

THE TAKEOVERS PANEL

**BRIEFING
FOR THE
INCOMING MINISTER:**

MINISTER OF COMMERCE

[This document has been proactively released]

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1. INTRODUCTION

- 1.1 The Takeovers Panel is the regulator of New Zealand’s market in corporate takeovers and control-change transactions.¹ The Panel’s jurisdiction covers companies that are subject to the Takeovers Code (**Code companies**). Code companies are New Zealand registered companies that are listed on the NZX or, if unlisted, have 50 or more shareholders (with voting rights)² and 50 or more share parcels.
- 1.2 The transactions that the Panel regulates are governed by the Takeovers Code and by Part 15 of the Companies Act 1993.
- 1.3 Investors, both domestic and international, benefit from the Code and from the Panel’s role as a market regulator, due to the significant contribution these make to the integrity of New Zealand’s capital markets. Since 2001, when the Code came into force, investors in Code companies have enjoyed the benefit of Code-protected rights to participate on a level playing field in control-change transactions.

2. ORGANISATION AND RESPONSIBILITIES OF THE TAKEOVERS PANEL

Independent Crown entity

- 2.1 The Takeovers Panel is an independent Crown entity established under the Takeovers Act 1993. Its monitoring department is the Ministry of Business, Innovation and Employment (**MBIE**).
- 2.2 The Panel has a board of 11 members drawn from the investment banking, legal, accounting and business community. The Chairman is lawyer David Jones MNZM of Auckland, and the Deputy Chairman is former investment banker Andy Coupe of Cambridge.
- 2.3 The Panel’s staff of 7.8 FTEs is located in Wellington, headed by Chief Executive Margaret Bearsley.

The Panel’s Responsibilities

Control-change transactions under the Code or Companies Act

What is the role of the Panel?

- 2.4 The Panel’s core function is the regulation of takeovers and other control-change transactions in Code companies. It does this through enforcing the Takeovers Code and also through engaging with applicants under the Companies Act who wish to undertake a ‘Court approved’ scheme of arrangement involving a Code company (**Code company scheme**).

¹ “Control-change transaction” in this context means when an investor increases their level of ownership of a company’s shares to any level above 20%. A control-change transaction could be a takeover offer by a person to all of the shareholders, or it could be an acquisition of an existing parcel of shares, or an allotment of new shares in the company, that takes the acquirer or allottee to above the 20% ownership threshold.

² ‘Voting right’ in this context is the right to vote that is attached to a share. Shareholders with voting rights can vote at meetings of the company on important issues that affect the company and their investment in it.

- 2.5 To perform this function 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.
- 2.6 The Panel also may facilitate transactions by granting exemptions from compliance with the Takeovers Code. The Panel may only grant exemptions that are appropriate and consistent with the objectives of the Code.
- 2.7 An independent adviser must be appointed by a Code company that is involved in any transaction regulated by the Code, and also must be appointed for Code company schemes. The independent adviser gives advice to the company's shareholders on the merits of the transaction. The adviser must be approved as being independent and competent by the Panel, before the adviser is appointed by the Code company for the transaction.

How does the Code work?

- 2.8 The Takeovers Code is a rule book on processes that must be followed, and on information that must be provided to shareholders to assist their decision-making. The Code ensures that a Code company's shareholders have the opportunity to participate in control-change transactions.
- 2.9 For example, many New Zealand companies have one or two large shareholders (these are often the founders of the company), owning more, sometimes much more, of the company's shares than the 20% level at which the Code 'kicks in'. These shareholders have a high level of control over the company because they control a significant proportion of the company's shares, or, in Code parlance, the company's 'voting rights'.
- 2.10 Any increase in these major shareholders' ownership of voting rights would likely be a control-change transaction which must be carried out in compliance with the Code. This means that all of the other shareholders have the opportunity to participate in the transaction. They also receive information and advice from the company's directors and independent advice from an independent adviser approved by the Takeovers Panel.³
- 2.11 The way the other shareholders participated would depend on the type of transaction that the major shareholders intended to do.
- 2.12 If the transaction was to be an acquisition of another shareholder's parcel of shares, or if it was to be an allotment of new shares by the company to the major shareholders, then all of the shareholders who weren't involved in the acquisition or allotment would have the opportunity to vote on whether the transaction should be allowed to occur. They would vote at a meeting of the shareholders, and the transaction could only proceed if the shareholders who were entitled to vote passed the resolution for the transaction.
- 2.13 If the transaction was to be a takeover of the company (whether by the major shareholders or by another person), the person doing the takeover would have to make an

³ For some transactions an exemption from compliance with the Code is available for investors to rely on. In these cases, provided the conditions of the exemption are met, compliance with the Code is not required. Another situation where Code compliance is not required is where a shareholder owns more than 50% of a Code company's voting rights. Such a large shareholder can 'creep'; that is, the shareholder can acquire up to 5% more of the company's voting rights over any 12-month period without having to comply with the Code.

offer to all of the shareholders and the offer would have to be made on the same terms to all of the shareholders. The Code also mandates the timing for each step of a takeover offer, so shareholders have adequate time to make their decision about whether to accept or reject the offer for their shares. If the person making the takeover offer receives enough acceptances of the offer to reach 90% ownership of the company, the Code provides for the compulsory acquisition of the rest of the shares. This ensures a fair 'exit' for the minority shareholders and economic efficiency for the company.

- 2.14 If the control-change transaction was a Code company scheme, the Panel would be involved to make sure that the shareholders received good information and independent advice, and that any interest classes amongst the shareholders were properly identified. Voting in interest classes gives shareholders much stronger voting power, because a Code company scheme has to be approved by each interest class in order to succeed (and for the High Court to consider whether it will approve the scheme).

What do transactions regulated by the Code 'look like'?

- 2.15 Four flowcharts are appended to this briefing. The first three flowcharts depict the basic steps in Code-regulated transactions. They are taken from the Panel's publication *A Basic Guide for Directors about the Takeovers Code* (available on the Panel's website www.takeovers.govt.nz). The fourth flowchart depicts the steps for a Code company scheme.

- 2.16 For takeovers and compulsory acquisitions of Code companies, the Code sets out the rules for the timing of each step of the transaction and also for the information requirements.

- 2.17 For transactions where the Code requires that shareholders give their approval before the transaction can proceed, the timing rules for the holding of the shareholders' meeting are actually in the Companies Act: information for a company meeting has to be sent to shareholders at least 10 working days before the meeting is held. The Takeovers Code stipulates the information that the shareholders must be given.

- 2.18 The Panel's role in a Code company scheme is to assist the Court by:

- reviewing scheme documents to ensure that appropriate information is placed before shareholders and that interest classes of shareholders have been adequately identified; and
- helping to ensure that matters that are relevant to the Court's decision are properly brought to the Court's attention.

What about transactions that are not regulated by the Code?

- 2.19 Transactions that are not regulated by the Code (e.g., because they are not control-change transactions or because they are transactions in an entity that is not a Code company) can be undertaken without involving all of the shareholders, without

providing independent advice to the shareholders, and offers can be made on better terms for some shareholders than others.⁴

2.20 Small investors and international investors can potentially be the most disadvantaged in unregulated offers, as acquirers can ‘cherry pick’ share parcels, and make offers on a first come first served basis, etc.

What do the Panel and the Code NOT do?

2.21 Neither the Takeovers Code nor the Takeovers Panel has any role in deciding whether a takeover offer or any other kind of transaction is ‘good’ or ‘bad’. The Panel does not have a role in determining what price should be offered by a person wanting to buy a parcel of shares or wanting to make a takeover offer.

2.22 The Takeovers Panel does not take sides. It is impartial and it acts only to ensure compliance with the Takeovers Code.

2.23 Shareholders must decide for themselves whether to accept a takeover offer or not, or whether to vote for or against a resolution about a transaction at a shareholders’ meeting.

Law reform and Public understanding

Law reform

2.24 Reviewing takeovers law and recommending to you, the Minister of Commerce, any changes that the Panel considers necessary, is another significant Panel role.

2.25 The Panel is an expert body comprised of experienced practitioners involved in the commercial and corporate takeovers arena. The Panel engages regularly with market participants and representative bodies to keep abreast of issues impacting on the effectiveness and efficiency of takeovers law, and considers this feedback when undertaking policy work.

Public understanding

2.26 When the Panel undertakes its function of promoting public understanding about takeovers law and practice, it aims to educate:

- small and large investors to help them understand their rights and obligations under the Code or for a Code company scheme;
- directors of Code companies to better understand their obligations under the Code or for a Code company scheme;
- legal and financial advisers to improve their understanding of takeovers law and the way the Panel enforces it, so they will give sound advice to their clients; and

⁴ However, for listed companies and other listed entities, the NZX Listing Rules set certain standards that have to be met. Companies also must hold shareholders’ meetings under the Companies Act for some transactions not regulated by the Code, such as some ‘major transactions’.

- journalists and market commentators to help them communicate and opine effectively about the Code's and the Panel's roles in relation to transactions that fall within the Panel's jurisdiction.

3. MAJOR POLICY AND IMPLEMENTATION ISSUES

- 3.1 As noted above the Panel has a function to keep takeovers law under review and to recommend any changes to you that the Panel thinks necessary.
- 3.2 The law reform activities that the Panel undertakes include recommendations on 'technical' or low-policy content amendments to the Code, to keep the Code aligned with developments in the capital markets and with policy expectations about informing shareholders.
- 3.3 A set of such technical amendments was made to the Code in 2007 and another set was made in 2013. The Panel's current work programme includes consideration of a number of possible further such technical amendments to the Code.
- 3.4 The Panel's recommendations for these will come to you in due course after a full policy development process and public consultation, and liaison with policy officials at MBIE.

4. PENDING DECISIONS

- 4.1 The Panel is currently undertaking policy development on one issue which may result in a recommendation from the Panel in late 2014 or early 2015, for amending the Code and possibly the Takeovers Act. This would require your consideration for seeking Cabinet approval for the amending legislation.
- 4.2 The issue relates to whether the costs of complying with the Code are disproportionate to the benefits of the Code's protections for shareholders in small Code companies and, if so, considering whether to reduce or remove the regulatory obligations of Code compliance for these companies. The Panel is considering this issue as a result of feedback from market participants who have suggested that Code compliance is too expensive for small companies.
- 4.3 As noted above, the Panel anticipates making a recommendation to you soon, if the policy process indicates to the Panel that law reform is necessary.
- 4.4 The Panel has two policy matters pending which have already had Cabinet approval. One is the Takeovers Code Approval Amendment Regulations which include amendments to the Code to require disclosure about the ownership of equity derivatives referenced to Code company securities. The Amendment Regulations also cover a number of amendments that are consequential to the Financial Markets Conduct Act and regulations changes. Progressing the Amendment Regulations is likely to require early input from you within the first six months of your term.
- 4.5 The other policy matter is included in the Regulatory Systems Bill. Having the Bill introduced may also require input from you within the first six months of your term. The Panel's proposal in the Bill gives the Panel a clear jurisdiction to determine disputes between target companies and takeover bidders as to the obligation on bidders to reimburse target companies for the expenses incurred from a takeover.

5. APPOINTMENT OF PANEL MEMBERS AND TERMS OF OFFICE

- 5.1 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.
- 5.2 At least one member of the Panel must be a lawyer with at least seven years' practice. The Panel's Chairman and three other members currently fill that requirement.
- 5.3 The Panel's statutory membership requirements ensure that the Panel constitutes an expert body of takeovers practitioners. 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 innovations within the takeovers market.⁵
- 5.4 One Panel member is appointed to the Panel on the recommendation of the Australian Government. This position is currently filled by Mr Richard Hunt. He is a member of the Australian Takeovers Panel. The Chairman of the New Zealand Panel is also a member of the Australian Panel. This reciprocal arrangement keeps the regulators in both jurisdictions abreast of trans-Tasman takeovers developments.
- 5.5 The composition of the Panel, drawn from market participants, and the retention of the Panel's institutional knowledge, are critical to the Panel's role in New Zealand's capital markets. The Panel's succession plan for members is built around these concerns. Due to the highly specialised nature of the Panel's work, finding suitable candidates for the role is essential and can take some time.
- 5.6 Members are appointed for terms of up to five years and may be reappointed when a term expires. The term of office of Richard Hunt expires in March 2015. Other Panel members' terms of office expire from September 2015 onwards. The positions that will require your early attention, in terms of instigating a search and appointment process are, in time-critical order, as follows:
- Richard Hunt (Australian member) – appointed 1 May 2014, **expires 7 March 2015**;
 - David Jones (Chairman since 8 March 2007) – appointed 24 June 2001, **expires 30 September 2015**;
 - Simon Horner – appointed 1 February 2011, **expires 31 January 2016**;
 - Roger Wallis – appointed 1 February 2011, **expires 31 January 2016**.
- 5.7 The Panel and MBIE will brief you fully on these matters at the time they require your attention.

⁵ Having a Panel of active market practitioners means that conflicts of interest have to be carefully managed. The Panel operates under a robust Conflicts of Interest Policy to ensure that only non-conflicted members act in relation to any matter that comes before the Panel.