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TAKEOVERS PANEL

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Kerifresh – Transactions

Introduction

The Panel has recently been involved in enforcement action in relation to the actions of certain current and former shareholders of Kerifresh Limited (Kerifresh). The Panel held two meetings under section 32 of the Takeovers Act 1993 (the Act) and made two sets of determinations that it was not satisfied that certain persons had acted, were acting or intended to act in compliance with the Code. The transactions that caused those persons to breach the Code were brought to the Panel's attention by potential takeover suitor Turners and Growers Limited.

This article deals with the transactions that gave rise to the Panel's determinations.

Background

Kerifresh is a Northland based citrus producer and exporter founded by Alan Thompson and Peter Hendl. Kerifresh has never been listed but has had more than 50 shareholders since its public offering in 1992 and more than \$20 million in net assets (according to independent valuations referenced in its annual reports) since the Code came into force on 1 July 2001. It was therefore a code company at all relevant times.

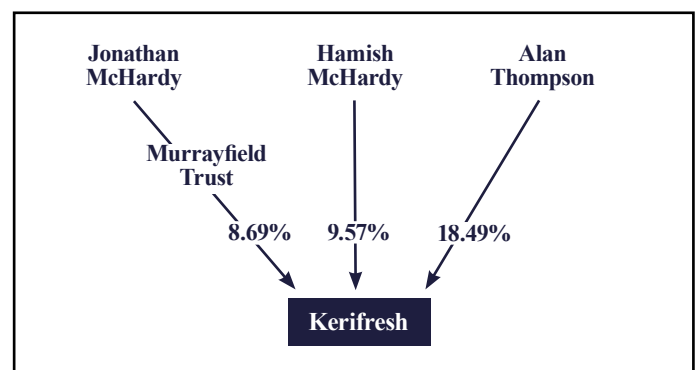
The warehousing agreement

In early 2002 Peter Hendl and his wife decided to sell their 17.84% shareholding in Kerifresh. A Mr Graham Cowley, who had assisted Kerifresh's public offering in 1992, found Hamish McHardy and his son Jonathan McHardy to take up the Hendls' shares. However, as a condition of his investment in Kerifresh, Hamish McHardy required shareholder and managing director Alan Thompson (who already had 18.49%) to take up 361,000 of the Hendls' shares.

Alan Thompson agreed, but, for his own reasons, did not want it known that he was a purchaser of the Hendls' shares. Alan Thompson and Hamish McHardy therefore entered into an agreement (characterised by the Panel as a "warehousing agreement") under which Hamish McHardy, using Alan Thompson's money, would buy the 361,000 shares and hold them for Alan Thompson's economic benefit. A written draft of the agreement was prepared which characterised the arrangement as an on-call, interest-free loan from Alan Thompson to Hamish McHardy, with redemption to be by transfer of the 361,000 shares. No provision was made as to who controlled the voting rights attaching to those shares.

2002 - Hamish McHardy and Jonathan McHardy's acquisitions

As a result of the acquisition of the Hendls' shares, Hamish McHardy increased his shareholding to 9.57%, of which 5.08% was subject to the warehousing agreement and held for Alan Thompson's economic benefit. Jonathan McHardy, through the Murrayfield Trust (his family trust), increased the percentage of shares that he controlled in Kerifresh to 8.69%.



McHardys considered associates - Rule 4(1)(d)

Hamish McHardy conceded to the Panel that he and Jonathan McHardy were “associates” at the time of these acquisitions.

The Panel accepted this and found them to be associates under rule 4(1)(d) of the Takeovers Code on the basis of their personal relationship as father and son, their business relationship as co-investors in Kerifresh and other ventures, and their ownership relationship as co-trustees of the Murrayfield Trust.¹

Hamish McHardy and Alan Thompson considered associates - Rule 4(1)(d)

The Panel considered that Hamish McHardy and Alan Thompson were associates also under rule 4(1)(d) as a consequence of the business and ownership relationships stemming from the warehousing agreement. Factors leading the Panel to this conclusion included:

- a. *Hamish McHardy said that he would not invest in shares in Kerifresh unless Alan Thompson made a similar commitment to acquire Kerifresh shares with his own money;*
- b. *The [warehousing agreement] was in effect an advance purchase of voting rights in Kerifresh by Alan Thompson because Hamish McHardy could not terminate the [warehousing agreement] other than by giving Alan Thompson 361,000 shares in Kerifresh...*
- c. *There was an element of subterfuge in the arrangements because it was the intent of both parties to disguise the identity of the real purchaser of a significant parcel of Kerifresh shares;*
- d. *The informal nature of the arrangement, being undocumented and therefore entirely dependent on mutual trust, was indicative of a closer business relationship than a normal commercial borrower-lender relationship.”* (paragraph 53 of the Panel’s 18 October 2007 determination and statement of reasons)

Hamish McHardy’s acquisition breached rule 6 of the Code because his increase in the percentage of Kerifresh voting rights that he held, to 9.57%, when taken with the percentage of voting rights held or controlled by his associates, Jonathan

McHardy (8.69%) and Alan Thompson (18.49%), exceeded, in aggregate, 20%. No rule 7 exception was used to effect this increase.²

Jonathan McHardy and Alan Thompson considered associates - Rule 4(1)(e)

The Panel also considered that the nature of the relationships between Jonathan McHardy, Hamish McHardy and Alan Thompson were such that, under the circumstances of Jonathan McHardy’s acquisitions, Jonathan McHardy and Alan Thompson were associates under rule 4(1)(e).³

Whilst there was no evidence that Jonathan McHardy was directly involved in the negotiation of, or participated in, the warehousing agreement, the Panel considered that Jonathan McHardy and Alan Thompson were associates under rule 4(1)(e) of the Code because:

- a. *Jonathan McHardy was aware of:*
 - A. *Relevant details of the purchase of shares from the Hendlis by both his father in his own right and himself and his father as trustees of the Murrayfield Trust;*
 - B. *The particular financing arrangements... between Hamish McHardy and Alan Thompson, at least in general terms, at the time that the Murrayfield Trust acquired 597,316 Kerifresh shares on 29 May 2002;*
- b. *The financial involvement of Alan Thompson in funding part of the purchase of Kerifresh shares acquired by Hamish McHardy was a material factor in Jonathan and Hamish McHardy’s decision, on behalf of the Murrayfield Trust, to purchase 597,316 Kerifresh shares on 29 May 2002.”* (paragraph 60 of the Panel’s 22 November 2007 statement of reasons)

This is one of the few occasions on which the Panel has found persons to be associates under rule 4(1)(e).

Jonathan McHardy’s acquisition breached rule 6 because his increase in the percentage of Kerifresh voting rights that he held, to 8.69%, when taken with the percentage of voting rights held or controlled by his associates Hamish McHardy (9.79%) and Alan Thompson (18.49%), exceeded, in aggregate, 20%. No rule 7 exception was used to effect this increase.

¹ Rule 4 of the Code which sets out the meaning of associates provides:

4 Meaning of associate

- (1) For the purposes of this code, a person is an associate of another person if:
 - (a) the persons are acting jointly or in concert; or
 - (b) the first person acts, or is accustomed to act, in accordance with the wishes of the other person; or
 - (c) the persons are related companies; or
 - (d) the persons have a business relationship, personal relationship, or an ownership relationship such that they should, under the circumstances, be regarded as associates; or
 - (e) the first person is an associate of a third person who is an associate of the other person (in both cases under any of paragraphs (a) to (d)) and the nature of the relationships between the first person, the third person, and the other person (or any of them) is such that, under the circumstances, the first person should be regarded as an associate of the other person.

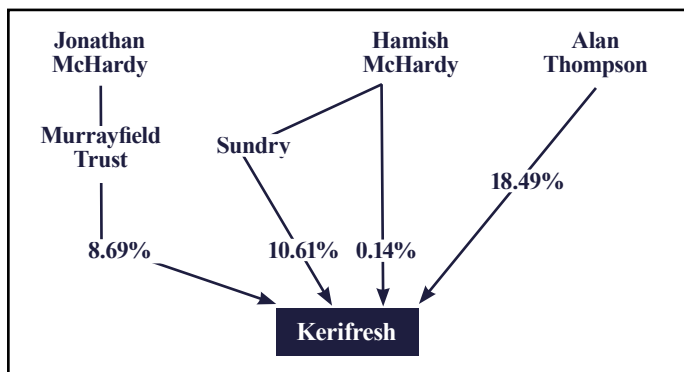
² The fundamental rule, rule 6 of the Code, prevents a person from increasing their shareholding to above 20% unless they use one of the exceptions set out in rule 7 of the Code. See Code Word Numbers 1, 2, and 7 available at the Panel’s website at www.takeovers.govt.nz/publications/

³ See footnote 1, above, on the various definitions of “associates”

2003 – Sundry Investments Limited - transfer, further acquisitions

In September 2002 Hamish McHardy transferred all but 0.14% of his Kerifresh shareholding to Sundry Investments Limited (Sundry), his investment vehicle. The Panel did not pursue the issue of whether this transfer breached the Code as those shares remained under Hamish McHardy’s control.

However, between August and September 2003 Sundry acquired another 1.18% of Kerifresh from minority shareholders. The following diagram illustrates the shareholding structure following this transaction.



Those later acquisitions of 1.18% of Kerifresh caused Hamish McHardy to breach the Code. They resulted in an increase in the percentage of voting rights he held or controlled to 10.75% which, when taken with the percentage of voting rights held or controlled by his associates, Jonathan McHardy (8.69%), and Alan Thompson (18.49%), exceeded, in aggregate, 20%. No rule 7 exception was used to effect this increase.

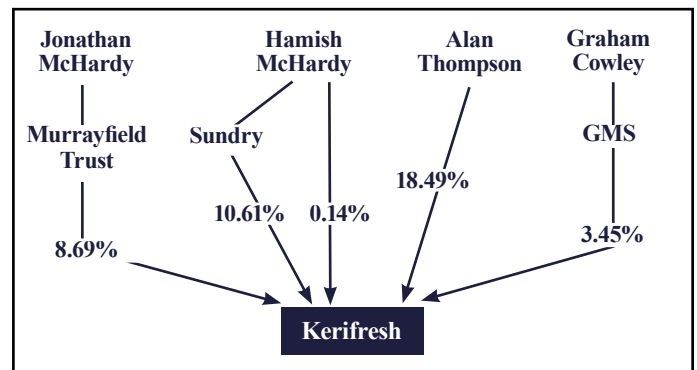
2004 – GMS acquisitions and warehousing agreement unwind

Hamish McHardy told the Panel that in early 2004 he wanted to increase his Kerifresh shareholding. However, he had become aware that the Code applied to Kerifresh and that he and his son were probably associates. With an aggregate shareholding between them of 19.44%, he would be prohibited from acquiring much more of Kerifresh. He therefore sought to unwind the warehousing agreement (which accounted for more than 3% of this shareholding). This was problematic because:

- Under the terms of the warehousing agreement he had no right to simply transfer the shares back to Alan Thompson;
- Even if he could, this would cause Alan Thompson to increase his own voting control in Kerifresh to over 20%, in breach of the Code;
- Hamish McHardy had become Chairman of Kerifresh and as such did not want to be seen to be selling down shares.

Graham Cowley had suggested a solution involving his company GMS Fulfilment NZ Limited (GMS). GMS would buy Kerifresh shares with Hamish McHardy’s money and hold those shares for Alan Thompson’s economic benefit pending transfer to Alan Thompson or his nominee. The shares acquired by GMS would replace and release the shares currently subject to the warehousing agreement. This would unwind the warehousing agreement while simultaneously increasing Hamish McHardy’s economic interest in Kerifresh. Hamish McHardy, Alan Thompson and Graham Cowley agreed to unwind the warehousing agreement in this way.

Between July 2004 and June 2005 GMS acquired 245,000 shares representing 3.45% of Kerifresh pursuant to this strategy. Accordingly, only 116,000 of the original 361,000 shares remained subject to the warehousing agreement. The following diagram illustrates the shareholding structure immediately following this transaction.



GMS acquisition causes Alan Thompson to be in breach of Code

The Panel found from the evidence that Alan Thompson controlled the shares acquired by GMS.

The Panel considered that GMS and Alan Thompson, and GMS and Hamish McHardy were associates under rule 4(1)(d) of the Code. This conclusion was reached in view of the business relationships they had with each other, directed at unwinding the warehousing agreement.

GMS’ acquisitions caused Alan Thompson and GMS to breach rule 6. Alan Thompson increased his control of the percentage of voting rights in Kerifresh he held to 21.94%. No rule 7 exception was used to effect this increase

GMS found to be in breach of Code

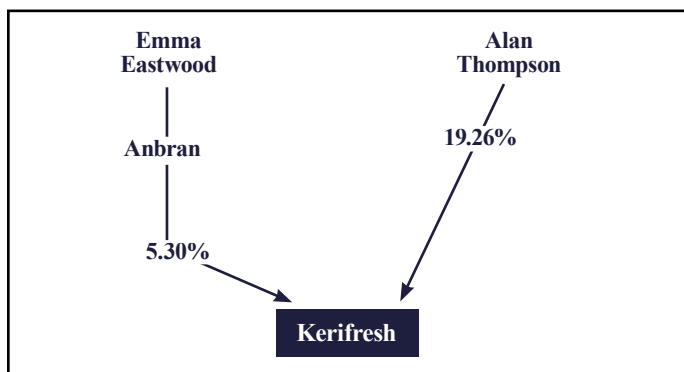
GMS increased the percentage of voting rights in Kerifresh it controlled to 3.45% which when taken with the percentage of voting rights held or controlled by GMS’ associates Alan Thompson (18.49%) and Hamish McHardy (10.75%) exceeded, in aggregate, 20%. No rule 7 exception was used to effect this increase.

2005 – Anbran transfer and acquisition

In late 2005 Graham Cowley told Alan Thompson and Hamish McHardy he wanted to exit the GMS arrangement.

Alan Thompson therefore settled the Anbran Trust to receive the 245,000 Kerifresh shares acquired by GMS. Anbran Trustee Company Limited (Anbran) was incorporated as trustee of the Trust. Its sole director and shareholder was Alan Thompson's niece, Emma Eastwood, who was also appointer of the Trust. The beneficiaries were Alan Thompson's children. On 31 October 2005 the 245,000 Kerifresh shares held by GMS were transferred to Anbran.

Anbran acquired a further 116,000 shares to increase its shareholding to 361,000. These acquisitions were made from minority shareholders on 31 December 2005, funded by Hamish McHardy, thereby unwinding the warehousing agreement. The Panel considered that, at the time the warehousing agreement was unwound, Hamish McHardy and Alan Thompson ceased to be associates.



The Panel found that Emma Eastwood, as sole shareholder and director of Anbran, and appointer of the Anbran Trust, controlled the Kerifresh shares acquired by Anbran.

Anbran an associate of Alan and Helen Thompson - Rule 4(1)(d)

The Panel considered that the personal, business and ownership relationships between Alan and Helen Thompson, Emma Eastwood, and Anbran were such that, under the circumstances of Anbran's acquisition and holding of Kerifresh shares, they should be regarded as associates under rule 4(1)(d). The Panel's reasons for coming to that conclusion were that:

- Anbran was set up specifically by Alan Thompson as a vehicle for holding shares, which he regarded as his, in a manner that was ostensibly outside the scope of the Code (because he did not control the voting rights);*
- Anbran acquired shares with funds provided by Hamish McHardy as a means of increasing McHardy's economic interest in Kerifresh shares while at the same time*

providing to Alan Thompson the legal, and not just beneficial, interest in the Kerifresh shares;

- Emma Eastwood had no role in deciding the assets to be acquired by the Anbran Trust. Although Ms Eastwood told the Panel that these matters were decided by Helen Thompson this was not borne out by Mrs Thompson's evidence. Helen Thompson told the Panel, and Alan Thompson confirmed, that these decisions were made by Alan Thompson;*
- Emma Eastwood appeared to have little knowledge of the Trust's affairs including how Anbran had financed the purchase of Kerifresh shares or had determined the price to be tendered for those shares. She could not assist the Panel with information about the terms of the share transfer. The evidence disclosed that Alan Thompson had attended to all these matters;*
- Emma Eastwood had no knowledge of who had deposited the funds into her personal cheque account to fund the payment for the 116,000 shares acquired in the tender as noted in paragraph 84." (paragraph 86 of the Panel's 18 October 2007 determination and statement of reasons)*

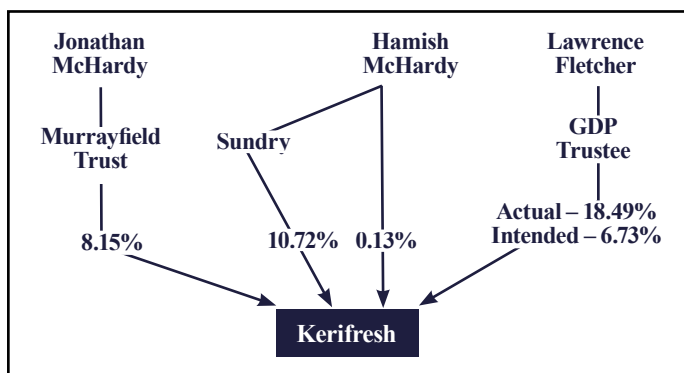
Anbran's acquisitions caused Anbran and Emma Eastwood to breach rule 6 of the Code. It increased the percentage of voting rights in Kerifresh held by Anbran and controlled by Emma Eastwood to 5.30% which when taken with the percentage of voting rights held or controlled by their associate Alan Thompson (19.26%), exceeded in aggregate 20%. No rule 7 exception was used to effect this increase.

2007 – Lawrence Fletcher's proposed acquisition

Lawrence Fletcher is a UK resident and an acquaintance of Jonathan McHardy. In early 2007 he had money on interest-bearing deposit with the Murrayfield Trust as a result of a previous business venture with Jonathan McHardy and Hamish McHardy. Lawrence Fletcher was interested in re-investing those funds in a suitable New Zealand investment. Jonathan McHardy suggested Kerifresh as such an investment. Detailed e-mail correspondence between Jonathan McHardy, Hamish McHardy and Lawrence Fletcher ensued.

As a result, Hamish McHardy arranged for Auckland law firm Grove Darlow & Partners (Grove Darlow) to act for Lawrence Fletcher in the purchase of Kerifresh shares. In August 2007 Grove Darlow's trustee company, GDP Trustee Limited (GDP Trustee) acquired 10,000 Kerifresh shares on Lawrence Fletcher's behalf. Hamish McHardy initially funded that purchase. Lawrence Fletcher immediately repaid Hamish from his funds deposited with the Murrayfield Trust.

Lawrence Fletcher subsequently expressed an interest in purchasing a further 500,000 Kerifresh shares. Meanwhile, Alan Thompson had received informal advice that there may have been a breach of the Code in respect of the Anbran transactions, and that he should sell down such number of shares that would reduce his and Anbran's combined shareholding to less than 20%, being approximately 160,000 shares. Through Hamish McHardy, Lawrence Fletcher became aware that Alan Thompson was seeking to sell down and agreed to purchase 165,000 of Alan Thompson's shares. Grove Darlow then sent out a letter to shareholders offering to purchase 335,000 shares (being the balance between the 500,000 shares sought by Lawrence Fletcher and the 165,000 shares available from Alan Thompson). Neither acquisition was completed because Lawrence Fletcher and Alan Thompson were restrained by the Panel from acquiring and disposing of Kerifresh shares, as a result the Panel's consideration of a complaint made by Turners and Growers Limited.



Fletcher and McHardys considered associates

The Panel considered that Lawrence Fletcher, Hamish McHardy and Jonathan McHardy were associates under rules 4(1)(a) and 4(1)(d) of the Code.

“In-Concert” association - Rule 4(1)(a)

The Panel found that those persons were acting “in concert” in relation to Lawrence Fletcher’s intended acquisitions and were associates under rule 4(1)(a). Referring to *Bateman v Newhaven Park Stud Ltd* (2004) 49 ACSR 597 and the authorities cited in that case, the Panel stated:

- “151. The essence of the concept of acting in concert involves knowing conduct the result of communication between the parties and not simply simultaneous actions occurring spontaneously. It involves at least an understanding between the parties as to a common purpose or object.
152. In relation to the acquisition and intended acquisition of voting rights in Kerifresh by Lawrence Fletcher the Panel finds as follows:

- a. Lawrence Fletcher, Hamish McHardy and Jonathan McHardy had an understanding between them that their purpose was to get Lawrence Fletcher to become the holder or controller of an increased percentage of voting rights in Kerifresh by initially acquiring 10,000 shares in Kerifresh and by subsequently increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders;
- b. There was knowing conduct arising from the frequent communications between Lawrence Fletcher, Hamish McHardy and Jonathan McHardy as to Lawrence Fletcher’s intention to become the holder or controller of an increased percentage of voting rights in Kerifresh by acquiring shares in Kerifresh and by increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders;
- c. There was a consensual adoption of a common understanding between Lawrence Fletcher, Hamish McHardy and Jonathan McHardy that Lawrence Fletcher was to become the holder or controller of an increased percentage of voting rights in Kerifresh by acquiring shares in Kerifresh and by increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders;
- d. There was mutual contemporaneous engagement, as evidenced by the many emails sent between or copied to each of them, in respect of Lawrence Fletcher becoming the holder or controller of an increased percentage of voting rights in Kerifresh by acquiring shares in Kerifresh and by increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders;
- e. The email correspondence sent between or copied to each of them clearly indicates that the actions of Lawrence Fletcher, Hamish McHardy and Jonathan McHardy in relation to Lawrence Fletcher’s becoming the holder or controller of an increased percentage of voting rights in Kerifresh by acquiring shares in Kerifresh and by increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders were not simply spontaneous and independent actions on the part of each one of them;
- f. The Panel considers that the thinking and actions of Lawrence Fletcher, Hamish McHardy and Jonathan McHardy intercepted in relation to Lawrence Fletcher becoming the holder or controller of an increased percentage of voting rights in Kerifresh by acquiring shares in Kerifresh and by increasing his holding to up to 500,000 Kerifresh shares through his offer to shareholders.

The thinking and actions of each of them did not merely run in parallel.” (paragraphs 151 and 152 of the Panel’s 22 November 2007 statement of reasons)

Fletcher’s acquisition of shares in Kerifresh...” (paragraph 155 of the Panel’s 22 November 2007 statement of reasons)

Personal/business relationship association - Rule 4(1)(d)

The Panel also found that they had personal or business relationships, such that, under the circumstances of Lawrence Fletcher’s proposed acquisitions they should be considered associates. Factors bringing the Panel to this conclusion included that:

- a. *Lawrence Fletcher and Jonathan McHardy have a personal relationship as friends and colleagues...;*
- b. *Lawrence Fletcher, Jonathan McHardy and Hamish McHardy have had a business relationship as evidenced by participation in the Neverland property syndicate and through the lending of a significant sum of money by Lawrence Fletcher to the trustees of the Murrayfield Trust, the trustees of which are Hamish McHardy, Jonathan McHardy and Roger Sinclair in 2006, on a basis clearly showing a high degree of confidence and trust in each other;*
- c. *Lawrence Fletcher, Hamish McHardy and Jonathan McHardy have an ongoing business relationship in relation to the acquisition of shares in Kerifresh by Lawrence Fletcher in circumstances:*
 - A. *Where Jonathan McHardy encouraged Lawrence Fletcher to invest in Kerifresh, a highly illiquid, under-performing, but asset-rich, company,*
 - B. *Where Hamish McHardy and Jonathan McHardy discussed strategies for raising capital funds for Kerifresh and increasing their percentage of control in Kerifresh which involved getting Lawrence Fletcher on to the Kerifresh share register,*
 - C. *Where Hamish McHardy made the initial contact with Grove Darlow, financed the initial purchase of shares, disclosed confidential company information to Jonathan, and remained closely involved with all aspects of the acquisition strategy,*
 - D. *Where, as Jonathan McHardy advised Hamish McHardy in an email of 17 October 2007, Lawrence Fletcher was “keen to get involved” and provided his own money to purchase up to 500,000 Kerifresh shares, and*
 - E. *Where Lawrence Fletcher, Hamish McHardy and Jonathan McHardy maintained frequent and close communications with each other over the strategy to be followed in planning and executing Lawrence*

Lawrence Fletcher’s proposed acquisition would have breached rule 6. It would have increased the percentage of voting rights in Kerifresh he held to 6.73% which, when taken together with the percentage of voting rights in Kerifresh held or controlled by his associates Hamish McHardy (10.72%) and Jonathan McHardy (8.41%), would exceed in aggregate 20%. No rule 7 exception was proposed to be used to effect that increase.

Other issues

Although the parties determined by the Panel to have breached the Code engaged with the Panel on the issue of remedies, those parties did not and do not accept the correctness of the Panel’s determinations.

In its complaints to the Panel Turners and Growers Limited alleged that Alan Thompson and his father, Harold Thompson, who held and controlled approximately 4.87% of Kerifresh, were associates. The Panel explored this relationship with Alan and Harold Thompson at its second section 32 meeting. The Panel found that Alan and Harold Thompson were not associates for the purposes of the Code at the time of the transactions in question. Harold Thompson had explained on oath his investment objectives in respect of his Kerifresh shareholding. He said that while he occasionally discussed Kerifresh matters at family gatherings, these were only in the most general terms. However, he regularly attended Kerifresh annual meetings, frequently spoke up in criticism of the performance of the company, and never gave his son or anyone else either a general or specific proxy to exercise the voting rights attached to his shares.

In its 18 October 2007 determination and statement of reasons the Panel made the observation that Alan Thompson was directly and knowingly concerned in the breach of the Code by Anbran and Emma Eastwood. This was not a determination by the Panel for the purpose of the exercise of its enforcement powers. It was an observation that might assist the Court in any subsequent application for orders as a statement of the Panel’s view on Alan Thompson’s involvement in those transactions. The Panel’s finding was not made on the basis that Alan Thompson knew that the transactions involving Anbran would breach the Code. Rather, the Panel’s finding was made on the basis that Alan Thompson had actual knowledge of and assisted in carrying out those transactions.

In its 9 November 2007 determination the Panel found that Jonathan McHardy and Hamish McHardy had breached the Code by being directly and knowingly concerned in Lawrence Fletcher's breach. In contrast to its 18 October 2007 finding that Alan Thompson was directly and knowingly concerned in Anbran and Emma Eastwood's breaches of the Code, this was a determination by the Panel for the purposes of the exercise of its enforcement powers. The law that applied to the Lawrence Fletcher transaction was different from that which applied to the Anbran transactions. The Takeovers Amendment Act 2006 came into force on 25 October 2006 and, among other things, expanded the definition of "contravention of the Code" to include secondary conduct such as aiding, abetting or being knowingly concerned in a breach of the Code. The Panel found Jonathan McHardy and Hamish McHardy in breach under this new expanded definition. The Panel's determination was not that Hamish McHardy and Jonathan McHardy knew that

Lawrence Fletcher's proposed acquisition would have breached rule 6. Rather, the Panel's determination was that Hamish McHardy and Jonathan McHardy were acting "in concert" with Lawrence Fletcher in respect of the proposed acquisition and were therefore knowingly concerned in it. They had knowledge of and were assisting in Lawrence Fletcher's proposed acquisition.

Conclusion

The Kerifresh matter demonstrates the Act and the Code in action. It provides guidance on the application of the Code, and the Panel's approach to enforcement and its interpretation of various aspects of the "associates" concept. The "associates" definition was intentionally drafted to allow flexibility as an anti-avoidance mechanism. The Kerifresh matter illustrates circumstances where persons are associates under rules 4(1)(a), 4(1)(d) and 4(1)(e).

Broker handling fees in a takeover

Broker handling fees are sometimes offered to brokers in connection with a takeover offer made under the Code.

Generally, the offeror pays the fee to brokers for 'handling' target company shareholders' acceptances of the offer. Evidence is provided of the broker having handled the shares, for example, by the broker's stamp appearing on the acceptance form relating to the shares.

The payment of broker handling fees by takeover offerors is now becoming a more common practice in New Zealand. The practice is relatively common in Australia.¹

The Code does not prevent the payment of broker handling fees. However, the Panel considers that the commitment by an offeror, to pay brokers fees for handling target company shareholders' acceptances, constitutes a term of the offer. Therefore the terms and conditions of any arrangement to pay a broker handling fee should be included in the offer document.

If the terms and conditions of a broker handling fee are not included in the terms of the offer, any announcement of an intention to pay such a fee may amount to a variation of the offer which is not permissible under rule 27 of the Code. The Panel considers that broker handling fees are not simply a matter between the offeror and the brokers. The payment and the conditions pertaining to the arrangement have implications for shareholders because shareholders will necessarily be approached by brokers and may be invited to pursue a particular course of action, involving use of the broker in relation to their acceptance of the offer.

This was an issue which the Panel had to address recently. In December 2007 the Canada Pension Plan Investment Board (CPPIB) made a partial takeover offer for Auckland International Airport Limited (AIAL). CPPIB wished to obtain a 40% stake in AIAL. The Code's partial offer rules required CPPIB to provide voting forms for the AIAL shareholders (to accompany the offer document

¹ The Australian Panel published a Guidance Note in 2003 expressing its view on the use of broker handling fees in the context of that jurisdiction's takeover rules. See GN 13: Broker Handling Fees, available under the Guidance menu, at www.takeovers.gov.au.

and acceptance forms sent to the shareholders) so that the shareholders could vote on whether to approve or object to CPPIB making a partial offer for less than a majority stake in the company.

The offer document was sent to AIAL shareholders on 14 December 2007. The offer document contained a statement indicating that a broker handling fee may be paid by the offeror, if the offeror chose to do so.

On the same day an announcement was made that included terms and conditions for the payment of the handling fee that were not included or anticipated in the offer document. In particular a condition required that, in order for brokers to be eligible to obtain payment of the fee, the brokers' stamps had to appear on not just accepting shareholders' acceptance forms but also on accepting shareholders' voting forms and the shareholder had to have voted to approve the partial offer being made.

There was no suggestion in CPPIB's offer document that the payment of the broker handling fee was conditional on acceptance forms being accompanied by voting forms where shareholders had voted in favour of the offer being made.

The Panel took a preliminary view that the broker handling fee may have amounted to a variation of the terms of the offer and may have also resulted in the offer document being misleading by omission.

Following discussions with the Panel, CPPIB decided to withdraw the qualification to the payment of broker handling fees that required shareholders to also approve of the offer.

Advisers should ensure that if broker handling fees are to be paid by an offeror, the offer document makes an express statement of that fact and sets out the terms and conditions which apply to their payment.

Panel becomes employer of its executive staff

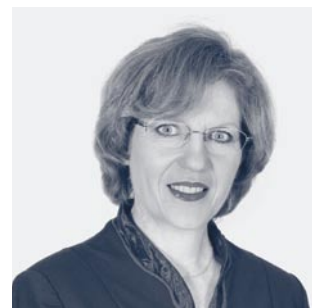
The Panel is pleased to announce two recent appointments to the Panel executive.

Kerry Morrell has been appointed as the Panel's first Chief Executive Officer. Kerry is a chartered accountant who was employed by the Securities Commission for 17 years. For the last seven of those years he was the Senior Executive Officer of the Panel, prior to accepting the position of Chief Executive Officer.

Margaret Bearsley has been appointed as the Panel's first General Counsel. Margaret was employed by the Securities Commission for three years as a Senior Lawyer for the Panel, prior to accepting the new position.



Kerry Morrell
Chief Executive Officer



Margaret Bearsley
General Counsel



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