

Takeovers Panel recommends technical changes to the code

The Takeovers Panel has finalised policy for a package of amendments to the Takeovers Code. Key among these are:

- more disclosure requirements on bidders regarding their commercial intentions for the target company
- a prohibition on imposing any conditions which would restrict the target company's ability to carry out its ordinary business, and
- an automatic two-week extension of the offer if minimum acceptance conditions are met or waived in the final week of the offer period.

The Takeovers Panel has, over the past three years, published a series of consultation papers concerning amendments to the Takeovers Code and last week made its final recommendations¹ to the Minister of Commerce.

Many of these proposals are technical in nature but some will be of direct interest and relevance to market participants. We discuss the more significant changes below.

Disclosure of the bidder's intentions for the target company

The Code currently requires a bidder to include in the offer document a statement of:

"...the general nature of any material changes likely to be made by the offeror in respect of the business activities of the target company..."

The Panel has concerns both about the quality of the disclosures made in response to this requirement and that bidders may make statements to regulators (such as the Overseas Investment Office) about their intentions without disclosing those intentions to target company shareholders.

Recommendations are that bidders be required to include in their offer documents:

- a statement of intentions regarding any material changes to the business activities, material assets and capital structure (including any intended changes in dividend policy, the raising of capital and the taking on of debt) of the target company
- any other information about the likelihood of changes to the target company that could reasonably be expected to be material to an offeree's decision to accept or reject the offer, and
- a statement to the effect that the information in the offer document concerning the bidder's intentions for the target company is consistent with any information provided by the bidder to a New Zealand or offshore regulator.

If a bidder has no intentions in respect of the target company regarding the matters above, it will be required to include a statement to that effect in its offer document.

The statement is not required if the offer is subject to a 90% minimum acceptance condition that cannot be waived (i.e. the offer will either result in the target company being privatised, or it will fail). This exception will remain.

Restrictive conditions

The Takeovers Panel has, for the past several years, taken the view that conditions to a takeover offer that restrict a target company from carrying out activities that are part of its ordinary business may be conditions that are within the judgement or control of the offeror and, therefore, not permitted by the Code.

Conditions of this type place the directors of target companies in a difficult position as they are torn between their obligation not to act in a manner that would potentially breach a condition (which could be a breach of the Code's prohibition on defensive tactics) and their obligations to the target company and its shareholders.

To address this issue the Panel is recommending an amendment to the Code that would effectively prohibit any condition which purports to restrict the target company from carrying out activities in the ordinary course of its business.

In addition, the Code would prohibit a bidder from relying on a condition "unreasonably".

Automatic Offer Period Extension

An issue has arisen in several takeover bids where the offer's minimum acceptance condition is satisfied towards or at the end of the offer period.

This can result in target shareholders, who would like to accept the offer given the likelihood that the takeover will proceed, losing the opportunity to do so before it expires. Target shareholders may also be "rushed" into accepting an offer in these circumstances.

The Panel is recommending amendments to the Code that will result in an offer being automatically extended by 14 days if an offer's minimum acceptance condition is satisfied or waived during the final seven days of the offer period.

Other Amendments

Further changes recommended by the Panel include:

- amendments clarifying the rules applying to partial offers, including making mandatory a recent exemption notice² extending scaling of shares to beneficial owners of custodians
- a requirement that bidders provide an update on the status of offer conditions, no later than seven days, and no earlier than 14 days, before the end of the offer period

- amendments to the Code and the Takeovers Act 1993, prompted by the High Court's decision in the Marlborough Lines expense reimbursement case, to establish the Panel's authority to adjudicate disputes concerning the recovery from bidders of target company takeover expenses, and
- various technical and definitional amendments.

Chapman Tripp comments

Despite the proposed changes, bidders may still be inclined to disclose as little as possible with respect to their intentions. This lack of disclosure often reflects a true uncertainty on the part of bidders as to their intentions for a target company.

The Panel has indicated that it will be applying the Code's prohibition on misleading or deceptive conduct to statements of intention, meaning that conduct inconsistent with a statement of intention could attract Panel sanctions.

This, combined with the consistency requirement relating to information in the offer document and given to regulators, will mean that bidders will need to be especially cautious when disclosing their intentions for the target company.

The question of what conduct could fall within the recommended "ban" on offer conditions that restrict a target company from carrying out activities in the ordinary course of business seems ripe for dispute.

Similarly, the proposed restriction on bidders "unreasonably" relying on conditions could be fertile ground for controversy as the Panel has indicated that a "minor" or "commercially insignificant" event would likely not justify invoking or relying on a condition. Whether an event is minor or commercially insignificant seems open to debate.

For the most part the Panel's proposed amendments are welcome, and will serve to address a number of substantive and technical deficiencies in the Code.

The recommendations are expected to come into force before the end of this year. While the changes to the Act will take longer, it is encouraging that they are still expected to be largely achieved within three years. This compares to the first set of technical changes³ which took more than four years to become law.

Footnotes

1. <http://www.takeovers.govt.nz/downloads/takeover-tech-amendments-aug12.pdf>
2. <http://www.takeovers.govt.nz/exemptions/en-partial-offers.php>
3. <http://www.takeovers.govt.nz/publications/code-word/code-word-20.pdf>

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