

Ref: 705-130 / #75432

TAKEOVERS PANEL

BRIEFING PAPER

**FOR HON LIANNE DALZIEL
MINISTER OF COMMERCE**

23 November 2005

CONTENTS

Background	3
Functions of the Panel	3
Powers of the Panel	4
Members of the Panel	4
The Panel Executive	6
The Takeovers Code	6
The Nature of the Code	6
Code Company	7
Key Features of the Code	7
Enforcing the Code	8
Independent Advisers	9
Resourcing – Vote Commerce	10
Relationships	10
Spheres of Work	11
Resourcing	13
Current Issues	14
Annex 1 – Extract from the Vote Commerce	15
Annex 2 – Statement of Intent	16

Background

The Takeovers Panel was established in 1995 by the Takeovers Act 1993. However the Panel had commenced the formulation of a takeovers code before then, having been formed originally as an advisory committee in 1991.

The Takeovers Act was part of the then Government's corporate law reform programme.

The Panel recommended the Takeovers Code to Government in June 1995 but the then Government decided not to proceed with the adoption of a takeovers code. At the time the Chairman noted that the failure to adopt a takeovers code meant that the additional protection granted to shareholders under the new Companies Act had not been matched in takeover situations as intended by the Takeovers Act.

The Panel was re-activated by the current Government in 2000 and the Takeovers Code was gazetted in October that year. This was the culmination of an extensive period of consultation and debate not only on the provisions of the Code but also on the desirability of having a Takeovers Code in any form.

The Takeovers Code came into force on 1 July 2001. It had a successful introduction and was well received, even by people originally opposed to having a Code at all. It has subsequently been tested in various ways and has proven generally to achieve its aims of ensuring takeovers take place in a orderly fashion with investors being well informed and treated fairly.

Some technical changes are being made to the Code. These are expected to take effect early in 2006. More changes to the Act and the Code are pending in the Securities Legislation Bill which is currently before the House.

Functions of the Panel

The functions of the Takeovers Panel are set out in section 8 of the Takeovers Act 1993. In summary the Panel's functions are:

- To keep under review the law relating to takeovers of specified companies and to recommend to the Minister any changes to that law it considers necessary;
- For the purposes of its review of the law, to keep under review practices relating to takeovers of specified companies;
- To investigate any act or omission or practice for the purpose of exercising its powers under the enforcement provisions of the Act;
- To make determinations and orders and make applications to the Court under the enforcement provisions of the Act;
- To co-operate with any overseas regulator and for that purpose to communicate to that regulator information obtained by the Panel in the performance of its functions and

powers which the Panel considers may assist that regulator in the performance of its functions;

- To promote public understanding of the law and practice relating to takeovers.

In exercising its functions and powers the Panel shall comply with the principles of natural justice.

Powers of the Panel

The powers of the Panel are set out in Part 3 of the Takeovers Act 1993. In summary the powers of the Panel are:

- To issue summonses and to take evidence on oath;
- To carry out inspections and obtain evidence at the request of overseas regulators;
- To make confidentiality orders;
- To accept undertakings that are enforceable by the Courts;
- To inspect documents, and to authorise the Registrar of Companies or any other person to undertake inspections;
- To grant exemptions from the Code;
- To enforce the Takeovers Code by:
 - making determinations on whether a person is complying with the Code;
 - issuing restraining orders; and
 - applying for Court orders.
- Under the Takeovers Code the Panel has powers to approve independent advisers and appoint independent experts.

The Panel's powers are expected to be expanded with the passage of the Securities Legislation Bill giving the Panel powers to deal with misleading or deceptive conduct.

Members of the Panel

The Panel consists of not less than 5 and not more than 11 members appointed by the Minister. At least one member must be a barrister, a solicitor, or a barrister and solicitor of the High Court of not less than 7 years' practice. The Minister shall not appoint a person as a member unless that person is qualified or experienced in business, accounting, or law. Currently the Panel has 10 members. They are:

Chairman John King

Consultant with Russell McVeagh. Director of The New Zealand Guardian Trust Company Limited and former director of Telecom Corporation of New Zealand Limited and a number of other public and private companies. Vice President of the Employers & Manufacturers Association (Northern) Inc. Member of the Council of Business New Zealand and Deputy Chairman of the Spirit of Adventure Trust. Chairman of the Panel since it was created in 1994 and previously of the Takeovers Panel Advisory Committee. Member of the Australian Takeovers Panel.

Deputy Chairman David Jones

Principal of Jones Young, Auckland, specialising in commercial and company law. Personal adviser to the Minister of Justice on the company law reform programme 1991. Member of the Company Law Monitoring Group 1993. Lecturer in company law for the Institute of Directors. Member of the Panel from its inception as an advisory group.

Denis Byrne

Brisbane-based company director. Chair of the Fisheries Research & Development Corporation, Director of Australia Magnesium Corporation Ltd., the Ball Solutions Group of Companies (Australia) and Birkdale Nursery Holdings Pty Ltd. Member of the Starlight Children's Foundation Advisory Board. Appointed to the New Zealand Takeovers Panel in 2001 and reappointed in 2005. Member of the Australian Takeovers Panel since 1997.

Anthony Frankham

Auckland-based independent financial analyst. Director of Grant Thornton Frankham Lyne Limited, Director of Auckland International Airport Limited and Chairman of Capital Properties Limited. Director and Chairman of New Zealand Experience Limited. Chairman of the Audit Office's New Zealand Audit Committee and Life Member of the New Zealand Institute of Chartered Accountants. Appointed to the Panel in 2002.

Colin Giffney

Principal of Giffney & Jones, specialist corporate advisers. NZX broker and a founding Member of the Market Surveillance Panel. Appointed to the Takeovers Panel in 2001.

Alastair Lawrence

Auckland-based investment banker. Principal of Antipodes, a private investment bank which provides specialist mergers and acquisitions advice, in addition to private equity for emerging New Zealand companies. Director of Landcare Research, and a number of private companies. Member of the Panel since 1994 and prior to that a member of the Takeovers Panel Advisory Committee.

Kevin O'Connor

Wellington company director. Director of Utilico Emerging Markets Limited and a range of private companies and charitable organisations. Former Chairman of the Market Surveillance Panel of the New Zealand Stock Exchange. Member of the Panel since 1994.

David Quigg

Partner of Quigg Partners, barristers and solicitors of Wellington, specialising in mergers and acquisitions, takeovers and corporate law. Lecturer in takeovers and mergers and acquisitions law for the Institute of Directors. Member of the National Board of the Institute of Directors. Appointed to the Panel in 2001.

Daphne Rawstorne

Wellington-based accountant, former Managing Partner of Deloitte, and Fellow of the Institute of Directors. Company director and business consultant. Member of the Panel since 1999.

Sue Suckling

South Island company director and business consultant. Chair of the National Institute of Water & Atmospheric Research, AgriQuality New Zealand Limited, Baker Fruit Processors Limited, Carsons (SI) Limited, and The Oxford Clinic Limited and HSR Governance Limited. Director of Westpac (NZ) Investments Limited. Appointed to the Panel in 2002.

The Panel Executive

Kerry Morrell, Senior Executive Officer

Marion Hemphill, Counsel to the Panel

Margaret Bearsley, Senior Lawyer

Graham Miller Lawyer

David Tsai, Lawyer

Nigel Brunsdon, Accountant (part time)

Catherine Chapman, Communications Manager (part time)

The Takeovers Code

The Takeovers Code is the schedule to the Takeovers Code Approval Order 2000 (SR 2000/210). The Code came into force on 1 July 2001.

The Code aims to provide commercial and sensible rules to ensure that takeovers take place in an orderly fashion. It seeks to ensure that all shareholders are treated equally and, on the basis of proper disclosure, are able to make an informed decision as to whether to accept or reject a takeover offer or vote to approve or otherwise an acquisition or allotment requiring shareholder approval.

The Nature of the Code

The Code is designed to ensure that all shareholders participate in the takeover process. Under the Code if a person wishes to acquire (when aggregated with associates) more than 20% of the votes in a code company then that can only be done in compliance with the Code which in broad principle means an offer to all shareholders or an acquisition with shareholder approval. The Code also includes pause and publicity provisions which were the basis of the takeover rules in New Zealand under the Companies Amendment Act 1963.

The New Zealand Code (and the Australian Code) are sometimes characterised as an enhanced participation regime, rather than a mandatory offer regime such as the City Code in London.

The Code does not take a black letter law approach which would make it impossible to foresee and deal with all possibilities. Rather the Code uses language dealing broadly with concept and principle which then requires a common sense interpretation against the background of the purpose and intent of the Code.

Code Company

The Code applies to companies that fall within the definition of a "code company". It applies only to companies and not, for example, to listed unit trusts. Companies are defined as companies registered in New Zealand. New Zealand registered companies that fall within the definition are companies that are:

- a party to a listing agreement with the New Zealand Exchange; or
- were a party to a listing agreement during the previous 12 months; or
- have 50 or more shareholders and \$20 million or more of assets.

The definition of a code company simply repeats the definition contained in the Takeovers Act. The Panel has no jurisdiction to amend that definition. However, it is being changed through the provisions of the Securities Legislation Bill, currently before the House, which removes the \$20 million asset requirement. The Bill will also result in companies no longer being defined as code companies if they are parties to listing agreements but do not have listed voting securities.

Key Features of the Code

Fundamental Rule

The Code is based upon a fundamental rule which prevents any person from becoming the holder or controller, with associates (if any) of more than 20% of the voting rights in a code company except in a manner permitted by the Code as an "exception". If any person already holds more than 20%, then that holding cannot be further increased except as permitted by the Code. There are no restrictions below the 20% threshold. The fundamental rule has anti-avoidance provisions which deal with situations where groups of people act jointly, or in concert, or join together as associates in the control of voting rights.

Equal Treatment

Equal treatment of shareholders is a key component of the Code. Consequently with full and partial offers the same terms, including price, must be offered to all security holders. Where there are different classes of shares, the price must be fair and reasonable as between classes. An independent adviser must certify that the price is fair and reasonable as between classes.

Compliance Options

The exceptions to the fundamental rule are a range of compliance options provided in the Code. They are:

- full and partial takeover offers;
- acquisition or allotment of voting securities with the approval of an ordinary resolution of non-associated shareholders of the Code company;
- a 5% per annum creep option for a person that already holds or controls more than 50% of the voting rights; and
- compulsory acquisition provisions which are triggered at the 90% threshold.

Exemptions

The fundamental rule catches, and is intended to catch, increases in voting power in a manner which can be regarded as involuntary. Such increases can arise with transactions such as rights issues and buy backs. Class exemptions are in place to deal with these transactions. The Panel also grants individual exemptions from provisions of the Code as appropriate.

The Code does not apply below the 20% threshold. However it can regulate quite small transactions because acquisitions are linked with any holdings of associates for Code purposes.

A full offer is an offer for all the voting securities in the target company. It must extend to all equity securities whether voting or non-voting. It must be conditional on achieving control of more than 50% of the company's voting rights.

A partial offer is an offer to all the holders of voting securities for a specified percentage of the voting securities in the target company that the bidder does not hold. The offer is not required to include other non-voting equity securities. Shareholders may sell all or part of their holdings into a partial offer but there are scaling provisions in the Code based on the specified percentage if there are excess acceptances. The bidder in a partial offer can never obtain more than the specified percentage originally sought. The specified percentage must be to obtain more than 50% of the company's voting rights unless shareholder approval is obtained for a lesser percentage.

Compulsory Acquisition

The Code's compulsory acquisition provisions apply when the threshold of 90% of voting rights has been reached. The dominant owner (the holder or controller of the 90%) has the right to buy and the remaining shareholders have a right to be bought out, although this right can only be exercised for a limited period. The Code includes pricing rules which generally ensure that a fair price is paid on compulsory acquisition.

Enforcing the Code

The Panel has extensive enforcement powers under the Takeovers Act.

Where the Panel suspects a breach or intended breach of the Code it can call a meeting to determine whether to exercise its powers. Where notice of such a meeting has been given, an interim restraining order may be made which may remain in force until two days after the date of the meeting. The meeting must be held within 7 days of being called.

If the Panel determines that it is not satisfied that the Code has been complied with, it can extend the restraining order for a further 21 days. If the Panel did not make an interim restraining order, it may make a restraining order for up to 21 days. The Panel may apply to the Court for a wide range of orders including orders for:

- disposal or forfeiture of shares;
- removal of voting rights;
- avoidance of agreements; and
- payment of compensation.

Interested parties may also apply for Court orders where the Panel determines that it is not satisfied that the Code has been complied with. These interested parties are:

- New Zealand Exchange (if the company is listed);
- the Code company concerned;
- shareholders and affected former shareholders of the Code company;
- other parties who have made offers under the Code in the six months prior to the application; and
- any other person with the leave of the Court.

However these parties may only apply if:

- the Panel has consented to the application; or
- the person has requested the Panel to apply to the Court and the Panel has not done so within 10 days.

These provisions ensure that those opposed to a particular takeover are not able to use the Code and the litigation process to derail a takeover and subvert the true purpose of the Takeovers Code.

Interested parties may also apply to the Court if the Panel was requested to hold a meeting to determine whether the Code had been complied with and had not made a determination on compliance within 14 days. If such a meeting was held and the Panel determined that it was satisfied that the Code had been complied with then the interested parties have no right to apply to the Court.

The Court may have regard to any determination or recommendation made by the Panel, including any recommendation made at the request of the Court.

Penalties

The Act provides significant pecuniary penalties. A person who breaches the Code or is party to a breach may be ordered to pay a fine of up to \$500,000 in the case of a person or \$5 million in the case of a body corporate.

Independent Advisers

Under the Code, reports from independent advisers are required in various circumstances:

- rules 15 and 16 require a report where a person seeks to acquire or have allotted to it voting securities in a code company with the prior approval of an ordinary resolution of shareholders;
- rule 21 requires the directors of a target company to obtain a report from an independent adviser on the merits of an offer;
- rule 22 requires the offeror to obtain a report from an independent adviser where an offer is made for different classes of securities; and

- rule 57(1) requires an independent adviser to certify in some circumstances that the cash sum proposed as consideration for a compulsory acquisition of equity securities under the Code is fair and reasonable.

An "independent adviser" means "an adviser whom the Panel considers is independent and who is approved by the Panel for the purposes of the Takeovers Code".

The Panel considers applications for approval case by case so that it can be satisfied that the adviser is appropriately qualified and experienced, and sufficiently "independent". The Panel applies the criteria rigorously. The Panel considers that independent advisers' reports are a key element in the success of the Code and actively promotes improvements in the quality of reports.

Resourcing - Vote Commerce

The Panel is funded in part by Government grant via the Vote Commerce, with the balance from application fees and the ability to recover costs for some of its enforcement actions. The Government also provides a litigation fund for Court actions taken by or against the Panel. A copy of the appropriation for the current financial year is at Annex 1. The Panel agrees a Statement of Intent with the Minister each year. A copy is at Annex 2. It provides quarterly reports and financial statements to the Ministry of Economic Development as well as presenting its Annual Report to the Minister. When the relevant sections of the Crown Entities Act 2004 come into force the Panel will also produce a Statement of Service Performance.

The Panel received an increase in Crown funding for 2005/2006 compared to the original budget allocation for 2004/2005 (an increase from \$904,000 to \$1,344,000 (GST exclusive)) reflecting both current workload and the expected impact of the Securities legislation Bill.

The Panel has a litigation fund of \$675,000. The Crown also makes an annual appropriation to top-up the fund on a quarterly basis as required.

Relationships

The Panel's two key relationships are those with the Ministry of Economic Development and with the Securities Commission. Put simply, the Ministry supplies the money and the Commission provides the staff and premises and other services.

Securities Commission

Rather than establish the Takeovers Panel with separate staff and premises, Government gave the Securities Commission an additional function under the Securities Act 1978:

Section 10 (e) By agreement with the Takeovers Panel, to provide administrative and support services to the Panel.

This relationship is formalised in a memorandum of understanding under which the Panel contracts office premises, equipment and services from the Commission. The Panel has no staff of its own, but eight Commission staff (six full time and two part time) are contracted from the Commission to carry out the work which supports the Panel.

The Panel pays the Commission for professional staff services at a fixed hourly rate which includes an overhead component to pay for rent, use of computer and other office equipment, access to library and other services, and secretarial services. Payment is made quarterly at the start of each quarter. The Panel pays its own members' fees, travel and accommodation, most communication costs and professional fees. New professional staff are employed by the Commission but are recruited in the Panel's name. There is limited interchange of staff between the Commission and the Panel. The Commission has on occasion helped the Panel with access to additional staff in times of severe strain.

Ministry of Economic Development

The Ministry is the Government department responsible for overseeing the Panel's financial operations and for scrutinising the Panel's budget bids.

The Panel has a good working relationship with the Ministry, both at the senior and operational levels. The Panel reports quarterly to the Ministry on its financial position and otherwise meets from time to time as required to explain its budget request or to discuss current issues. The Panel aims for a "no surprises" relationship with the Ministry.

Cabinet recently approved a number of proposals for amendments to the Takeovers Code. These are expected to be promulgated after a limited period of consultation early in 2006. We have also worked with officials on other Government legislative proposals of significance to the Panel, in particular the new Crown Entities Act and the Securities Legislation Bill.

Australian Takeovers Panel

To reflect the increasing integration of the New Zealand and Australian business sectors, the then Minister of Commerce, Hon Paul Swain, appointed Australian commercial lawyer, Denis Byrne, to the New Zealand Panel in 2001. Mr Byrne has been a Member of the Australian Takeovers Panel since 1997. At the same time the Australian Government appointed Chairman John King as a member of the Australian Panel. These terms expired in March 2005 and both appointments have subsequently been renewed through to March 2007.

Spheres of Work

Enforcement

The largest portion of the Panel's resources spent on external outputs, some 40 – 45%, is spent on enforcement activities. These range from routine scrutiny of takeover documents to ensure compliance with the Code (the Panel aims for 100% scrutiny), undertaking enquiries into market activity that looks as if it could involve non-compliance with the Code, through to the formal conduct of meetings under section 32 of the Takeovers Act.

The Panel is set up to have a pivotal role in the takeovers market. If a participant considers that another party may have breached the Code it may make a complaint to the Panel. If the Panel has a meeting and determines that the Code has been complied with then the complainant is not able to take the issue to Court. To ensure that the takeover process does not become bogged down in legal processes, when the Panel calls a meeting it must be held within 7 days and any orders that the Panel may wish to make must be made within two further days. If a party asks the Panel to hold a meeting and the Panel does not do so within 14 days then the party can take the matter to Court.

These processes are very intensive and put considerable pressure on both Panel members and the executive when underway.

Exemptions

The granting of exemptions is the next largest component of the Panel's external outputs, at some 30% of overall resources.

The provisions of the Code are quite tight, and may have unintended or unreasonable consequences in some cases. The Panel has made a number of class exemptions to facilitate normal market activity while preserving the disciplines of the Code.

The Panel's decisions on some individual exemption applications have attracted some controversy. A number of applications related to the treatment of overseas shareholders in the case of scrip offers.

Scrip offers are an important part of the takeovers market. However the cost of making a scrip offer for a code company is increased by the need to comply with securities laws in every country where shareholders of the target reside. The Panel's policy is to grant exemptions which enable different treatment of overseas shareholders under scrip offers but only if it is satisfied that the number of overseas shareholders in the jurisdiction in question is extremely small and the offer documents cannot be used in that jurisdiction. As a condition of the exemption, the Panel generally requires that overseas shareholders be offered a cash equivalent which is the net proceeds of the sale of the scrip they would have received. This puts overseas shareholders in the same position as a New Zealand shareholder who immediately sold the scrip received under the takeover offer. Unfortunately with the takeover offer for Powerco Limited the exemption granted in accordance with this principle was able to be exploited in an unexpected manner because of the unusual terms of the offer. However, the Panel's policy is valid and the conditions of future exemptions will ensure that the problem does not arise again.

The second type of exemption application which have attracted some comment related to upstream acquisitions. The Code was deliberately constructed to capture the change of control of voting rights in code companies by means of a transaction upstream from the direct holder of the voting rights in the code company. However, shareholders can approve upstream transactions under the provisions of Rule 7(c).

The Panel's stance on exemptions for upstream acquisitions was made clear in its rejection of an application made by Vector Limited. Vector wished to acquire 64.25% of the voting rights in NGC Holdings Limited by purchasing a holding company of The Australian Gas Light Company. AGL did not wish to sell the NGC shares held by its holding company into a direct takeover because it would have had tax disadvantages for AGL, and did not wish to go through the shareholder approval process under rule 7(c). However, the Panel's exemption power is not intended to enable market participants to structure a transaction in a manner that does not comply with the Code to achieve a particular commercial outcome or benefit. There was no reason why the alternatives provided by the Code could not be utilised and accordingly the exemption application was declined.

The Panel issued a guidance note in January 2005 to clarify the Panel's exemption power and to assist market participants in their appreciation of when exemptions are likely to be granted.

In general terms the Panel has been concerned to ensure that it is not considered “part of the game”, so that exemptions are not granted to give parties a commercial advantage not otherwise available under the Code.

Law Reform

The Panel has as one of its primary functions to keep under review the law relating to takeovers and to make recommendations to the Minister on changes to the law. Under that function the Panel has made a number of detailed recommendations for technical changes to the Code. These have been through the departmental system and received Cabinet approval earlier this year. Regulations have been drafted and are currently being reviewed prior to submissions to Cabinet and final promulgation. These changes will improve the workings of a number of aspects of the Code without changing any of the fundamental parameters. Further changes to the Takeovers Act and Takeovers Code are being made through the Securities Legislation Bill, currently in the House. These changes will extend the scope of the Panel’s jurisdiction to enable it to deal with misleading and deceptive conduct in the takeovers market to a far greater extent than at present.

The Panel has a number of projects arising from its experience with the Code which it would like to progress. Unfortunately pressure on resources has meant it has been unable to do much work on these projects. They include:

- the interaction between the provisions of the Takeovers Act and the Companies Act as they apply to amalgamations and schemes of arrangement.
- the interface between the Securities Act and the Takeovers Act where takeovers involve scrip rather than cash as consideration; and
- a review of current procedures for recommending and implementing changes to the provisions of the Code;

Public Understanding

The Panel maintains a website (www.takeovers.govt.nz) and publishes a newsletter, *Code Word*, two or three times a year. These aim to enhance public understanding of the Code and the work of the Panel. The Panel publishes its policies, and practice and guidance notes to assist market participants. The Panel uses the news media to make its decisions widely known and the Chairman delivers speeches in relevant forums from time to time. The Chairman and executive meet regularly with market participants including independent advisers to ascertain market feedback about the Panel’s performance.

Resourcing

The Panel executive has been operating with four full time staff and two part time staff, This has proved to be inadequate. Additional funding received in both 2004/2005 and 2005/2006 supported an increase in the Panel’s establishment to six full time staff. This is to cover both the existing workload and to meet the expected demands arising from the Securities Legislation Bill.

A difficulty for the Panel is the unpredictability of its third party income. A single section 32 meeting can generate nearly \$100,000 in income (significantly offset by members' fees and barrister's costs) but could also cost \$30,000 – 50,000 if the Panel proves unable to recover any of its costs. Where the Panel's enforcement or exemption activity generates large amounts of revenue the Panel will have a high level of debtors until the accounts are settled. This causes added pressure on the Panel's resources because the Panel must pay its own creditors while awaiting payment from its debtors. The Panel is unable to borrow and has to fund creditors and debtors from its own balance sheet. At the end of the last financial year the Panel had accumulated funds of approximately \$300,000.

Current issues

Oyster Bay Takeover

The Panel is currently involved in Court proceedings relating to takeover offers by two parties for Oyster Bay Marlborough Vineyards Limited. An offer by Delegates' Wine Estate Limited achieved its minimum acceptance level while that from Peter Yealands Investments Limited failed to do so. Mr Yealands and another shareholder, David Rankin, complained to the Panel about aspects of the target company statement issued by Oyster Bay. The Panel held a meeting and determined that Oyster Bay had not complied with the Code by failing to disclose certain information about the value of its vineyard properties. The Panel imposed a number of restraining orders to give the opportunity to implement remedies appropriate to the breach. This process was overtaken by Delegates' Wines which initiated Court proceedings seeking to have the Panel's decision overturned on judicial review. The Panel counter-claimed seeking interim orders against Oyster Bay and Delegates' under section 36 of the Takeovers Act. The Court upheld the Panel's decision in respect of the Code contravention by Oyster Bay and granted the interim orders sought by the Panel, effectively freezing the Delegates' offer. The Panel is now in the process of seeking final orders from the Court. Mr Yealands and Mr Rankin as well as Oyster Bay and Delegates' are parties to the proceedings. It seems likely that the outcome will be that the takeover offers will need to start afresh.

Changes to the Law

The Panel will be given expanded powers under the provisions of the Securities Legislation Bill. These in turn will increase the workload of the Panel, particularly during contested or opposed takeovers.

The Panel believes it is essential to be properly prepared for the introduction of the new legislation. For this it is necessary to review its current procedures manual and develop guidance notes or practice notes on the interpretation of some of the key provisions in the Bill. This work is now underway. The Panel believes that it will be put under pressure when the new law comes into force as the market seeks to find how the Panel interprets the provisions of that law.

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Extract from the Vote Commerce**Part C2 – Non-Departmental Output Classes***Administration of the Takeovers Code*

The Minister of Commerce will purchase the performance of the following functions by the Takeovers Panel in accordance with the Takeovers Act 1993:

- Review the Takeovers Code as the Panel sees fit and recommend amendments to the Minister of commerce, and consult with MED as required.
- Code Approvals – for independent advisors and experts under the rules of the Takeovers Code.
- Code Exemptions – class and individual exemptions from the rules of the Takeovers Code.
- Enforcement – maintaining oversight of takeover activity and intervening where necessary in accordance with its statutory powers.
- Review of market practice relating to takeovers – surveillance of takeover activity.
- Public understanding – promoting public understanding of the Code.

TAKEOVERS PANEL

STATEMENT OF INTENT

2005/2006

*Laid before the House of Representatives
Pursuant to Section 41F of the Public Finance Act 1989
and section 198 of the Crown Entities Act 2004*

CONTENTS

1. STATEMENT OF OBJECTIVES	18
2. THE NATURE AND SCOPE OF THE ACTIVITIES TO BE UNDERTAKEN BY THE PANEL	19
3. THE PANEL'S PERFORMANCE TARGETS AND STANDARDS	20
4. STATEMENT OF THE PANEL'S ACCOUNTING POLICIES	25

STATEMENT OF OBJECTIVES

- 1.1 This Statement of Intent for the Takeovers Panel (“the Panel”) relates to the 2005/2006 financial year and each of the following two financial years.
- 1.2 The objectives of the Panel for these three financial years are to perform its functions under the Takeovers Act 1993 (“the Act”) in a manner consistent with the requirements of the Act.
- 1.3 Section 8 of the Act sets out the present functions of the Panel. The functions of the Panel are:
 - 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 for the purposes of paragraph (a), to keep under review practices relating to takeovers of specified companies;
 - c to investigate any act or omission or practice for the purpose of exercising its powers and functions under Part III of the Takeovers Act 1993;
 - d to make determinations and orders and make applications to the Court in accordance with Part III of the Act;
 - e 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; and
 - g to perform such other functions as are conferred on it by the Act.

2. THE NATURE AND SCOPE OF THE ACTIVITIES TO BE UNDERTAKEN BY THE PANEL

- 2.1 The Panel is a body corporate established by the Takeovers Act 1993. It is a Crown entity under the Public Finance Act 1989. It is responsible for administering the Takeovers Code.
- 2.2 The Panel does not have any staff of its own but uses staff from the Securities Commission under a memorandum of understanding agreed between the Panel and the Commission in 2001. The Commission provides professional and support services to the Panel and the Panel pays for these services on an hourly basis.
- 2.3 In the years ending 30 June 2006, 30 June 2007, and 30 June 2008 the Panel will administer the provisions of the Takeovers Code and exercise its powers under the Takeovers Act. The Panel's activities will include:
- a keeping the Code under review;
 - b processing requests for approvals under, and exemptions from, the Code;
 - c monitoring compliance with the provisions of the Code;
 - d investigating any act or omission or practice for the purpose of deciding whether to exercise any of its powers or functions;
 - e exercising its powers and functions as appropriate;
 - f reviewing market practice relating to takeovers;
 - g promoting public understanding of the law and practice relating to takeovers;
and
 - h maintaining relationships with comparable overseas bodies.

3. THE PANEL'S PERFORMANCE TARGETS AND STANDARDS

3.1 The performance targets and other measures by which the Panel's performance may be judged in relation to its objectives are set out in the table below.

Performance Measures	2005/2006 Performance Standards/Output Estimates
<p><u>Output One – Takeovers Code</u></p> <p>Quantity and Quality</p> <p>Keeping the Code and the Act under review on an ongoing basis and recommending amendments to the Code as it considers necessary, having regard to experience gained from administering the Code and to feedback from market participants.</p> <p>Participate as agreed on projects and reviews with the Ministry of Economic Development, other government departments and interested parties that are relevant to its responsibilities, including reviews of the Code.</p> <p>Timeliness</p> <p>Amendments to the Code will be promoted promptly as the need for change is identified. Comments on proposals by the Minister will be provided within agreed timeframes.</p>	<p>The Panel will comply with its obligations under the Takeovers Act 1993 and with other relevant legislation. It will aim to ensure that the provisions of the Code are effective and relevant to market practice. It will base its work on accurate research into, and analysis of, the existing law and practice.</p> <p>1 per year</p>
<p><u>Output Two – Code Approvals</u></p> <p>Quantity</p> <p>Consider applications for approval of independent advisors and independent experts.</p> <p>Consider applications for consent to withdrawal of offers, and in relation to defensive tactics.</p> <p>Quality</p> <p>Proportion of approvals processed in accordance with the law, consistently applied</p>	<p>40</p> <p>4</p> <p>100%</p>

Performance Measures	2005/2006 Performance Standards/Output Estimates
<p>in terms of the Panel's published policies, including, where appropriate, the laws of natural justice and also having regard to feedback from market participants.</p> <p>Timeliness</p> <p>Decisions made within 3 working days of receipt of complete application.</p>	<p>To be achieved in 80% of cases</p>
<p><u>Output Three – Code Exemptions</u></p> <p>Quantity</p> <p>Consider applications for individual exemptions from the Takeovers Code</p> <p>Panel to formulate class exemptions from the Takeovers Code on own initiative or in response to applications.</p> <p>Quality</p> <p>Proportion of applications processed in accordance with the law consistently applied including, where appropriate, the rules of natural justice and also having regard to feedback from market participants.</p> <p>Timeliness</p> <p>Decision made within timeframe agreed with applicants</p>	<p>24</p> <p>4</p> <p>100%</p> <p>To be achieved in 80% of cases</p>
<p><u>Output Four – Enforcement</u></p> <p>Quantity</p> <p>Review of offer documents</p> <p>Review of meeting documents</p> <p>Section 32 meetings</p> <p>Section 35 actions</p> <p>Investigation of possible breaches of Code</p>	<p>20 100% of offer documents reviewed</p> <p>20 100% of meeting documents reviewed</p> <p>8</p> <p>1</p> <p>35</p>

Performance Measures	2005/2006 Performance Standards/Output Estimates
<p>Quality</p> <p>Documents reviewed for compliance with the law. Remedial action prompted, where appropriate, to correct deficiencies.</p> <p>Enforcement action taken in accordance with the law, where necessary.</p> <p>Meetings conducted in accordance with the law and the rules of natural justice.</p> <p>Timeliness</p> <p>Encourage remedial action to be taken in a timely manner within the structures of the Code. Complete enforcement work within the timeframes specified in the Takeovers Act 1993</p>	<p>90%</p> <p>100%</p> <p>100%</p> <p>100%</p>
<p><u>Output Five – Review of Market Practice</u></p> <p>Quantity and Quality</p> <p>Keep under review practices relating to takeover activities.</p> <p>Initiating a specific inquiry into market practice with a view to recommending amendments to the Code</p> <p>Timeliness</p> <p>Complete inquiry work promptly.</p>	<p>Continuous</p> <p>3</p> <p>Review work to be based on accurate research into, and review of, existing practices, including feedback from market participants.</p>

Performance Measures	2005/2006 Performance Standards/Output Estimates
<p><u>Output Six – Public Understanding</u></p> <p>Quantity, Quality and Timeliness</p> <p>Publish a publication designed to provide up-to-date and relevant information about the Takeovers Code and relevant law.</p> <p>Participate in public seminars to explain the workings of the Code.</p> <p>Meet with major customers and business leaders to obtain views on the performance of the Panel in carrying out its functions.</p> <p>Maintain relationships with the news media and provide them with relevant information about the Panel and the Code.</p> <p>Maintain a web-site with accurate, comprehensive and relevant information about the Code and Act and the policies, procedures, decisions and activities of the Panel.</p> <p>Receive miscellaneous inquiries from members of the public and professional firms.</p>	<p>3 times a year</p> <p>3 times a year</p> <p>Meet once per year with major customers and business leaders</p> <p>Continuous</p> <p>All relevant material posted promptly to the website, generally within 5 working days of the event or decision.</p> <p>Receive 200 enquiries and respond to each within 3 working days</p>
<p><u>Output Seven – International Liaison</u></p> <p>Quantity and Quality</p> <p>To liaise with comparable overseas bodies, particularly in Australia, both directly and through relevant international gatherings, to improve the administration and enforcement of takeovers law, and to promote international understanding of New Zealand law.</p> <p>Support reciprocal membership between Australian and New Zealand Takeovers Panels.</p>	<p>Respond to enquiries from overseas bodies within five working days</p> <p>Maintain one Australian Panel member on the New Zealand Panel and one New Zealand Panel member on the Australian Panel</p>

Performance Measures	2005/2006 Performance Standards/Output Estimates
<p>Timeliness</p> <p>Panel representatives to meet regularly with overseas bodies.</p>	<p>1 time a year</p>
<p>Administration</p>	<p>The Panel will have a Memorandum of Understanding with the Securities Commission for the provision of support services.</p> <p>The Panel will consult with Ministry officials on the Memorandum of Understanding and inform it of any issues during the year arising from the Memorandum of Understanding.</p>

3.2 For the years ending 30 June 2006, 30 June 2007 and 30 June 2008 the Panel will continue to produce the following classes of outputs:

Output 1: *Takeovers Code and amendments to the Code* (keeping under review the law relating to takeovers, including recommending to the Minister any changes that it considers necessary);

Output 2: *Code approvals* (granting various approvals under the rules of the Code);

Output 3: *Code exemptions* (processing class and individual exemptions);

Output 4: *Enforcement* (reviewing offer documents, investigation of complaints, and the taking of enforcement action, including section 32 meetings, issuing restraining orders, receiving enforceable undertakings, court proceedings etc.);

Output 5: *Review of market practice relating to takeovers* (maintaining an overview of the market);

Output 6: *Public understanding* (promoting public understanding of the Code, including maintaining a website, publishing newsletters, conducting press conferences, issuing explanatory guidelines to assist the market, meeting with market participants, etc.); and

Output 7: *International liaison* (maintaining relationships with similar overseas bodies, particularly in Australia).

The range of the Panel's enforcement activities are expected to be expanded if the current legislative initiatives being taken by the Government become law.

4. STATEMENT OF THE PANEL'S ACCOUNTING POLICIES

4.1 The following is a statement of the Panel's accounting policies.

a Reporting Entity

The Takeovers Panel is a body corporate established by the Takeovers Act 1993. The financial statements presented here are prepared pursuant to section 16 of the Takeovers Act 1993 and section 41 of the Public Finance Act 1989.

b Measurement System

The accounting principles recognised as appropriate for the measurement and reporting of results and financial position on an historical cost basis will be applied.

c Accounting Policies

i ***Budget Figures***

The budget figures will be those approved by Panel Members on 28 June 2005.

The budget figures will be prepared in accordance with generally accepted accounting practice.

ii ***Short Term Deposits***

Short term deposits will be shown at cost.

iii ***GST***

The Panel is registered for GST and GST will be accounted for by the net method.

iv ***Financial Instruments***

Financial instruments to be recognised in the Statement of Financial Position will include cash balances, receivables, payables, and investments.

v ***Income Tax***

The Panel is exempt from income tax under the Income Tax Act 1994.

vi ***Sundry Debtors***

Sundry debtors are stated at their expected realisable value after providing for doubtful and uncollectable debts.

vii ***Revenue Recognition***

The Government grant is recognised as revenue when it becomes due. Revenue from application fees and costs recoverable is recognised when the relevant services are provided or when the Panel has made the relevant determination under section 32 of the Takeovers Act 1993.

viii ***Litigation Fund***

Interest income and expenditure on approved litigation fund matters will be reported as income and expenditure of the Panel in the financial period in which they were derived or incurred. Reimbursements from the Crown to top-up the fund are reported as income in the period in which the Panel's claim for reimbursement is accepted by the Crown.

The balance of the fund is disclosed as a component of equity in the statement of financial position.

A handwritten signature in black ink, appearing to read 'John King', with a horizontal line underneath it.

John King
Chairman
Takeovers Panel

Date: 9 August 2005