THE TAKEOVERS PANEL'S BRIEFING FOR THE INCOMING MINISTER:

MINISTER OF COMMERCE

NOVEMBER 2008

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ORGANISATION AND RESPONSIBILITIES OF TAKEOVERS PANEL

1. The Panel – the Organisation

1.1 The Takeovers Panel is an independent Crown entity established under the Takeovers Act 1993. It is the regulator of New Zealand's corporate takeovers market.

1.2 The Panel is governed by a Board of eleven Members drawn from the investment banking, legal, accounting and business community. The Chairman is Mr David Jones of Auckland, Solicitor, and the Deputy Chairman is Mr Colin Giffney, Investment Banker, also of Auckland. Under reciprocal arrangements with the Australian Government, the Chairman, David Jones, is also a Member of the Australian Takeovers Panel.

1.3 The Panel employs an executive staff which is located in Wellington. The Panel executive currently constitutes a Chief Executive, Mr Kerry Morrell, and five lawyers who include a General Counsel and one senior lawyer, one intermediate lawyer, and two junior lawyers. The Panel executive has a full time secretary. The Panel has been purchasing services from the Securities Commission such as those relating to IT infrastructure and support, communications advice, reception, etc.

2. The Panel's Responsibilities - Outputs

2.1 The Panel's core output is the regulation of takeover activity through the enforcement of the Takeovers Code. To achieve this effectively, the Panel has robust investigatory powers and the ability to make temporary restraining orders and some limited permanent orders. When exercising its enforcement powers, the Panel acts judicially as a tribunal.

2.2 The Panel's responsibilities also include:

(a) Exemptions - the granting of exemptions from compliance with the Code. Exemptions assist with ensuring that the Code applies effectively, appropriately and efficiently in an environment of rapidly changing takeover proposals and capital structures.

(b) Approvals – approving the appointment of independent advisers who give advice to Code company shareholders about Code-regulated transactions. The Panel's approvals policy sets high standards for the independence and competence of advisers.

(c) Review of Law – reviewing takeovers law and recommending any changes that the Panel considers necessary, to you, the Minister of Commerce. The

Takeovers Act empowers the Panel, which is an expert body comprised of experienced takeovers practitioners, to initiate recommendations for changes to takeovers law. When the Panel makes any such recommendations, it is the role of the Ministry of Economic Development ("MED") to give you policy advice on the recommendations. The Panel and its executive staff liaises closely with Ministry officials on proposals for changes to takeovers law.

(d) Public Understanding – promoting public understanding of takeovers law and practice, and co-operating with overseas regulators.

3. Background to Code

3.1 The Takeovers Code came into force in July 2001. The Code provides the legal framework within which takeovers proceed. It has achieved broad market acceptance. There appears to be a high level of compliance with the Code, which market feedback suggests is the result of the Panel's reputation for decisive enforcement activity, beginning with its issuing of restraining orders on the first day of the Code's operation (on Sunday 1 July 2001).

3.2 Prior to the introduction of the Code, opponents to the reform of the law had argued that a takeovers code would spell the demise of takeover activity in New Zealand. However that has not proved to be the case. It is now apparent that the level of takeover activity is a product of prevailing market forces not the presence of a Code. The global downturn which began in 2007 with the US sub-prime mortgage crisis was ultimately reflected by lower mergers and acquisitions activity in New Zealand during and since the latter part of 2007. The more recent financial markets crisis has been similarly reflected in the latter part of 2008.

MAJOR POLICY AND IMPLEMENTATION ISSUES

4. Schemes of arrangement and amalgamations involving Code companies

4.1 In May 2008 the Panel sent to the Minister of Commerce its recommendations for changing the law relating to the use of schemes and amalgamations under the Companies Act 1993 to effect changes of control of Code companies. The Panel was responding to the concerns expressed by the market about the recent use of the reconstruction provisions of the Companies Act to effect takeovers and other Code-regulated types of transactions involving Code companies, instead of achieving that outcome under the Code. The reconstruction provisions, instead of the Code, have been employed for a number of takeovers since 2005.

4.2 The current gap in the law has resulted in a market practice of regulatory arbitrage which the Panel and the investor sector of the market believes has had a negative impact on procedural safeguards for shareholders, and thus on the perceived integrity of New Zealand's capital markets. For this reason the Panel's proposals for schemes and amalgamations involving Code companies warrant a high priority.

4.3 A summary of these recommendations is set out in section 9 of this briefing.

5. Minor changes to Takeovers Act

5.1 In May 2008 the Panel also recommended to the Minister some minor, low policy, amendments to be made to the Takeovers Act (unrelated to the schemes and amalgamations issue) that would resolve some anomalies and unintended impacts within the Takeovers Act. These could be attended to in the Takeovers Amendment Bill proposed for the schemes and amalgamations issue.

6. Upstream takeovers

6.1 The Panel's other policy priorities include a review of the Code's impact on upstream takeovers. This project is a priority, following the difficulties that occurred with a UK company's (BG Group plc) attempted takeover of Origin Energy Limited in Australia, in mid-2008, which would, if successful, have resulted in BG Group obtaining control of Contact Energy Limited, a subsidiary of Origin and a New Zealand Code company.

6.2 The Code must be complied with if these large off-shore transactions would result in the acquirer of the overseas entity thereby also gaining control of a New Zealand Code company. Under the current law the "upstream" acquirer is required to either successfully takeover, or obtain shareholder approval for the acquisition of the controlling stake in, the Code company *before* it can acquire the overseas target.

6.3 This creates inefficiency on an international scale and does not meet the obligations of international comity. In circumstances such as the BG Group/Origin attempted takeover, it can even result in a target being literally takeover-proof. The Panel is currently developing a policy proposal for public consultation on this issue.

7. Other policy projects

7.1 There are a number of other policy projects that the Panel has underway or that are pending. However, the Panel does not anticipate making any recommendations regarding any of these to you in the very near future unless market conditions should create a need to reprioritise.

8. Panel Governance

8.1 Another matter currently exercising the Panel is a governance matter that has an impact on the Panel's funding needs. This matter may require your attention within the first six months of your term as Minister of Commerce.

8.2 From its establishment in 2001 the Panel was serviced by staff from the Securities Commission, even though the Panel is a separate independent Crown entity. The co-location model was adopted at that time because the level of work for a Panel secretariat under a new piece of regulation (the Takeovers Code) was not known. It was felt that synergies could be gained by the closely related work areas of the Panel and the Commission, both being regulators in the corporate and capital markets.

8.3 The anticipated synergies between the work of the Commission and the Panel turned out to be quite small and related to infrastructure rather than outputs. In practice each area of the law (securities and takeovers) requires separate specialist legal expertise

and accordingly there is no sharing of legal staff between the Panel and the Commission.

8.4 Following a recent governance review, including discussions held with the Securities Commission and officials from the MED, the Panel became the employer of all its full time staff. This was undertaken in order to secure control of executive accountabilities to the Panel and so that it could comply with its statutory obligations to ensure the organisational health of the entity.

8.5 The Panel executive is still physically co-located with the Securities Commission, but the Panel is working on relocating to its own premises and to operating on a stand-alone basis, with some contracted part time support services. The Panel understands that the Securities Commission needs to increase its personnel for the functions it has acquired under the newly passed Financial Advisers Act. Accordingly, the Commission will need additional office space for its own staff, making a move by the Panel executive convenient to all affected parties.

8.6 The Panel's relocation has funding implications relating to the initial set-up costs, which would include any necessary fit-out or alterations of leased office space, furnishings, and IT hardware and software. However, current models indicate that the Panel will not incur increased operational costs as a stand-alone entity.

PENDING DECISIONS

9. Policy Decisions

9.1 Two policy matters are pending that may require your attention within the first six months of your term:

(a) The first relates to the Panel's May 2008 recommendations on schemes and amalgamations.

(b) The second relates to the Panel's May 2008 recommendations on minor amendments to the Takeovers Act.

9.2 The Panel understands that MED officials are working on their policy advice regarding the Panel's proposals. The recommendations relating to schemes and amalgamations are a greater priority than the minor amendments to the Takeovers Act, because they are significant to the functioning and integrity of New Zealand's capital markets.

9.3 The Panel has recommended that the law on schemes and amalgamations be changed to align it more closely with that in Australia. The Panel's recommended regulatory proposal would produce greater certainty in this area of the law where, currently, promoters of a change of control in a Code company can choose whether to avoid the Code or to undertake the transaction under the Code's jurisdiction.

9.4 The Panel accepts that there can be valid and commercially sensible reasons for structuring a change of control as a scheme of arrangement or an amalgamation. The concerns about the use of the Companies Act reconstruction provisions are

procedural. They are particularly acute in respect of the Part 13 amalgamation process, as Part 13 amalgamations have little regulatory oversight.

9.5 The Panel's proposal addresses the need for certainty while retaining the flexibility of allowing changes of control of Code companies to occur outside of the Code, but with greater regulatory oversight, better information for shareholders, and more rigorous shareholder voting requirements.

9.6 In summary, the Panel's proposal includes the following:

(a) An amalgamation involving a Code company could be undertaken, but only through the scheme provisions in the Companies Act, so that the Court would supervise the process.

(b) For any scheme (including an amalgamation undertaken as a scheme) that has an effect on voting rights in a Code company, either –

(i) the Court would have to be satisfied, before it could approve the scheme, that the Code company shareholders would not be disadvantaged by the transaction not being undertaken under the Takeovers Code; or

(ii) the promoters of the scheme could produce to the Court a statement from the Takeovers Panel stating that the Panel has no objection to the scheme.

(c) These two requirements would be in addition to the current common law tests which the Court applies when considering a scheme.

(d) The promoters of schemes involving Code companies would be able to apply to the Panel for a "no-objection" statement before seeking Court orders for the proposed scheme. This proposal parallels the Australian process where the Australian Securities and Investments Commission has a "no-objection" statement process.

(e) The Companies Act would set out the voting thresholds for the shareholders' approval of schemes involving Code companies. These thresholds would require approval by 75% of the votes cast at meetings of shareholders in each interest class (this is the current voting threshold for a scheme) and, in addition, all of those votes combined would have to represent more than 50% of the total voting rights of the company.

(f) The Companies Act would be amended to include some guidance for the Court on how to determine the different interest classes of shareholders for the purpose of their meeting to vote on the scheme.

(g) A "no-objection" statement from the Panel would assist the Court to decide whether to approve a scheme. If the Panel opposed a transaction being undertaken as a scheme under the Companies Act, the Panel would be able to object to it in Court.

APPOINTMENT OF PANEL MEMBERS AND TERMS OF OFFICE

10. Appointment/Qualifications

10.1 Members are appointed by the Governor-General on the recommendation of the Minister of Commerce and must, in the opinion of the Minister, be qualified or experienced in business, accounting or law.

10.2 At least one Member of the Panel must be a lawyer who has at least seven years' practice. The Chairman, as well as two other current Members, fills that requirement.

10.3 The Panel's statutory membership requirements ensure that the Panel constitutes a "committee of the market". Because they are all active market participants, Panel members are closely attuned to market practices and concerns. This helps to ensure that, to the extent legally appropriate and in accordance with best practice, the Panel can utilise its exemption and enforcement powers to facilitate an innovative and commercially vibrant takeovers market.

10.4 Members are appointed for terms of up to five years and may be reappointed when a term expires. The term of office of Mr Kevin O'Connor of Wellington is due to expire in September 2009, and the term of Ms Sue Suckling of Christchurch will expire in 2010. All other Members' terms of office will expire in 2011 or later.

10.5 One Panel Member, currently Mr Peter Scott, is appointed to the Panel on the recommendation of the Australian Government. He is a Member of the Australian Takeovers Panel. The Chairman of the New Zealand Panel is also appointed as a Member of the Australian Panel. This arrangement keeps the regulators in both jurisdictions abreast of trans-Tasman takeovers developments.

10.6 The Panel has a robust conflicts policy consistent with the Crown Entities Act, the general law and proper commercial practice. The policy ensures that Members with interests do not participate in matters under consideration by the Panel in respect of which they are conflicted.