



25 August 2011

Takeovers Panel  
PO Box 1171  
**WELLINGTON 6140**

By email: [takeovers.panel@takeovers.govt.nz](mailto:takeovers.panel@takeovers.govt.nz)

### **Takeovers Panel Consultation Paper: Further Technical Issues with the Takeovers Code**

1. The New Zealand Law Society's Commercial & Business Law Committee (Committee) welcomes the opportunity to comment on the Takeovers Panel's latest consultation paper '*Further Technical Issues with the Takeovers Code*', July 2011 (Consultation Paper).
2. As outlined below, the Committee is generally supportive of the Panel's preferred solutions for addressing the problems identified. However the Committee has raised a handful of questions about the wording to the draft amendments to the Code in the context of Section Two of the Consultation Paper.

#### **Section One: Substantive Issues**

##### **Defeating Conditions**

3. In its recent submissions on other changes to the Takeovers Code proposed by the Panel, the Committee has largely been supportive of the Panel's moves to introduce greater certainty for the bidder and target alike, about the conditions that may be imposed in an offer. In sympathy with those earlier submissions, the Committee supports the Panel in:
  - (a) identifying concerns about the problem caused by the absence of an obligation to publicly notify the status of the conditions during the offer period; and
  - (b) suggesting preferred options to address the problem identified.
4. In particular, the Committee agrees that the Code should be amended to provide for a requirement for the offeror to provide details of the status of defeating conditions prior to the close of the offer period (and include a safeguard – in the form of an extension of the offer period if any such condition is satisfied or waived in the final week). The Committee also accepts the Panel's conclusion that the absence of such requirements puts the New Zealand market out of step with comparable jurisdictions, notably Australia, and as a result puts investors at a disadvantage.
5. As a result, the Committee supports the proposed recommendation of the addition of a new rule in the Code to address the issue of a minimum acceptance condition being satisfied or waived in the final week – by providing an automatic extension of the offer period for a further 14 days.
6. The Committee also supports the drafting of the proposed rule 24C of the Consultation Paper but suggests that rule 24C(4) is amended to adopt a "substance over form" approach. The

words “...which provides that ...” should be replaced with words like “... which has the effect of making ....” to achieve this.

7. The Committee also wishes to record its support for the proposed status update – in the form of the proposed new rule 49B. In principle, the Panel’s proposal is a logical harmonisation with the requirements under Australian law. After making allowances for the differences with the Australian regime, including the scope for waiver of conditions in a manner that is not permitted in Australia, the Committee also supports the drafting of the proposed new rule 49B.
8. Finally on this issue, the Committee would be interested to hear the views of market participants such as fund managers and institutional investors, as to whether a policy shift to (effectively) prevent an offer closing whilst still conditional represents such a significant point of difference with Australia and other jurisdictions as to hamper investment in the New Zealand market. In principle the Committee considers that, for the sake of certainty for recipients of a takeover offer, it is preferable for an offer to be unconditional for a short period of time prior to the close of an offer. This would enable all investors to decide whether to accept or reject the offer in circumstances where the outcome of the offer is certain.

#### **Statements of the offeror’s intentions for the target**

9. The Committee is aware that the Code is out of step with the level of disclosure required of an offeror about its intentions for the target when compared with comparable jurisdictions (particularly Australia). This disparity appears to be highlighted as a result of the apparent predilection in this country for partial offers.
10. As a result, the Committee is supportive of the Panel’s proposal to improve the level of information available for the market and market participants and is largely persuaded by the listing of merits contained in paragraph 61 of the Consultation Paper. However, the Committee is also mindful of the need for New Zealand not to appear to be out-of-step with comparable overseas jurisdictions and thereby risk imposing barriers to further international investment into the New Zealand market. With this in mind, the Committee questions, in relation to the Panel’s proposed replacement clause 14(1) of Schedule 1 to the Code:
  - (a) whether the reference to “*strategic expectations*” in paragraph (a) is itself too wide-reaching when used in the context of New Zealand-scale Code companies (and thereby possibly injecting uncertainty rather than clarity) – and suggests that a suitable alternative is that of “*intentions*” (as used in Australia)?
  - (b) (for similar reasons to those in a above) whether the use of “expectations” in paragraph (c) should be replaced with a statement of “intentions” about the future ownership and use of the major part of the target’s assets?
11. Also in relation to the wording of the proposed new clause 14(1), the expansive wording suggested for paragraph (e) appears to put New Zealand in the position of market leadership in relation to the disclosure of the offeror’s intentions for the target. This causes the Committee some concerns and leads us to question whether, in light of the other provisions of Schedule 1<sup>1</sup> which require the offeror to disclose information that could reasonably be

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<sup>1</sup> In particular, clause 24, which requires disclosure of any other information not required to be disclosed elsewhere that could reasonably be expected to be material to the offeree’s decision-making process.

expected to be material to the offeree's decision-making process, whether this requirement is simply a step too far.

### **Follow-on offers**

12. The Committee is aware of commentary to the effect that the absence of safeguards such as those provided in Australia (with a 4-month look back period affecting pricing of follow-on offers) is a material difference and a possible disincentive for international investors into the New Zealand market when compared with Australia. Balanced against this is the impact of rule 64 and what would appear to be the emergence of market practice for offerors to provide clarity about the likelihood of a follow-on offer being made.
13. Therefore, notwithstanding the two examples referred to in the Consultation Paper, the Committee shares what it takes to be the Panel's view – namely that there is not a pressing problem in need of a solution. However, the Committee would lean towards a push to harmonise the treatment of follow-on offers with that in Australia if there was a body of opinion from fund managers, institutional investors and other market participants to the effect that the mismatch with Australia was a real and substantial disincentive for them and is particularly mindful of legislative points of difference that might amount to the type of 'country risk' that would act as a barrier to international investment in the New Zealand market.

### **Section Two: Drafting anomalies and inconsistencies**

14. The Committee makes the following comments in relation to the proposals in Section Two of the Consultation Paper:
  - (a) **Sending / delivering consideration:** The Committee believes that the words "send" and "deliver" would be read purposively. However, the Committee accepts that, for the reasons given by the Panel, there is a risk of ambiguity and largely supports the Panel's preferred option to remove that risk – but suggests that the proposed amendments to rules 34, 60 and 61 should follow the pattern established by the proposed amendment to rule 33 by catering for both alternatives:
 

i.e. "*sent or provided*"
  - (b) **Offeror / offeree definitions:** The experience of the Committee members is that, in practice, the definitions are read purposively and they are not aware of the anomaly identified by the Panel leading to material non-disclosures. However, the Committee accepts that, for the reasons given by the Panel, there is a problem and supports the Panel's preferred option for a solution (including the proposed amendments to the definitions).
  - (c) **Redundant words:** The Committee agrees that, for the reasons given by the Panel, there is a problem and supports the Panel's preferred option for a solution (including the proposed amendment to the Code).
  - (d) **Availability of annual reports:** The Committee agrees that, for the reasons given by the Panel, there is a problem and supports the Panel's preferred option for a solution (including the proposed amendment to the Code).
  - (e) **Disclosure of trading behind nominees:** The Committee members do not have any personal experience of the "clutter" of trading data as a result of the aggregation of holdings by professional custodians, but accept the Panel's description of the problem

and note that preferred solution would achieve the desired de-cluttering whilst still preserving disclosure of trading details by “true” substantial security holders.

- (f) **Variation of offer for more complete information about securities:** The Committee agrees that, for the reasons given by the Panel, there is a problem that requires a solution. Indeed, the Committee is aware of at least one ‘near miss’ where incomplete information about a class of securities in the available public records was only discovered at the last minute and the memory of the discussion about the (then) knock-on consequences for the offer process is an unpleasant memory. When reviewing the proposed solution, there was a thought that reliance on the revised rule 44(3) should include a requirement that the shortcomings in the class notice given under rule 42A should not be as a result of the offeror overlooking material that was provided by the target or readily available – but on balance the Committee supports the Panel’s suggested drafting of a ‘no fault’ solution.
- (g) **Director and the Limited Partnerships Act:** The Committee agrees that, for the reasons given by the Panel, there is a problem and supports the Panel’s preferred option for a solution (including the proposed amendment to the Act and the Code).
15. If you have any queries about this submission, please contact the Committee’s secretary, Vicky Stanbridge, NZLS Legal Affairs Department (ph (04) 463 2912, [vicky.stanbridge@lawsociety.org.nz](mailto:vicky.stanbridge@lawsociety.org.nz)).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'B. Gilmour', with a long horizontal line extending to the right.

Bruce Gilmour  
Vice President