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**JOHN KING STEPPED DOWN AS CHAIRMAN OF THE TAKEOVERS PANEL IN MARCH 2007. THIS ISSUE OF CODE WORD INCLUDES A VALEDICTORY PIECE BY JOHN KING, AND A TRIBUTE TO HIM FROM THE MINISTER OF COMMERCE, HON LIANNE DALZIEL. INCOMING CHAIRMAN DAVID JONES ALSO PAYS TRIBUTE TO THE FIRST CHAIRMAN AND SIGNALS THAT THE PANEL'S APPROACH TO ADMINISTERING AND ENFORCING TAKEOVERS LAW WILL CONTINUE UNDER HIS CHAIRMANSHIP.**

## Valediction - John King



*John King*

It was a very lengthy process from the appointment of the original Takeovers Panel Advisory Committee back in 1991 to the Code becoming law in 2001.

I pay tribute to Sir Douglas Graham for the introduction of the Takeovers Act in 1993 which provided for a panel appointed from the market to formulate and administer a Takeovers Code. Unfortunately, in spite of his best efforts, the government of the day shelved the adoption of the Code.

When the present government took office in late 1999 it moved the Code off the shelf very quickly. The Takeovers Code Approval Order was made on 19 October 2000 and the Code became operative on 1 July 2001. I compliment the government and the minister of the day, Paul Swain, on quickly filling the gap in an important part of the regulatory framework of the capital markets.

The Panel had quite a dramatic start. The Code became law on Sunday 1st of July 2001, and on that day the Panel held its first meeting, issued its first restraining order, and called its first enforcement meeting. The enforcement meeting was held on the 6th of July and the Panel's decision was released on the same day. The Panel was dealing with the contested takeover for Montana Wines.

Although demanding, this was a great start for the Panel. It showed the market that we were in business and would act promptly and decisively.

While there is the policeman aspect in the Panel's role, I see the role as more akin to that of a referee, to facilitate the smooth operation of the takeovers market. The market has responded to this approach. Where we have found a breach, it has been remedied without the need for court action. The only exception where a matter went to court involved another wine company, Oyster Bay, where the High Court upheld the Panel's decision.

I think a key reason for this response from the market is the fact that the decisions are made by a panel drawn from the market. It is most important therefore that the high quality of the Panel membership is maintained. I am very pleased that this is in fact happening as evidenced by the recent appointment of three very highly qualified individuals to the Panel.

At present we have a very active takeovers market and, with the weight of money around and the interest of private equity funds, it looks as if the takeovers market will continue to be strong for some time. I have no doubt that we have been fortunate that the Code has been in place during this period. Takeovers in New Zealand now take place in an orderly way with all shareholders, including, in particular, minority shareholders, taking part in the takeover process. At a time when New Zealand has concerns about the loss of major companies to overseas buyers, it is even more important that there be a sensible regulatory framework to govern the takeovers market.

It has been a privilege to lead the Panel. It was a significant challenge to first of all formulate a Takeovers Code suitable

for the New Zealand market and then to undertake the administration and enforcement of that Code.

I have been fortunate to have been well supported by the very able people that have served on the Panel and by Senior Executive Kerry Morrell and the executive team. David Jones will be an able leader of the Panel. He and Alastair Lawrence, the new deputy chairman, were members of the original Panel. I believe I leave the Panel in good hands.

## From the Minister of Commerce, Hon Lianne Dalziel



*Minister of Commerce,  
Hon Lianne Dalziel*

I want to thank John King for his major contribution to New Zealand's business regulatory environment and in particular for his dedication to the development and implementation of the law covering takeovers. John's interest in takeovers law saw him involved from the initial Panel, set up in the early 1990s, through the preparation and implementation of the Takeovers Code, and the first almost six years of its application.

The smooth transition of this new law and the wide general acceptance of the Code are largely due to John's foresight and wisdom. Takeovers in New Zealand now follow disciplined processes and involve well-informed shareholders.



*Alastair Lawrence*

I congratulate David Jones on his appointment as chair and Alastair Lawrence on becoming deputy chair.

Three new Panel members have been appointed for five year terms. They are:

**John Waller** who has in-depth commercial experience from his role leading the PricewaterhouseCoopers Advisory Division. He is also a member of the PwC New Zealand board;

**Keith Taylor** who has considerable experience gained over many years in the corporate world, including his time as chief executive with Tower; and

**Pip Greenwood** a partner at Russell McVeagh who specialises in securities offerings, mergers and acquisitions, takeovers and general corporate advisory work. She is a member of the firm's board of management.

## From the Chairman David Jones



*David Jones*

I take this opportunity to pay tribute to John King for his long involvement with the regulation of takeovers. John had a key role from the initial Panel set up in 1991, through the development and drafting of the Code, the reactivation of the Takeovers Panel in 2000 and the introduction of the Code in 2001. He chaired the Panel through almost six years of operation during which time it has been tried and tested, and generally well received. Takeovers in the New Zealand market now take place in an orderly way and shareholders are kept well informed of, and involved in, the takeover process.

My appointment as Chairman does not herald any change. It will be business as usual. I worked closely with John King on the development, implementation and enforcement of the Code for more than a decade in my capacity as Deputy Chair, and we share the same philosophy on the application of the Code and its underlying principles. This will contribute to market certainty.

I am assuming the Chair when the Code is "bedded down" in that the manner in which the Code is applied and its provisions interpreted is largely settled. The market understands the Code and the Panel's approach to interpretation and enforcement very well. We recognise the importance to the market of maintaining consistency in this approach.

That is not to say that there will not be changes in the future. Commerce and the takeovers market is a dynamic environment where change is a part of the landscape. In the face of change the Code will be tested and the Panel may need to respond. Any response will be made in a manner consistent with the principles of the Code and, to the extent possible, in consultation with the market. The Panel will continue to work with the market as it has always done. We pride ourselves on providing certainty and, subject to the legal limitations of the Takeovers Act and the Code, will always strive for sensible commercial outcomes.

# Exemptions for IPOs

## IPO CLASS EXEMPTION REVOKED

The Panel revoked the class exemption for initial public offerings (IPOs) on 15 May 2006. The IPO class exemption was contained in clause 7 of the *Takeovers Code (Class Exemptions) Notice (No 2) 2001*.

Clause 7 was revoked because it was being relied on for transactions involving schemes of arrangement which were not genuine IPOs and where changes of control could occur. The Panel considered that this was not an appropriate use of a class exemption.

The Panel said it would consider exemptions for IPOs on a case by case basis. The approach the Panel will take to exemption applications relating to IPOs or similar public offerings is explained below.

## THE IPO CLASS EXEMPTION

The IPO class exemption provided an exemption from rule 6(1) of the Code for any person who increased their voting control in a Code company as the result of an allotment of shares under a public offer. The IPO class exemption was available to any person, subject to the following conditions:

- the allotment was made within 6 months after, and pursuant to, an offer of voting securities to the public by the Code company;
- the offer complied with the Securities Act 1978;
- the prospectus and investment statement for the offer clearly stated the potential maximum aggregate of the control percentages of the person and the person's associates after allotments under the offer were completed;
- the company was not, or would not have been (but for having entered into a listing agreement with the exchange in connection with the offer) a Code company before the allotment of voting securities being offered.

## VIKING CAPITAL LIMITED IPO EXEMPTION

Soon after the IPO class exemption was revoked the Panel received an application for exemption from the promoters of a proposed float of Viking Capital Limited ("Viking"). The Viking IPO was to have opened on 23 May 2006. After the 15 May revocation of the IPO class exemption, Viking's legal advisers realised that Viking needed to apply for an exemption from the Code. This gave the Panel an opportunity to review the policy of the IPO exemption and the disclosure requirements in the conditions of exemption.

Viking became a Code company when it entered into a listing agreement with NZX in preparation for the IPO.

Under the minimum subscription threshold that had been set for the IPO, the shares that were to be allotted to the interests associated with Mr Brent King represented potential holdings of around 63% of Viking. The shares to be allotted to interests associated with Mr Grant Baker represented around 21%. The maximum aggregate control percentage that could be held or controlled by Messrs King and Baker and their associates represented approximately 84% of the Viking shares to be issued.

An exemption was required to enable these persons to acquire Viking shares under the IPO without breaching the fundamental rule of the Code, as none of the exceptions to the fundamental rule could be used for the allotments. The exemption was sought on similar conditions to those in the revoked IPO class exemption.

On 2 June 2006 the Panel granted an exemption from rule 6(1) of the Code to various persons associated with Messrs King and Baker relating to the IPO to be undertaken by Viking.

Consistent with the policy as reviewed for IPO exemptions, the exemption required the offer document to disclose:

- the aggregated control percentages that had been required by the IPO class exemption; and
- a breakdown of the prospective holding and potential maximum control percentage, after the allotments were completed, of each of the persons relying on the exemption, *without* aggregating their holdings with those of their associates.

This breakdown was not required by the IPO class exemption which required only the aggregated percentages of each of the persons relying on the exemption together with the associates of each of those persons.

Adding the disaggregated disclosures, in conjunction with the disclosures of the aggregated control percentages, means the conditions of exemption for individual IPO exemptions match more closely the disclosure requirements for a notice of meeting under rule 16 of the Code. The Viking exemption was subject to conditions that:

- the allotments to the exempted persons are made within 6 months after the date of, and pursuant to, the offer; and
- the offer complies with the Securities Act 1978 as modified by the Securities Act (NZX-NZAX Market) Exemption Notice 2005; and
- the prospectus clearly states:

- o the number of voting securities in Viking to be allotted pursuant to the offer to each of the exempted persons; and
- o the potential maximum control percentage in Viking of each of the exempted persons after the completion, and as a result, of allotments pursuant to the offer; and
- o the potential maximum aggregate of the control percentages of each of the exempted persons and that person's associates after the completion, and as a result, of allotments pursuant to the offer; and
- Viking was not, or, but for having entered into a listing agreement with NZX in connection with the prospectus, would not have been, a Code company before the allotment of voting securities pursuant to the offer.

The Viking exemption's statement of reasons stated that the Panel considered it was appropriate and consistent with the objectives of the Code to grant the Viking exemption because:

- any person choosing to subscribe for shares in Viking for the first time can be expected to take into account allotments that are notified to them in the prospectus;
- if an offeree subscribes for Viking shares offered under the Viking IPO on the basis of the information disclosed in the prospectus showing the potential maximum control percentages of each of the exempted persons, then the offeree can be taken to approve of the potential maximum control percentages to be held or controlled by the exempted persons; and
- the exemption facilitates an initial public offer by a company that will only become a Code company as a consequence of the offer. The attaching conditions ensure that the exemption applies only to an offer that is effectively a preliminary step to Viking becoming a Code company.

The Panel considers applications for individual exemptions for IPOs in terms of this policy. The Panel may grant exemptions on similar terms and conditions as those of the Viking exemption. However, the terms and conditions may be altered for a particular exemption to better align them with the particular transaction.

It should not be assumed that an exemption will be granted. The Panel is empowered to only grant exemptions that are appropriate and consistent with the objectives of the Code. Full and frank disclosure should be made to the Panel, when an exemption is applied for, about the nature of the transaction and any related transactions, as well as of the relationships of the proposed allottees.

## Revised policy - Exemptions for Companies Act schemes of arrangement

The Panel has published a revised policy on the use of its exemption powers relating to schemes of arrangement under Part XV of the Companies Act 1993.

The Panel adopted the revised policy after considering submissions on a draft policy (4 April 2006) and a discussion paper *Schemes of Arrangement and Amalgamations Involving Code Companies* (19 June 2006).

The full text of the revised policy is on the Panel's website. However the Panel's general approach to schemes of arrangement when considering applications for exemption is explained below. The differences between the revised policy and the earlier policy published on 1 July 2003 are highlighted.

### THE PANEL'S APPROACH TO SCHEMES OF ARRANGEMENT INVOLVING CODE COMPANIES

Companies can use the provisions of the Companies Act relating to schemes of arrangement to effect mergers with, or acquisitions of, other companies. In some situations a scheme is the most appropriate way to structure a transaction.

If a scheme results in a person becoming the holder or controller or more than 20% of the voting rights in a code company, the parties to the proposed scheme must comply with the Code as well as Part XV of the Companies Act.

It is appropriate that parties who increase their control in a code company comply with the Code. The Code gives shareholders of code companies special protections and rights which should be available regardless of the type of transaction used to effect a change of control.

Some forms of scheme are caught by the fundamental rule but the structure does not fit the exceptions in rule 7 of the Code. In these situations the Panel may grant an exemption to enable the transaction to proceed in a manner consistent with the principles of the Code. This is discussed in more detail below.

Schemes involving code companies can be structured to avoid the Code. The Panel considers that it is not the intent of the Code that the rights and protections of shareholders, in relation to a change of ownership or control of code companies, should be determined by the form of the transaction used to effect the change of ownership or control. It will seek to be heard by the High Court on these schemes. The Panel's detailed views on the use of

schemes to avoid the Code are stated in recommendations to the Minister of Commerce on schemes of arrangement and amalgamations involving code companies (25 August 2006)<sup>1</sup>.

## REVISED POLICY ON EXEMPTIONS FOR SCHEMES

The Panel's policy on exemptions for schemes is aimed at schemes which cannot proceed without some form of exemption. The policy is not aimed at schemes which can proceed without an exemption.

The policy on exemptions for schemes has been changed in two respects.

### Circumstances where exemptions may be granted

The Panel will when it considers an application for exemption, focus on how the Code applies to the particular scheme of arrangement that the parties want to use. It will consider any proposed exemption in accordance with the Panel's guidance note on the Takeovers Panel's Exemption Power (January 2005). The guidance note states that, when deciding whether an exemption is appropriate, the Panel will consider whether compliance with the Code is possible and whether compliance would create an inappropriate, unreasonable or unintended result.

### Conditions of exemptions for schemes of arrangement

The conditions of any exemption for a scheme will preserve as far as possible the rights and protections contained in the Code. They will focus on:

- the level of shareholder approval required for a transaction to proceed;
- who is entitled to vote on the relevant resolution; and
- the information given to shareholders about the proposed transactions.

When imposing conditions the Panel will focus on the same issues that it will address in submissions to the High Court on applications for the approval of proposed schemes.

The Panel's general approach is that schemes should be approved by shareholders representing:

- at least 75% of the votes cast at a meeting at which all shareholders can vote, provided that the resolution represents more than 50% of the total voting rights in the code company; and
- at least 75% of the votes cast at the meeting of independent shareholders. Independent shareholders are shareholders who were not involved in formulating the proposal.

<sup>1</sup> Available on the Panel's website [www.takeovers.govt.nz](http://www.takeovers.govt.nz)

The approach to approval thresholds recognises that:

- the support of a significant majority of shareholders should be required where a change of control is being imposed upon all shareholders; and
- shareholders involved in formulating and/or promoting a scheme, and their associates, should not dominate or determine the outcome of a shareholder vote. Independent shareholders should have a real opportunity to take part in the decision on whether or not to proceed with a scheme.

The exception to this approach is where a transaction does not involve a merger of shareholder interests, i.e. when the scheme provides for the shareholders of the merging companies to become shareholders of the same company. Where a scheme involves shareholders of one participating company exiting for cash, the Panel considers the appropriate shareholder approval threshold for the transaction to proceed is a resolution which represents 90% of the total voting rights in that company. This reflects the compulsory acquisition threshold in the Code.

The conditions of any exemption will also require that shareholders are given sufficient information about the scheme to decide the merits of the proposal. The conditions will require that shareholders are given at least:

- information equivalent to information required to be provided under a Code offer; and
- a report on the merits of the scheme by a Panel-approved independent adviser.

The Panel will decide in each case whether:

- one adviser will be appointed to report on the merits of the transaction from the perspective of the shareholders of each of the companies taking part in the proposed scheme; or
- different advisers for the shareholders of each company involved will be required.

In many situations one independent adviser would be appropriate.

### Applications for exemption

The Panel will seek to be heard by the High Court on schemes of arrangement involving code companies when initial orders are being made. If parties to a scheme are granted an exemption, the conditions of that exemption may mean that the Panel does not need to seek to be heard by the Court.

Applicants for exemptions for schemes should tell the Panel their intentions early in the planning process and well before an initial application is made to the Court.

## Waiveable offer conditions

Many offers have conditions which can be waived by the offeror. This allows an offeror to protect itself from unforeseen circumstances while enabling it to decide to proceed with an offer even if all the conditions of the offer are not met. This means that an event which prevents a condition from being satisfied will not automatically cause the offer to lapse.

The only condition which cannot be waived by the offeror is the minimum acceptance condition required by rule 23(1) of the Code. All full offers are subject to the condition that the offeror receives acceptances that, when taken together with voting securities already held or controlled by the offeror, confer more than 50% of the voting rights in the target company. Partial offers must be subject to the condition that the offeror receives acceptances that, when taken together with voting securities already held or controlled by the offeror, confer the specified percentage set out in the offer.

The ability to waive conditions can be abused. For example:

- a waiveable offer condition could be used by the offeror to provide an option to not continue with an offer for reasons not connected with that condition;
- waiveable offer conditions can be coercive. If an offeror has the ability to waive an offer condition after an offer closes, shareholders may feel compelled to accept the offer before the closing date (when it is not known whether the offer will succeed) to avoid being a minority shareholder in a company controlled by the offeror.

The use of offer conditions in this way would not normally be a breach of the Code if the conditions themselves otherwise comply with the Code. But this may not be the case when the new rule 64 of the Takeovers Code on misleading and deceptive conduct (outlined in Code Word 17) comes into force. The Panel will look closely at the use of waiveable offer conditions and whether their use in a particular offer involves misleading or deceptive conduct. In the future bidders should consider the requirements of rule 64 when deciding what conditions will be waiveable and in what circumstances.

The Panel also encourages market participants to consider the effect of conditions made waiveable by the offeror, and what action they might take on conditions they consider unacceptable or coercive. The market can influence the behaviour of bidders on the use of waiveable offer conditions. Offerees can decide not to accept an offer while it is subject to conditions which they consider should be waived or satisfied before the end of the offer period.

Directors of target companies and independent advisers appointed under rule 21 of the Code can, and should, help shareholders by highlighting unacceptable conditions and taking them into account in their recommendations to shareholders.

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

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