TO: THE TAKEOVERS PANEL

ON: PROPOSED AMENDMENTS TO THE TAKEOVERS CODE OCTOBER 2016

A TAKEOVERS PANEL CONSULTATION PAPER

2 December 2016

INTRODUCTION

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ABOUT CHAPMAN TRIPP

3 Chapman Tripp is a leading law firm with offices in Auckland, Wellington and Christchurch, with a strong practice in commercial and corporate law, including mergers and acquisitions and initial public offerings. We act for equity and debt issuers, investors, arrangers, trustees, derivative market participants and other intermediaries on a broad range of domestic and international capital markets transactions. We regularly act for offerors, targets and other participants in transactions governed by the Takeovers Code.

SUBMISSIONS TO CONSULTATION PAPER

4 We have submitted on each of the feedback questions included in the Panel's consultation paper dated October 2016 (the *Consultation Paper*).

5 We address each of the Panel's feedback questions below. Note that the question numbering follows the Panel's submission template and not the numbering used in the Consultation Paper.

Section One: Substantive Amendments

Reducing the cost of Code Compliance for "Small Code Companies"

Q1: What are your views on whether the Code prevents small companies from raising capital or undertaking other share transactions? Please give examples.

6 We refer to our earlier submissions on the impact of Code requirements on small companies.

7 It is probably not the case that the Code "prevents" small companies from raising capital or undertaking other share transactions. Instead the Code imposes a level of cost, complexity and delay that at a minimum increases the difficulty of raising capital

and at the margins dissuades small companies from pursuing capital raisings in favour of alternatives not regulated by the Code (i.e. instruments which avoid voting rights).

8 Given's the Panel's expressed comfort with companies avoiding the Code (e.g. through nominee structures) a well-advised small growth company would be taking advantage of these structures to avoid the Code entirely – we're aware of several small growth companies doing just this in a crowd-funding context.

9 From a policy perspective it would be better for small companies to be carved out of the Code by an assets test (i.e. Option 3), with the Code then applying at an appropriate stage in the company's lifecycle, while also maintaining the ability for companies to opt out of the Code entirely (through structuring) should they so wish.

10 We have been advocating a return to an assets test in the definition of Code Company throughout our submissions on the Panel's series of "small Code companies" consultation papers.

Q2: Do you agree with the Panel's estimates of the costs of transactions under the Code?

Q3: Given the current policy settings for the capital markets, do you agree that the costs outweigh the benefits of Code compliance for small unlisted Code companies? Please give your reasons.

11 The Panel's numbers largely align with our experience, although the efficient use of advisers could result in lower costs in some cases. We strongly agree with the statement that, for small Code Companies, the costs of Code compliance may outweigh the benefits. Applying a regime designed for significant listed and unlisted companies to small companies, with the attendant complexity, cost and delay, is *obviously* inappropriate, we think.

Q4: Do you agree with the Panel's view that Option 2 (the "Code light" regime described in paragraphs 29 to 34 of the Consultation Paper) would increase the overall complexity of the Code for small Code companies? Please give your reasons.

12 Yes – by definition the proposal is complex, with its back and forth between company and shareholders perhaps assuming a greater level of shareholder interest and activism than is often the case. More importantly it would do nothing to dissuade the emerging trend of structuring out of the Code, which can't be a positive outcome if compliance with the Code by unlisted companies of substance (which presumably a number of currently small unlisted Code companies will become) is a goal the Panel is concerned with.

Q5: Do you agree with Option 3 (change the definition of "Code company to exclude small-by-value unlisted companies" as set out in paragraphs 43 – 46 of the Consultation Paper)? Please give your reasons.

Q6: Do you agree with the proposed transitional arrangements for the Option 3, the preferred option, set out in paragraph 41 of the Consultation Paper?

Q7: Do you have a proposal (that the Panel has not included) that would better reduce compliance costs and also meet the Panel's other Policy Objectives? If so, please provide the possible key features of that proposal and some analysis of how it would meet the Panel's Policy Objectives.

13 We support a move back to including an assets test in the definition of Code company, for the reasons outlined above and in our earlier submissions on this topic.

14 The proposed transitional arrangements are uncontroversial.

15 However, is $20 million in assets the correct threshold? Any dollar threshold like this is unavoidably arbitrary. $20 million is the original number used in the 2001 Code – applying 1.5% average inflation (for argument's sake) over a 15 year period (compounded yearly) gives $25 million. Why not adopt $25 million, or at least a similar round figure acknowledging the effects of inflation over an extended period?

"Days" in the Code

Q9: Do you have experience of detrimental effects being caused by takeovers or compulsory acquisitions occurring over a holiday period? If yes, please describe the detriment caused, and to whom, and give your views as to how the Code's timing rules caused this detriment.

Q10: Do you agree with the Panel's analysis of Option 1 (maintaining the status quo as found in paragraphs 63 to 66 of the Consultation Paper)? If not, please give your reasons.

Q11: Do you agree with the Panel's view that there would be no real benefit to amending the Code to the effect that takeovers, and compulsory acquisitions involving a voluntary sale process, occurring over the Christmas holiday period are given extra days? Please give your reasons

Q12: Do you agree with the preferred Option (stating timing provisions as "working days" as described in paragraphs 71 to 76 of the Consultation Paper)? Please give your reasons. If you have a proposal that would better resolve the problem, please provide its key features and your analysis of how it would meet the Panel's policy objectives.

16 We and other advisers have on occasion been inconvenienced by the Code's approach to "days". By itself this would not be a good reason to adopt a working days approach. We are also aware of company directors and management being inconvenienced by the Code's approach to timing.

17 We think the better focus is on whether the Code's calendar days approach compromises the ability of Code companies to adequately comply with the Code and shareholders' ability to assess and consider their actions in response to a Code transaction. We are not aware of any actual evidence of a problem, although a logical argument can be constructed that one could exist, as the Panel has done in the Consultation Paper.

18 The Panel's preferred option is inoffensive, although somewhat inconveniencing to bidders contemplating transactions around holiday periods.

Electronic Access for Shareholders

Q13: Do you agree that there is a problem regarding low usage of electronic communications under the Code? Please give your reasons.

Q14: Do you agree with the Panel's preferred Option (introducing electronic communication as described in paragraphs 91 to 95 of the Consultation Paper)? Please give your reasons, particularly if you disagree.

19 We agree there is an issue, particularly given recent changes to NZ Post's delivery schedule.

20 We support the Panel's preferred option, although query whether the Panel should maintain Code-related documentation on its website, particularly for unlisted companies.

21 Thought should also be given to requiring recipients of shareholder email addresses to only use those addresses for a proper Code-related purpose – email addresses are a valuable commodity which could, subject to Privacy Act limitations, be misused (e.g. sold to marketing lists).

Section Two: Technical amendments of low policy content

Q15: Do you agree with the Panel's suggested resolution of each of the following low policy content amendments? If not, please explain why.

22 **Controller of the offeror:** Care should be taken with what is meant by "control". We suggest including a concept of effective or practical control, to avoid situations where offerors are required to name persons or entities at the top of large corporate trees who, although having the technical capacity to control the offeror, do not in fact do so as a practical matter. This concept (and relevant language) is acknowledged in the definition of control used in Schedule 1 (see clause 48) of the Financial Markets Conduct Act 2013.

23 **Clause 14, Schedule 1:** The proposed solution seems more complex than the problem being solved (if there is a problem). Requiring a person to make a statement that "the person is not required to give, and has not given, any information to any regulatory body (in New Zealand or in an overseas jurisdiction), other than the Panel, in relation to the offer" is asking a lot of offerors. What if the person *becomes* required to give information to a regulator? The wording "any information" to "any regulatory body" is very broad. We could see time and effort going into discussing this issue with offerors, for little apparent gain; we would be surprised if the inclusion of this statement has resulted in actual confusion among offerees.

24 **Clause 7, Schedule 1:** No comments.

25 **Related company of Offeror:** No comments.

26 **Copies of reports:** No comments.

27 **Persons increasing control:** No comments.

28 **Rule 3A(2):** No comments.

29 **Access to share register:** This proposed rule (particularly the broad wording "contacting other shareholders in respect of a Code-regulated transaction" in clause (1) – does that include making offers to buy their shares?) could enable makers of "low-ball" offers, for example, to get around the restrictions placed on their activities by the court decisions referenced in the Consultation Paper. We query whether it is appropriate for the Code to cut across the Companies Act in the manner suggested.

30 **Timing rules**: No comments.