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Takeovers Panel
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Takeovers Panel Consultation Paper: The Code and Hostile Takeovers

The New Zealand Law Society's Commercial & Business Law Committee (Committee) welcomes the opportunity to comment on the Panel's latest consultation paper, *The Code and Hostile Takeovers, December 2010* (Consultation Paper).

As outlined below, the Committee is generally supportive of the Panel's preferred solutions for addressing the problems identified. However, the Committee suggests alternative wording for the draft amendments to the Code in the context of Part One of the Consultation Paper.

Part One: Offer Conditions and Defensive Tactics

In the Committee's recent submission on Parts 1 to 5 of the Takeovers Code,¹ it agreed with the Panel that there is a problem arising out of the application of rules 25(1) and 38 of the Code. As a result, the Committee supported moves to introduce greater certainty for the bidder and target alike, about the conditions that may be imposed in an offer and the constraints that might otherwise be seen to hamstring the ability of the target to conduct "business as usual" over an extended period.

Consequently, the Committee continues to support the Panel's proposals (as refined in the Consultation Paper) and endorses the Panel's preferred option of applying a materiality threshold to any decision by an offeror to invoke a defeating condition.

However, the Committee has some submissions about the proposed drafting of new rules 25(1A) and 25(1B) as set out in paragraph 35 of the Consultation Paper.

As currently drafted, the Panel's proposed new rule 25(1A) prohibits conditions that restrict the target company from carrying out activities in the ordinary course of its business. By contrast, the Committee prefers an alternative approach that would prohibit an offeror from invoking a condition in circumstances where the condition has not been satisfied merely because the target company has carried out activities in the ordinary course of its business.

The Committee prefers this alternative approach because, if adopted, any doubt about the legitimacy of a condition under the new rule 25(1A) will only need to be tested in the event an offeror seeks to invoke the condition. As presently drafted, rule 25(1A) would enable a target company to challenge the validity of a condition, and therefore the entire offer, in circumstances

¹ *Takeovers Panel Consultation Paper: Parts 1 to 5 of the Takeovers Code*, New Zealand Law Society submission dated 3 August 2010.

where it was unknown whether the offeror wishes to invoke the condition or not. This presents the risk of a strategic challenge to the legitimacy of a condition as a means to delay or defeat an offer.

It is also considered preferable to allow the Panel to assess the situation in light of the facts at the time the offeror wishes to rely on a condition to withdraw an offer, rather than at the time the offeror includes the condition in the offer. In the Committee's view, the most appropriate time to assess the validity of a condition against a measure of "ordinary course of business" is at the time the offeror seeks to invoke it rather than at the time it is stipulated. In this way, rather than the Panel having to consider hypothetical examples of the circumstances in which a condition might be invoked, it will be able to assess the condition in light of the facts relied on by the offeror.

An alternative form of drafting the new rule 25(1A) for consideration by the Panel is as follows:

"An offeror shall not be entitled to invoke or rely on a condition as a result of activities carried out in the ordinary course of business by the target company during the period following sending by an offeror of a notice under rule 41 of the code and the close of the offer period."

In summary, the Committee answers the questions raised by the Panel as follows:

- *Question 1:* Yes.
- *Question 2:* Yes, although the Committee considers the proposed wording to new rule 25(1A) above is preferable for the reasons outlined.
- *Question 3:* The Committee suggests that its alternative formulation of the restriction provides a better match with the prevailing practice in Australia (as outlined in the Australian Panel's Guidance Note 12) of prohibiting, as unacceptable circumstances, action that is taken or proposed that may cause the offer to be withdrawn or lapse. That is, the Australian Panel focuses on actions rather than the mere existence of possibly defeating conditions. This, the Committee suggests, is a better match with one of the other objectives of reform in this area – namely harmonisation with relevant overseas practice.

Part Two: A: Target Companies' Reimbursement of Takeover Expenses

Question 1: The Committee is firmly of the view that the Panel is the appropriate body to assess categories of expenses under the Code for the reason alluded to in the judgment of McKenzie J (specialist expertise).

Question 2: The Committee also considers that the Panel is the most appropriate adjudicator for rule 49 disputes, for the same reason.

Question 3: The Committee agrees with the preferred option identified by the Panel for the reasons outlined in the Consultation Paper (i.e. effectiveness, efficiency, expertise and timeliness).

Question 4: It is not apparent to the Committee why the Panel would reserve the right not to consider a dispute over which it had jurisdiction, and, in the Committee's view, it would be unusual for a specialist tribunal to have such discretion. In the absence of good reasons for retaining discretion, the Committee is of the view that the Panel should be obliged to carry out its function in circumstances where it has jurisdiction.

Question 5: The Committee does not have view on this matter.

Part Two: B: Technical Issue: the Definition of Code Company

The Committee agrees with the preferred option identified by the Panel for the reasons given in paragraph 68 of the Consultation Paper.

If you have any queries about this submission, please contact the Committee secretary, Vicky Stanbridge, NZLS Legal Affairs Department (ph (04) 463 2912, vicky.stanbridge@lawsociety.org.nz).

Yours sincerely

A handwritten signature in black ink, appearing to read 'J Temm', written in a cursive style. The signature is contained within a light gray rectangular box.

Jonathan Temm
President