or a member, officer, or employee of the Panel must not, without reasonable excuse,—
- “(a) refuse or fail to appear before the Panel to give evidence:
- “(b) refuse to take an oath or affirmation as a witness:
- “(c) refuse to answer any question:

- “(d) refuse or fail to provide any document or information that the person is required to provide.
- “(3) A body corporate contravenes subsection (2) if its representative refuses or fails to appear before the Panel to give evidence, refuses to take an oath or affirmation as a witness, refuses to answer any question, or refuses or fails to provide any document or information that the body corporate is required to provide.
- “(4) A person must not act in contravention of any order made by the Panel under section 31X or section 32.
- “(5) Every person who contravenes this section commits an offence and is liable on summary conviction to a fine not exceeding \$300,000 and, if the offence is a continuing one, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence is committed.

“44A Conviction of offence under section 44 excluded in certain cases

- “(1) A person must not be convicted of an offence under section 44 if, in the opinion of the Court dealing with the case,—
- “(a) the contravention related to matters that were immaterial to the relevant matter before the Panel; or
- “(b) the contravention ought reasonably to be excused, having regard to all the circumstances of the case.
- “(2) A director of a body corporate must not be convicted of an offence under section 44 in relation to a contravention by the body corporate if, in the opinion of the Court dealing with the case, the contravention took place without the director’s knowledge and consent.

“False or misleading statement or information

“44B False or misleading statement or information

- “(1) A person must not make a statement or disseminate information, in relation to any transaction or event regulated by the takeovers code or incidental or preliminary to a transaction or event that is or is likely to be regulated by the takeovers code, if—
- “(a) a material aspect of the statement or information is false or the statement or information is materially misleading; and

- “(b) the statement or information is likely to—
- “(i) induce a person to trade, or hold, the securities of a specified company; or
 - “(ii) have the effect of increasing, reducing, maintaining, or stabilising the price for trading in those securities; or
 - “(iii) induce a person to vote for, or to vote against, a transaction that is or is likely to be regulated by the takeovers code, or to abstain from voting in respect of that transaction.

“(2) In this section, **trade** means to acquire or dispose of securities.

“44C Criminal liability for false or misleading statement or information

- “(1) A person who contravenes section 44B commits an offence if the person has actual knowledge that the statement or information is false in a material aspect or is materially misleading.
- “(2) A person who commits an offence against subsection (1) is liable on conviction on indictment to,—
- “(a) in the case of an individual, imprisonment for a term not exceeding 5 years or a fine not exceeding \$300,000, or to both;
 - “(b) in the case of a body corporate, a fine not exceeding \$1,000,000.

“44D Exception for disclosure by investment advisers or brokers

Section 44B does not apply to conduct in relation to a disclosure under Part 4 of the Securities Markets Act 1988 or to conduct in relation to an advice advertisement, a broker advertisement, or a product advertisement to the extent that that conduct is regulated by Part 4 of that Act.

“44E Fair Trading Act 1986 excluded

The Fair Trading Act 1986 does not apply to conduct in relation to any transaction or event regulated by the takeovers code or incidental or preliminary to a transaction or event that is or is likely to be regulated by the takeovers code.

“Subpart 4—Other Court orders

“*Management bans*

“44F When Court may make management banning orders

The Court may, on application by any person referred to in section 35(1)(a) to (g), make a management banning order against a person (A) if—

- “(a) A has been convicted of an offence against either section 44 or section 44C or a pecuniary penalty order has been made against A under this Act for a contravention of the takeovers code; or
- “(b) A has, while a director of an incorporated or unincorporated body,—
 - “(i) persistently contravened this Act, the Companies Act 1993, the Securities Markets Act 1988, the Securities Act 1978, or the takeovers code; or
 - “(ii) if the incorporated or unincorporated body has so contravened, persistently failed to take all reasonable steps to obtain compliance with those Acts or the code; or
- “(c) A has been prohibited in an overseas jurisdiction from carrying on activities that the Court is satisfied are substantially similar to any of the activities referred to in section 44G in connection with a contravention of any law relating to takeovers.

“44G Terms of management banning orders

A management banning order may, for a period stated in the order of 10 years or less, prohibit or restrict the person (without the leave of the Court) from being a director or promoter of, or in any way (whether directly or indirectly) being concerned or taking part in the management of, an incorporated or unincorporated body (other than an overseas company, or an incorporated or unincorporated body, that does not carry on business in New Zealand).

“44H Offence of contravening management banning order

An individual who acts in contravention of a management banning order under section 44F commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding 3 years or to a fine not exceeding \$100,000, or to both.

“44I Only one management banning order may be made for same conduct

If conduct by a person constitutes grounds for making an order under any 1 or more of section 44F of this Act, section 60A of the Securities Act 1978, section 43F of the Securities Markets Act 1988, and section 383 of the Companies Act 1993, proceedings may be brought against that person under any 1 or more of those provisions, but no person is liable to more than 1 order under those provisions for the same conduct.

“44J Persons automatically banned from management

- “(1) This section applies to a person if the person has been convicted of an offence against either section 44 or section 44C or a pecuniary penalty order has been made against the person under this Act for a contravention of the takeovers code.
- “(2) The person must not, for the period of 5 years after the conviction or making of the order (without the leave of the Court) be a director or promoter of, or in any way (whether directly or indirectly) be concerned or take part in the management of, an incorporated or unincorporated body (other than an overseas company, or an incorporated or unincorporated body, that does not carry on business in New Zealand).
- “(3) An individual who acts in contravention of this section commits an offence and is liable, on conviction on indictment to imprisonment for a term not exceeding 3 years or to a fine not exceeding \$100,000, or to both.

“44K General provisions for bans and banning orders

- “(1) The Registrar of the Court must, as soon as practicable after the making of a management banning order under section 44F,—
- “(a) give notice to the Registrar of Companies and the Panel that the order has been made; and
- “(b) give notice in the *Gazette* of the name of the person against whom the order is made and the period or dates for which the ban applies.
- “(2) A person intending to apply for the leave of the Court under section 44G or section 44J must give to the Panel not less than 10 days’ written notice of that person’s intention to apply.

- “(3) The Panel, and any other person that the Court thinks fit, may attend and be heard at the hearing of the application.

“Orders to preserve assets to satisfy claims

“44L When Court may prohibit payment or transfer of money, securities, or other property

- “(1) This section applies if—

- “(a) an investigation is being carried out under this Act in relation to an act or omission by a person, being an act or omission that constitutes or may constitute a contravention of this Act or the takeovers code; or
- “(b) a prosecution has begun against a person for a contravention of this Act; or
- “(c) a civil proceeding has begun against a person under this Act.

- “(2) The Court may, on application by the Panel or by an aggrieved person, make 1 or more of the orders listed in section 44M if the Court considers it necessary or desirable to do so for the purpose of protecting the interests of an aggrieved person.

- “(3) In this section and section 44M,—

“aggrieved person means any person to whom a relevant person is liable

“associated persons are—

- “(a) persons who are relatives within the meaning of the Income Tax Act 2004 or de facto partners; or
- “(b) persons who are partners to whom the Partnership Act 1908 applies; or
- “(c) bodies corporate that consist of substantially the same shareholders or are under the control of the same persons; or
- “(d) a body corporate and a person who has the power, directly or indirectly, to exercise, or control the exercise of, the right to vote attached to 25% or more of the voting securities of the body corporate; or
- “(e) a body corporate and a person who is a director or principal officer of the body corporate

“liable means liable, or may be or become liable, to pay money (whether in respect of a debt, by way of damages or compensation, or otherwise) or to account for securities or other property

“**relevant person** means a person referred to in subsection (1).

Compare: Section 1323(1), Corporations Act 2001 (Aust.)

“44M What orders may be made

“(1) The orders that may be made under section 44L are—

- “(a) an order prohibiting the relevant person from transferring, charging, or otherwise dealing with money, securities, or other property held or controlled by the relevant person:
- “(b) an order prohibiting a person who is indebted to the relevant person or to an associated person of the relevant person from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the person to whom the debt is owed:
- “(c) an order prohibiting a person holding money, securities, or other property, on behalf of the relevant person, or on behalf of an associated person of the relevant person, from paying all or any of the money, or transferring, or otherwise parting with possession of, the securities or other property, to, or to another person at the direction or request of, the person on whose behalf the money, securities, or other property, is or are held:
- “(d) an order prohibiting the taking or sending out of New Zealand by a person of money of the relevant person or of an associated person of the relevant person:
- “(e) an order prohibiting the taking, sending, or transfer by a person of securities or other property of the relevant person, or of an associated person of the relevant person from a place in New Zealand to a place outside New Zealand (including the transfer of securities from a register in New Zealand to a register outside New Zealand):
- “(f) an order requiring the relevant person, or any person holding money, securities, or other property on behalf of the relevant person or an associated person of the relevant person, to pay or transfer money, securities, or other property to a specified person to be held on trust pending determination of the investigation, prosecution, or civil proceeding:
- “(g) an order appointing,—

- “(i) if the relevant person is a natural person, a receiver or trustee, having any powers that the Court orders, of the property or of part of the property of that person; or
 - “(ii) if the relevant person is a body corporate, a receiver or receiver and manager, having any powers that the Court orders, of the property or of part of the property of that person:
 - “(h) if the relevant person is a natural person, an order requiring that person to deliver up to the Court his or her passport and any other documents that the Court thinks fit:
 - “(i) if the relevant person is a natural person, an order prohibiting that person from leaving New Zealand, without the consent of the Court.
- “(2) A reference in subsection (1)(e) or (g) to property of a person includes a reference to property that the person holds otherwise than as sole beneficial owner, for example,—
- “(a) as trustee for, as nominee for, or otherwise on behalf of or on account of, another person; or
 - “(b) in a fiduciary capacity.
- “(3) An order may be expressed to operate for a specified period or until the order is discharged by a further order under this section.

Compare: Section 1323(1), (2A), (6), Corporations Act 2001 (Aust.)

“44N Interim orders

- “(1) If an application is made to the Court for an order under section 44L, the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim order, being an order of the kind applied for that is expressed to have effect pending the determination of the application.
- “(2) The Court must not require the applicant or any other person, as a condition of granting an interim order under this section, to give an undertaking as to damages.
- “(3) In determining an application for the grant of an interim order, the Court must not take into account that the applicant is not required to give an undertaking as to damages.

Compare: Section 1323(3), (4), Corporations Act 2001 (Aust.)

“44O Relationship with other law

“(1) Nothing in sections 44L to 44N affects the powers that the Court has apart from those sections.

“(2) This section has effect subject to the Insolvency Act 1967.

Compare: Section 1323(7), (8) Corporations Act 2001 (Aust.)

“44P Offence

A person commits an offence who contravenes an order by the Court under section 44M or section 44N that is applicable to the person and is liable on conviction on indictment,—

“(a) in the case of an individual, to imprisonment to a term not exceeding 3 years or to a fine not exceeding \$100,000, or both:

“(b) in the case of a body corporate, to a fine not exceeding \$300,000.

Compare: Section 1323(9), (10), Corporations Act 2001 (Aust.)

“Subpart 5—General**“44Q Jurisdiction of Courts in New Zealand**

The High Court has exclusive jurisdiction to hear and determine proceedings in New Zealand under this Act, other than proceedings for offences against this Act or appeals under section 31G.

“44R Court may order payment of Panel’s costs

If the Panel brings proceedings under this Part and the Court makes any order against a person under this Part, the Court may also order that person to pay the Panel’s costs and expenses in bringing the proceedings.

“44S Orders to secure compliance

The Court may, for the purpose of securing compliance with any order it makes under this Part, direct a person to do or refrain from doing a specified act.

“44T Giving notice of applications for Court orders

Before making an order under this Part, the Court may direct the person making the application for the order to—

“(a) give notice of the application to those persons the Court thinks fit:

“(b) publish notice of the application in the manner the Court thinks fit.

“44U General provisions as to Court’s orders

“(1) An order under this Part may be made on the terms and conditions the Court thinks fit.

“(2) The Court may revoke, vary, or suspend an order made under this Part on the terms and conditions the Court thinks fit.

“44V Persons entitled to appear before Court

The following persons are entitled to appear and be heard at the hearing of an application to the Court under this Part:

“(a) the applicant:

“(b) the Panel:

“(c) if the specified company’s securities are, or were at the material time, quoted on a registered exchange’s market, that registered exchange:

“(d) the specified company:

“(e) a person who is alleged to have suffered, or to be likely to suffer, loss or damage because of an alleged contravention of this Act or the takeovers code (whether that person or another person makes the allegation):

“(f) a person who was a security holder of the specified company at the time that the conduct to which the application relates occurred:

“(g) a person who, at any time within the period of 6 months before the making of the application, has made an offer or offers to acquire securities in the specified company in accordance with the takeovers code:

“(h) a person directed to be given notice of the application:

“(i) with the leave of the Court, any other person.

“44W Knowledge of matters presumed if employee or agent knows matters

In any proceedings under this Act, it is presumed, in the absence of proof to the contrary established on the balance of probabilities, that a person knew, at a material time, of any matter if, at that time, an employee or agent of that person knew of the matter in his or her capacity as employee or agent.

“44X No pecuniary penalty and fine for same conduct

A person cannot be ordered to pay a pecuniary penalty and be liable for a fine under this Act for the same conduct.”

25 New Part 4 heading substituted

The heading above section 45 is repealed and the following heading substituted:

**“Part 4
“Miscellaneous”.**

Amendments to takeovers code

26 Takeovers code substituted

Sections 27 to 29 amend the Schedule of the Takeovers Code Approval Order 2000.

27 Interpretation

- (1) Rule 3(1) is amended by revoking the definition of **code company** and substituting the following definition:

“**code company** means a company that—

“(a) is a party to a listing agreement with a registered exchange and has securities that confer voting rights quoted on the registered exchange’s market; or

“(b) was within paragraph (a) at any time during the period of 12 months before a date or the occurrence of an event referred to in this code; or

“(c) has 50 or more shareholders”.

- (2) Rule 3(1) is amended by inserting the following definition in its appropriate alphabetical order:

“**engaging in conduct** means doing or refusing to do an act, and includes,—

“(a) omitting to do an act; or

“(b) making it known that an act will or will not be done”.

- (3) Rule 3 is amended by adding the following subclause:

- “(3) The definition of **code company** in this rule specifies the period of time to be specified by the code for the purposes of the definition of **specified company** in the Act.”

28 Offer period

Rule 24 is amended by adding the following subclause:

- “(4) If the offer period is extended by the Panel by order made under section 32 of the Act, that additional period is included in the offer period for the purposes of this code.”

29 New Part 8 added

The following Part is added after rule 63:

**“Part 8
“Market manipulation**

“64 Misleading or deceptive conduct

- “(1) A person must not engage in conduct that is—
- “(a) conduct in relation to any transaction or event that is regulated by this code; and
 - “(b) misleading or deceptive or likely to mislead or deceive.
- “(2) A person must not engage in conduct that is—
- “(a) incidental or preliminary to a transaction or event that is or is likely to be regulated by this code; and
 - “(b) misleading or deceptive or likely to mislead or deceive.

“65 Exception for disclosure by investment advisers or brokers

Rule 64 does not apply to conduct in relation to a disclosure under Part 4 of the Securities Markets Act 1988 or to conduct in relation to an advice advertisement, a broker advertisement, or a product advertisement to the extent that that conduct is regulated by Part 4 of that Act.”

Amendments to replace references to takeovers schemes

30 Amendments to replace references to takeovers schemes

- (1) Section 67C(4) of the Companies Act 1993 is amended by omitting “a takeover scheme under section 4 of the Companies Amendment Act 1963” and substituting “a takeover offer made under the takeovers code in force under the Takeovers Act 1993”.
- (2) Section 26(3) of the Co-operative Companies Act 1996 is amended by omitting “a takeover scheme under section 4 of the Companies Amendment Act 1963” and substituting “a

takeover offer made under the takeovers code in force under the Takeovers Act 1993”.

Transitional provisions

31 Transitional provision for acquisitions made or committed to before commencement of this section

No amendment made by this Act requires a person to comply with the principal Act or the code—

- (a) by reason only of the fact that, on the commencement of this section, a particular proportion of securities have been acquired in a specified company, whether by that person or any other person before the commencement of this section; or
- (b) by reason of the acquisition of securities in a specified company, whether by that person or any other person, on or after the commencement of this section, if the acquisition arises from the performance of a contractual obligation incurred, or the exercise of a right acquired, before the commencement of this section.

32 Transitional provision for existing offences and contraventions

- (1) The principal Act and the code continue to have effect as if they were not amended by this Act for the purpose of—
 - (a) investigating an existing offence or contravention:
 - (b) commencing or completing proceedings for an existing offence or contravention:
 - (c) imposing a penalty or other remedy, or making an order, in relation to an existing offence or contravention.
 - (2) In this section, **existing offence or contravention** means an offence under, or contravention of, the principal Act or the code that was committed or done before the commencement of this Act.
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Legislative history

10 October 2006	Divided from Securities Legislation Bill (Bill 234–2) as Bill 234–3C
12 October 2006	Third reading
24 October 2006	Royal assent

This Act is administered by the Ministry of Economic Development.
