



IN THIS ISSUE

- › The Code's First 100+ days _____ pg 1
- › Denis Byrne joins the Panel _____ pg 1
- › Comments on Exemptions _____ pg 2
- › Comment on Rule 16 _____ pg 3
- › Comments on Independent Advisors _____ pg 3
- › Comments on Enforcement _____ pg 4
- › Members of the Panel _____ pg 4
- › How to contact us _____ pg 4

Denis Byrne joins the Panel



Australian commercial lawyer, Denis Byrne, has been appointed to the Takeovers Panel by the Minister of Commerce, Hon Paul Swain. Mr Byrne has been a member of the Australian Takeovers Panel since 1997.

“Mr Byrne’s

appointment reflects the increasing integration of the New Zealand and Australian business sectors in the broader context of CER,” Mr Swain said.

“Greater attention needs to be given to ensuring domestic laws enhance trans-Tasman business initiatives, and that the law works effectively where business activities span both jurisdictions.”

“To achieve this goal a close relationship between the regulators in both countries is essential.”

Denis Byrne is a Brisbane-based commercial lawyer with wide experience in the corporate, infrastructure and resources areas. His legal practice, from 1970 to 1997, included public company takeovers, corporate restructures and major asset acquisitions and sales.

He has a keen interest in New Zealand having worked with New Zealand lawyers on development of public policy.

THE CODE'S FIRST 100+ DAYS

The Takeovers Code was a long time coming. Its commencement on 1 July 2001 was almost 10 years after the Takeovers Panel Advisory Committee was appointed which followed almost 10 years of intensive debate. In contrast to that lengthy build-up, July 1 brought literally an instantaneous reaction by the Panel to the operation of the takeovers market.

July 1 was a Sunday. At 9.30am that day a division of the Panel held its first meeting in connection with the contested bid for Montana. Later that day the first notice calling a meeting under the enforcement provisions was given accompanied by the first restraining order. It was a demanding start but it signaled clearly to the market that the Panel was up and operating and willing to exercise its powers outside normal working hours where necessary.

There has been a steady stream of commercial activity requiring Panel involvement, including:

- **Enforcement under Section 32 of the Act** - Three meetings, two adverse decisions
- **Restraining Orders** - Five restraining orders issued
- **Exemptions** - 22 exemption applications, ten approved
- **Takeover Notices** - eight takeover notices under the Code received
- **Independent Advisers** - 21 independent advisers approved

Considering these matters and reaching decisions have helped the Panel consolidate and refine its policies.

The Panel is keen to be as transparent as possible to ensure that the market understands the reasons behind its decisions. It has published a range of policies on its website and in earlier issues of Code Word, particularly Code Word No 3 issued in September 2001.

A statement of reasons is published with each exemption granted from the Takeovers Code, and the exemption notices are posted in full on the website.

Market participants are urged to be aware of this published information in their dealings with the Panel. We aim to act quickly and decisively, being driven by the needs of the market and the purpose, policy and legal framework of the Code.

Procedures are in place to deal with exemption and approval applications. However, efficient processing of applications depends on applicants knowing the requirements and providing the Panel with all the information it needs. We cannot emphasise enough the importance of making full and frank disclosures to the Panel.

To further help the market understand how the Panel applies the Takeovers Code we are publishing, in this issue of Code Word, comments on various procedures and on some of the Panel's decisions.

COMMENTS ON EXEMPTIONS

TIME REQUIRED TO PROCESS EXEMPTION APPLICATIONS

If an exemption is required this should be taken into account early in the process of the transaction. Applicants should notify the Panel as soon as they can of the need for an exemption. It can take up to a month to process an exemption application. Follow the Guide to Applying for Exemptions from the Takeovers Code in Code Word 3 and ensure all the necessary information is included.

CANADIAN NATIONAL RAILWAY COMPANY - EFFECT OF THE EXEMPTION - UPSTREAM PARTIES

The Panel exempted Canadian National Railway Company from compliance with rule 6(l). The exemption was granted in respect of any increase in voting rights in Tranz Rail Holdings Limited controlled by Canadian National that might occur as a result of a merger between a wholly owned subsidiary of Canadian National and Wisconsin Central Transportation Corporation.

This exemption was concerned with the “upstream” merger affecting Wisconsin Central which holds a parcel of shares in Tranz Rail. Through the merger in North America the control of that parcel of shares will change. The exemption was granted because the merger was directed to operational rail network issues in North America and the change in control of the Tranz Rail parcel was incidental to the overall transaction.

FISHER & PAYKEL INDUSTRIES LIMITED - EFFECT OF THE EXEMPTION - RECONSTRUCTION

The Panel exempted Fisher & Paykel Industries Limited (FPI) and Fisher & Paykel Appliances Holdings Limited (FPA) from compliance with rule 6(l) of the Code. The exemption was in respect of FPI shares to be acquired by FPA under the proposed arrangement to separate FPI into two listed companies. The need for the exemption arose because, as part of the separation, FPA would temporarily hold more than 20% of the shares of FPI. The exemption was given on condition that FPA's holding in FPI would reduce to below 20% within one month and FPA's shares could not be voted until the shareholding fell below 20%.

DATA ADVANTAGE LIMITED - EFFECT OF THE EXEMPTION - SCHEMES OF ARRANGEMENT

An exemption from rule 6(l) of the Code was granted to Data Advantage Limited and its wholly owned subsidiary Aqua Advantage (New Zealand) Limited in respect of their acquisition of all the shares in Baycorp Holdings Limited through a scheme of arrangement under part XV of the Companies Act 1993. The exemption was granted on conditions, including that Baycorp shareholders were given information broadly comparable to that which would have been provided under a Code offer. In addition

the shareholder vote required to approve the scheme of arrangement had to be passed by 75% of the votes cast, being at least 50% of the total votes of the company, and also by 50% by number of the shareholders voting at the meeting.

Applicants seeking an exemption to allow a takeover via a scheme of arrangement under Part XV of the Companies Act 1993 are required to state to the Panel why the transaction is to be made under a scheme of arrangement rather than by a takeover offer.

AIR NEW ZEALAND LIMITED - EFFECT OF THE EXEMPTION - URGENCY

The Panel exempted the Crown from compliance with rule 6(l) in respect of the Crown's increased control of voting rights in Air New Zealand resulting from entry into the shareholder support agreement with Air New Zealand's two largest shareholders.

The Panel also exempted the Crown from rule 7(d) to the extent that it requires rule 17(2) (imposing voting restrictions) to apply to the ordinary resolution of Air New Zealand needed to approve any increase in the Crown's control of voting rights in Air New Zealand that will arise from the anticipated allotment of voting shares to the Crown.

Rule 17(2) provides that the allottee and its associates must not vote on a resolution for the approval of the allotment under rule 7(d). The exemption effectively permits the principal shareholders to vote in favour of the allotment of shares in Air New Zealand to the Crown despite the fact that, because of the shareholder support agreement, they are associates of the Crown.

The reasons for granting the exemptions were:

- the financial position of Air New Zealand;
- the importance of early certainty about the Crown's financial support to the viability of Air New Zealand;
- the need for that financial support to be provided ahead of the shareholders' meeting; and
- if time and circumstances had allowed the arrangements could have been made conditional on a shareholder meeting conforming with the Code at which the principal shareholders would be able to vote.

NORMANDY NFM LIMITED - EFFECT OF THE EXEMPTION - NON-AUSTRALASIAN SHAREHOLDERS AND UNMARKETABLE PARCELS

Normandy is making a code offer for all the shares and options in Otter Gold Mines Limited, a New Zealand listed company. Rule 20 of the Code states that all shareholders of the target company must be offered the same consideration on the same terms and conditions.

Normandy is exempted from rule 20 in respect of shareholders of Otter resident outside Australia and New Zealand. Those shareholders who accept the offer will have their Normandy share entitlement transferred to a nominee appointed by

Normandy. The nominee is then obliged to sell those shares and distribute the proceeds to the shareholders. A similar arrangement is permitted for holders of small parcels of Otter shares. They can elect to transfer their share entitlement to the nominee.

These exemptions were granted because of:

- the cost of complying with securities law in multiple jurisdictions where share scrip is being offered as consideration in a takeover;
- the opportunity provided to consolidate small holdings; and
- the principle of equal consideration still being observed.

COMMENT ON RULE 16

As an exception to the fundamental rule contained in rule 6 of the Takeovers Code, a person may become the holder or controller of an increased percentage of the voting rights in a code company by an allotment approved by an ordinary resolution of shareholders under rule 7(d). In this situation, the requirements of rule 16 Notice of meeting: allotment of voting securities, must be met.

Rule 16 (b) and (d) require the notice of meeting to state among other things:

- the number of voting securities being allotted to the allottee;
- the percentage that number represents of the voting shares on issue post-allotment;
- the total percentage of the voting rights on issue that the allottee will have post-allotment; and
- the price at which the securities will be issued and the date the consideration is payable.

The situation may arise where rule 7(d) cannot be complied with because the notice of meeting is unable to state the particulars of rule 16, especially 16(b) or (d). This situation can arise in a number of instances including:

- major shareholder underwriting a pro rata issue of voting securities made to all shareholders;
- issue of options convertible at a later date; or
- issue of convertible notes, convertible at a later date.

The precise number of voting securities to be allotted might be unknown because:

- the exact number of options that may be exercised is unknown;
- a conversion ratio for convertible notes may not be known;
- the number of shares that a principal shareholder has to subscribe for under an underwriting agreement is not known.

Often where an event is happening in the future the outcome post-allotment cannot be stated with the certainty required by the Code.

In such cases, an exemption from rule 16 is required for the allotting company, and an exemption from rule 7(d), to the extent that rule 7(d) requires compliance with rule 16, is required for the allottee. An exemption aims to facilitate such allotment arrangements while remaining consistent with the objectives of the Code. To achieve this outcome conditions will be imposed relating to the information to be included in the notice of meeting. They are also likely to include:

- a constraint on any change in effective control of the allottee between the time of shareholder approval of the allotment of voting securities and the allotment itself; and
- a requirement to disclose the effect of any ability of the shareholder to take advantage of the “creep” provisions of rule 7(e) of the Code.

COMMENTS ON INDEPENDENT ADVISERS

TIME AND COSTS OF PROCESSING APPROVALS

Applications for approval to act as an independent adviser should be sent to the Panel as early as possible and should comply with the Outline for Application set out in Code Word 3.

The cost to applicants of processing an application has ranged to date from about \$1000 to more than \$5000.

DISCLOSURE OF ALL INFORMATION IN APPLICATIONS - INCLUDING RELATIONSHIPS WITH DIRECTORS & SHAREHOLDERS OF PARTIES TO THE TRANSACTION AND WHETHER AN APPLICATION HAS BEEN MADE TO THE NZSE

Frequently the Panel has had to seek more information from prospective independent advisers about their applications. In particular these requests have related to:

- Disclosure of all past and present relationships between the applicant and any other party, including the directors and major shareholders of the parties, as well as the directors and major shareholders of the offeror and the target company. This disclosure should give the nature, extent and duration of the relationship, including the fees earned, the time-frame of the assignments and whether there has been any past or present involvement with any of the parties as auditor.
- Whether the independent adviser has any involvement in other advisory activities associated with the transaction and whether they have had any prior involvement in the transaction, especially the formulation of the transaction.
- If the independent adviser is preparing an appraisal report under the New Zealand Stock Exchange Listing Rules, this should be disclosed.

Each case is considered very carefully. Several applications have been declined because the Panel considered that the nature, extent or duration of a disclosed relationship was such that the applicant was not sufficiently independent.

SUBCONTRACTORS - MUST ALSO BE INDEPENDENT OF THE TRANSACTION

A subcontractor or consultant who compiles information for an independent adviser's report must be appointed by the adviser and be independent of the transaction. The adviser must ensure that the subcontractor or consultant is independent and state this in their application.

PRACTICE NOTE - COMBINED REPORTS, MERITS OF THE TRANSACTION

Reports by independent advisers are required under several rules of the Code, in particular:

- Rule 18 (relating to meetings required to approve allotments or acquisitions of voting securities);
- Rule 21 (relating to the merits of a takeover offer); and
- Rule 22 (relating to rule 8 and whether the consideration and terms offered as between various classes of voting securities, and as between classes of voting and non-voting securities, are fair and reasonable).

A policy/practice note on use of combined reports is published on our website. The essence of this note is:

- a report on the "merits" is not just a valuation; it needs to have a much broader focus;
- the Panel prefers separate reports where both the Code and the Listing Rules are involved, but if there is a combined report it should have a separate and distinct part that deals with the "merits" for the purposes of the Code; and
- directors should ensure that the independent adviser's report complies with the Code.

RULE 22 STATEMENT

An independent adviser's report under rule 22 is required to report on the fairness of consideration as between two or more different classes of securities. Where such a report is required, it must accompany the takeover offer. The Panel is concerned that shareholders of the target company may see this report and not appreciate that a further report on the merits of the transaction will accompany the target company statement. Accordingly the Panel asks that a report under rule 22 should have a prominent statement at the front to make the position clear. The wording required is contained in the policy on the website.

MEMBERS OF THE PANEL

CHAIRMAN: John King DEPUTY CHAIRMAN: David Jones
MEMBERS: Denis Byrne, Colin Giffney, Alistair Lawrence,
Kevin O'Connor, David Quigg, Daphne Rawstorne

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COMMENTS ON ENFORCEMENT

OFFEROR'S STATEMENT - DISCLOSE UPSTREAM PARTIES

Clause 6 of Schedule 1 of the Code relates to shares of the target company held or controlled by the offeror and certain other parties, including "related" parties.

The Panel has noted that some takeover notices received have not disclosed the identities of parties controlling the shares held by the offeror. We have pointed out these deficiencies to the offeror so that details of the number, designation and percentage of shares held or controlled by related companies may be included in the offer document sent to shareholders of the target company.

It should be noted that "related company" under the Code is defined by reference to the Companies Act 1993. This definition includes a holding company and all subsidiaries.

OFFEROR'S STATEMENT - DISCLOSE DETAILS OF TRANSACTIONS

Clause 7 of Schedule 1 to the Code requires the takeover notices to disclose trading in the equity securities of the target company by certain parties in the six months before the takeover notice is served. The consideration for, and date of every transaction must be disclosed.

The Panel appreciates that, before a takeover notice is served, it would be inappropriate for the offeror to make enquiries of outside parties (particularly substantial security holders) about past share transactions. However in the Panel's view the offeror should make "proper enquiry" about these details once the takeover notice has been issued and before the directors sign the directors' certificate required under clause 19 of Schedule 1 and dispatch the offer document to target company shareholders.

TARGET COMPANIES - DIRECTORS' INTERESTS IN CONTRACTS OF OFFEROR

It is essential that information about the nature and extent of the interests of directors and officers of a target company in the material contracts of the offeror is made available by all directors of a target company, regardless of whether or not they are independent directors of the parties to a takeover.

This information is required to be disclosed by clause 13 of schedule 2. The Panel considers that all directors of the target company have a duty to disclose this information even though it may be only the independent directors who sign the target company statement.

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