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PROPOSED AMENDMENTS TO THE TAKEOVERS ACT: DEFINING A CODE COMPANY

EXPLANATORY MEMORANDUM

RECOMMENDATIONS TO
THE MINISTER OF COMMERCE FROM
THE TAKEOVERS PANEL

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PROPOSED AMENDMENTS TO THE TAKEOVERS ACT:
DEFINING A 'CODE COMPANY'

Introduction

1. The Panel has a statutory function to keep under review the law relating to takeovers of the companies that are subject to the Takeovers Code and to recommend to the Minister of Commerce any necessary changes to that law. As part of that function the Panel monitors the efficiency and effectiveness of the Code itself. The Panel listens to feedback from the market about the practical effects of the Code's procedural and substantive rules.

2. In 2003 and in 2005 the Panel made a number of recommendations for technical amendments to the Code, to resolve practical difficulties that had become apparent in the first few years of the Code's operation. These recommendations resulted in the *Takeovers Code Approval Amendment Regulations 2007*.

3. The recommendations that are discussed in this Explanatory Memorandum are part of the Panel's current technical review of the Code. They are related or consequential to recommendations that will be made for changes to the Code (the policy development for which is currently under consideration). The market will be consulted on the proposals for technical amendments to the Code in due course.

4. The Panel made the recommendations that are set out in this paper to the Minister of Commerce on 16 May 2008. These recommendations were made in conjunction with recommendations on the use of the Companies Act 1993 reconstruction provisions for amalgamations and schemes of arrangement involving Code companies.

Executive summary

5. The proposed amendments discussed in this paper are all of a minor nature. They are intended to reduce direct and indirect costs to the market by increasing certainty or by removing from the Code's definition companies that were not intended to be included.

6. The issues relate to the definition of specified company/code company as set out in the Takeovers Act 1993 (the 'TA') and Code. This definition provides that:

> ***Specified / code 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*

7. Under this definition any company with 50 or more shareholders is a Code company. A recently de-listed company remains a Code company for 12 months after delisting. This Explanatory Memorandum discusses four problems associated with the current

definition. The Panel also recommends one other minor amendment relating to a drafting issue in section 8 of the TA, arising out of amendments that were made to the TA in 2006.

8. The issues are:

A. The definition of 'specified company' in the Act is the same as the definition of 'code company' in the Code but the difference in terms (specified company/Code company) is unnecessary and confusing. The term Code company is generally used in the market;

B. Transactions or events that start with the Code should finish with the Code. However, the drafting of the definition of 'code company' creates doubt about that;

C. The Act does not define the meaning of 'shareholder' for '50 or more shareholders'. There is uncertainty in the market as to whether 'shareholders' means all shareholders whose names are entered on the company's share register, or whether joint shareholders are to be counted as one shareholder;

D. The '50 or more shareholders' definition catches those shareholders who are holding securities that do not confer voting rights;

E. In 2006 the Act was amended by splitting, and re-numbering, Part III into Parts 3 and 4. However, section 8 of the Act, which sets out the Panel's functions, retains the old numbering. An argument could be raised that this resulted in a change to the Panel's functions and powers.

Proposal A: Changing 'specified company' to 'code company' in the TA's definition

The issue

9. In the TA a company that is subject to the Code is called a 'specified company'. In the Code, such a company is called a 'code company.' In both cases the definitions are the same.

10. The reason for the difference in nomenclature dates back to when the TA was passed – in 1993 – and there was as yet no Code. It was thought that a 'specified company' might be defined more generally in the TA than in the Code, which would allow the Code regulations to define the scope of the term. If necessary, the Code's definition could then be changed more easily than at statute level.

11. The issue is twofold; first, it seems inappropriate that such a key definition (it defines the entities that are subject to the Code) can be changed in a regulation without the full scrutiny of the parliamentary processes required to change an Act. Second, it is inconsistent and annoying to have two different, defined, terms meaning exactly the same thing.

12. The market has accepted the term 'code company' and communications from the Panel generally refer to Code companies. The term 'specified company' tends only to

be used when the Panel is exercising its enforcement powers or in Court proceedings.[1] However the formal enforcement powers of the Panel are used relatively rarely – on average, perhaps once or twice a year – and Court orders have been made under the TA on only one occasion.[2] By comparison, the Panel (and more informally the Panel executive) communicates frequently with the market, employing the commonly accepted term 'code company'.[3]

Alternative options

13. The options are:

(a) Maintain the status quo (not preferred):
Retaining the definitions as they are does not resolve the issue of whether the Code company definition should be open to change at regulation level, and the annoyance of having two differently named definitions having the exact same meaning;

(b) Change the 'specified company' terminology in the TA to 'code company' and define it in the TA by reference to the definition of 'code company' in the Code (not preferred):
This option would require all references to 'specified company' to be changed throughout the TA to 'code company'. While this option would solve the issue of the two different terms having the same meaning (the annoyance issue) it would not address the issue of having important changes potentially being made at regulation level.

(c) Change the 'specified company' terminology in the TA and replace it with 'code company', and have the TA as the only source of the definition of 'code company' (preferred option);
All references to 'specified company' throughout the TA would be changed, and the definition of 'code company' in the Code would be replaced with a reference to the definition in the TA. A consequential amendment to paragraph (b) of the definition in the TA would also be required.[4]

Analysis of preferred option

14. This is quite a minor proposal that would have no costs or other negative impact on the market. It would simply resolve an anomaly in terminology that causes irritation. With a legislative opportunity available, it is timely to resolve it by aligning the terminology used in the Code and TA. The Panel proposes that the definition in the

[1] These powers of the Panel are under section 32 of the TA; since the restraining orders it may make are set out in the TA the term 'specified company' is used. Orders that may be made by the Court are set out in the TA and therefore use the term 'specified company'.
[2] From the Annual Report 2007: There were no section 32 meetings in the 2006-7 year, but two section 32 meetings have been held during the current year. The Court orders were made in 2005 in relation to the takeover of Oyster Bay Marlborough Vineyards Limited.
[3] From the Annual Report 2007: The Panel received 29 exemption applications and 56 independent adviser approval applications (granting all but 4). There were 23 takeover notices and the Panel reviewed all formal takeover documents.
[4] Paragraph (b) of the definition relates to recently de-listed companies. See paragraph 2, above, for the definition.

TA should be termed 'code company' as this term has market acceptance and is more apposite to companies that are subject to a takeovers 'code'.

15. The scope of the definition defines the application of the Code. It seems appropriate that the definition be in the TA only. Accordingly, the current 'code company' definition in the Code would be replaced with a reference to the definition of 'code company' in the TA.

16. Because this definition defines the persons that are subject to the Code, any changes to the definition should be subject to the direct scrutiny of Parliament. This option addresses both the annoyance factor of two different terms for the same definition, and the appropriateness of defining the Code's application in primary legislation. It also maintains the use of the term that is in common market parlance.

17. The change in name would mean changes to all references of 'specified company' to 'code company' in the TA.[5] None of these changes would be substantive changes; rule 2(3) of the Code would become superfluous and could be removed,[6] and paragraph (b) of the definition consequentially amended to remove the reference to the Code specifying the time period for the look-back in respect of recently de-listed companies.

18. Hereafter in this paper, it is assumed this change is made and all references used are simply stated as 'Code company'.

Recommendation

19. The Panel recommends:

(a) Replacing the term 'specified company' in the definition section of the TA with 'code company';

(b) Changing all references in the TA from 'specified company' to 'code company';

(c) Removing the substantive part of the definition of 'code company' from the Code and replacing it with a reference to the definition of 'code company' in the TA; and

(d) Revoking rule 2(3) of the Code and consequentially amending paragraph (b) of the definition in the TA to reflect that change.

Proposal B: Start with the Code, finish with the Code

The issue

20. Under rule 6(1)(a) of the Code, a person may not increase their percentage of voting rights 'in a code company' unless, after that event, they hold or control (together with

[5] See Table One (attached to the end of this paper) for the consequential changes to the TA required to change the 'specified company' nomenclature to 'code company'.

[6] Rule 2(3) states: '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 **code company** in the Act.'

their associates) not more than 20% of the voting rights 'in the code company'. This fundamental rule of the Code relies on the definition of Code company in the TA's and the Code's definition provisions. The company in respect of which the increase occurs must therefore either be listed, de-listed within the last 12 months, or have 50 or more shareholders in order to be a Code company and be subject to the fundamental rule.

21. The question has been raised as to whether the Code still applies if a company no longer meets the Code company definition of '50 or more shareholders' midway through a Code regulated transaction or event. This could happen where the number of shareholders which have not accepted an offer is less than 50 and the offer is unconditional (i.e. the bidder has been able to take up the acceptances that have been given). Alternatively, or in conjunction with the former, sufficient of the remaining shareholders of the target company may have sold their shares to another acquirer, so that the number of shareholders dropped below 50, but not directly as a result of the takeover.

22. If the Code no longer applied, the shareholders would lose their Code protections and the Panel would lose its powers to intervene and supervise the takeover. Although the takeover would proceed based on the underlying contract created by the offer documents, the provisions in the Code not replicated in the offer documents, and the Panel's supervisory and enforcement role, would be gone.

23. The problem is perhaps even worse in relation to Part 7 of the Code which mandates the requirements in relation to compulsory acquisition. Part 7 deals with the situation where a shareholder becomes a 'dominant owner'. Rule 50 sets out the definitions for Part 7, including that a 'dominant owner, in relation to a code company', means a person who becomes the holder or controller of 90% or more of the voting rights 'in a code company'.

24. Part 7 requires the dominant owner to elect whether to compulsorily acquire all the outstanding securities or to adopt a 'voluntary sale' under which the outstanding security holders have the right to sell their shares in the company to the dominant owner (and the dominant owner must purchase the shares of any outstanding security holder that exercises that right within a defined period of time).

25. If a person becomes a dominant owner of an unlisted company as the result of, say, a full takeover offer and by the time the offer closed there were less than 50 shareholders left in the company, the person might want to argue that they were not a 'dominant owner' as defined by rule 50. They would argue that the company was not a 'code company' because it did not have 50 or more shareholders. Therefore the person was not a dominant owner 'in relation to a code company'. This argument might be tried in a situation where the market had fallen sharply during the course of the takeover and the company was no longer so attractive to the bidder at the price paid. The Code's pricing rules for compulsory acquisition could well leave the bidder in a position where the same consideration had to be paid for the outstanding securities that are subject to the compulsory acquisition rules as had been paid under the takeover. Even if the bidder elected a voluntary sale (so it only had to acquire the shares of any outstanding security holder who wanted to sell) instead of a compulsory acquisition (which leaves the outstanding security holders with no choice – their shares will be taken by the dominant owner), the consideration would now be so

advantageous to the outstanding security holders that they may all want to take up the voluntary sale.

26. Another possible scenario is where a bidder makes a full offer at a low price for an unlisted company, because it really only wants to acquire a relatively small parcel of shares – say, to take it from 48% to over 50%. During the course of the offer period the market falls significantly and the offer is accepted by so many shareholders that the bidder ends up with 90% of the all the company's shares, but there are less than 50 outstanding security holders left after the offer closes. The bidder does not want to have to acquire any more shares so argues that it is not a dominant owner because the company is no longer a Code company.

27. The argument might also be tried by an outstanding security holder that does not want to be compulsorily acquired. The definitions in rule 50 for outstanding securities and outstanding security holders are also pegged to the securities 'in the code company'.

28. It has been asserted that the Code could be interpreted as ceasing to apply as a result of achieving dominant ownership of the Code company, on the basis that there were no longer 50 shareholders. Several enquiries have also been made about this issue.

29. Although the problem is not considered to be large (in that the Panel has so far managed the issue with the co-operation of the parties), the disruption that would be caused by, for example, having to resolve the issue through the Court, and dealing with the potential information flows, during the Code's intense time frames, could be very great indeed to the shareholders, the bidder and the Panel.

30. The problem, therefore, is one of uncertainty.

Alternative options

31. The options are:

(a) Maintain the status quo (not preferred):
This would not resolve the current uncertainty. If it is not clear in the legislation that transactions begun under the Code must proceed to their completion under the Code, the provisions in the Code may be argued to not apply.

(b) Add a clarifying provision to the TA (preferred).
Under the preferred option the definition of 'code company' would be amended to clarify that a company remains a Code company for the duration of any Code regulated transaction or event (including for a subsequent compulsory acquisition resulting from a takeover or other Code-regulated transaction or event).

Analysis of preferred option

32. Amending the TA to clarify that a Code company remains a Code company throughout any Code regulated transaction or event ensures clarity and removes any possibility of raising the argument that the Code ceases to apply mid-transaction.

33. Although a purposive reading of the Code suggests that the Code should continue to apply throughout a takeover offer (and into compulsory acquisition if the bidder becomes a dominant owner as a result of the takeover), the Panel considers that a legislative change to clarify the Code's application is desirable. It would impose no costs or disadvantages, as it would merely clarify the current intended application of the law.

Recommendation

34. The Panel recommends a legislative change to clarify that a company remains a Code company for the duration of any Code regulated transaction or event (including for a subsequent compulsory acquisition resulting from a takeover or other Code-regulated transaction or event).

Proposal C: Clarifying '50 or more shareholders'

The issue

35. The market has raised the question as to how the '50 or more shareholders' definition is to be interpreted.[7] Some share parcels are held by more than one person; for example, couples may hold a single parcel of shares jointly; two or more trustees may hold shares on trust for beneficiaries. Should each individual shareholder in the company be counted, or the number of share parcels that are held?

36. The Panel has considered this question and has concluded that the correct interpretation is that *shareholders* means each shareholder named in the company's share register. The Panel published its decision as to how it will enforce the Code in its *Guidance Note: The meaning of 50 or more shareholders in the definition of Code company*, in December 2007.

37. As the Guidance Note and a number of practitioners have suggested, notwithstanding the Panel's decision, the law is a little uncertain and the issue should be clarified in the TA. While this is not a new problem, the removal in 2006 of an asset threshold (of $20 million or more) from the definition of 50 or more shareholders made the question more acute. It is not known how many companies became Code companies as a result of removing the asset threshold.

38. The Panel is aware, from comments made by market practitioners both before and after issuing its Guidance Note, that some legal advisers had advised their clients that 50 or more shareholders means 50 or more share parcels (an interpretation the Panel does not accept) while others have been giving advice in accordance with the Panel's view expressed in the Guidance Note.

39. The term *shareholder* is defined in the Companies Act 1993, for the purposes of that Act, as follows:

> *"**Section 96 Meaning of "shareholder"***
> *In this Act, the term "shareholder", in relation to a company, means-*

[7] See the definition set out on page 1.

(a) A person whose name is entered in the share register as the holder for the time being of one or more shares in the company:

(b) Until the person's name is entered in the share register, a person named as a shareholder in an application for the registration of a company at the time of registration of the company:

(c) Until the person's name is entered in the share register, a person who is entitled to have that person's name entered in the share register under a registered amalgamation proposal as a shareholder in an amalgamated company."

Alternative options

40. The options are:

(a) Maintain the status quo (not preferred):
Under this option, the uncertainty in how shareholders are to be counted, for the purposes of the Code, would remain.

(b) Counting share parcels rather than individual shareholders (not preferred):
Defining 'shareholder' by share parcel would be consistent with the approach in the Australian takeovers legislation, which expressly states that joint holders of a parcel of shares are treated as one person when counting the number of members.[8]

Such a definition was also favoured by some practitioners commenting to the Panel on its 2007 Guidance Note on the meaning of 50 or more shareholders. These practitioners argued that the underlying policy or intention of the legislation is to encourage competition for control; and the wider the shareholding base – in terms of 'parcels' rather than numbers of persons – the greater the potential for contested takeovers and the greater the need for regulatory protection. On the basis of this policy consideration the shareholding parcel definition was considered by these practitioners to be more appropriate.

The TA and the Companies Act 1993 both came into force at about the same time. The Companies Act defined 'shareholder' by reference to the persons whose names are entered in the share register – i.e., the individual shareholder meaning. Historical indications, from early drafts of the Code, are that the intention of the Takeovers Panel Advisory Committee (which drafted the Code) was to use a definition in the takeovers regime that was in accord with the new Companies Act.

The Panel recognises that persons can and will structure their shareholdings to fit their objectives. If the intent of restructuring is to avoid the Code, it would not matter whether the individual shareholding or the share parcel definition were included in the TA. Any structuring would merely take the interpretation into account and arrange matters accordingly. The use of companies or of

[8] Corporations Act 2001 (Cth), section 606(3).

trusts to own shares, for example, decreases the number of shareholders, respectively, whether the shareholders are counted individually or by parcel.

There appears to be little in the way of policy reasons to make a change from the individual shareholder interpretation that is currently accepted. A change may mean that market participants who had sought advice on the application of the Code to them might need to seek further advice; it would be disruptive, costly and unsettling.

(c) Define 'shareholders' to mean individual shareholders (preferred).

Analysis of preferred option

41. This option effectively maintains the status quo while providing legislative certainty. The individual shareholder interpretation is also consistent with the definition of shareholder in the Companies Act.

42. The market appears to have generally accepted the Panel's interpretation that *shareholder* means 'individual shareholders' as contained in the Panel's 2007 Guidance Note. Market participants will have taken this interpretation into consideration when arranging their affairs (or when having re-arranged them as a result of the Guidance Note). If legal advisers had been advising their clients that 50 shareholders meant 50 share parcels, they will likely have remedied that advice since the publication of the Guidance Note.

43. To clarify this interpretation, the Panel considers that a definition of 'shareholder' could be inserted into the TA, which would define 'shareholder' in a way that is consistent with the Companies Act, section 96, definition.

Recommendation

44. The Panel recommends legislative clarification in the TA to support the 'individual shareholder' definition, which would be consistent with the Panel's approach as set out in its Guidance Note and consistent with section 96 of the Companies Act 1993.

Proposal D: 50 or more shareholders – only holders of voting securities?

The issue

45. The Panel has received an application for certain exemptions from the Code in regard to a finance company ("F"). The company's legal adviser accepted that F had become a Code company in 2002 when it issued non-voting redeemable preference shares which were taken up by approximately 200 shareholders. Prior to the issue there were (and still are) fewer than 20 shareholders holding ordinary shares in F. There are likely to be other companies that have issued non-voting shares (e.g., redeemable preference shares)[9] to large numbers of shareholders but that have fewer than 50

[9] While it is recognised that instruments such as redeemable preference shares often have limited voting rights (such as the ability to vote on a proposal that affects the rights attached to the securities themselves), they are generally not considered to be 'voting securities' for the purposes of the Code and so the term 'non-voting' is used here to reflect the specific meaning given to 'voting securities' in the Code.

shareholders that have voting rights in the company (i.e. ordinary shares). A brief review of prospectuses indicates that there may be somewhere in the order of 20 to 40 such companies.

46. F's exemption application raised the issue of whether the 'code company' definition should be changed to exclude companies with less than 50 shareholders holding voting securities.

47. F and other companies with similar circumstances must comply with the Code regardless of the fact that they have very few ordinary shareholders. The Panel cannot exempt such companies from being Code companies.

Alternative options

48. The options are:

(a) Maintain the status quo (not preferred):
This option means that companies with fewer than 50 shareholders holding ordinary shares, but with 50 or more shareholders when non-voting security-holders are counted, continue to be subject to the Code.

(b) Change the 'code company' definition to only include companies with 50 or more shareholders who hold securities that confer voting rights (preferred).

Analysis of preferred option

49. In 2006 the definition of 'code company' was amended so that listed companies with only non-voting securities quoted on a registered exchange were no longer captured by the definition. No change was made in respect of the type of shareholdings for un-listed companies. The question was simply not addressed.

50. The commentary to the Securities Legislation Bill in respect of the proposed amendment for listed companies, as reported from the Commerce Committee, stated:[10]

> *The code governs bids to achieve controlling stakes in companies. It is thus concerned principally with control of voting rights. The code should not apply to companies that are party to a listing agreement only in respect of listed debt securities, equity warrants, or other non-voting interests. The change responds to submitters' concerns on this point.*

51. The Panel considers that these comments are equally applicable to companies whose equity securities are unlisted and whose non-voting interests effectively make them Code companies. The intention of the legislature was for the Code to govern control of voting rights. There is now an opportunity to address the issue by providing that non-voting securities are not included when counting shareholders for the '50 or more shareholders' definition.

[10] At page 9

Recommendation

52. The Panel recommends that the 'code company' definition be amended by adding, in paragraph (c), after the words '50 or more shareholders', the words 'holding securities that confer voting rights', or words to that effect.

The overall recommendation

53. Putting all the recommendations together, the Panel recommends:

A. Renaming the TA definition of 'specified company' as 'code company'.

B. Clarifying that a Code company remains subject to the Code until a transaction or event under the Code has concluded;

C. Introducing a definition of 'shareholder' that is consistent with the definition in the Companies Act 1993; and

D. Qualifying the non-listed company definition of Code company to only include companies with 50 or more shareholders holding securities that confer voting rights.

54. As a result of proposals A, and D, the definition of 'code company' in the TA might look like this:

> ***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 12 months before any date or the occurrence of any event referred to in the Code; or*
>
> *(c) has 50 or more shareholders* ***holding securities that confer voting rights****.*

Proposal E: The section 8 issue

The Issue

55. In the 2006 round of legislative amendments to securities and takeovers law that occurred under the Securities Legislation Bill, some small, consequential amendments to the TA were inadvertently missed, resulting in unintentional and inconsistent references in the TA. With the opportunity for legislative amendment, the Panel recommends these incorrect references be remedied.

56. In section 8 of the TA there are three references to 'Part III'. The 2006 amendments made two relevant changes:

(a) The numbering of the TA's Parts was changed from Roman to Arabic numbers; Part III became Part 3; and

(b) As a matter of organising the TA under current Parliamentary Counsel Office drafting standards, Part III was divided into two Parts, with a new 'Part 4' introduced to separate miscellaneous powers (such as the Panel's exemption powers, and the TA's regulation-making powers) from the investigation and enforcement provisions in Part 3 of the TA.

57. Thus the old Part III has now become Parts 3 and 4.

58. Section 8 of the TA sets out the Panel's functions. It provides as follows:

> "***8 Functions of Panel***
> *(1) The Panel has the following functions:*
>
> *(a) To keep under review the law relating to takeovers of specified companies and to recommend to the Minister any changes to that law that it considers necessary:*
>
> *(b) Repealed:*
>
> *(c) For the purposes of paragraph a, to keep under review practices relating to takeovers of specified companies:*
>
> *(d) To investigate any act or omission or practice for the purpose of exercising its powers and functions under* ***Part III*** *of this Act:*
>
> *(e) To make determinations and orders and make applications to the Court in accordance with* ***Part III*** *of this Act:*
>
> *(ea) To co-operate with any overseas regulator and, for that purpose (but without limiting this function), to communicate, or make arrangements for communicating, to that overseas regulator information obtained by the Panel in the performance of its functions and powers (whether or not confidential) that the Panel considers may assist that overseas regulator in the performance of its functions:*
>
> *(f) To promote public understanding of the law and practice relating to takeovers:*
>
> *(g) To perform such other functions as are conferred on it by this Act.*
>
> *(2) In the exercise of its functions and powers under* ***Part III*** *of this Act and the takeovers code, the Panel shall comply with the principles of natural justice.*"

59. It was not intended in the 2006 amendments that the application of section 8 of the TA be changed to exclude any of what was Part III and is now Parts 3 and 4. For example, the Panel's exemption power, now in Part 4 of the TA, is often exercised in conjunction with the Panel's enforcement powers to facilitate the remedying of breaches of the Code.

60. The Panel believes that there may be a risk of challenge to its powers if a litigant were to argue that, by separating Part III into two new Parts and leaving the references in section 8 unchanged, Parliament intended to limit the Panel's functions in some way.

61. The Panel does not consider this to be a significant threat; however, it is preferable to have consistency in the legislation and to ensure that mistakes are corrected.

Alternative options

62. The options are:

(a) <u>Maintain the status quo (not preferred)</u>:

This would mean the inconsistency in section 8 remained.

(b) Replace references in section 8 to 'Part III' with Parts '3' and '4' (preferred). In particular, the reference to 'Part III' in –

- section 8(1)(c) would be changed to 'Parts 3 and 4';
- section 8(1)(d) would be changed to 'Part 3'; and
- section 8(2) would be changed to 'Parts 3 and 4'.

Analysis of preferred option

63. 'Part III' no longer exists in the TA. It is now restructured into two Parts, named 'Part 3' and 'Part 4'. Part 4, which contains the Panel's powers to grant exemptions, regulation-making powers and various savings and amendment provisions (most of which have been repealed) were formerly included in Part III.

64. The Panel's function of granting exemptions has always been an integral part of the Panel's supervision and enforcement of the Code. The Panel should not be hampered from continuing to facilitate timely and commercially sensible resolutions to breaches of the Code by an accidental and artificial separation of its exemption function from its enforcement functions. That was never the intention of the 2006 amendments to the TA.

65. Amending section 8 to change the references to 'Part III' to 'Parts 3 and 4' would remove the possibility of any argument as to the Panel's functions as they relate to the granting of exemptions.

Recommendation

66. The Panel recommends that the references to 'Part III' in –

- section 8(1)(c) be changed to 'Parts 3 and 4';
- section 8(1)(d) be changed to 'Part 3'; and
- section 8(2) be changed to 'Parts 3 and 4'.

Table One

Table of sections that require consequential amendments to change ‘specified company’ terminology to ‘code company’.

Section	Title
2	Definition of securities
17	Annual fee in respect of funding of Panel
21	Matters to be considered by Minister in making recommendations concerning takeovers code
22	Specific provisions applying to takeovers code
23	Takeovers code not to apply in certain cases
33	Temporary restraining orders
33M	When Court may make pecuniary penalty orders and declarations of contravention
33O	What declarations of contravention must state
35	Persons who may apply
42	Court may require person to give evidence or produce documents relating to interests in securities
44B	False or misleading statement or information
44V	Persons entitled to appear before Court