



12 June 2009

Jennifer Fawcett
Takeovers Panel
PO Box 1171
WELLINGTON 6140

By email: jennifer.fawcett@takeovers.govt.nz

Dear Ms Fawcett

Upstream Takeovers

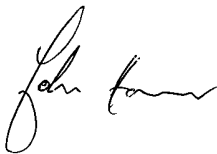
The Society's Commercial and Business Law Committee (the Committee) welcomes the opportunity to comment on the consultation paper referred to above.

1. The Committee agrees that problems arise due to upstream takeovers due in part to uncertainty about how the Panel will respond to an exemption application.
2. The Takeovers Act 1993 sets out the objectives in developing a Takeovers Code. It would be logical for a "class exemption" to be judged against those objectives, although it may be difficult to judge weighting given potentially competing objectives.
3. In respect of the various options put forward by the Panel:
 - A. *Option 1 – status quo: exemptions considered on a case by case basis.* This is not a suitable outcome. The present situation is uncertain. This option will not achieve certainty. The Committee agrees with the disadvantages noted in paragraph 82.
 - B. *Option 2a – class exemption relating to threshold and purpose test.* More detail is required to provide meaningful comment on option 2a. For example:
 - i. It is unclear how the purpose test will be applied, and how the test will be satisfied. The Panel needs to explain how, should the acquisition be one purpose, it will be determined to be "main purpose" or not.
 - ii. The value test is unclear as to how the value is determined by a bidder. One possibility is that it is determined from the latest accounts of the upstream company, although these may not be available to a bidder. Events may arise after balance date, which are not known to the bidder, but which affect value. These circumstances should be taken into account, and advice provided.
 - iii. By permitting the acquisition to occur without the upstream acquisition being regulated, there is a risk that the exemption could be abused. However, this risk might be negligible given the purpose test.
 - C. *Option 2b – class exemption relating to 25% asset threshold and purpose test.* The comments to option 2a apply. It would appear that the higher the percentage, the greater the risk that a "main purpose" will acquire the shareholding in the downstream company. Accordingly, provided the tests are both well drafted, the percentage should be less than 50%. 25% may therefore be an acceptable compromise.

- D. *Option 2c – class exemption relating to 50% asset threshold, purpose test, and upstream acquisition in jurisdiction with comparable investor protection.* This option has the same issues as identified in options 2a and 2b. The Panel notes that the result of selecting this option is that it would apply only to listed upstream entities. That is not appropriate. The Takeovers Code in New Zealand applies to all Code companies, not just listed companies. If this option is adopted, it should apply to both listed and unlisted entities, provided the upstream party is subject to takeover provisions of an equivalent nature to the Code. The Panel could publish from time to time approved jurisdictions and consider others on application.
- E. *Option 3 - complete exemption.* This option is not appropriate. It is not followed in the other jurisdictions cited by the Panel and does not appear to comply with the objectives of the Code.
- F. *Option 4 - complete exemption except where “unacceptable circumstances”, current Australian position.* This option should not be adopted. It is inappropriate for the Panel to have the power to declare “unacceptable circumstances”. This would add significantly to the uncertainty in the market and risk people “gaming” the Panel.
4. The Panel should publish a guidance note with the procedure it will follow and likely requirements it will impose if the upstream takeover does not satisfy any eventual exemption which is established. For example, that follow-on offers are permitted and conditional offers, which are subject to obtaining shareholder approval under rule 7(c), are permitted (i.e. it is not necessary first to obtain approval before the offer is made).

If you have any queries regarding this submission please contact Diana Brown, the Committee Secretary in the first instance, by phone 04 463 2967 or email diana.brown@lawsociety.org.nz.

Yours sincerely



John Horner
Convener, Commerce and Business Law Committee