

TAKEOVERS BILL

EXPLANATORY NOTE

THIS Bill provides for the establishment of a Takeovers Panel. The Panel is to consist of 7 members appointed by the Minister of Justice.

The principal function of the Panel is to formulate and recommend a takeovers code that, on its approval by the Governor-General by Order in Council, will apply to takeovers of listed public issuers.

The Panel is required to formulate a takeovers code that, so far as practicable,—

- (a) Encourages the efficient allocation of resources:
- (b) Encourages competition for corporate control:
- (c) Assists in ensuring that shareholders are treated fairly:
- (d) Promotes the international competitiveness of New Zealand's capital markets:
- (e) Recognises that ultimately it is for shareholders to determine the merits of a takeover offer:
- (f) Maintains a proper relation between the costs of compliance with the code and the benefits from it.

It is intended that the Panel will have a wide discretion in determining both the type of takeovers code it should recommend and the specific provisions of the code itself.

The Bill specifies the matters the Panel must consider in formulating the code. It is required to consider whether the code should provide for—

- (a) Advance notice and publicity about a takeover:
- (b) The equal treatment of shareholders in a takeover:
- (c) Mandatory bids, equal pricing, and equal opportunity for acceptance:
- (d) Incremental acquisitions and partial bids:
- (e) Pricing rules and defensive tactics.

The Panel is required to give persons and organisations that wish to do so the opportunity to make submissions to it both as to the type of takeover code that should be formulated and as to the actual provisions of the proposed code.

On being approved by the Governor-General by Order in Council the recommended code will have the force of law.

The Bill deems an Order in Council that approves the takeovers code to be a regulation for the purposes of—

- (a) The Acts and Regulations Publication Act 1989; and
- (b) The Regulations (Disallowance) Act 1989.

The Bill authorises the making of regulations prescribing offences for contraventions of the code and conferring on the High Court the power to make orders in cases where shares in a public issuer have been acquired in contravention of the code.

On a date to be appointed by the Governor-General by Order in Council the provisions of Part 1 of the Companies Amendment Act 1963, which relates to company takeovers, will cease to apply to takeovers of listed companies.

TAKEOVERS

ANALYSIS

	PART II TAKEOVERS CODE
Title	11. Objectives of takeovers code
1. Short Title and commencement	12. Matters to be considered by Panel in formulating takeovers code
2. Interpretation	13. Specific provisions applying to takeovers code
3. Act to bind the Crown	14. Harmonisation with Australia
4. Object of this Act	15. Consultation
	16. Approval of takeovers code
PART I	17. Order in Council deemed to be regulation
TAKEOVERS PANEL	18. Power to make regulations prescribing offences and civil remedies and for related purposes
5. Establishment of Takeovers Panel	19. Panel may grant exemptions
6. Membership of Panel	20. Amendment to Companies Amendment Act 1963
7. Functions of Panel	21. Amendment to Official Information Act 1982
8. Powers	Schedule
9. Annual reports	
10. Further provisions applying to Panel	

A BILL INTITULED

An Act to establish a Takeovers Panel for the purpose of recommending a takeovers code in relation to takeovers of public issuers and for related purposes

5 BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title and commencement—(1) This Act may be cited as the Takeovers Act 1991.

(2) Except as provided in section 20 of this Act, this Act shall come into force on the 1st day of April 1992.

10 **2. Interpretation**—(1) In this Act, unless the context otherwise requires,—

“Company” has the same meaning as in—

(a) Section 2 of the Companies Act 1955; or

- (b) **Section 2** of the Companies Act 1990,—
as the case may be, and includes an overseas
company:
- “Court” means the High Court; and includes a Judge of
that Court: 5
- “Director” means,—
- (a) In relation to a company, any person occupying
the position of a director of the company by whatever
name called:
- (b) In relation to a partnership (other than a special 10
partnership), any partner:
- (c) In relation to a special partnership, any general
partner:
- (d) In relation to a body corporate or
unincorporate, other than a company, partnership, or 15
special partnership, any person occupying a position
in the body that is comparable with that of a director
of a company:
- (e) In relation to any other person, that person:
- “Minister” means the Minister of Justice: 20
- “Panel” means the Takeovers Panel established under
Part I of this Act:
- “Public issuer” means a person that is a party to a listing
agreement with a stock exchange:
- “Stock exchange” means the New Zealand Stock 25
Exchange; and includes a stock exchange registered
under the Sharebrokers Act 1908.
- (2) In this Act, unless the context otherwise requires,
references to formulating and recommending a takeovers code
include formulating and recommending amendments to a 30
takeovers code approved under **section 16** of this Act.

3. Act to bind the Crown—This Act binds the Crown.

4. Object of this Act—The object of this Act is to—

- (a) Establish a panel to be called the Takeovers Panel for the
purpose of formulating and recommending rules in 35
the form of a code that, on being approved by the
Governor-General by Order in Council, will apply to
takeovers of companies and other bodies whose
shares are listed on a stock exchange:
- (b) For that purpose to confer on the Panel the function of 40
determining the transactions or classes of transactions
that constitute takeovers and to which the code will
apply as well as the function of determining the

nature of the rules that should apply to those transactions and the content of the rules themselves.

PART I

TAKEOVERS PANEL

5 **5. Establishment of Takeovers Panel**—There is hereby established a panel to be called the Takeovers Panel.

6. Membership of Panel—(1) The Panel shall consist of 7 members appointed from time to time by the Minister.

10 (2) One member shall be appointed by the Minister as Chairperson of the Panel, and another shall be appointed by the Minister as Deputy Chairperson of the Panel.

 (3) The Minister shall not appoint a person as a member of the Panel unless, in the opinion of the Minister, that person is qualified or experienced in business, accounting, or law.

15 **7. Functions of Panel**—The Panel has the following functions:

 (a) To formulate and recommend, from time to time, a takeovers code applying to takeovers of public issuers:

20 (b) To formulate and recommend, from time to time, such amendments to the takeovers code as the Panel thinks fit:

 (c) For the purposes of paragraphs (a) and (b) of this section, to keep under review practices relating to takeovers of public issuers.

25 **8. Powers**—In addition to the powers conferred on it by this Act, the Panel has such powers as are reasonably necessary or desirable to enable it to carry out its functions.

30 **9. Annual reports**—(1) As soon as practicable after the end of each year ending with the 30th day of June, the Panel shall furnish to the Minister a report of its operations during that year.

 (2) The Minister shall lay a copy of the report before the House of Representatives as soon as practicable after receiving it.

35 **10. Further provisions applying to Panel**—The provisions set out in the Schedule to this Act apply in respect of the Panel.

PART II

TAKEOVERS CODE

11. Objectives of takeovers code—The Panel shall formulate and recommend a takeovers code that, as far as practicable,—

- (a) Encourages the efficient allocation of resources; and
- (b) Encourages competition for the control of public issuers; and
- (c) Assists in ensuring that shareholders in a takeover are treated fairly; and
- (d) Promotes the international competitiveness of New Zealand's capital markets; and
- (e) Recognises that shareholders must ultimately decide for themselves the merits of a takeover offer; and
- (f) Maintains a proper relation between the costs of compliance with the code and the benefits resulting from it.

12. Matters to be considered by Panel in formulating takeovers code—Without limiting the matters that the Panel may consider, the Panel shall, in formulating a takeovers code, consider whether the code should provide—

- (a) That advance notice and publicity should be given of takeovers;
- (b) That in a takeover, the public issuer and its shareholders should be fully informed;
- (c) That in a takeover, offers should be made to all shareholders, that the consideration offered should be the same for all shareholders, and that all shareholders should have the same opportunity for acceptance;
- (d) That incremental acquisitions and partial bids should be permitted;
- (e) That there should be rules to determine the price or prices payable for the acquisition of shares in a takeover;
- (f) For the compulsory acquisition of shares in a public issuer at the option of offerors or shareholders, or both;
- (g) For the regulation of defensive tactics.

13. Specific provisions applying to takeovers code—Without limiting the power to formulate a takeovers code, the Panel may—

- (a) Define the transactions or classes of transactions in relation to which the code applies and for that

purpose define terms and expressions used in the code in such manner as it thinks fit:

- 5 (b) Prescribe the requirements in relation to offers and the making of offers to acquire shares in a public issuer in a takeover including requirements as to the form and content of those offers, variations of those offers, the time during which those offers are to remain open for acceptance, the persons to whom those offers are to be made, and the manner of acceptance:
- 10 (c) Prescribe the information, statements, certificates, and documents or other matters that must be supplied to a public issuer and the shareholders of the public issuer in a takeover:
- 15 (d) Prescribe requirements for the registration of documents in connection with a takeover:
- (e) Prescribe the duties and obligations of a public issuer and the directors of the public issuer and other persons in a takeover.

20 **14. Harmonisation with Australia**—In formulating a takeovers code the Panel shall have regard, as far as practicable, to the principles applying to the harmonisation of business law contained in the Memorandum of Understanding between the Governments of Australia and New Zealand on the Harmonisation of Business Law signed at Darwin on the 1st day
25 of July 1988.

15. Consultation—(1) The Panel shall, in formulating a takeovers code, do everything reasonably possible to afford such persons and organisations as wish to do so a reasonable opportunity to make submissions to it as to the nature and
30 scope of the code and the matters with which it should deal.

(2) Before recommending the takeovers code the Panel shall—

- (a) Do everything reasonably possible to afford such persons and organisations as wish to do so an opportunity to
35 make submissions to it on the proposed code; and
- (b) Make copies of the proposed code available to any such person or organisation for that purpose.

(3) A failure to comply with this section does not affect the validity of any takeover code that is approved under this Act.

40 **16. Approval of takeovers code**—(1) The Panel shall recommend the proposed takeovers code to the Minister who may, if he or she is satisfied that the code meets the objectives

set out in **section 11** of this Act, advise the Governor-General to approve the code by Order in Council.

(2) If the Minister is not satisfied that the code meets the objectives set out in **section 11** of this Act, or, if the Minister does not propose to advise the Governor-General to approve the code, as the case may be, the Minister shall, as soon as practicable,—

(a) Advise the Panel in writing accordingly stating his or her reasons; and

(b) Request the Panel to recommend a further code to the Minister.

(3) The Minister may, if he or she is satisfied that a takeovers code recommended under **subsection (2)** of this section meets the objectives set out in **section 11** of this Act, advise the Governor-General to approve the code.

(4) The Governor-General may, on the advice of the Minister, by Order in Council, approve a takeovers code or any amendment to a takeovers code, as the case may be, recommended by the Panel.

(5) On the approval of a takeovers code or any amendments to a takeovers code, the code or the amendments, as the case may be, shall have the force of law and shall come into force on a date specified in the code or the amendments, not being a date earlier than 28 days after the approval of the code or the amendments.

17. Order in Council deemed to be regulation—Every Order in Council made under **section 16 (4)** of this Act—

(a) Shall set out the takeovers code or the amendments, as the case may be, in a Schedule to the order; and

(b) Is deemed to be a regulation for the purposes of—

(i) The Acts and Regulations Publication Act 1989; and

(ii) The Regulations (Disallowance) Act 1989 (except section 9 of that Act).

18. Power to make regulations prescribing offences and civil remedies and for related purposes—The

Governor-General may, from time to time, make regulations—

(a) Prescribing offences in respect of the contravention of, or non-compliance with, provisions of the takeovers code and the fines (not exceeding \$100,000 in the case of individuals and \$300,000 in the case of bodies corporate) or other penalties that may be imposed for

those offences and prescribing defences available to persons charged with such offences:

- 5 (b) Conferring on the Court the power to make such orders as may be specified where shares or any interest in or rights relating, whether directly or indirectly, to shares in the public issuer concerned have been acquired in contravention of, or without complying with, any of the provisions of the takeovers code, and without limiting the generality of the foregoing, conferring on the Court power to make any of the following orders:
- 10 (i) An order prohibiting the exercise for such period as the Court thinks fit of any right to vote attaching to the shares:
- 15 (ii) An order directing the public issuer not to make payment, or to defer making payment for such period as the Court thinks fit, of any sum or sums due from the public issuer in respect of the shares:
- 20 (iii) An order directing the public issuer not to register the transfer or transmission of all or any of the shares:
- (iv) An order prohibiting the public issuer from issuing any shares in addition to, or in substitution for, or in replacement of, the shares:
- 25 (v) An order restraining the disposal of all or any of the shares or any interest in or rights relating to them:
- (vi) An order directing the disposal of all or any of the shares or any interest in or rights relating to them:
- 30 (vii) An order directing the forfeiture of all or any of the shares:
- (viii) An order vesting the shares in a person as trustee for sale on such terms and conditions as the Court thinks fit:
- 35 (ix) An order declaring that the exercise of voting or other rights attaching to the shares is void and of no effect:
- (x) An order declaring any agreement for the acquisition of the shares or an interest in or rights relating to them to be void and of no effect:
- 40 (xi) An order declaring any agreement for the acquisition of the shares or an interest in or rights relating to them to be voidable at the option of the

- person from whom the shares or the interest or rights were acquired:
- (xii) For the purposes of securing compliance with any of such orders, an order directing any person to do or refrain from doing a specified act: 5
- (c) Conferring on the Court the power to make such orders as may be specified in any other case which involves the contravention of, or non-compliance with, any of the provisions of the takeovers code and without limiting the generality of the foregoing, conferring on the Court the power to make any of the following orders: 10
- (i) An order directing any person to comply with any provision of the takeovers code even though the time for doing so may have expired:
- (ii) An order requiring a person specified in the order or the public issuer concerned, as the case may be, to supply information specified in the order to a person or class of persons specified in the order: 15
- (iii) An order restraining a person from, or doing any act for the purpose of, acquiring shares, or any interest in or rights relating, whether directly or indirectly, to shares, in the public issuer concerned: 20
- (iv) For the purpose of securing compliance with any of such orders, an order directing a person to do or refrain from doing a specified act: 25
- (d) Conferring on the Court the power to make any such orders on conditions:
- (e) Where the Court makes any such order, prescribing duties and obligations to be carried out by the public issuer concerned or such other persons as may be specified in consequence of the order: 30
- (f) Specifying the persons who may apply to the Court for the making of any such orders:
- (g) Specifying the persons who are entitled to appear at the hearing of an application for any such orders: 35
- (h) Prescribing requirements for the giving of notice of the making of any such application:
- (i) Conferring on the Court the power to make, as an interim order, any order that it is empowered to make on any such application: 40
- (j) Limiting the type of order that the Court may make where the Court is satisfied that the contravention of, or failure to comply with, a provision of the takeovers code ought to be excused to such orders as may be specified: 45

- 5 (k) Conferring on the Court, where it is satisfied that an act or omission that constituted a contravention of, or failure to comply with, any provision of the takeovers code ought to be excused, the power to declare that the act or omission did not have that effect.

10 **19. Panel may grant exemptions**—(1) The Panel may, from time to time, in its discretion and on such terms and conditions as it thinks fit, by notice in the *Gazette*, exempt any person from compliance with any provision of the takeovers code and may in like manner vary or revoke any such exemption.

(2) Every such exemption shall have effect according to its tenor.

15 **20. Amendment to Companies Amendment Act 1963**—(1) Section 3 of the Companies Amendment Act 1963 is hereby amended by inserting, after paragraph (a), the following paragraph:

“(ab) Any shares in a public issuer within the meaning of **section 2** of the Takeovers Act 1991; or”.

20 (2) Part I of the Companies Amendment Act 1963 shall, notwithstanding **subsection (1)** of this section, continue in force in respect of the acquisition of shares in a public issuer within the meaning of **section 2** of the Takeovers Act 1991 in any case where notice of a takeover scheme has, before the
25 commencement of this section, been served on the public issuer under section 4 of the Companies Amendment Act 1963.

(3) This section shall come into force on a date to be appointed by the Governor-General by Order in Council.

30 **21. Amendment to Official Information Act 1982**—The Official Information Act 1982 is hereby amended by inserting, in the First Schedule to that Act, in its appropriate alphabetical order, the following item:

“Takeovers Panel”.

Section 10

SCHEDULE

PROVISIONS APPLYING TO TAKEOVERS PANEL

1. Term of office—(1) Every member of the Panel shall be appointed for such term as the Minister shall specify in the instrument appointing the member, being a term not exceeding 5 years.

(2) A member of the Panel may from time to time be reappointed.

2. Continuation in office after term expires—Notwithstanding clause 1 of this Schedule, every member of the Panel whose term of office has expired shall, unless sooner vacating office under clause 3 of this Schedule, continue to hold office by virtue of the appointment for the term that has expired, until—

(a) That member is reappointed; or

(b) A successor to that member is appointed.

3. Extraordinary vacancies—(1) A member of the Panel may at any time be removed from office by the Minister for disability affecting the performance of his or her duties as a member, bankruptcy, neglect of duty, or misconduct, proved to the satisfaction of the Minister.

(2) A member of the Panel may at any time resign office by giving written notice to that effect to the Minister.

(3) If a member of the Panel dies or resigns or is removed from office, the vacancy created shall be deemed to be an extraordinary vacancy.

(4) An extraordinary vacancy may be filled by the appointment of a person by the Minister in accordance with section 6 of this Act.

(5) A person appointed to fill an extraordinary vacancy shall be appointed for the residue of the term for which the vacating member was appointed.

(6) The powers of the Panel are not affected by a vacancy in its membership.

4. Meetings of Panel—(1) The Chairperson shall convene such meetings of the Panel as he or she thinks necessary for the efficient performance of the functions of the Panel.

(2) Meetings of the Panel shall be held at such times and places as the Chairperson determines.

(3) At any meeting of the Panel the quorum shall be 3 members.

5. Chairperson—(1) The Chairperson shall preside at every meeting of the Panel at which he or she is present.

(2) Where the Chairperson becomes incapable of acting by reason of illness, absence, or other sufficient cause, or during any vacancy in the office of Chairperson, or if the Chairperson considers it not proper or desirable to participate personally in relation to a determination, the Deputy Chairperson shall have and may exercise all the powers, functions, and duties of the Chairperson.

(3) Where the Deputy Chairperson is incapable of acting by reason of illness, absence, or other sufficient cause, or there is a vacancy in the office of Deputy Chairperson, or if the Deputy Chairperson considers it not proper or desirable to participate personally in relation to a determination, the members of the Panel shall, by resolution, appoint 1 of their number to act as Chairperson for the period or purpose stated in the appointment.

(4) A member of the Panel appointed to act for the Chairperson shall, while acting as such, be deemed to be the Chairperson, and shall have and

SCHEDULE—*continued*

PROVISIONS APPLYING TO TAKEOVERS PANEL—*continued*

may exercise all the powers, functions, and duties of that office for the period or for the purpose stated in the appointment.

(5) No appointment of a member of the Panel to act as Chairperson and no act done by that member as such, and no act done by the Panel while any member is acting as such, shall in any proceedings, be questioned on the ground that the occasion for the appointment had not arisen or had ceased.

6. Voting at meetings—(1) All questions arising at a meeting of the Panel shall be decided by a majority of the votes cast by the members present.

(2) The Chairperson shall have a deliberative vote and, in the event of any equality of votes, shall also have a casting vote.

(3) A resolution in writing signed or assented to by letter or telegram or facsimile transmission or telex, by all members of the Panel, shall be as valid and effectual as if it had been passed at a meeting of the Panel duly called and constituted.

7. Procedure—Subject to this Act, the Panel may regulate its procedure in such manner as it thinks fit.

8. Remuneration and travelling allowances—The members of the Panel shall be paid such fees, salaries, and allowances, and such travelling allowances and expenses, as the Panel may from time to time determine with the approval of the Minister.

9. Members not personally liable—No member of the Panel is personally liable for an act or default done or made by the Panel or by any member of the Panel in good faith in the course of carrying out its functions.