Draft Guidance Note

Schemes of arrangement and amalgamations under Part 15 of the Companies Act 1993

A CONSULTATION PAPER
ISSUED BY THE TAKEOVERS PANEL

29 August 2012

TAKEOVERS PANEL

INTRODUCTION

1. The Panel is seeking feedback on a draft Guidance Note relating to schemes of arrangement and amalgamations ("schemes") under proposed new sections 236A and 236B of the Companies Act 1993, intended to be inserted into Part 15 of the Companies Act on enactment of clause 25 of the Companies and Limited Partnerships Amendment Bill currently before the Commerce Select Committee.

2. This paper attaches the draft Guidance Note. It includes questions on which the Panel would like submitters' comments.

3. The proposed new provisions are similar to the schemes legislation that has been in place in Australia for many years. The Panel proposes to follow similar procedures to those followed by the Australian Securities and Investments Commission for the giving of a "no objection statement" which a scheme's promoter(s) can produce to the Court when seeking approval of a scheme. The draft Guidance Note deals with how to apply for a no objection statement and the Panel's process for providing the statement.

4. The draft Guidance Note explains:

   (a) the Panel's role under the schemes provisions proposed to be included in Part 15 of the Companies Act;

   (b) how to apply for a no objection statement; and

   (c) the matters the Panel plans to consider when determining whether to provide a no objection statement.

5. The Panel is currently working with officials to have the references to compromises removed from clause 25 of the Bill. The inclusion of compromises was an error made at the time of drafting the Bill.

6. In addition to responses to this consultation, the proposed Guidance Note may need revision if the Commerce Select Committee recommends changes to the Companies and Limited Partnerships Amendment Bill.

7. The Guidance Note does not extend to long form amalgamations of Code companies under Part 13 of the Companies Act 1993, as the Companies and Limited Partnerships Amendment Bill proposes to prohibit long form amalgamations of Code companies.

Request for comments on this paper

8. The Panel invites submissions on this draft Guidance Note.

9. The closing date for submissions is 26 October 2012.

10. Submissions should be sent to the Takeovers Panel for the attention of Lauren Donnellan:

By email: lauren.donnellan@takeovers.govt.nz

By post: Takeovers Panel
Level 3, Solnet House
70 The Terrace,
P O Box 1171,
WELLINGTON 6011

By fax: (04) 815 8459

Official Information Act

11. Any submissions received are subject to the Official Information Act 1982. The Panel may make submissions available upon request under that Act. If any submitter wishes any information in a submission to be withheld, the submission should contain an appropriate request (together with a clear identification of the relevant information and the reasons for the request). Any such request will be considered in accordance with the Official Information Act 1982.

Guidance Note - Schemes of arrangement and amalgamations under Part 15 of the Companies Act 1993

Purpose of the Guidance Note

1. This Guidance Note explains how to apply for a no objection statement from the Panel under section 236A of the Companies Act 1993. It also explains the Panel's process for giving a no objection statement and the matters that the Panel plans to consider when deciding whether to give the statement. This Guidance Note also covers what would happen if the Panel does not give a no objection statement for a scheme proposal.

Background

2. Schemes of arrangement and amalgamations under Part 15 of the Companies Act ("schemes") are statutory Court-approved procedures that allow the reorganisation of the rights and obligations of shareholders and companies. Schemes involving Code companies are now regulated under sections 236A and 236B of Part 15 of the Companies Act.

3. Since the coming into force of sections 236A and 236B of the Companies Act, a Code company may not amalgamate under sections 220 and 221 of the Companies Act. The provisions do not cover 'short form' amalgamations under section 222 and pro-rata share cancellations that do not affect the holding or control of voting rights. An amalgamation involving a Code company can, however, be achieved under Part 15 as a scheme.

4. The section 236A and 236B schemes provisions were introduced to better align the schemes procedure under the Companies Act with the protections for shareholders under the Takeovers Code. The schemes provisions align New Zealand's Code company reconstruction law more closely with the Australian regime.

5. Under section 236A, the Court cannot approve a scheme that has any effect on the voting rights of a Code company unless:

   (a) it is satisfied that the shareholders of the Code company will not be adversely affected by the use of a scheme rather than the Code to effect the change involving the Code company; or

   (b) a statement in writing by the Panel that it has no objection to the scheme is produced to the Court.

6. The purpose of the Panel's no objection statement is to signal to the Court that the Panel is satisfied that the shareholders are not adversely affected by the use of the schemes provisions rather than the Code.

7. In New Zealand, some unopposed schemes are considered by the Court 'on the papers', and there is no actual hearing. The Panel is not averse to this practice provided that, for schemes involving Code companies, the Panel has given a no objection statement.

The Panel's approach

8. The Panel views schemes as a legitimate and valuable means for undertaking complex corporate transactions in New Zealand. The ability to carry out corporate transactions under a Companies Act process, rather than under the Code, provides economically sensible commercial flexibility.

9. The Takeovers Act and the Code set out the rules for disclosure of information and equitable treatment for all shareholders involved in Code-regulated transactions. It is these rules that guide the Panel's consideration of the extent to which a scheme proposal may or may not adversely affect shareholders.

10. The Panel will have regard to the Code's disclosure requirements and the extent to which there are separate interest classes of shareholders under a scheme proposal of which it is notified. As with takeovers under the Code, the Panel will express no views on the merits of a scheme.

11. The Panel encourages potential applicants for a no objection statement to undertake early engagement with the Panel executive. The Panel's staff are happy to discuss draft proposals and review early drafts of documents on a confidential basis, in much the same way as the Panel's staff review draft Code transaction documents.

The Panel's role

12. The Panel's role in a scheme is to assist the Court by:

    (a) reviewing scheme documents, to ensure that appropriate information is placed before shareholders and that associates and interest classes of shareholders have been adequately identified; and

    (b) helping to ensure that matters that are relevant to the Court's decision are properly brought to the Court's attention.

13. The Panel may make submissions to the Court in relation to a proposed scheme proposal whether or not it has given a no objection statement. However, it will be less likely that the Panel would wish to appear if it has given a no objection statement.

14. It is likely that the Panel *would* wish to appear and make submissions to the Court if it has not provided a no objection statement.

15. The Panel will object to a scheme proposal involving a Code company if:

    (a) the scheme documents do not meet the disclosure requirements outlined in this Guidance Note; or

    (b) the interest classes amongst the shareholders for the purposes of voting on the resolution to approve the scheme, have not been properly identified.

How to apply for a no objection statement

Engage an independent adviser

16. The Panel will provide a no objection statement only for scheme proposals that are accompanied by an independent adviser's report on the merits of the transaction for each class of shareholders, and for each interest class of those shareholders, who will be asked to vote on the scheme.

17. The independent adviser must be approved by the Panel for the purposes of drafting the report. Full details of the Panel's policy and practice on approvals for independent advisers and reviewing independent adviser reports are contained in the *Guidance Note about the role of independent advisers*, which is available on the Panel's website (www.takeovers.govt.nz).

Early contact with the Panel is essential

18. Under section 236A of the Companies Act, the applicant for final Court orders for a scheme under section 236(1) of the Companies Act must notify the Panel of the application at the same time as filing the application in Court.

19. However, to ensure that the Panel has had time to review the scheme documents and consider whether it would give a no objection statement, the scheme's promoter(s) should provide draft scheme documents and any supporting material to the Panel well in advance of the application to the Court for *initial* orders under section 236(2) of the Companies Act.

20. The time it takes to process an application will depend on the nature and quality of the application, and the resources available within the Panel. When making an application, the dates by which the applications for initial Court orders and final Court orders are intended to be filed need to be specified. The Panel will do its best to meet reasonable timeframes.

21. If the Panel has not had adequate time to consider the scheme documentation, the Panel would be unlikely to give a no objection statement. If no application for a no objection statement has been made, or if the Panel does not intend to issue a no objection statement to an applicant, the Panel would seek to be heard at the Court proceedings. There, the Panel may object to the scheme or ask the Court to make orders on the information for shareholders or on the identification of interest classes of shareholders, etc.

Complex or novel issues

22. In applications for a no objection statement from the Panel, promoter(s) should carefully explain any complex or novel issues, or areas of uncertainty, concerning the scheme or its impact on shareholders. The better the Panel understands the issues, the more readily it will be able to decide whether or not it objects to the scheme on the basis of the adequacy of the disclosures to be made to shareholders or the identification of interest classes of shareholders for the purposes of their voting on the scheme.

23. Issues that the promoter(s) of a scheme should also bring to the Panel's attention include any difficult or novel questions of law, for example, where a legal opinion has been obtained on the question, or other legal or financially relevant matters on which expert advice has been obtained.

Apply for a no objection statement and send supporting documents to the Panel

24. An application for a no objection statement should include the following information:

(a) who is applying;

(b) an explanation of the terms of the proposed scheme and its effects on the holders and controllers of voting securities in the subject Code company;

(c) a draft notice of meeting together with a draft explanatory memorandum, and if applicable any draft prospectus or investment statement or similar securities law disclosure document, that contains or is accompanied by:

(i) the appropriate disclosures, described in paragraphs 46 - 47 below. Applicants should also identify the disclosures contained in Schedules 1 and 2 of the Code that, in their view, would apply, whether in whole or in part, to the particular scheme proposal;

(ii) a report from an adviser whom the Panel considers is independent and who is approved by the Panel for the purpose of writing the report;

(d) the timeframe for applying for initial Court orders and final Court orders; and

(e) whether there are any Panel members that may be conflicted in relation to the application.

25. See the section below "Matters Panel takes into account in determining whether to provide a no objection statement" at paragraphs 43 - 59 for more detail on what the Panel would expect to see in an application.

Fees

26. Under the Takeovers (Fees) Regulations 2001 the Panel is able to charge for certain aspects of its work, including the processing of no objection statement applications.

[**The Panel understands that the regulations will be amended to allow for this work to be charged to the applicants, by the time the Bill is passed. If this does not happen, the Panel will not be able to charge applicants**].

27. The usual hourly rates, set out in the Takeovers (Fees) Regulations 2001, apply for the time of staff and Panel members for considering a no objection statement application. Applicants will be billed monthly.

Procedure

Letter of Intention

28. If the Panel provides a no objection statement it will be issued to the applicants just prior to their filing for the second Court hearing, at which the Court makes final orders regarding the scheme (usually to approve the scheme and give effect to it). This ensures that the Panel has had an opportunity to observe the entire scheme process and satisfy itself that there have been no material changes to the information it considered in advance of the hearing for initial Court orders.

29. However, the Panel recognises that the promoter(s) of a scheme may want to be able to give an indication to the Court, at the initial hearing, of the Panel's views on the scheme. If the Panel has been satisfied with the draft scheme documentation, and with the identification of the interest classes of shareholders, it will be likely to have no objection to the scheme. The Panel will provide a letter prior to the first hearing ("letter of intention") for the promoter(s) to produce to the Court indicating that the Panel is minded to issue a no objection statement on the basis of the information received at that stage.

30. The letter is likely to be in a form similar to that set out in Schedule A of this Guidance Note.

31. The Panel's position set out in the letter of intention will be based on the information provided by the scheme's promoter(s), and may change if the scheme's circumstances change. The Panel's position *will* change if a person engages in misleading or deceptive conduct, or in conduct that is likely to mislead or deceive, in relation to the scheme. The Panel's approach to rule 64 of the Code provides an indication of the sorts of conduct the Panel would consider to be misleading or deceptive for a scheme.[1]

Panel's no objection statement

32. The Panel is not required under the Companies Act to provide a no objection statement and scheme promoter(s) are not required to apply for a no objection statement. The Panel will consider providing a no objection statement only at the request of an applicant.

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[1] Rule 64 provides that :

(1) A person must not engage in conduct that is—

(a) conduct in relation to any transaction or event that is regulated by the Code; and

(b) misleading or deceptive or likely to mislead or deceive.

(2) A person must not engage in conduct that is—

(a) incidental or preliminary to a transaction or event that is or is likely to be regulated by the Code; and

(b) misleading or deceptive or likely to mislead or deceive.

Code Word 22, which is available on the Panel's website (www.takeovers.govt.nz) discusses how the Panel applies this rule to Code-regulated transactions.

33. When providing a no objection statement, the primary question the Panel will consider is whether shareholders are adversely affected by the transaction being implemented by a scheme rather than by a takeover under the Code.

34. The Panel will state in writing that it has no objection to a scheme if an applicant satisfies the Panel that:

    (a) all material information relating to the scheme proposal has been disclosed;

    (b) the standard of disclosure to, and processes for, all shareholders has been equivalent to the standard that would be required by the Code in a takeover;

    (c) the interest classes of shareholders were adequately identified; and

    (d) there are no other reasons to oppose the scheme, and the other matters referred to in this Guidance Note have been complied with.

35. The Panel's no objection statement is likely to be in a form similar to that set out in Schedule B of this Guidance Note.

Panel Court appearances

36. If the Panel does not give a letter of intention in relation to the scheme, the Panel would likely seek to be heard at the initial Court hearing.

37. The Panel will ordinarily not appear at the second hearing if it has no objection to the scheme.

38. The Panel may seek to appear before the Court if:

    (a) there are issues that the Panel considers should be raised before or addressed by the Court;

    (b) it has become aware of conduct that, if it were in relation to a matter regulated by the Code, may breach rule 64 of the Code or section 44 of the Takeovers Act;[2] or

    (c) it has concerns about the conduct of the scheme meetings.

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[2] See footnote 1 above in relation to rule 64 of the Code. Section 44 of the Takeovers Act provides:

(1) A person must not—

(a) furnish information, produce a document, or give evidence to the Panel or a member, officer, or employee of the Panel knowing it to be false or misleading; or

(b) attempt to deceive or knowingly mislead the Panel or a member, officer, or employee of the Panel in relation to any matter before it.

Objection by a shareholder

39. The Panel may consider an objection by a shareholder or other interested party to a scheme proposal when determining whether to provide a no objection statement. The Panel will treat applications for a no objection statement in confidence, so this situation would only be likely to arise where the scheme promoter(s) or "target" company have published that a no objection statement is being sought, or after the initial hearing when the scheme documents have been sent to shareholders (including any letter of intention from the Panel).

40. Under section 236A of the Companies Act the Court is entitled to rely on the no objection statement to approve a scheme. However, the no objection statement is based on the Panel's view of the disclosure of information and the scheme process (for example, the proper identification of interest classes of shareholders). The Court does not have to approve a scheme merely because a Panel no objection statement has been produced to the Court.

41. The Panel will express no view on the merits of the scheme. Shareholders will always need to form their own view on the merits of the scheme, having regard to the disclosures made, including in the independent adviser's report(s).

42. Under the Companies Act, shareholders will continue to be entitled to make submissions to the Court on the scheme whether or not a no objection statement is given.

Matters the Panel takes into account in determining whether to provide a no objection statement

Identification of participants

43. The Panel will review the scheme documents to ensure that they identify the criteria and the date for determining:

    (a) the persons who are to participate in the scheme;

    (b) the persons who are entitled to vote at the meeting of scheme participants (including interest classes); and

    (c) the persons who will be bound by the scheme if it is approved by the Court.

Notice of meeting

44. The Panel would expect the notice of meeting sent to shareholders to fairly and fully inform the recipients of:

    (a) the proper business of the meeting; and

    (b) the scheme proposed for each class of security that is subject to the scheme.

Explanatory memorandum

45. The Panel would expect the explanatory memorandum for shareholders to contain the following information:

(a) a clear introduction;

(b) a summary of the transaction;

(c) the reasons for the scheme being undertaken;

(d) particulars of the key documents relating to the scheme, including any conditions that need to be met for the scheme to take effect;

(e) a proposed timetable for completion of the scheme;

(f) a clear description of the statutory voting thresholds;

(g) a statement regarding whether a no objection statement from the Panel has been applied for; and

(h) the rights of shareholders to object to the Court.

Disclosures

46. The Panel would expect the promoter(s) and subject Code company to make the disclosures contained in Schedules 1 and 2 of the Code or those contained in rule 15 or rule 16 of the Code (modified in each case as appropriate).

47. The scheme's promoter(s) and associates should contact the Panel executive early in the process to agree what relevant disclosures should be made in light of that particular scheme.

Interest classes

48. Under the common law, and in accordance with section 236A of the Companies Act, a scheme must be considered and voted on at separate meetings by each interest class affected by the scheme. The requisite voting threshold needs to be achieved in each interest class if the scheme is to succeed.

49. When a scheme involves separate interest classes, the Panel expects the division of classes to be clearly specified in the scheme documents and disclosed in the explanatory memorandum, together with an explanation of why the divisions have been drawn.

50. Schedule 10 to the Companies Act sets out the principles for the division of shareholders into interest classes. The key message is that classes for voting on a scheme are determined by taking into account the rights and obligations of shareholders and the effect of the scheme on them. Accordingly, if the scheme would result in a different effect for a group of shareholders, that group of shareholders should be considered as a different interest class for the purposes of voting on the

scheme. The Panel will not be aiming to have different interest classes identified unnecessarily.

Voting

51. The voting requirements must be disclosed in the scheme documents, consistently with the requirements of section 236A(4) of the Companies Act.

52. For the purposes of section 236A(4), the Code company's shareholders may only approve the scheme by a resolution approved by a majority of 75% of the votes of the shareholders in each interest class entitled to vote and voting on the question ("the shares voted at the meeting"). The resolution must also be approved by a simple majority all of the eligible voting rights ("the total voting rights").

53. At a practical level, points to note are that valid votes by proxy should be included for counting the shares voted at the meeting. The total voting rights are counted by aggregating all of the valid votes cast. If these votes taken together equate to more than 50% of the Code company's relevant total voting rights, then the voting threshold for approving the resolution has been met (if the 75% threshold has also been met by each interest class).

Option holders

54. The Panel considers that the information that option holders require when considering whether or not to approve a scheme should be of the same standard as the information provided to shareholders.

Offers of scrip

55. Where the scheme involves securities as consideration, the shareholders should be provided with sufficient information about the securities to allow them to decide how they will vote on the resolutions put before them. The independent adviser's report will need to consider the merits of the scrip consideration, and may include a valuation particularly if the scrip offered is not listed and frequently traded. The Panel would expect to review drafts of the regulatory documents for the scrip consideration at the time a no objection statement was applied for.

Third parties

56. Some schemes are part of transactions that depend on the actions of third parties, for example, scheme consideration may be issued by an entity that is not otherwise a party to the scheme.

57. The Panel would expect that third parties in these situations should be made legally bound to fulfil their obligations. For example, the Panel may request that a third party become contractually bound to provide the relevant benefits.

58. Depending on the significance of the third party arrangements to the scheme, the promoter(s) may need to submit relevant documentation to the Panel for its consideration and, in certain cases, explain the arrangements in the explanatory memorandum for shareholders.

59. The Panel will examine any disclaimer, release or indemnity provided to any person participating or otherwise involved in the scheme to ensure that it does not unnecessarily erode the effect of the scheme.

Questions

1. Should the Guidance Note address any other issues? If so, please provide your suggestions and reasons.

2. Do you have any comments on the guidance for how to apply for a no objection statement?

3. Is the guidance on disclosures required to be made in the scheme documents clear? What are your suggestions for improving our guidance on disclosures?

4. Any other comments?

Schedule A

Letter of Intention

I refer to the scheme of arrangement between [insert name of company] and its [shareholders / option holders / specify particular class of shareholders or option holders]. [insert further details of the scheme of arrangement if necessary] ("scheme of arrangement").

The Takeovers Panel, based on the information that has been provided to the Panel, intends at this stage to issue a no objection statement in respect of the above scheme of arrangement.

The Panel expresses no view on the merits of the scheme of arrangement.

This advice is given having regard to the Panel's policy on schemes of arrangement as set out in the Panel's Guidance Note "Schemes of arrangement and amalgamations under Part 15 of the Companies Act 1993", dated [X].

Yours faithfully

Schedule B

No objection statement

I refer to the [scheme of arrangement] between [insert name of company] and its [shareholders/option holders/specify particular class of shareholders or option holders]. [insert further details of the scheme of arrangement if necessary] ("scheme of arrangement").

The Takeovers Panel has no objection to the scheme of arrangement, based on the information that has been provided to the Panel.

The Panel has considered the disclosures made by the parties to the scheme of arrangement, the process and the rights and protections relevant interest groups would have had if the scheme of arrangement was conducted under the Takeovers Code.

The Panel expresses no view on the merits of the scheme of arrangement.

This advice is given having regard to the Panel's policy on schemes of arrangement as set out in the Panel's Guidance Note "Schemes of arrangement and amalgamations under Part 15 of the Companies Act 1993", dated [X].

Yours faithfully