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THE TAKEOVERS PANEL'S BRIEFING FOR THE INCOMING MINISTER:

MINISTER OF COMMERCE

NOVEMBER 2011

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INTRODUCTION

1.1 This briefing explains who the Panel is and describes its areas of responsibility. It highlights key areas of policy that currently concern the Panel and that will require the Minister's early attention. The Panel proposes that its Chairman meets with you early in the New Year to establish our relationship with you and to contextualise the issues highlighted in this briefing.

ORGANISATION AND RESPONSIBILITIES OF TAKEOVERS PANEL

2. The Panel – the Organisation

2.1 The Takeovers Panel is an independent Crown entity established under the Takeovers Act 1993. It is the regulator of New Zealand's corporate takeovers market.

2.2 The Panel is governed by a board of 11 members drawn from the investment banking, legal, accounting and business community. The Chairman is Mr David Jones of Auckland, Solicitor, and the Deputy Chairman is Mr Colin Giffney, Investment Banker, also of Auckland.

2.3 The Panel employs a professional executive staff comprising 7.7 FTEs, which is located in Wellington. The Panel's Chief Executive is Ms Margaret Bearsley.

2.4 The Panel and the Panel executive have a positive relationship with, and liaise closely with, officials from the Panel's monitoring department, the Ministry of Economic Development ("MED").

3. The Panel's Responsibilities - Outputs

3.1 The Panel's core output is the regulation of takeover activity through the enforcement of the Takeovers Code. To achieve this effectively, the Panel has robust investigatory powers and the ability to make temporary restraining orders and some limited permanent orders. When exercising its enforcement powers, the Panel acts judicially as a tribunal.

3.2 The Panel's responsibilities also include:

(a) Exemptions - the granting of exemptions from compliance with the Code. Exemptions assist with ensuring that the Code applies effectively, appropriately and efficiently in New Zealand's dynamic and fast changing securities market.

(b) Approvals – approving the appointment of independent advisers who give advice to Code company shareholders about Code-regulated transactions. The Panel's approvals policy sets high standards for the independence and competence of advisers.

(c) Review of Law – reviewing takeovers law and recommending any changes that the Panel considers necessary, to you, the Minister of Commerce. The Panel is an expert body comprised of experienced takeovers practitioners, and is well placed to understand what needs to be done to make takeovers law effective and efficient. When the Panel makes any such recommendations, the MED will give you policy advice on those recommendations.

(d) Public Understanding – promoting public understanding of takeovers law and practice, and co-operating with overseas regulators.

4. Background to Code

4.1 The Takeovers Code provides the legal framework within which takeovers in New Zealand proceed. The Code provides for fair treatment of all shareholders and a transparent takeover process. It has achieved a broad and enduring market acceptance.

4.2 There appears to be a high level of compliance with the Code, which market feedback suggests is the result of the Panel's reputation for decisive enforcement activity, beginning with its issuing of restraining orders on the first day of the Code's operation (on Sunday 1 July 2001).

4.3 Prior to the introduction of the Code, opponents to the reform of the law had argued that a takeovers code would spell the demise of takeover activity in New Zealand. This has proved not to be the case. It is now apparent that the level of takeover activity is a product of prevailing market forces not the presence of a Code.

4.4 During the equity boom of 2006/07 the mergers and acquisitions market was correspondingly active, with some 23 takeovers in New Zealand. The global financial crisis of 2008 resulted in low levels of takeover activity in New Zealand (12 for 2007/08 and four in 2008/09) and throughout the world. However, the level of mergers and acquisitions activity has slowly lifted with business confidence growing and banks easing lending policies (seven takeovers were commenced in each of 2009/10 and 2010/11). The current year appears to be tracking for stronger takeover activity than the previous three years.

ENGAGEMENT WITH MINISTER

5.1 Over the term of government, the Panel's Chairman (Mr Jones until September 2012, when his term of office expires) would like to be able to meet with you from time to time, ideally twice per year, to engage on issues of importance.

5.2 The Panel would also seek to engage with you if it has significant concerns that need to be drawn to your attention. It was through such engagement with the previous Minister of Commerce that the Panel's major policy concern in relation to takeovers being undertaken under the Companies Act 1993 (described immediately below), was moved significantly forward last year.

MAJOR POLICY AND IMPLEMENTATION ISSUES

6. Schemes of arrangement and amalgamations involving Code companies

6.1 Some three years ago the Panel made its recommendations to the then Minister of Commerce for changing the law relating to takeovers being effected by way of schemes and amalgamations under the reconstruction provisions of the Companies Act.

6.2 The Panel's recommendations were made in response to both the Panel's and the market's concerns about the use of the Companies Act as a means of avoiding the requirements and disciplines of the Code. The Code provides greater protection to shareholders than the Companies Act's reconstruction provisions. Code-regulated transactions also have the benefit of supervision by an active regulator (the Panel) during the takeover process. By contrast, the Companies Act largely relies on shareholders themselves having to apply to the High Court for relief, which is beyond the reach of all but the largest and best advised.

6.3 This gap in the law resulted in a market practice of regulatory arbitrage which the Panel, and the investor sector of the market, believes has had a negative impact on procedural safeguards for shareholders, and thus on the perceived integrity of New Zealand's capital markets. The previous administration approved the Panel's proposals for law change in 2010, and the proposals were introduced into the House in October 2011 in the Companies and Limited Partnerships Amendment Bill 2011.

6.4 In summary, the takeovers provisions in the Companies and Limited Partnerships Amendment Bill will introduce into New Zealand a regime similar to the one that has operated successfully in Australia for several decades, by providing as follows:

(a) An amalgamation involving a Code company can be undertaken only through the schemes provisions in the Companies Act (so that the Court supervises the process).

(b) For any scheme (including an amalgamation undertaken as a scheme) that has an effect on voting rights in a Code company, either –

(i) the Court must be satisfied, before it approves the scheme, that the Code company shareholders would not be disadvantaged by the transaction not being undertaken under the Takeovers Code; or

(ii) the promoters of the scheme can produce to the Court a statement from the Takeovers Panel stating that the Panel has no objection to the scheme;

The Court can then either approve the scheme or not, in its discretion.

(c) The promoters of schemes involving Code companies can apply to the Panel for a "no-objection" statement before seeking Court orders for the proposed scheme.

(d) The current common law tests which the Court applies when considering a scheme will continue to be applicable.

(e) The Companies Act will set out the voting thresholds for the shareholders' approval of schemes involving Code companies. These thresholds require approval by 75% of the votes cast at meetings of shareholders in each interest class (this is the current voting threshold for a scheme) and, in addition, all of those votes combined have to represent more than 50% of the total voting rights of the company.

(f) The Companies Act will include some guidance for the Court on how to determine the different interest classes of shareholders for the purpose of their meeting to vote on the scheme.

6.5 A "no-objection" statement from the Panel as an expert body will assist the Court to decide whether to approve a scheme. If the Panel opposed a transaction being undertaken as a scheme under the Companies Act, the Panel would be able to object to it in Court.

6.6 The Panel is pleased to have its proposals now moving forward. It strongly encourages you to make the completion of this important reform in financial sector regulation a high priority.

7. Technical amendments to Takeovers Code

7.1 The Panel has just completed a full technical review of the Takeovers Code, including undertaking a lengthy and robust policy development process with stakeholder consultations.

7.2 As a result of this process, the Panel has decided that the Code could be improved both in terms of its market efficiency and the extent of mandatory disclosures to shareholders. The Panel will make recommendations to you in the near future on these matters. In addition, a number of purely technical drafting anomalies and inconsistencies are also proposed to be remedied and will be included in the pending recommendations.

8. Amendments to the Takeovers Act

8.1 There are three changes sought to the Takeovers Act on which the Panel has consulted and in respect of which it has liaised with officials from MED. These relate to:

(a) giving the Panel a clear jurisdiction to determine disputes between target companies and takeover bidders as to the obligation of bidders to reimburse target companies for the expenses incurred from a takeover, and to provide a new statutory process for dealing with them;

(b) dealing with an inadvertent change to the definition of listed Code companies, that occurred in 2006 but was only noticed in early 2011;[1] and

[1] In 2006, the Takeovers Amendment Act amended the definition for listed Code companies to remove debt-listed-only companies from the Code's reach. That amendment appears to have resulted in companies with a new equity listing (say, for an initial public offer of securities ("IPO")) not becoming Code companies until the

(c) amending the definitions of 'director' in the Code and the Act, to bring them up to date with the new limited partnerships regime.

8.2 It was hoped that these proposals could have been included in a 2012 corporate omnibus bill (such as a Regulatory Reform Bill or Business Law Reform Bill). The Panel is aware that corporate legal practitioners have also approached officials to have some minor, but annoying, anomalies with the Companies Act remedied in such a Bill. However, it is not clear that any such legislative vehicle is pending.

9. Judicial decisions database and IT upgrade for Panel

9.1 The Panel's IT capability and document management system have not been upgraded since the Panel was established in 2001. With each passing year the danger of loss of corporate knowledge increases, with its resulting potential for inconsistent administrative and judicial decision-making by the Panel, due to the poor state of the Panel's IT capability.

9.2 The Panel therefore intends to undertake an upgrade of its IT software with a particular focus on installing a robust judicial decisions database and improving its document management and security systems. We are liaising closely with MED on this upgrade. The intention is to manage the upgrade with a fiscally neutral funding proposal.

PENDING DECISIONS

10. Policy Decisions

10.1 The Panel has only one policy matter pending that may require your attention within the first six months of your term. This is the Panel's recommendations on a raft of technical and low policy content amendments to the Takeovers Code that flow from the technical review of the Code that the Panel has undertaken.

10.2 The Panel is liaising closely with officials from the MED on the timing for the Panel to formally make the recommendations to you on these proposed amendments. The intention is that the Panel will hold off making the recommendations until the Ministry is ready with a policy response that can be made immediately on your receipt of the Panel's recommendations.

APPOINTMENT OF PANEL MEMBERS AND TERMS OF OFFICE

11. Appointment/Qualifications

11.1 Members are appointed by the Governor-General on the recommendation of the Minister of Commerce and must, in the opinion of the Minister, be qualified or experienced in business, accounting or law.

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securities begin trading. This will always be *after* an IPO, so the Code cannot now regulate the disclosures in the prospectus for the IPO.

11.2 At least one member of the Panel must be a lawyer with at least seven years' practice. The Chairman and three other current members fill that requirement.

11.3 The Panel's statutory membership requirements ensure that the Panel constitutes a "committee of the market". Because they are all active market participants, Panel members are closely attuned to market practices and concerns. This helps to ensure that, to the extent legally appropriate and in accordance with best practice, the Panel can utilise its exemption and enforcement powers to facilitate an innovative and commercially vibrant takeovers market.

11.4 Members are appointed for terms of up to five years and may be reappointed when a term expires. The terms of office of Mr Keith Taylor of Wellington and Ms Sue Suckling of Christchurch have recently expired. Under the Crown Entities Act, members continue in office until reappointed or replaced. All other Panel members' terms of office will expire in 2012 or later.

11.5 One Panel member, currently Mr Peter Scott, is appointed to the Panel on the recommendation of the Australian Government. He is a member of the Australian Takeovers Panel. The Chairman of the New Zealand Panel is also appointed as a member of the Australian Panel. This arrangement keeps the regulators in both jurisdictions abreast of trans-Tasman takeovers developments.

11.6 The Panel recognises that the composition of the Panel drawn from market participants, and the retention of the Panel's institutional knowledge, is critical to the Panel's role in New Zealand's capital markets. Its succession plan for members is built around these concerns. The emphasis on composition is reflected in the Panel's desire to have four members drawn from the investment banking sector, four from the legal sector who work in the capital markets, and two drawn from accounting or business.

11.7 With five-year terms and effective rotation, the best that can be hoped for is an average institutional knowledge of 2.5 years in any one representative group. The Panel's rotation plan seeks to optimise the level of institutional knowledge. Delays in some new appointments and recent and pending retirements of members have compromised the Panel's succession plan. For that reason, the Panel, through MED, will be recommending to the Minister the extension of the terms of one or two members along with the appointment of a new member.

11.8 The Panel has a robust conflicts policy consistent with the Crown Entities Act, the general law and proper commercial practice. The policy ensures that members with interests do not participate in matters under consideration by the Panel in respect of which they are conflicted.