

CHANGES TO THE TAKEOVERS CODE AND TAKEOVERS ACT AND AN UPDATE ON THE OPERATIONS OF THE PANEL

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Introduction

The focus of this update is on the changes to the takeovers landscape as a result of the Securities Legislation Bill. However, practitioners, advisers, and senior officers of Code companies, as well as potential acquirers of equity securities in Code companies, do also need to be aware that there are other changes afoot to the takeovers landscape in the form of a raft of minor or technical amendments to the Code. An edition of the Panel's periodic publication, *Code Word*, will soon be released discussing the many minor changes to the processes for takeovers that the technical amendments will introduce.

The imminent passage of the Securities Legislation Bill will result in rather more significant amendments to takeovers laws, as well as making the changes to the securities legislation that have already been discussed today.

A new Takeovers Amendment Act as a result of the Bill will alter the Takeovers Act 1993 and the Takeovers Code in four significant areas, three of which will have effect from the day after the giving of the Royal Assent:

- the definition of “*code company*” in the Code and “*specified company*” in the Takeovers Act are changed;
- 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 in late 2006);
- the Panel's enforcement powers are expanded; and
- the penalties and remedies under the Takeovers Act are increased and broadened.

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 will be changed in respect of 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 –

- (a) *is a party to a listing agreement with a registered exchange;*
- (b) *is not a party to a listing agreement with a registered exchange but that 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 the NZX were caught by the Code. Some of these companies are wholly-owned subsidiaries of overseas companies. However, it was not intended that the Code should apply to such companies (because the Code is concerned with voting rights held by a spread of shareholders) and the Panel has granted a number of exemptions from compliance with the Code as a result.

The “code company/specified company” definitions are being changed to exclude listed companies that have only non-voting securities quoted on an exchange’s market. Accordingly, the new definitions apply to any company that –

- (a) *is a party to a listing agreement with a registered exchange **and that has securities that confer voting rights quoted on the registered exchange’s market;** or*
- (b) *was within paragraph (a) at any time during a period specified in the takeovers code (being a period not exceeding 12 months before any date or the occurrence of any event referred to in the code).*

In relation to unlisted companies, the definitions had applied in respect of companies that had “50 or more shareholders and \$20,000,000 or more of assets”. The asset threshold is being removed from the definition, so that the Code and Takeovers Act will apply 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) will no longer be a “code company/specified

company” (unless it has 50 or more shareholders). The 12-month ‘look back’ for previously listed companies applies similarly. Every company with 50 or more shareholders, regardless of its assets, falls within the “code company/specified company” definitions.

The practical outcome is that some companies that are currently within the definitions will no longer be subject to the Code. On the other hand, a number of small non-listed companies that currently are not subject to the Code will come under its jurisdiction.

To our knowledge this means that 31 NZDX listed issuers will no longer be Code companies and 162 NZSX and NZAX listed issuers will remain Code companies. We cannot predict with any certainty how many more companies will be Code companies after the \$20 million asset threshold is abolished because the Companies Office does not collect the data. But there could be something like 150.

Misleading and deceptive conduct

Market manipulation provisions of Code and Act

The most 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:

A person must not engage in conduct, in relation to any transaction or event that is regulated by the Code, or that is incidental or preliminary to a transaction or event that is or is likely to be regulated by the Code, that is 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 potentially 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 in respect of misleading conduct that may have occurred other than in relation to the signed takeover documents.

The Panel has often been frustrated by its inability to exercise its enforcement powers in response to, and to deal adequately with allegations of, misleading conduct during takeovers. As a result, the Panel asked the government to extend to the Takeovers Code the market manipulation provisions that were originally envisaged only for the Securities Markets Act.

The new rule 64 in the Code is cast very broadly. Just as with the new section 13 of the Securities Markets Act (which prohibits dealings, in listed and non-listed securities, that are misleading or deceptive), new rule 64 essentially imports into the Code section 9 of the Fair Trading Act 1986 (which prohibits misleading and deceptive conduct in trade).

This new prohibition 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.

The term 'misleading or deceptive' has been subject to wide judicial consideration over many years in many cases in New Zealand and Australia, as it appears frequently in consumer protection legislation. However, the term also occurs in market manipulation provisions of the Australian Corporations Act 2001, and an analysis of Australian jurisprudence indicates that the Courts in Australia have chosen to apply the consumer protection tests and reasoning to market manipulation cases. There is no reason to believe the same would not occur in New Zealand Courts.

In view of that, the Panel is likely to construe the words 'misleading' and 'deceptive' in their natural and ordinary meaning, which has been accepted by the Courts in New Zealand and Australia to mean 'to lead into error'. Accordingly, conduct, whether it be in respect of acts or statements, or of failures to act, or of silence, may be considered by the Panel to be misleading or deceptive if the conduct leads, or would be likely to lead, persons into error.

While in most situations there will have been written or oral statements that are complained of as being misleading or deceptive, rule 64 relates to 'conduct', and therefore not only to statements or representations. Therefore, even where no statements have been made the Panel would still be able to regard conduct, such as trading in shares, as being misleading or deceptive where the circumstances would warrant that finding.

The Australian Takeovers Panel and the Australian Securities and Investments Commission (ASIC) have extensive experience, and have developed detailed policies, in relation to the 'truth in takeovers' provisions in the Australian law that are similar to the new provisions in the New Zealand Code. The abundance of Australian jurisprudence and practice, as well as New Zealand case law in respect of section 9 of the Fair Trading Act, are all of assistance to the Panel in the development of its own policies and practices around the term as it is used in the new rule 64.

While these policies cannot be tested until the new provisions come into effect, it would be prudent for market participants to expect to have to take some considerable care with any representations made to the media and to the market once the provisions are operative. This will be particularly so where there is a contest for control or where a takeover is opposed, not in the least because in these situations there are always parties looking for the opportunity to complain to regulators in the hope of gaining a tactical advantage over their opponent from doing so.

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 market manipulation provisions are anticipated to be brought into force in late 2006. 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. This will ensure that the Panel continues its role as the principal regulator of changes of control in Code companies.

Practical implications of Code's market manipulation provisions

The Panel expects that its new powers to regulate misleading and deceptive conduct in respect of Code-related transactions and events will provide challenges for both the Panel and the market.

The new rule 64 is cast sufficiently widely that the Panel may be able to take action to ensure that the market is not misled, or that any misinformation is corrected, even before shareholders have taken any action that could be based on the misleading conduct.

For example, the Panel may be able to require, where a prospective offeror has engaged in misleading conduct in relation to a proposed offer, that correcting information be published before a formal takeover offer is made or is included in the offer documents that will be sent to shareholders.

Similarly, where a shareholder meeting has been called by a Code company to seek shareholder approval for a proposed allotment to or acquisition by a person of voting securities in the Code company, the Panel will be able to require a party that has engaged in misleading or deceptive conduct in relation to the proposed allotment or acquisition to undertake appropriate remedial action before shareholders receive the notice of meeting and explanatory material that accompanies the notice, or to include correcting information with these documents when they are sent to shareholders.

As a result of the ability of the Panel to take action in advance of Code-related transactions or events, shareholders may not even have been in a position to accept or reject a takeover offer, or to consider whether they would cast their vote in favour of or against a Code allotment or acquisition, before the misleading or deceptive conduct has been remedied.

Of course, the misleading or deceptive conduct could well take place during the course of a Code-related transaction or event, and the Panel will need to respond in a manner which appropriately protects the best interests of the market. The Panel's five years of experience in regulating the market for control of Code companies, as well as the vast experience of the Australian Panel and ASIC, will assist the Panel in managing its new powers.

However, we fully expect that the new provisions will significantly increase the Panel's workload in enforcing the Code. It seems very likely, especially in respect of hostile or contested takeovers, that making complaints to the Panel of misleading or deceptive conduct will form part of the arsenal used against their opponents by takeover protagonists to protect or promote their positions. The Panel is no stranger to resistant target company directors and to fiercely competitive bidders, since tactical complaining occurs already. The new powers will, however, widen the range of ammunition potentially available to tactical complainants and could potentially make significant demands on the Panel's resources.

Because of the likelihood of tactical complaints being made, and also as a general tool for managing its enforcement resources efficiently and responsibly, the Panel is developing

policies that will establish threshold tests for deciding whether to act on a complaint about misleading or deceptive conduct.

Potential complainants, especially those who are protagonists in a contested or hostile Code-related transaction or event such as a takeover, can expect to have to do more than merely complain to the Panel. They should expect to have to make some effort to convince the Panel that its resources would be properly used by acting on the complaint. Depending on the circumstances involved, the Panel may require the complainant to show, for example, that it has something akin to a *prima facie* case, or that the complaint is not vexatious, or to establish that there would be merit in the Panel's acting on the complaint.

If a complainant formally requests the Panel to convene a meeting under section 32 of the Takeovers Act (which provides the Panel with its principal enforcement powers) to determine whether there has been a breach of the misleading or deceptive conduct prohibition in the Code, this will always be taken very seriously by the Panel. We discuss the Panel's enforcement powers further, below.

The primary implication of the new provisions for the takeovers landscape, then, is that the Panel will act where appropriate and, if warranted, where a complainant has made out a case of misleading or deceptive conduct. The Panel will act, as swiftly and decisively in respect of such a complaint, as it has done over the last five years in respect of any other breach of the Code. Where it finds a breach of new rule 64 the Panel will advance the most appropriate remedy for the breach in the particular circumstances of the case.

Any remedy ordered by the Panel will be balanced with achieving the right outcome for the market, whether that be by way of requiring the maker of a misleading statement to provide correcting information to shareholders and to the market or to act in accordance with the terms of the statement. Keeping a bid on track is likely to be at the forefront of the remedies put in place, unless it would be more appropriate in the particular circumstances of a case to stop the bid from proceeding.

We do not anticipate any conspicuous changes from the Panel's present enforcement practices in the approach the Panel will take to dealing with contraventions of rule 64. The Panel will have new powers to make permanent orders, which are discussed a little later in this presentation. However, these will mostly only enable the Panel to achieve by way of enforceable orders what it can already accomplish with the cooperation from the party found

to have been in breach of the Code (which it usually, but not in every case, receives). It seems likely that the new orders will achieve greater efficiency in the advancing of remedies.

From the Panel's perspective, then, the principal implication for the takeovers landscape of the Panel's new powers is that it will be business as usual, but perhaps a bit more of it. It is hoped that the market will accept this and will not see any advantage in testing the Panel's mettle when the new powers come into effect. We will be ready.

The Panel expects to have a substantial policy base in place at the time the new market manipulation provisions come into force to deal with complaints of misleading or deceptive conduct. In the meantime, the Panel's general enforcement powers will be expanded with immediate effect on the giving of the Royal Assent to the legislation resulting from the Securities Legislation Bill.

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 available 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 taken to the High Court.

The Panel's enforcement powers are enlarged under the new legislation, enabling the Panel to make a number of permanent compliance orders in addition to temporary restraining orders.

The permanent compliance orders (which were briefly referred to earlier) 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 ...

[there is a new definition of 'contravention' of the Takeovers Code, discussed later]:

(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 Courts) 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 (prohibiting misleading or deceptive conduct in relation to the Code), they are also available to the Panel to deal with misleading or deceptive, or otherwise defective, takeover documents. They come into effect immediately and are available to the Panel notwithstanding that rule 64 will not come into force until a later date.

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

Prior to the inclusion of the new definition, the Panel has been able to exercise its enforcement powers under section 32 only against the person or persons breaching the Code (whether directly or because of a breach of a term or condition of an exemption from 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 (whether directly or because of a breach of a term or condition of an exemption from 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 or not act in compliance with**, includes, in relation to the takeovers code or a term or condition of an exemption from the takeovers code,—*

- (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 will now be able, after making appropriate findings, to 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 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. This is expected to facilitate the making of claims for compensation that might otherwise be too costly to bring to Court.

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) are increased from the current 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 - when it 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's powers also now will include the 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

Transitional provisions mean that the changes to the definitions of “code company” and “specified company” will not have an impact on persons who currently hold or control voting rights in a company that falls within the definitions under the new provisions, until such time as the person seeks to increase their holding or controlling of voting rights. When such an increase would be caught by the Code, for example because it takes the person’s voting control, together with that of their associates, above 20% of the voting rights in the company, then the Code will have to be fully complied with.

In other words, shareholders in a company that becomes a Code company because of the law change will not be affected by any (Code-related) event that took place prior to the commencement of the new definition. But the Code will have effect in relation to (Code-related) events that occur at any time after the commencement of the new definition.

Moreover, any acquisition of securities in a company that has become a Code company by virtue of the new definition 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 come into effect.

Similarly, any offences against the Takeovers Act and contraventions of the Code that were committed or done before the commencement of the new provisions would be investigated and dealt with under the Takeovers Act and the Code as they were prior to their being amended. In other words, the law changes will not apply retrospectively.

Technical Amendments to Code

As mentioned at the beginning of this presentation, the changes to the takeovers landscape effected by the Securities Legislation Bill will be further extended by the promulgation of regulations to give effect to the technical amendments to the Code that were approved by the Government in June 2005. These regulations are expected to be completed and to have effect quite quickly after the giving of the Royal assent to the legislation resulting from the Securities Legislation Bill.

The technical amendments will not radically alter the Code. They make no fundamental changes to the Code’s underlying philosophy, policy or intent. However, there are a large

number of minor changes and these do have practical implications for all of the persons affected by the Code, including shareholders.

Shareholders do not need to feel concerned about whether or not they will know about the changes, since their Code rights and obligations should always be explained in the Code-related documentation that is sent to them.

Once a firm date is known for the commencement of the *Takeovers Code Approval Amendment Regulations 2006*, the Panel will publish an edition of *Code Word* that will be focused solely on the technical amendments. The regulations will also be made available on the Panel's website.

Schemes of arrangement and amalgamations – what is the Panel doing about them?

Under the law as it currently stands, effecting a change of control of a Code company can be undertaken through one of three mechanisms:

- a. a change of control under the Code which requires, generally, the approval of a majority of shareholders not associated with the seller or the buyer of a parcel of shares, or, for a takeover offer, a minimum shareholder acceptance threshold of more than 50%, or the 90% dominant owner threshold of Part 7 of the Code for compulsory acquisition;
- b. an amalgamation under Part XIII of the Companies Act (avoiding the requirements of the Code if the Code company goes out of existence before the acquisition of any voting rights in the Code company). Under Part XIII a special resolution is required to be passed of shareholders voting at the meeting. Minority buy-out rights are available under Part XIII of the Companies Act; and
- c. a scheme of arrangement under Part XV of the Companies Act (avoiding the requirements of the Code if, for example, voting rights in a Code company are cancelled prior to the securities being acquired). The Court tends to require a special resolution of each affected company's shareholders voting at the meeting, however there are no minority buy-out rights available under a scheme of arrangement.

Under the current Companies Act and Takeovers Code regimes, the form of the transaction determines the rights of shareholders under that transaction.

The Waste Management NZ Limited proposal to amalgamate with Transpacific Industries Group Limited prompted fairly significant public debate, which fed into the submissions on the Panel's consultation paper, released in April, on the Panel's exemption policy in relation to schemes of arrangement. This has highlighted concerns in the market about avoidance of the Code's protections, through use of the Companies Act mechanisms for effecting changes of control in Code companies.

The Panel's position is that the way the Code is drafted clearly indicates Parliament's intention that the Code should apply to all changes of control of Code companies. For example, rule 5 of the Code prohibits parties from contracting out of the Code. In addition, the Panel's powers to grant exemptions also require that any exemption that is granted from compliance with the Code must be consistent with the objectives of the Code.

The Panel has three avenues for taking action under the current law, where Code companies are involved in changes of control that are effected under the Companies Act's mechanisms:

- a. The Panel will seek to be heard in the Court in respect of schemes of arrangement to make submissions to the Court that the principles of the Code be taken into account in the structure of the scheme;
- b. the Panel will impose Code disciplines as conditions of exemption where companies seek exemptions in respect of schemes of arrangement (this was proposed in the Panel's April consultation paper on its exemption policy for schemes); and
- c. the class exemption for initial public offerings in clause 7 of the *Takeovers Code (Class Exemptions) Notice (No. 2) 2001* has been revoked (the Panel will consider granting individual exemptions in relation to IPOs).

The Panel recognises that the above steps can have only a limited effect in dealing with avoidance of the Code's protections for Code companies and their shareholders. The Panel is, therefore, also considering proposals for recommending changes to the law.

The Panel believes that it is appropriate to retain the current differing mechanisms under the Companies Act and Takeovers Code for effecting changes of control in Code companies, as there can be legitimate commercial reasons for choosing to structure a transaction as an amalgamation or a scheme of arrangement. However, in the Panel's view there should be greater alignment of rights for shareholders of Code companies under the Companies Act mechanisms with those under the Takeovers Code.

The Panel is therefore proposing to recommend to the Government that schemes of arrangement and amalgamations be clearly carved out of the Code's reach, but that the principles of the Code be introduced through some mechanism into the provisions of the Companies Act dealing with schemes and amalgamations. The Panel will soon be consulting with the market on its proposals in this area.

Conclusion

The takeovers market is currently very active. Analysts are not predicting any slow down in the near future. The Panel has been involved this year with some very significant transactions and proposals. The Panel has undertaken a number of enforcement actions this year.

The primary implication for the takeovers landscape of the Panel's new enforcement powers and of the new prohibitions on misleading or deceptive conduct in respect of Code-related transactions or events, is that the Panel will continue its proactive regulation of the takeovers market much as it has done since the inception of the Code. Where it finds a contravention of the new prohibition in the Code, the Panel will advance the most appropriate and commercially effective remedy for the breach in the particular circumstances of the case.

In relation to amalgamations and schemes of arrangement involving Code companies the Panel aims to see the principles of the Code given greater weight in future.

For the Panel the changes to takeovers law will mean business as usual, but probably more of it, especially during contested or opposed takeovers. We will be ready for this.

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