APPENDIX B – PARTIAL OFFERS IN NEW ZEALAND

A review of partial offers made under the Code is set out below. Any Code-compliance issues that were raised during the course of these offers and which had a particular relevance to partial offers are discussed.

Lion Nathan Limited/ Montana Group (NZ) Limited

On 1 July 2001 (the day the Code came into force), the Panel received notice from Lion Nathan Limited ("Lion Nathan") of its intention to make a partial offer for 11% of the shares in Montana Group (NZ) Limited ("Montana") for $5.50 per share.

The draft offer document stated that, if the offer became unconditional, Lion Nathan intended to make a further full offer for all of the outstanding shares in Montana at $3.70 per share. Lion Nathan made several public announcements with respect to its partial offer which referred to the intention to make a subsequent full offer.

Subsequent offer

After receiving the announcement, the Panel considered that the draft offer terms may not have complied with the Code and, accordingly, decided to hold a meeting under section 32 of the Takeovers Act. The meeting was held on 16 July 2001.

In its determination following the section 32 meeting, the Panel decided that the clear effect of Lion Nathan's announcements was that offers would be made for 11% of Montana at $5.50 per share and thereafter for the remainder of the Montana shares at $3.70 per share. The Panel considered that, whilst the offer did not discriminate between shareholders, it would constitute a single offer at different prices. The Panel was not satisfied that such conduct would comply with rule 20 of the Code. The Panel made orders restraining Lion Nathan from acquiring any shares in Montana unless in compliance with the Code.

GPG Forests Limited/ Rubicon Limited

On 28 August 2002, GPG Forests Limited, a subsidiary of Guinness Peat Group plc, ("GPG Forests") gave notice of its intention to make a partial offer for shares in Rubicon Limited ("Rubicon"). GPG Forest's draft offer was formulated as an offer for either:

(a) 40% of Rubicon's shares that it did not hold or control (approximately 32% of Rubicon's total shares); or

(b) if GPG did not achieve sufficient acceptances to leave GPG holding over 50% of Rubicon's total shares and approval was obtained from Rubicon's shareholders in accordance with rule 10(1)(b) of the Code, then its offer was for "the percentage of the Outstanding Rubicon Shares, falling between the Unconditional Percentage and the 30% Minimum, for which acceptances are received under this Offer."

Alternative partial offers

The Panel considered that the draft offer terms did not appear to comply with the Code. The Panel held a meeting under section 32 of the Takeovers Act to determine whether it should

exercise its powers under the Act in respect of the proposed GPG Forests partial offer. The meeting was held on 5 September 2002.

The Panel considered that, in relation to a partial offer made under the Code, the potential offeror must choose between whether to make an offer for a specified percentage of the target company's shares that would take its total control of voting rights to more than 50%, or choose a specified percentage that would take its voting control to 50% or less. In the latter case, the offer needs the approval of the majority of non-associated shareholders who choose to vote.

The Panel considered that the Code did not contemplate the making by an offeror of alternative offers. Rather, on the ordinary meaning of rules 9 and 10, the Code provided for a single offer, which involved an election by the offeror as to the actual percentage of the target company's shares that would be sought by the offeror.

Accordingly, the Panel considered that GPG Forest's proposed partial offer did not comply with the Code. The Panel made orders restraining GPG Forests from acquiring any shares in Rubicon under the terms of the proposed alternative partial offers.

On 27 September 2002, GPG Forests announced revised terms of a partial offer for Rubicon. The offer was for 40% of the Rubicon shares not already held or controlled by GPG Forests.

On 2 December 2002, the Panel received a notice from GPG Forests of the lapse of its partial takeover offer for ordinary shares in Rubicon Limited. The offer closed on 29 November. Acceptances had fallen short of the number required for GPG to control more than 50% of the voting rights in Rubicon.

<u>Rural Portfolio Investments Limited/ Wrightson Limited</u>

On 20 April 2004, Rural Portfolio Investments Limited ("RPI") announced its intention to make a partial takeover offer for Wrightson Limited ("Wrightson").

RPI's draft offer document, which accompanied its notice of intention to make an offer, stated that RPI was offering to purchase shares in Wrightson that represented 37.069% (the specified percentage) of the Wrightson shares not already held or controlled by RPI. At the date of the announcement, RPI held or controlled 13% of Wrightson. The draft offer document stated that RPI wished to acquire 50.01% of the shares in Wrightson as a result of the offer.

Misstatement of the specified percentage

If RPI acquired 37.069% of the shares in Wrightson that it did not already hold as at the date of the offer (and it held 13% on that date), this would not be sufficient to confer 50.01% of the voting rights in Wrightson.

The specified percentage appeared to the Panel executive to have been calculated on the basis of the percentage of *total* shares which RPI would need to confer 50.01% of the voting rights in Wrightson rather than the percentage of shares that RPI *did not already hold or control.*

RPI withdrew its takeover notice and reissued a new notice later in the day on 20 April 2009. The new notice correctly stated the specified percentage for the purposes of rule 9 of the Code.

H&G Limited/ Rural Equities Limited – First offer

On 30 April 2004, H&G Limited ("H&G") gave notice of its intention to make a partial offer for Rural Equities Limited ("REL"), to hold, when combined with its associates, 50.1% of the voting rights in REL. If the offer was successful, H&G alone would hold 40.83% of REL.

H&G's offer was subject to shareholder approval in accordance with rule 10 of the Code (because H&G, the offeror, would have voting control of 50% or less if the offer was successful). The offer was the first instance of rule 10 being applied since the Code came into force.

Subsequent to H&G announcing its offer, on 21 May 2004, St Laurence Property & Finance Limited ("St Laurence") announced its intention to make a full takeover offer for REL. H&G indicated that neither it, nor any of its associates, would accept the St Laurence offer.

St Laurence then took steps to acquire 19.99% of the voting rights in REL. Once announcing that it had made this acquisition, St Laurence said it would not proceed with its full takeover offer.

The shareholders approved H&G's partial offer. H&G received sufficient acceptances for its offer, and accordingly, the offer was successful.

Oyster Bay Marlborough Vineyards Limited

The contested partial takeover in 2005 of Oyster Bay Marlborough Vineyards Limited ("Oyster Bay") led to a number of complaints being made to the Panel by the parties involved. The saga culminated in High Court litigation.

On 6 May 2005, Peter Yealands Investments Limited ("PYIL") issued a takeover notice in respect of a partial offer for 44.4% of the ordinary shares in Oyster Bay not already held or controlled by PYIL. The draft offer stated that the offer was conditional on PYIL holding 51.1% of the total shares in Oyster Bay.

On 8 June 2005, Delegat's Wine Estate Limited ("Delegat's") gave notice of its intention to make a partial offer for 25.98% of the voting securities of Oyster Bay not already held or controlled by Delegat's. When combined with the current holding of Delegat's of 32.58% of the issued ordinary share capital of Oyster Bay, the acquisition of shares under the partial offer would result in Delegat's holding 50.1% of the total issued share capital of Oyster Bay. The Delegat's offer was ultimately successful.

Misstatement of specified percentage by PYIL

Although the Oyster Bay saga raised numerous issues for the Panel, only one issue was specifically in relation to the provisions of the Code that relate to partial offers.

The executive reviewed PYIL's takeover notice and noted that the 44.4% stated in the notice as the specified percentage was insufficient to enable the company to meet the requirements of the minimum offer and acceptance rules for its offer (rules 10(1)(a) and 23 of the Code each of which relates to a minimum holding of "*more than 50%*" of the target's shares). The stated specified percentage was also, therefore, too low to enable PYIL to get to its stated 51.1% minimum acceptance condition of the offer. PYIL had misinterpreted rule 9 of the Code.

The executive wrote to PYIL and suggested that, given the non-compliance issues identified in the notice, PYIL should withdraw the notice immediately and reissue a new corrected notice. PYIL agreed to withdraw its non-compliant takeover notice. The final corrected takeover notice that PYIL sent to Oyster Bay on the 13th May 2005 had the correct specified percentage, being 47.64% of the shares not already held by PYIL.

Todd Energy Limited/ King Country Energy Limited

On 13 February 2007, Todd Energy Limited ("Todd") announced its intention to make a partial offer for 14.72% of the shares in King Country Energy Limited ("KCE")(being 22.78% of the shares in KCE not already held or controlled by Todd). Todd held or controlled 35.38% of KCE. A successful offer would increase Todd's holding to 50.1%.

Todd's partial offer followed a previously unsuccessful full offer by Todd for KCE.

Misstatement of minimum acceptance condition

The subsequent partial offer was conditional on, amongst other things, Todd receiving acceptances which would result in it holding or controlling "more than 50%" of the total KCE voting rights.

The Panel executive considered that this condition implied that the offer would be unconditional once Todd received sufficient acceptances such that Todd held or controlled *50.01%* of KCE. This was inconsistent with the specified percentage stated in the offer document, which indicated that the offer would be unconditional once acceptances in respect of *50.10%* of the shares had been received.

The executive advised Todd that the takeover notice did not comply with the Code in a fundamental aspect and should be immediately withdrawn and reissued with the non-compliance corrected.

Todd subsequently withdrew its takeover notice and reissued it with the minimum acceptance condition amended to refer to it receiving acceptances that would take it to 50.10%.

Finzsoft Solutions Limited/ Pi Capital Investments Limited

On 18 April 2007, Pi Capital Investments (FS) Limited ("Pi Capital") announced its intention to make a partial offer for 63.61% of the shares in Finzsoft Solutions Limited ("Finzsoft") for $1.30 per share. Pi Capital did not hold or control any shares in Finzsoft prior to the offer.

Prior to the announcement of the offer (on 5 April 2007), a number of shareholders (the "pre-bid shareholders") who were all associated with Finzsoft's managing director announced that

they had entered into a pre-bid agreement with Pi Capital. The pre-bid shareholders represented just over 63.61% of the shares in Finzsoft. Under the pre-bid agreement, Pi Capital agreed that it would make a partial offer for 63.61% of Finzsoft and the pre-bid shareholders agreed that they would accept it.

The pre-bid agreement permitted the pre-bid shareholders to accept a third party takeover offer, provided the offer was for not less than 63.61% of Finzsoft and met certain price and timing requirements.

The offer was declared unconditional in June 2007.

H&G Limited/ Rural Equities Limited – Second offer

On 14 May 2007, H&G announced its intention to make a partial offer for 16.89% of the voting securities in REL that it did not already hold or control.

As at the date of the announcement, H&G, an investment company of Sir Selwyn Cushing and his son David Cushing, held 40.83% of REL. Other Cushing family interests held a further 9.27% of REL. The combined interests of H&G together with other Cushing holdings was 50.1%. If the partial offer was successful, H&G's individual holding would increase to 50.83% (a total of 60.1% held together with the other Cushing interests).

The offer was successful with H&G receiving acceptances in respect of exactly the number of securities it sought under the offer.

Canada Pension Plan Investment Board/ Auckland International Airport Limited

On 16 November 2007, Canada Pension Plan Investment Board ("CPPIB") announced its intention to make a partial offer for a specified percentage of 39.53% of the shares in Auckland International Airport Limited ("AIAL") that CPPIB did not already hold or control. The offer was conditional on approval being obtain for the purposes of rule 10 of the Code. (The offer was made through CPPIB's wholly-owned subsidiary, NZ Airport NC Limited)

Proposed amalgamation

CPPIB's draft offer document had stated that immediately following a successful completion of the partial offer, CPPIB proposed to amalgamate AIAL with a subsidiary company wholly owned by CPPIB. AIAL shareholders would be paid some cash together with "stapled" securities that would be issued by the CPPIB-subsidiary company. CPPIB stated that it intended to take all reasonable steps within its control to ensure that the amalgamation proposal would be put to AIAL shareholders as soon as practicable after the end of the offer.

The executive formed a view that the partial offer together with the proposed amalgamation would, in substance, constitute one full offer, and that it could be that the prospect of the amalgamation would have a coercive effect on the AIAL shareholders. Although the consideration proposed to be offered under the amalgamation appeared to have the same value as the consideration offered under the partial offer, the latter was only cash, whereas the former was a combination of cash and securities. Public statements by a CPPIB representative and media commentary on the offer indicated that CPPIB's proposals were effectively a "two tier" offer.

The Panel was concerned that CPPIB's proposals may have not complied with rule 20. The Panel sought comment from CPPIB. CPPIB submitted that it was complying with rule 20 because:

(a) The offeror was only stating its intention to take all reasonable steps within its control to ensure that the proposed amalgamation would be put to shareholders;

(b) the proposed amalgamation would be structured so as to not involve any acquisition of voting rights in AIAL and was not therefore subject to the Code;

(c) Clause 10 of Schedule 1 of the Code required disclosure of the amalgamation proposal in the offer document and that was why the proposed amalgamation was disclosed there; and

(d) The Panel's determination in the Lion Nathan case [a previous case where a "two-tier" transaction had breached the Code] was based on the particular and very unusual circumstances in that case.

External legal advice which the Panel sought on the issue was consistent with CPPIB's submissions. Accordingly, the Panel decided that it would not take the amalgamation issue any further.

Minimum acceptance condition

The draft offer document stated that the offer was subject to a "minimum acceptance" condition in the following terms:

> *This offer is further conditional on the offeror receiving acceptances by no later than the Closing Time in respect of not less than the Specified Percentage [39.53%] of [the voting securities in AIAL not already held or controlled by the offeror].*

The rule 10 approval form was similarly drafted.

The Panel considered that the wording of the minimum acceptance condition did not satisfy rules 10(1)(b) and 23 of the Code. The "specified percentage" was 39.53%, but rule 23 required that the minimum acceptance condition in the offer be expressed as a percentage of the *total voting rights to be held by the offeror as a result of the offer*, which was 40%.

It was likely that AIAL would issue new shares (as a result of the exercise of options), which meant that if CPPIB's offer was successful and all of the relevant options were exercised during the offer period, CPPIB's final shareholding (after taking up the "specified percentage" of 39.53% would be 39.99%. The effective result being that CPPIB's offer could not become unconditional because it would not be able to reach the minimum acceptance percentage of 40% due to the dilutionary effect of the exercise of the options.

The Panel granted CPPIB an exemption from rule 23 of the Code such that the minimum acceptance condition could be stated as being 39.99%. The Panel considered that the exemption was appropriate and consistent with the objectives of the Code because it would resolve the dilution problem for CPPIB but would not in any way prejudice any of the AIAL shareholders.

Guinness Peat Group plc/Tower Limited

On 2 May 2008, Guinness Peat Group plc ("GPG") announced its intention to make a partial offer for 15.30% of the shares in Tower Limited ("Tower"). At the date of the announcement, GPG held 19.70 % of Tower. If the offer was successful, GPG's holding would increase to 35%.

The offer was conditional, among other things, upon shareholder approval being obtained for the purposes of rule 10 of the Code.

On 28 May 2008, GPG announced that its offer was full and final and that the offer price would not increase, nor would the offer period be extended.

On the same day, the board of Tower announced that it recommended that Tower shareholders vote to approve the offer, but noted that this did not commit shareholders to accepting the offer. The board recommended that shareholder's not accept GPG's offer price of $2.30 per share. The board considered that the offer price did not fall within the valuation range specified by the independent adviser, Grant Samuel & Associates Limited.

Identity of voters for rule 10 approval

Prior to the despatch of the offer document, Tower asked the Panel executive to confirm that only those persons who were registered as shareholders on Tower's share register as at the record date should be entitled to vote in the approval process under rule 10 of the Code. The executive advised GPG and Tower that that was the Panel's view.

GPG wrote to those Tower shareholders who had acquired Tower shares after the offer record date and advised them that the Panel had taken the view that only those persons on a target company's register as at the record date were eligible to vote under rule 10 of the Code.

Potentially misleading and deceptive statement

In the press release which accompanied GPG's notice of intention to make the offer, GPG Chairman, Mr Tony Gibbs stated that:

> *"[he] expected the offer to be extremely well supported by both large and small shareholders. In particular small shareholders, many of whom hold uneconomic parcels, will have the opportunity to sell their shares at a premium price without incurring disproportionately large brokerage costs to dispose of their shares. The reduction of the number of small size shareholders would in turn assist TOWER to reduce the administrative costs of maintaining and communicating with such a large number of shareholders"*

The Panel executive took the view that the statement by Mr Gibbs was potentially misleading as it was unlikely that any shareholders would be able to sell their entire shareholding into the offer.

The executive also noted that the acceptance form sent to each shareholder with the offer purported to state the total consideration per Tower share that that shareholder would receive if the offer were accepted in respect of all Tower shares that they held. However, the figure provided was the total consideration that they would receive if all of the shares that they held in Tower were taken up under the offer. In the executive's view, that was also potentially

misleading as again it was highly unlikely that shareholders would be able to divest their entire shareholdings under the offer.

The executive considered that both the press release statement and the acceptance form statement could constitute misleading and deceptive conduct under rule 64 of the Code.

Following discussions with the executive, GPG wrote to all Tower shareholders and advised that shareholders may accept the offer for up to all of their shares, however the offer was a partial offer for 15.30% (or 29,342,450 shares) of Tower's shares. If GPG received acceptances for more than that number of shares, in accordance with the Code the acceptances of those shareholders who accepted for more than 15.30% of the their holding would be scaled back.

Knott Partners/ Rubicon Limited

On 31 March 2009, Knott Partners LP and certain associated funds[1] (together, "Knott") announced an intention to make a partial offer for a specified percentage of 10.83% of the shares in Rubicon Limited ("Rubicon") that Knott did not already hold or control.

At the date of the announcement, Knott held 18.50% of the shares in Rubicon. If the offer was successful, Knott would increase its holding to 27.33%. In addition, Mr David M Knott, an associate of Knott, already held or controlled 0.98% of Rubicon, which would mean, if the offer was successful, Mr Knott and Knott would together hold 28.31% in Rubicon.

The offer was conditional on, among other things, shareholder approval being obtained for the purposes of rule 10 of the Code. The offer was successful.

Misstatement of specified percentage

The notice of intention to make a takeover offer misstated the specified percentage of Rubicon shares that Knott wished to acquire under its offer. Knott was advised that Knott could state the correct specified percentage in its offer document (rather than re-issuing a takeover notice and beginning the offer procedure again) if:

(a) The Rubicon directors consented to the offer document that would be sent to shareholders being different from the takeover notice, to the extent that the specified percentage would be correctly stated in the offer document; and

(b) Promptly after such consent being received, Knott made a market announcement explaining the error in the offer document.

Knott subsequently obtained the consent of Rubicon's directors for the necessary changes to the offer document and made a market announcement to that effect.

[1] Knott Partners LP, Knott Partners Offshore Master Fund LP, Commonfund Hedged Equity Company, Good Steward Trading Company SPC, Muisanne Partners LP, Shoshone Partners LP, and Focus 300 Limited.

Identity of voters for Rule 10 approval

The draft offer provided that the persons who were entitled to vote in the rule 10 approval process would not be limited to those persons who were shareholders of Rubicon at the offer's record date, but would exclude those shareholders who sold their shares after that date and include persons who purchased Rubicon shares after that date.

The Panel executive advised Knott that the persons who should be eligible to vote for the purposes of rule 10 do not include offerees who acquire shares in the target company after the record date. The Panel had expressed this view previously, in respect of the partial offer by CPPIB for AIAL. The view was taken because it would provide the greatest certainty and transparency within the current wording of the Code. It would be difficult otherwise to ensure that there was no "double voting" during the approval process.

Knott accordingly amended its voting form that was to be sent to Rubicon shareholders. It made a market announcement explaining the changes together with its announcement in relation to the correction of the specified percentage.

Treatment of nominee holdings for scaling purposes

The Reserve Bank of New Zealand raised an issue during the course of the offer about the treatment of the holdings of the New Zealand Central Securities Depository Limited ("NZCSD") for scaling purposes under rule 12 of the Code.

NZCSD was the registered holder of about 85% of the shares in Rubicon. The shares were held on behalf of firms which participate in the Reserve Bank's Austraclear wholesale securities settlement system.

NZCSD proposed to "split" its holding into two accounts: the first account would represent those beneficial owners of shares held by NZCSD who accepted Knott's offer in respect of the specified percentage of shares or less (or did not accept at all), and the second account would represent those who accepted in respect of more than the specified percentage of shares.

The concern was that if NZCSD was treated as one "offeree" (and could not split its holding into two accounts) there would be a distortion in the scaling of acceptances under rule 12. The splitting of accounts was intended to avoid any distortion effect. As it transpired, NZCSD did not follow its proposed course, and the distortion effect occurred.

Votes cast by the offeror

As noted above, Knott already held or controlled 18.50% of the shares in Rubicon. At the completion of the partial offer, it transpired that Knott's agent, Dorset Management Corporation ("Dorset"), had cast votes in respect to the approval of its offer for the purposes of rule 10(1)(b) of the Code. Rule 10(1)(b)(iv) provides that the voting rights of the offeror and its associates must be disregarded for the purposes of the approval procedure.

The Panel held a meeting under section 32 of the Takeovers Act to determine whether Knott had acted in contravention of the Code. The evidence at the meeting indicated that Knott was

aware that it should not have voted. However, as a result of an administrative oversight, Knott's shares had come to be voted.

The Panel considered the effect of rule 10(1)(b)(iv). The Panel decided that the wording of rule 10 of the Code does not, at first blush, appear to prohibit the offeror and its associates from voting on the rule 10 approval. Rule 10(1)(b)(iv) states that "voting rights held by the offeror and its associates must be disregarded". The Panel analysed rule 10(1)(b)(iv) in light of rule 64 of the Code, which prohibits misleading or deceptive conduct for transactions carried out under the Code.

The Panel noted that rule 64 coloured all other provisions of the Code and, as such, "conduct which may otherwise appear to be permitted by a Code rule, may, when interpreted in the light of the rule 64 prohibition, be effectively prohibited in certain circumstances."[2] On that basis, the Panel considered that "the combined effect of rule 10 and rule 64 is to effectively prohibit shares owned by the offeror and its associates being voted on rule 10 approvals."

The Panel determined that Dorset had not acted in compliance with rule 64 of the Code, in relation to having voted Knott's shares on the rule 10 approval. The Panel was not, however, aware of any harm or adverse effect resulting from Dorset's conduct. The Panel decided, therefore, not to seek any remedies against Dorset.

[2] Ibid, para 132.