



## IN THIS ISSUE

- Amendments to the Takeovers Act 1993 and the Takeovers Code

THE SECURITIES LEGISLATION BILL WAS PASSED BY PARLIAMENT IN OCTOBER 2006 AND MUCH OF IT BECAME LAW ON 25 OCTOBER 2006. AMONG ITS PROVISIONS ARE CHANGES TO THE TAKEOVERS ACT 1993 AND THE TAKEOVERS CODE. THIS ISSUE OF CODE WORD IS DEVOTED TO AN EXPLANATION OF THOSE CHANGES AND WHAT THEY MEAN FOR MARKET PARTICIPANTS AND THE TAKEOVERS PANEL.

## AMENDMENTS TO THE TAKEOVERS ACT AND THE CODE

The passage of the Securities Legislation Bill, which amends significant areas of securities and takeovers laws, has resulted in amendments to the Takeovers Act 1993 and the Takeovers Code in four significant areas, three of which have immediate effect.

The four areas are:

1. the definitions of “code company” in the Code and “specified company” in the Takeovers Act have been changed;
2. the Code and Act will specifically empower the Panel and Court to deal with misleading and deceptive conduct in relation to all Code-related transactions and events (these provisions are to come into effect at a later date, expected to be early-to- mid 2007);
3. the Panel’s enforcement powers have been expanded; and
4. the penalties and remedies under the Takeovers Act have been increased and broadened.

The changes in paragraphs 1, 3 and 4 came into effect on 25 October 2006.

### CHANGES TO THE DEFINITION OF CODE COMPANY

The definition provisions in the Code and in the Takeovers Act that specify the companies to which the Code applies have been changed for both listed and unlisted companies.

The definitions relating to listed companies had provided that a “code company”, or a “specified company”, was a company that was –

- (a) a party to a listing agreement with a registered exchange;
- (b) not a party to a listing agreement with a registered exchange but was a party to a listing agreement with a registered exchange at any time during the period of 12 months before any date or the occurrence of any event referred to in the code.

Under the old definitions, all listed companies were caught by the Code. This meant that companies that had only non-voting securities quoted on an exchange were caught by the Code. However, it was not intended that the Code should apply to such companies (because the Code is concerned with voting rights) and the Panel has granted a number of exemptions from compliance with the Code as a result.

The “code company/specified company” definitions have now been changed to exclude listed companies that have only non-voting securities quoted on an exchange. Accordingly, the new definition of a Code company will be 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 period of 12 months before a date or the occurrence of an event referred to in the code.

For unlisted companies, the definitions had applied to companies that had “50 or more shareholders and \$20,000,000 or more of assets”. The asset threshold has been removed from the definition, so that the Code and Takeovers Act apply now to every company that has 50 or more shareholders. (This is in line with Australian legislation).

The result of these definition changes is that any listed company with only non-voting securities quoted (for example, debt securities) is no longer a “code company/specified company”. The 12-month ‘look back’ for previously listed Code companies is retained. Every company with 50 or more shareholders, regardless of its assets, falls within the “code company/specified company” definitions.

## MISLEADING AND DECEPTIVE CONDUCT

Another significant change to the Code and to the Takeovers Act is the introduction of new provisions which will prohibit misleading or deceptive conduct in a broad range of circumstances in relation to transactions or events governed by the Code. The principal new provision is a new rule 64 in the Code.

Rule 64 states:

- (1) A person must not engage in conduct that is –
  - (a) conduct in relation to any transaction or event that is regulated by this code; and
  - (b) misleading or deceptive or likely to mislead or deceive.
- (2) A person must not engage in conduct that is –
  - (a) incidental or preliminary to a transaction or event that is or is likely to be regulated by this code; and
  - (b) misleading or deceptive or likely to mislead or deceive.

This new rule addresses a deficiency in the Code that has limited the Panel’s ability to deal with misleading conduct occurring outside of signed takeover documents. Because takeover offer documents and target company statements must be certified as being true and correct and not misleading, by directors and senior executives of the offeror and the target, respectively, the Panel has been able to take action where such documents have been found to be misleading. However, the Panel has not been able to exercise its enforcement powers for misleading conduct that may have occurred other than in the signed takeover documents.

The new rule 64 in the Code is cast very broadly and will enable the Panel to exercise its enforcement powers for any misleading or deceptive conduct that relates to any transaction or event that is or is likely to be regulated by the

Code. Misleading or deceptive conduct that is incidental or preliminary to events or transactions that are or are likely to be regulated by the Code will also be subject to the Panel’s enforcement powers.

In addition to the new rule 64, it will also be a criminal offence under a new section 44C of the Takeovers Act to make or disseminate materially false or misleading statements or information in relation to any transaction or event regulated by the Code or incidental or preliminary to a transaction or event that is or is likely to be regulated by the Code.

These new misleading and deceptive conduct provisions are anticipated to be brought into force in early to mid-2007. At the time that these new provisions become operative, the Fair Trading Act will no longer apply to conduct that is regulated by the Code and the Takeovers Act. The Panel will provide further information on these new provisions closer to their commencement date.

## CHANGES TO THE PANEL'S ENFORCEMENT POWERS

Section 32 of the Takeovers Act provides the Panel with its principal powers for dealing with concerns about compliance with the Takeovers Code.

Once the Panel considers that a person may not have acted or may not be acting or may intend not to act in compliance with the Code, it can call a meeting and make temporary restraining orders. These orders are issued with the notice that is sent to the relevant parties notifying them of the date for holding the meeting under section 32 of the Act to determine whether the Panel will exercise its enforcement powers. The temporary restraining orders are set out in section 33 of the Act. They must expire within two days after the section 32 meeting. Their purpose is to preserve the status quo until the Panel has issued its determination regarding whether it is satisfied or not satisfied as to the person’s compliance with the Code.

If the Panel determines that the person has not complied with the Code, it can make further section 33 restraining orders that have effect for up to 21 days. Because of the timelines for takeovers that are set up by the Code, these orders, although temporary, can often result in a complete remedy for the breach. If not, they maintain the status quo for sufficient time to enable the matter to be determined by the High Court.

The Panel’s enforcement powers have now been enlarged, enabling the Panel to make a number of permanent compliance orders in addition to temporary restraining orders.

The permanent compliance orders are set out in new section 33AA of the Act, as follows:

For the purposes of section 32, a permanent compliance order is an order for one or more of the following:

- (a) prohibiting or restricting a person from making any statement or distributing any document that is or that may reasonably be expected to constitute a contravention of the takeovers code;
- (b) directing a person to disclose in accordance with the order information for the purpose of securing compliance with the takeovers code;
- (c) directing a person to publish, at the person's own expense, in the manner and at the times specified in the order corrective statements that are specified in, or are to be determined in accordance with, the order;
- (d) for the purpose of securing compliance with any of those orders, an order directing a person to do or refrain from doing a specified act.

The permanent orders are focused on giving the Panel the power to deal decisively with any kind of misleading conduct, by enabling the Panel (without recourse to the Court) to prohibit or restrict persons from making statements or distributing documents, and to direct persons to disclose information or to publish, at the person's own expense, corrective statements.

While these orders are designed to complement the new rule 64 of the Code (which will prohibit misleading or deceptive conduct in broad circumstances in relation to the Code), they are also available to the Panel to deal with misleading or deceptive takeover documents. They came into effect on 25 October 2006 and are available to the Panel notwithstanding that rule 64 is not yet in force.

A further extension of the Panel's enforcement powers has occurred through the addition to the Takeovers Act of a definition of 'contravening the Code'.

Prior to the inclusion of the new definition, the Panel was able to exercise its enforcement powers under section 32 only against the person or persons breaching the Code. Any secondary conduct, such as aiding, counselling or inducing the actual contravener to breach the Code could only be dealt with through the High Court, by way of seeking a pecuniary penalty against the person who engaged in the secondary conduct.

The new definition extends the reach of the Panel's powers so that restraining orders and compliance orders can be made by the Panel against not only the person who has actually breached or intends to breach the Code, but also in respect of any secondary involvement in the breach. The new definition provides as follows:

In sections 32, 33, and 33AA and in subpart 2 of Part 3 [of the Takeovers Act] (which contain the enforcement powers of the Panel and Court), unless the context otherwise requires, **contravene the takeovers code** or **not act in compliance with the takeovers code**, includes—

- (a) a contravention of the takeovers code or a term or condition of an exemption from the takeovers code; or
- (b) an attempt to contravene the takeovers code or a term or condition of an exemption from the takeovers code; or
- (c) aiding, abetting, counselling, or procuring any other person to contravene the takeovers code or a term or condition of an exemption from the takeovers code; or
- (d) inducing, or attempting to induce, any other person, whether by threats or promises or otherwise, to contravene the takeovers code or a term or condition of an exemption from the takeovers code; or
- (e) being in any way, directly or indirectly, knowingly concerned in, or a party to, the contravention by any other person of the takeovers code or a term or condition of an exemption from the takeovers code; or
- (f) conspiring with any other person to contravene the takeovers code or a term or condition of an exemption from the takeovers code.

Accordingly, the Panel can now, after making appropriate findings, make determinations and issue temporary restraining orders or permanent compliance orders against persons engaged in secondary conduct related to breaches or intended breaches of the Code or of terms or conditions of exemptions from the Code. In addition, any of the orders that the Court can make or remedies that it can grant also can relate to secondary involvement in breaches or intended breaches of the Code or of exemptions.

#### CHANGES TO THE PENALTIES AND REMEDIES AVAILABLE UNDER THE TAKEOVERS ACT

The powers of the High Court under the Takeovers Act for providing civil remedies for contraventions of the Code and also in relation to penalties and offences have been completely overhauled.

#### Civil remedies and penalties

The new civil remedies regime includes not only the orders that could formerly be sought from the Court (e.g., orders to prevent transfers or disposals of securities, or for forfeiture, or preventing the exercise of voting rights, etc) but also now includes new compensatory orders which may be awarded to a person who has suffered or is likely to suffer loss or damage because of a contravention of the Code. Compensatory orders are made to compensate an aggrieved person in whole or in part for loss or damage suffered as a

result of a contravention of the Code or are made to prevent or reduce loss or damage.

A new pecuniary penalties regime through the High Court has also been included in the Act. The maximum amount of a pecuniary penalty is \$500,000 for an individual and \$5,000,000 for a body corporate, for each contravention of the Code. Pecuniary penalties are paid to the Crown.

Only the Panel has standing to make an application for a pecuniary penalty order. It can make such an application if it has held a meeting under section 32 of the Takeovers Act and has made a determination that it is not satisfied that a person has acted or is acting or intends to act in compliance with the Takeovers Code.

On an application for a pecuniary penalty, if the Court determines that there has been a contravention of the Code, the Court must make a declaration of contravention. The declaration of contravention must be made regardless of whether or not the Court also orders that the person who contravened the Code pay a pecuniary penalty. The purpose of a declaration of contravention is to enable an applicant for a civil remedy order or a compensatory order to rely on the declaration of contravention and not be required, for their civil action, to prove the contravention.

## Offences and Orders

The fines for general offences under section 44 of the Act (for example for misleading or attempting to mislead the Panel or for contravening orders made by the Panel) have been increased from the original range of \$10,000 - \$30,000 for individuals and \$100,000 for companies, to \$300,000 whether the offence is committed by an individual or a company. A fine of up to \$10,000 per day for continuing offences may also be imposed.

In addition to the penalties and remedies mentioned above, the Court now may also make management banning orders against persons convicted of an offence under section 44 of the Act (for misleading the Panel, etc) or under section 44C (for making or disseminating materially false or misleading statements or information - when this section comes into effect).

Company directors who persistently contravene the Takeovers Act or Code, the Companies Act, the Securities Markets Act or the Securities Act may also be subject to management banning orders. Consequently, even though a

director's persistent contraventions may never have resulted in a criminal prosecution, a management banning order may nevertheless be made against him or her.

These banning orders can prohibit or restrict the person from being a director or promoter or in any way taking part in the management of companies in New Zealand for a period of up to 10 years.

If a criminal conviction for an offence under sections 44 or 44C of the Takeovers Act has been made against a company director, or a pecuniary penalty order has been made against him or her, that director is automatically banned for 5 years (except with the leave of the Court) from any involvement in the management of New Zealand companies.

The High Court also now has power to make orders aimed at preserving the assets of a person in respect of whom an investigation is being carried out by the Panel or where a prosecution or civil proceeding has been begun in respect of that person. These orders include the ability to require the subject person to deliver up their passport, and are broad enough to cover property held in trust. When an application is made to the Court for an order to preserve assets, interim orders preserving assets may be made pending the hearing of the substantive application.

## TRANSITIONAL ARRANGEMENTS

The transitional provisions mean that the new laws will have no impact on persons or entities that acquired securities before the commencement of the new provisions, in a company that becomes a Code company under the amendments. In addition, any acquisition of securities in such a Code company after the commencement of the new provisions is not required to be made in compliance with the new laws if it is made in performance of a contractual obligation, or by exercising a right acquired, before the new provisions came into effect.

Similarly, offences against the Takeovers Act and contraventions of the Code that were committed or done before the commencement of the new provisions will be dealt with under the Takeovers Act and the Code as they were prior to being amended.

Outside of these specified transitional arrangements, the Code and the Takeovers Act, as amended, have full effect for any Code-related event or transaction that occurs on or after 25 October 2006.

If you wish to receive Code Word in hard copy or by email please contact [catherine.chapman@takeovers.govt.nz](mailto:catherine.chapman@takeovers.govt.nz)

## How to contact us

Takeovers Panel  
Level 8, Unisys House  
56 The Terrace  
PO Box 1171  
Wellington

Phone: 64 4 471 4618  
Fax: 64 4 471 4619  
Email: [takeovers.panel@takeovers.govt.nz](mailto:takeovers.panel@takeovers.govt.nz)  
Website: [www.takeovers.govt.nz](http://www.takeovers.govt.nz)

### Disclaimer

Code Word is produced for general information only. The Takeovers Panel does not assume any responsibility for giving legal or other professional advice and disclaims any liability arising from the use of the information.

If you require legal or other expert advice you should seek assistance from a professional adviser.