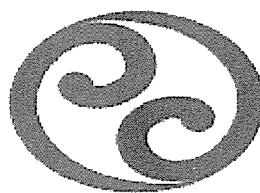


*Ministry of* **Economic  
Development**



*M a n a t ū Ō h a n g a*

**REVIEW OF THE FUNCTIONS  
OF THE  
SECURITIES COMMISSION  
AND TAKEOVERS PANEL**

**DISCUSSION DOCUMENT**

May 2001

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## **Process**

This discussion paper has been prepared by the Ministry of Economic Development following consultation with other government officials and agencies. Written submissions on the issues raised in the discussion paper are invited from all interested parties. The closing date for submissions is **Friday, 7 July 2001**. After receipt of submissions they will be evaluated and further comments sought as required before the Ministry develops recommendations for the government to consider.

Submissions should be sent to:

Review of the Functions of the Securities Commission  
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## **Official Information and Privacy Act Requirements**

Please note that the contents of submissions provided to the Ministry in response to this discussion paper will be subject to the Official Information Act 1982 and the Privacy Act 1993. If the Ministry receives a request for information contained in a submission, it would be required to consider release of the submission, in whole or in part, in terms of the criteria set out in these Acts.

In providing your submission, please advise if you have any objections to the release of any information contained in your submission, and, if you do object, the parts of your submission you would wish withheld, and the grounds for withholding.

## **Disclaimer**

Any statements made or views expressed in this discussion paper are those of the Ministry of Economic Development and do not reflect official government policy.

Readers are advised to seek specific advice from a qualified professional before undertaking any action in reliance on the contents of this discussion paper. While every effort has been taken to ensure that the information set out in this paper is accurate, the Crown does not accept any responsibility whether in contract, tort, equity or otherwise for any action taken, or reliance placed on, any part, or all, of the information in this paper or for any error in or omission from this paper.

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## Summary of Questions for Submissions

The questions for submissions are found at the end of each of the relevant sections in the discussion document, as well as here in summary form.

We would appreciate it if submissions could refer to the question numbers and outline all the reasons why, or why not, certain proposals should be accepted or rejected.

### Questions for Submissions

1. Should the Securities Commission be able to undertake inspections to ascertain whether a breach of the Securities Amendment Act 1988 has occurred? Should the Securities Commission also be able to undertake inspections in relation to the Securities Act 1978?
2. Should the Registrar retain its current inspection powers in relation to the Securities Act 1978? Should these powers be extended to secondary market inspections?
3. Should the requirement that the "Responsible Minister" agree to the Securities Commission complying with an overseas request for inquiry be removed?
4. Should the Commission be given the ability to specify conditions in relation to confidentiality orders under section 19(5) of the Securities Act 1978?
5. Should section 28 of the Securities Act 1978 be extended to include protection of information held by the Commission?
6. Should section 15 of the Securities Act 1978 be amended to allow the Commission to convene meetings using telecommunication equipment?
7. Should the Securities Commission be given the ability to sit in divisions?
8. Should the requirement under section 18 and section 18A of the Securities Act 1978 that evidence be received "at any meeting of the Commission" be removed?
9. Are there any other improvements or additions that might be made to the Commission's monitoring and investigative functions that could assist the Commission in better monitoring and investigating breaches of securities law?
10. Should the Commission's powers in relation to responses to overseas requests for assistance, be extended to accord with any new powers in relation to monitoring and investigation that the Commission is given domestically?
11. Should the Takeovers Panel, rather than the Registrar of Companies, be able to undertake inspections to ascertain or establish whether a breach of the Takeovers Act 1993 has occurred?

12. Should the Takeovers Panel be given the power to co-operate with overseas takeovers bodies?
13. Should the Takeovers Panel be given the ability to specify conditions in relation to confidentiality orders under section 13(1) of the Takeovers Act 1993?
14. Should the requirement under section 9 of the Takeovers Act 1993 that evidence be received "at any meeting of the Panel" be removed?
15. Are there any other improvements or additions that might be made to the Panel's monitoring and investigative functions that could assist the Panel in better monitoring and investigating breaches of takeovers law?
16. If the Panel were to be given the power to co-operate with overseas takeovers bodies, should any powers the Panel is given be made to accord with the powers in relation to monitoring and investigation that the Panel has domestically?
17. Should the Securities Commission be given the ability to issue one/more of the policy statements, undertakings, guidelines etc outlined in the enforcement section?
18. Should the Takeovers Panel be given the ability to issue one/more of the policy statements, undertakings, guidelines etc outlined in the enforcement section?
19. Should the Takeovers Panel be able to make unacceptable circumstances declarations and orders like the Australian Corporations and Securities Panel?
20. Should the Takeovers Panel have the power to review its own decisions and have decisions referred to it from the Court?
21. We would be interested in any views you may have about whether there are any problems with the operation of any of the functions of the Securities Commission, besides monitoring, investigation and enforcement. If you can identify any problems, what changes could be made to address these problems?
22. We would be interested in any views you may have about whether there could be any problems with the operation of the functions of the Takeovers Panel. If you can identify any problems, what changes could be made to address these problems?
23. We would be interested in any comments or suggestions you may have in relation to:
  - Whether there are any changes that could be made to the powers/functions of any of the organisations that operate in the securities market, in relation to their role in securities market issues, to ensure that they are able to operate effectively and efficiently?; and
  - Whether there are changes that could be made to ensure that these organisations work together effectively to facilitate efficient regulation of the

market?

24. What, if any, sort of law reform function should the Securities Commission have?

25. What, if any, sort of law reform function should the Takeovers Panel have?

# Introduction

## Executive Summary

1 The Government has identified as one of its key objectives promoting confidence in the New Zealand sharemarket. This objective involves ensuring that the regulatory bodies in the market are robust and provide adequate protection from unscrupulous practices. Effective regulatory bodies can not only act as a deterrent against undesirable practices but can also give confidence to both domestic and international investors that the rules are enforced and that the integrity of the market is maintained.

2 The environment of our securities market is changing. The government has agreed to, and is in the process of implementing, regulatory reforms designed to increase confidence in our securities market. One of these reforms has resulted in the Securities Commission ("the Commission") being given a public civil enforcement role for insider trading. Law reform currently under consideration in the areas of continuous disclosure and market manipulation may lead to additional enforcement functions for the Commission.

3 By giving the Commission a civil enforcement role in relation to insider trading, the government is shifting the Commission from its focus on monitoring our existing law and providing administrative comment towards a more active enforcement role ensuring compliance with our securities law. In order for the Commission to effectively undertake these new enforcement functions, it will need to be given further powers in relation to monitoring, investigation and enforcement. When considering what additional powers are required for the Commission to be able to effectively enforce the law, it is also important to consider whether the Takeovers Panel ("the Panel"), the other main regulator of the securities market, also has sufficient enforcement powers. Part III of this discussion document outlines proposals to improve both the Panel and Commission's monitoring, investigation and enforcement powers.

4 Internationally there have also been significant developments in the securities arena. With improvements in electronic commerce and trends towards cross border trading there is an impetus for the securities regulators to be able to co-operate internationally in the detection, investigation and enforcement of securities market breaches. There is also pressure for governments to enter into arrangements and joint policy processes, and develop policy consistent with internationally agreed norms and principles. When considering the powers the Commission and the Panel should have in relation to monitoring, investigation and enforcement it is important to consider whether these powers allow our regulatory bodies to co-operate adequately with other countries and whether the government has the freedom to move with these international developments. In view of our Memorandum of Understanding on Co-ordination of Business Law with Australia, and the obvious advantages of co-ordinating New Zealand and Australian securities law, the Ministry of Economic Development will give particular attention to the Australian law when considering the issues.

5 The government's decision to utilise the Commission as an enforcement agency also raises questions regarding the 'fit' of these new functions with its current functions. There must be consistency and accountability in relation to the operation of a body's functions in order for it to be robust and effective. It is important to determine whether there is consistency and accountability in relation to not only the Commission's but also the Panel's functions. Part IV examines the costs and benefits of a body carrying out both enforcement and law reform functions.

## **Content of the Discussion Document**

### ***Part I: Regulators and Regulation Making in the New Zealand Securities Market***

6 Part One of the document provides a description of the regulation of the securities market in New Zealand. It outlines in detail the current functions of the main securities market regulators, the Takeovers Panel, the Securities Commission, and the Ministry of Economic Development (including both the Registrar of Companies and the Competition and Enterprise Branch).

### ***Part II: The Need for a Review of the Functions of our Regulators***

7 This Part discusses how recent law reform, increased cross border trading and integration of markets has led to a need to examine the focus and functions of our securities market regulators. In particular it examines the government's recent decision to make the Securities Commission the public enforcement agency for insider trading and discusses other potential areas of law reform which may involve the Commission being given additional enforcement roles. It considers the trends towards integration and globalisation in capital markets world-wide, how improvements in information technology and new products have increased cross border trading and how these developments impact on the functions and actions of securities market regulators and governments.

### ***Part III: Proposals for Change: Monitoring, Investigation and Enforcement***

8 Part III outlines and invites comment on some detailed proposals to improve the monitoring, investigation and enforcement functions of the Commission and the Panel. It also invites general comment on some of the other functions that these bodies perform and improvements that could be made to all the organisations in our securities market to enable them to operate and co-ordinate efficiently and effectively.

### ***Part IV: Law Reform and Enforcement***

9 Part IV provides a general discussion and invites comment on the benefits and costs of an enforcement body having both an enforcement and law reform role. It considers different types of law reform function and how other countries have dealt with these issues. Finally, it invites comment on what sort of law reform function the Panel and Commission should perform.



# **PART I: Regulators and Regulation Making in the New Zealand Securities Market**

## ***Introduction***

10 The main bodies regulating the New Zealand securities market include the Securities Commission, the Takeovers Panel and the Ministry of Economic Development (including both the Registrar of Companies and the Competition and Enterprise Branch). The functions and powers of each of these bodies are outlined further below.

11 Besides these regulatory bodies, the Commerce Commission, the Reserve Bank of New Zealand, the Serious Fraud Office, and a number of self-regulatory organisations also play a limited role within the New Zealand securities market.

12 The Commerce Commission has enforcement powers of warnings, settlements and court action for breaches of the Commerce Act 1986 and Fair Trading Act 1986, which apply generically to the securities market. The Reserve Bank deals with the registration of banks, supervision and monitoring of banks financial performance and the authorisation of public securities dealers. The Police and the Serious Fraud Office take enforcement action in respect of securities matters that involve criminal offences, such as crimes of dishonesty or fraud under the Crimes Act 1961. As these bodies only play a limited role in the securities arena, and as recent law reform and international developments have not fundamentally altered or changed this role, the paper does not deal with the functions or form of these bodies in any great detail.

13 There are also a number of self-regulatory organisations that play a role in the market. The New Zealand Stock Exchange (the "NZSE") and its Market Surveillance Panel create and enforce rules for listed companies, and can censure and suspend companies from quotation. The New Zealand Futures and Options Exchange ("NZFOE") and its Business Conduct Committee monitor and investigate potential breaches of NZFOE rules and can fine, reprimand, or suspend a dealer from operating. The Banking and Insurance Ombudsmen resolve disputes about the provision of banking disputes and insurance. The Advertising Authority has developed a code for financial advertising and the Advertising Standards Complaints Board prevents any advertisements from being published or broadcast further. As these bodies are self-regulatory organisations and the Government has limited control over their role or functions, these bodies are also not considered within the paper.

## **The Securities Commission**

14 The Securities Commission is an independent Crown entity with a variety of roles and functions in relation to the administration of securities law. Section 10 of the Securities Act gives the Commission the following general functions:

- to perform the functions and duties conferred or imposed on it by or under the Securities Act 1978 or any other enactment;

- to keep under review the law relating to bodies corporate, securities, and unincorporated issuers of securities, and to recommend to the Minister any changes thereto that it considers necessary;
- to keep under review practices relating to securities, and to comment thereon to any appropriate body;
- to co-operate with any securities commission or other similar body in any other country and for that purpose, but without limiting this function, to communicate, or make arrangements for communicating, information obtained by the Commission in the performance of its functions and powers, confidential or not, to that commission or body which the Commission considers may assist that commission or body in the performance of its functions; and
- to promote public understanding of the law and practise relating to securities.

15 In order to fulfil its functions under the Act the Commission's work programme, effective from 1 July 2001, covered the following 7 categories of activity.

#### ***Enforcement***

16 The Commission has the power to suspend and/or prohibit prospectuses, investment statements and advertisements. It also monitors and investigates particular market practices. The most visible examples of this function are the investigations conducted and subsequent reports on, insider trading activity.

17 The Commission also has some powers in relation to the prohibition of contributory mortgage brokers and the power to make applications to the High Court in relation to substantial security holder notices.

18 For the year ended 30 June 2000 the Commission allocated an estimated 38.5% of its appropriation to enforcement.

#### ***Market Authorisations***

19 The Commission has authorisation powers in relation to futures dealers and futures exchanges. It also approves trustees and statutory supervisors and considers applications for approval of electronic transfer systems under the Securities Transfer Act.

20 For the year ended 30 June 2000 the Commission allocated an estimated 2% of its appropriation to authorisations.

#### ***Exemptions***

21 Under section 5(5) of the Securities Act the Commission is able to exempt any person or class of persons from compliance with:

- Part II of the Securities Act and any regulations made under section 70(1) of the Securities Act (dealing with the disclosure requirements for offers of securities to the public); and
- Part II of the Securities Amendment Act 1988 and any regulations made under Part II of that Act (dealing with the requirements for the disclosure of interests of substantial security holders in public issuers).

22 For the year ended 30 June 2000 the Commission allocated an estimated 19.5% of its appropriation to exemptions.

### ***Law Reform***

23 The Commission conducts its own reviews into various aspects of securities law. It also assists the Ministry in securities law reform.

24 In addition to the Commission's general law reform function, it has a specific and exclusive role under Section 70 of the Securities Act to recommend Regulations to be made under the Act to the Governor-General. Under Section 70, the Commission is required to consult with those parties that would be affected by the regulation before it can make a recommendation.

25 For the year ended 30 June 2000 the Commission allocated an estimated 16 % of its appropriation to law reform.

### ***International Liaison***

26 The Commission is party to memoranda of understanding on information sharing and related matters with a number of overseas regulators, most importantly, the Australian Securities and Investments Commission ("ASIC").

27 New Zealand is also a member of the International Organisation of Securities Commissions ("IOSCO"). New Zealand has signed up to a number of IOSCO resolutions including the Rio Declaration which calls on signatories to provide assistance on a reciprocal basis in the gathering of information related to market oversight and protection of investors against fraudulent securities transactions.

28 Finally, the Commission has the ability under section 18A to take evidence on behalf of overseas commissions or similar bodies.

29 For the year ended 30 June 2000 the Commission allocated an estimated 12% of its appropriation to international liaison.

### ***Public Understanding***

30 The Commission produces an annual report, publishes a newsletter/bulletin, has a website and comments both publicly and directly to participants on securities market matters.

31 For the year ended 30 June 2000 the Commission applied an estimated 12 % of its appropriation to promoting public understanding in the area of securities.

### ***Provision of Administrative Support to the Takeovers Panel***

32 The Commission provides administrative and support services as required to the Takeovers Panel to enable the Panel to carry out its statutory functions under the Takeovers Act 1993.

## **The Takeovers Panel**

### ***Introduction***

33 The Takeovers Panel is established by the Takeovers Act 1993 and is an independent Crown entity. The Panel has the function of formulating a takeovers code and recommending to government any amendments to a code as it sees fit. Under Part III of the Act the Panel, along with the Court, also has the responsibility of enforcing a takeovers code once it comes into effect. Section 8 of Part I of the Act gives the Panel the following specific functions:

- formulating and recommending a takeovers code applying to takeovers of specified companies to government;
- formulating and recommending amendments to the code to the government;
- for the purposes of formulating and amending a takeovers code to keep under review practices relating to takeovers of specified companies;
- to investigate any act or omission for the purpose of exercising its enforcement functions;
- to make determinations and orders and make applications to the Court in accordance with its enforcement functions under Part III of the Act; and
- to promote public understanding of the law and practice relating to takeovers.

34 Under section 45 the Panel also has the power to grant individual and class exemptions to the Takeovers Code<sup>1</sup>.

### ***Law Reform***

35 The Takeovers Panel has the primary responsibility for takeovers law reform in New Zealand. As stated above it is the responsibility of the Panel to formulate the takeovers code, the main body of law governing takeovers in New Zealand.

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<sup>1</sup> The Takeovers Code (Implementation and Enforcement) Bill will amend the Takeovers Act 1993 and will give the Panel the ability to grant class exemptions. It is anticipated that the Bill will be passed by 1 June 2001.

36 The only guidance that the Panel is given in the Act as to how it should formulate the Code is a set of objectives that it must consider. It is up to the Panel to determine the weighting that should be given to these objectives when formulating the code<sup>2</sup>. These objectives include:

- To encourage efficient allocation of resources;
- To encourage competition for the control of companies subject to the Code;
- To assist in ensuring that shareholders are treated fairly in a takeover;
- To promote international competitiveness of New Zealand's capital markets;
- To recognise that shareholders must ultimately decide for themselves the merits of a takeover offer; and
- To maintain a proper relation between the costs of compliance with the Code and the benefits resulting from it.

37 A Takeovers Code has been formulated by the Panel and recommended to the government. The Takeovers Code was adopted by the Government on 19 October 2000 and will come into effect on 1 July 2001.

38 It is now the responsibility of the Panel to make and recommend any amendments and modifications to the Code that it sees fit.

#### *Enforcement of the Takeovers Code*

39 Part III of the Takeovers Act sets out the Panel's powers to enforce the Code. Under Part III of the Act the Panel can hold a meeting to determine whether a party has breached or is intending to breach, the Code. The Panel can also issue restraining orders and can apply to the Court for a determination or an order in certain circumstances. The enforcement functions of the Panel are outlined in more detail in Part III of this discussion document.

40 Part III of the Act aims to ensure that those opposed to a particular takeover should not be able to use the code and the litigation process to frustrate a takeover offer and subvert the true purpose of the code.

#### *Exemptions from the Takeovers Code*

41 Under section 45 of the Takeovers Act 1993 the Panel may, subject to such terms and conditions as the Panel sees fit, exempt any person or class of person, transaction or offer from any provision or provisions of the Takeovers Code<sup>3</sup>.

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<sup>2</sup> The Minister of Commerce can also give an indication to the Panel of the weight that can be given to the objectives when the Panel is formulating the Code, see the section on the functions of the Ministry of Economic Development.

<sup>3</sup> It is anticipated that the Takeovers Code (Implementation and Enforcement) Bill will amend section 45 by inserting a provision which reads that the Panel's reasons for granting an exemption must include

### ***Role in Monitoring and Investigation***

42 The Panel has the function of keeping under review practices relating to takeovers of specified companies for the purposes of formulating and recommending the Code or amendments to the Code.

43 It also has the function of investigating acts or omissions or practice for the purpose of exercising its enforcement powers and functions under Part III of the Act.

### ***Public Awareness Function***

44 The Panel also has the function of promoting public understanding of the law and practice relating to takeovers. In order to fulfil this goal the Panel has set up a website which provides information about the Takeovers Act 1993, the Code and about the Panel and its work. The Panel also has a newsletter "Code Word" that provides information on takeovers and takeover regulations to interested parties.

## **The Ministry of Economic Development**

### **The Registrar of Companies**

#### ***Monitoring and Investigation***

45 The Registrar of Companies has the role of checking prospectuses prior to registration to ensure they address the matters specified in the Securities Regulations 1983.

46 The Registrar is also empowered by section 67 of the Securities Act 1978 and section 31A of the Takeovers Act 1993<sup>4</sup> to require documents to be produced for inspection and to make records of such documents. This power may be exercised by the Registrar, or any person authorised by him, for the purposes of Part III of the Takeovers Act 1993, or for the purposes of the Securities Act or any of the corporate governance legislation specified in the First Schedule to the Securities Act. However, the Registrar requires the Commission's or the Panel's prior approval, on a case by case basis, before carrying out such investigations.

47 The Registrar also has the ability to carry out inspections under section 365 of the Companies Act 1993. These inspections cover a wide breath of matters, including financial reporting by issuers. It also carries out investigations under the Corporations (Investigation and Management) Act 1989 and director disqualifications under section 385 of the Companies Act 1993.

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why it is appropriate that the exemption is granted and how the exemption is consistent with the objectives of the Takeovers Code.

<sup>4</sup> The Takeovers Code (Implementation and Enforcement) Bill will insert section 31A into the Takeovers Act 1993. It is anticipated that the Bill will be passed by 1 June 2001.

## ***Enforcement***

48 The Registrar also has a number of enforcement powers under the Securities Act 1978 in relation to securities markets. These include:

- to register or decline to register prospectuses;
- prosecuting offences of offering, distributing or allocating securities in contravention of the Act;
- prosecuting offences of mis-statements in advertisements or registered prospectuses;
- prosecuting offences of failure to produce documents for inspections; and
- prosecuting offences of failure to keep registers of securities etc.

## **The Competition and Enterprise Branch**

### ***General Securities***

49 The Ministry is the government's primary policy adviser on the legal framework for business and issues affecting business. As such, the Competition and Enterprise Branch has responsibility for providing policy advice to the government on 40-odd business law statutes, including those that regulate the securities market. The Securities Act 1978, which confers an express law reform role on the Commission is included in those responsibilities.

50 The Minister of Commerce also receives recommendations for legislative changes and regulations directly from the Commission and, if he or she agrees with the recommendations, is responsible for seeking Cabinet Committee and Cabinet approval. Generally the Minister will request the Ministry to review any proposals for law reform received from the Commission and other sources. These proposals require ministerial sponsorship to be included on the legislative programme, or to be promulgated as regulations.

### ***Takeovers***

51 The Minister of Commerce has limited responsibilities in relation to the Takeovers Code.

- The Minister of Commerce can, by notice in writing, give an indication to the Panel of the weight that can be given to the objectives specified in the Takeovers Act when the Panel is formulating the Takeovers Code.
- The Minister can recommend that the Governor-General approve, not approve or defer any code or amendment to the code recommended by the Panel.
- The Minister can request the Panel to formulate and recommend a further takeovers code to replace any code that has been approved or declined.

52 The Minister or Ministry has no control over, and cannot modify or amend the detail of, the Takeovers Code. However, the Takeovers Act 1993 which sets up the Takeovers Panel, the processes for formulating and making amendments to a takeovers code, and outlines how a code is to be enforced is the responsibility of the Ministry of Economic Development.



## PART II: THE NEED FOR A REVIEW OF THE FUNCTIONS OF OUR REGULATORS

### Recent Law Reform

53 There have been a number of factors highlighted as contributing to the under-performance of New Zealand's sharemarket. One of these factors is the regulatory environment in which our sharemarket operates.

54 The government believes in order to achieve its aim of promoting confidence in the New Zealand securities market, and increasing participation in the market, it is important to ensure investors have confidence that the rules are fair and that the institutions in the market are robust and provide adequate protection from unscrupulous practices.

55 The government has given the Commission a civil enforcement role in relation to insider trading. Other regulatory reforms in the areas of continuous disclosure and market manipulation may also give the Commission an enforcement role. All of these reforms will seek to ensure that there is a robust enforcement regime and that the primary focus of our securities market regulators is the effective enforcement of our law.

### *Insider Trading*

56 The government decision to make the Securities Commission an enforcement body for insider trading was based on a number of factors. These include:

- Deterrence: Providing an enforcement body dedicated to the detection and enforcement of insider trading law could act as a deterrent to potential insider traders;
- Evidential problems with private enforcement: An individual may not have the ability to require the necessary information from an insider to prove a case. A state agency, such as the Commission, can have a significant advantage over private enforcement in obtaining information through exercising statutory investigative powers. Equally the Commission can have an advantage in obtaining information in foreign jurisdictions through networks and legislation (bilateral and multilateral agreements);
- Lack of incentives for private enforcement: The losses associated with instances of insider trading are usually dispersed among a number of people, none of which individually may have a sufficient economic motivation to take an action. The Commission would not be deterred by the costs or time involved in taking an action and would be able to undertake an action where there was clear insider trading and it was desirable for the public benefit;
- Expertise: The Commission can establish a high level of expertise and experience in securities law matters. This gives the Commission an advantage over an

individual in being able to efficiently and effectively analyse any information obtained and identify non-compliance with the law;

- The Commission will have the resources to monitor and investigate potential insider trading activity, this may increase the likelihood of catching insider traders;
- It was considered appropriate that the Securities Commission undertake this role rather than setting up a separate enforcement agency as there would be considerable savings in utilising the Commission's infrastructure; and
- Further, the Commission, rather than the Registrar of Companies or the Serious Fraud Office, was considered the appropriate body to carry out this civil enforcement role as the Commission has experience with insider trading investigations and a role already under the Securities Amendment Act 1988.

57 Submissions received on the insider trading discussion document released in September 2000 by the Ministry of Economic Development, and comments made by the Securities Commission itself, have indicated that giving the Commission this enforcement role will result in a material shift in the focus of the Commission. For this reason an assessment of the fit of this role with the Commission's current functions and responsibilities is required.

58 The government has not yet made a decision on whether criminal penalties should be imposed for insider trading. Further, the government has also not made a decision about which agency would enforce any criminal penalties should they be imposed.

#### ***Other Securities Law Reform (Continuous Disclosure and Market Manipulation)***

59 Besides changes in the area of insider trading, the government has announced that it will be introducing a statutory continuous disclosure regime and looking at the possibility of introducing market manipulation law. These areas of law reform may need a body to play a public enforcement role and it is possible that the Commission may be given this task.

60 Market manipulation and insider trading law are closely interrelated as they drive off the same market integrity and efficiency principles and often a person will be found to have committed offences in both areas. The procedures for detection and investigation will also be similar for both offences. Therefore, if Commission staff are skilled in the detection and investigation of insider trading their skills would be useful for market manipulation investigations.

61 Continuous disclosure is also closely related to both of these areas and is the means by which market manipulation and insider trading breaches are often deterred and detected. For this reason it is advisable that an agency that carries out the enforcement of insider trading also carry out any enforcement role for continuous disclosure.

62 For these reasons it may be appropriate to also give the Commission a role for continuous disclosure and market manipulation. It may also be appropriate to give the Commission a role in these areas for similar reasons as those made for giving it a role in relation to insider trading, i.e. the deterrent effect, the fact the Commission will not be deterred by the time and cost involved in taking an action, the Commission's greater access to information etc. It may also increase confidence in the New Zealand market if there is a body dedicated to the enforcement of our securities law.

63 If the Commission is to be given a role in relation to continuous disclosure and market manipulation it will re-enforce the need for the Commission to have adequate and effective monitoring, investigation and enforcement functions.

## **Cross Border Trading and Integration in Capital Markets and the need for Co-operation and Co-ordination**

### *Introduction*

64 Since the Commission, and even the Panel, were established, there have been important economic and regulatory reform and advances in information technology, which have led to integration in securities markets and an increase in cross border trading.

65 Particular features of this integration and cross border trading include:

- The technological ability to transact quickly and across borders;
- Freeing up regulation relating to financial markets<sup>5</sup>;
- Removal of regulatory impediments to cross-border transactions;
- Increasing international financial market regulatory co-ordination, for example, through the OECD and IOSCO; and
- The development of linkages and alliances between financial market institutions, both domestically and internationally, as they seek to increase their global market share.

### *What do these international developments mean for Governments?*

66 The trends towards global and interconnected markets impact on how governments regulate their capital markets and develop policy.

67 In particular these trends may encourage governments to have regulations similar to other jurisdictions for a number of reasons:

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<sup>5</sup> This does not mean that countries are moving away from the concept of fair rules, but rather giving their law and institutions the flexibility to move with fast paced international trends and developments.

- Investors and sellers operating in a number of international jurisdictions may be deterred from operating in a market where the regulatory requirements are significantly different to those imposed elsewhere, because of the transaction costs involved. Divergence in regulation entails learning costs for foreign investors and sellers in understanding regulatory regimes different to their own. There may also be difficulties in obtaining crucial information regarding the operation of legislation. These costs may be particularly large in relation to smaller markets, where smaller pools of capital often make the transaction costs of understanding a different regime less attractive to investors as costs are less likely to be recovered. New Zealand is a small and distant market in international terms and a judgement needs to be made as to whether we can afford to be different in terms of the level of protection we provide to market shareholders;
- With the international interest towards mergers and alliances of exchanges, and governments entering into agreements and forming trading partners with other countries, there is also a pressure to enter into agreements that may involve closer co-ordination or mutual recognition of our laws with other countries. Mutually agreed or co-ordinated reform creates economic benefits that are shared domestically and between trading partners. Such arrangements create positive side effects of creating a common basis for governments in different countries and helps them to co-operate further, including to accept entry of foreign firms or products more positively. Government's must have freedom and control over their policy and law reform in order to be able to enter into such arrangements and formulate similar laws; and
- With international developments there comes a trend for countries to move towards, and to agree to, sets of international principles and norms. With these international norms and principles there also comes a pressure for countries to comply. Compliance with international principles may satisfy investors that a country has a market of integrity that meets international standards, where investors have adequate protections and rights and the laws are enforced. Establishing compliance with these standards not only encourages investment by overseas investors but also may prevent domestic investors from going elsewhere where they may have greater confidence in the integrity of another market.

68 New Zealand has a high level of overseas investment. The credibility of our regime is integral to investment. New Zealand must be able to reassure international sellers and buyers that New Zealand has a market of integrity with fair rules that are adequately enforced. The government's recent proposed reforms in the areas of takeovers and insider trading are designed to enhance our credibility and ensure that regulators and investors have confidence in the effectiveness of our regulation. This review should also go some way to reassuring international buyers and sellers that our institutions are robust and can adequately enforce the law.

***What do international developments mean for regulatory bodies?***

69 The convergence of securities regulation internationally also implies the increasing convergence of the nature and role of securities market regulators. Cross-border trading, multiple listings and globalised markets have created difficulties in enforcement of securities laws as national boundaries become blurred making it

difficult to determine in which jurisdiction a transaction has taken place, and adding to problems of monitoring and investigation.

70 This has increased the need for international co-operation between regulators in detecting, investigating and prosecuting securities breaches. In particular, New Zealand regulators will need to be able to investigate offences that occur in more than one country (including New Zealand), offences occurring outside of New Zealand but that breach New Zealand law and offences that occur in New Zealand and breach another country's law.

71 Regulatory co-operation may be enhanced in situations where a regulator has the legislative authority to obtain information on behalf of its foreign counterparts in order to share it with them. Further, co-operation may also be enhanced where an overseas regulator is convinced of the ability of a regulator to investigate and enforce their regulatory regime. It is important that we ensure that our regulators can meet both of these criteria.

#### *Co-ordination with Australia*

72 Last year the New Zealand government signed a Memorandum of Understanding on Co-ordination of Business Law with Australia. The MOU reflects the desire of the Australian and New Zealand governments to deepen the trans-tasman relationship within a global market, through increased co-ordination of business law, thereby creating a mutually beneficial trans-tasman commercial environment.

73 In view of our obligations under the MOU and the obvious advantages of co-ordinating New Zealand and Australian securities law, the Ministry of Economic Development will give particular attention to the Australian law relating to issues raised in this discussion paper. Further, we will welcome submissions on the appropriateness of this Australian law being adopted in New Zealand.

## **PART III: PROPOSALS FOR CHANGE: MONITORING, INVESTIGATION AND ENFORCEMENT**

### ***Introduction***

74 By giving the Commission a civil enforcement role in relation to insider trading, the government is shifting the Commission from its focus on monitoring our existing law and providing administrative comment towards a more active enforcement role ensuring compliance with our securities law. In order for the Commission to effectively undertake these new enforcement functions, it will need to be given further powers in relation to monitoring, investigation and enforcement.

75 When considering what additional powers are required for the Commission to be able to effectively enforce the law, it is also important to consider whether the Takeovers Panel, the other main regulator of the securities market, also has sufficient enforcement powers.

76 The international developments discussed in Part II need to be considered in this context. In particular, whether the Securities Commission and Takeovers Panel have adequate powers to co-operate with international organisations in relation to monitoring, investigation and enforcement.

77 Well resourced and empowered regulatory bodies will ensure that our securities law is adequately and effectively enforced. This will increase confidence that the institutions are robust and that the rules are enforced.

78 In order for a regulatory body to be able to effectively carry out investigations they need to be able to gather evidence. In particular, they need the following evidence gathering powers:

- The ability to carry out inspections (or have inspections carried out on their behalf) so that they can gain the necessary documents to establish whether breaches of the law have occurred. This is particularly important in securities law matters where often the activity is carried out in secret and involves information which is held by the company being investigated;
- Efficiently receive documents in evidence; and
- Summon people to appear and produce documents.

79 In order for the regulators to be able to carry out investigations for other international organisations they also need to be able to efficiently and effectively exercise the same evidence gathering powers on behalf of those international bodies.

80 As well as evidence gathering powers there also must be sufficient protections around the evidence provided and for those providing it, so that the parties involved are willing to provide information and know their rights are protected.

81 Part III of this discussion document identifies possible areas where the current investigation and monitoring functions do not effectively fulfil the criteria outlined above and could be improved. It also invites general comment on some of the other functions that these bodies perform and improvements that could be made to all the organisations in our securities market to enable them to operate and co-ordinate efficiently and effectively.

## Monitoring and Investigation

### Securities Commission

*If the Commission is to have a greater enforcement role, what additional powers relating to investigation and information will be required?*

82 Currently the Commission has the following specific investigatory powers:

- to receive documents in evidence (section 18 of the Securities Act 1978);
- to summon any person to appear and produce documents (section 18 of the Securities Act 1978);
- to receive documents in evidence and to summon any person to appear and produce documents for an overseas commission's investigations (section 18A of the Securities Act 1978);
- to order proceedings before it to be heard in private or that publication of the evidence obtained by it be prohibited (section 19 of the Securities Act 1978); and
- to request the Registrar of Companies to require the production of documents or inspect documents – the Commission itself does not have a power to inspect documents (section 67 of the Securities Act 1978).

83 It has already been publicly announced that the Securities Commission is to become New Zealand's public enforcement agency for insider trading breaches. As outlined in Part II, this and other possible changes to securities law and international developments, mean that it is appropriate to consider what additional powers the Commission may need in order to ensure it is able to effectively enforce the law.

84 The following areas have been identified as potential areas where the Commission's current investigation and monitoring functions do not effectively fulfil the criteria for adequate and effective evidence gathering powers outlined above and could be improved:

- Giving the Commission the power to undertake inspections (currently there is no ability for a body to carry out secondary market inspections);
- Extending the Commission's current powers to respond to requests for assistance for overseas regulators;
- Allowing the Commission to impose conditions on confidentiality orders;
- Extending the protections for material held by the Commission;



- Allowing the Commission to convene meetings using tools such as telephone and video conferencing;
- Allowing the Commission to meet in divisions;
- Removing the requirement that evidence must be received “at a meeting of the Commission”; and
- Allowing the Commission to use these additional powers to respond to overseas requests for assistance.

*Enabling the Commission to undertake inspections in relation to specific matter.*

85 This option could involve either shifting responsibility for undertaking inspections in relation to the Securities Act 1978 from the Registrar of Companies to the Commission or giving the Commission, as well as the Registrar, the ability to carry out inspections.

86 Currently, the Commission itself is unable to execute an inspection or search in relation to a breach of the Securities Act or Securities Amendment Act 1988. Instead, at the request of the Commission, the Registrar of Companies carries out inspections on the Commission’s behalf for breaches of the Securities Act 1978. The Registrar of Companies cannot currently carry out secondary market investigations (i.e. investigations under the Securities Amendment Act 1988).

87 In order to gain credibility in the market as the enforcer of the Securities Amendment Act and other securities legislation, there is a reasonable case for the Commission to be given inspection/search powers. This would have the advantage of enabling the officers responsible for the Commission’s investigation to actually undertake the inspection/search therefore ensuring the most pertinent information is obtained. It would also enable the Commission to carry out inspections more efficiently.

88 The other main regulatory body that enforces business law in New Zealand, the Commerce Commission, currently has the ability under the Commerce Act 1986 to execute search warrants where it is considered necessary for the purpose of assisting the Commission to ascertain or establish whether a breach of the Act has occurred. Both the Commerce Commission and the Securities Commission work in areas where they need to obtain vital information, quickly. Further, the information will often be held by the company that is being investigated. For these reasons it is appropriate that these bodies have the ability to inspect the information that these companies hold in order to determine whether a breach of the law has occurred.

89 Part III of the Australian Securities and Investments Commission Act 1989 gives the ASIC a range of investigatory powers including:

- the power to inspect statutory records;
- the power to require a person to attend an examination in relation to an investigation; and

- the power to require the disclosure of information about dealings in securities and futures contracts<sup>6</sup>.

90 As discussed in Part II, it is important that our regulatory bodies can adequately carry out investigations for overseas agencies. In order to carry out efficient and effective investigations for ASIC it will be useful for the Commission to be able to carry out its own inspections. This will ensure that New Zealand's regulatory integrity is maintained by its ability to reciprocate and respond to requests for assistance.

91 The Registrar will retain its role of vetting prospectuses prior to registration and as the principal prosecutor for Securities Act 1978 breaches. Further, the Register has specialist staff and extensive experience in conducting inspections under the Securities Act and the Companies Act and has offices in several centers. For this reason, it may be appropriate for the Registrar to retain the ability to carry out inspections in relation to securities as well as giving the Commission an inspection function.

92 Both the Commission and the Registrar could be given the ability to carry out inspections in relation to primary (the Securities Act 1978) and secondary market (the Securities Amendment Act 1988) inspections. Memoranda of understanding or other such mechanisms could be employed to ensure that there is no overlap in the carrying out of inspections. Alternatively, the Registrar could retain the ability to carry out inspections in relation to primary inspection where it has the experience and an enforcement function, and the Commission could carry out secondary market inspections, where it currently plays a role.

*Extending the Commission's current powers to respond to requests for assistance for overseas regulators*

93 When the Commission receives an overseas request for an inquiry, section 18A (2)(c) requires the "Responsible Minister" to agree to the Securities Commission complying with the request<sup>7</sup>. It seems unnecessary and inefficient for the Minister to have to approve every request for an inquiry by an overseas body. It is therefore suggested that the need for the Minister to be involved in the decision to comply with such requests be removed.

94 This amendment will be important for the Commission to be able to respond efficiently and appropriately to any request for assistance by an overseas body. It also provides more scope for co-operation between regulators on particular enforcement matters. This ensures that cross-border transactions can be adequately covered by the regulation and that New Zealand's regulatory integrity is maintained by its ability to reciprocate and respond to requests for assistance.

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<sup>6</sup> The actual execution of search warrants is normally undertaken by the Australian Federal Police.

<sup>7</sup> Under section 51 of the Serious Fraud Office Act 1990, the Attorney General must accept a recommendation from the Director of the SFO before the SFO can enter into an agreement with a person from another country that also carries out detection and investigation of cases of fraud. This section is similar to that used in the Securities Act 1978 but differs in the fact it allows agreements in relation to a particular case or cases of fraud (while the Securities Act acts on a request by request basis) and in that it deals with criminal prosecutions.

95 When considering whether to remove the need for the Minister to be involved in the decision to comply with such requests, it may be appropriate to consider whether the government should have a say in relation to possibly sensitive New Zealand information being released to other countries.

*Allowing the Commission to impose conditions on confidentiality orders*

96 Section 19(5) of the Securities Act 1978 gives the Commission the power to make an order prohibiting the publication or communication of any information given to, or obtained by, the Commission in connection with its inquiry or proceedings.

97 It is suggested that the Commission be given the ability to specify conditions in relation to such confidentiality orders. The Commission has advised that, in practice, it has found it necessary to specify terms and conditions in certain circumstances. For example, the Commission may want to permit a person who provides evidence to the Commission to make use of that information. An amendment that explicitly states that the Commission can specify conditions would clarify existing practice in this area.

*Extending the protection of material held by the Commission*

98 Under section 28(4), members, officers and employees of the Commission may not be required to give evidence in any Court in respect of anything coming to their knowledge in the course of the operations of the Commission. They can, however, as a recent case decided, be required to discover material held by the Commission in the course of its operations.

99 It has been suggested that, in order to protect the quality and candour of the information supplied to it, such information should be protected. The Commerce Commission and Takeovers Panel are given such wide protection under section 106(7) of the Commerce Act and section 11(7) of the Takeovers Act 1993. Section 106(7) and 11(7) state that no court shall be entitled to require any member, officer or person present at any meeting of the Commerce Commission/Panel to divulge or communicate any information or documents, obtained, produced or tendered, or evidence given in connection with the operations of the Commission/Panel.

100 It is proposed that section 28 be amended to give a similar protection to the Securities Commission.

*Allowing the Commission to convene meetings using tools such as telephone and video conferencing*

101 Section 15(2) of the Securities Act 1978 prescribes that meetings of the Commission shall be held at such places as the Chairman determines. This does not provide the Commission with sufficient flexibility to convene meetings using telecommunication tools such as telephone and video conferencing.

102 It is proposed that the section be amended to clarify that meetings of the Commission can be held at such places, dates and times, and by such methods, as the

Chairperson determines. A further amendment should also be inserted that states that a meeting of the Commission may be held either by:

- A quorum of members being assembled together at the place, date and time appointed for the meeting; or
- by means of audio, or audio and visual communication by which a quorum of members can simultaneously hear each other throughout the meeting.

103 This amendment would also make the section consistent with the provisions proposed to the Takeovers Act 1993 in the Takeovers Code (Implementation and Enforcement) Bill.

*Allowing the Commission to meet in divisions*

104 Allowing the Commission to sit in divisions might enable the Commission to operate more efficiently and ensure that the Commission is better able to enforce legislation.

105 Other enforcement bodies such as the Commerce Commission and the Takeovers Panel<sup>8</sup> have the ability to meet in divisions. The Chairman of these bodies have the power to direct that the powers of the organisations can be exercised by separate divisions in relation to any matter or class of matter. Divisions are made up of a group of selected members of the Commission/Panel with the requisite experience or skills to consider a matter. The use of divisions is deemed necessary in order for the bodies to make efficient decisions, meet timeframes and fulfil their obligations under the Acts they administer.

106 It is suggested that the Commission be given similar provisions to allow it to sit in divisions.

*Removing the requirement that evidence must be received at a meeting*

107 Section 18 and section 18A of the Securities Act 1978 require that evidence be received “at any meeting of the Commission”. The requirement that the evidence must be received “at a meeting” means that every time the Commission wants to receive any documents delivered to it, it must convene a meeting. This results in unnecessary costs and may slow down the Commission’s investigations.

108 Under the Commerce Act 1986 section 99 gives the Commerce Commission similar powers as those outlined under section 18 of the Securities Act, however, the Commerce Commission is not required to receive evidence at a meeting.

109 In order to ensure that the Securities Commission can efficiently carry out its investigation function it is proposed that this requirement be removed so that the Commission can receive evidence outside of a meeting.

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<sup>8</sup> It is anticipated that the Takeovers Code (Implementation and Enforcement) bill will amend the Takeovers Act 1993 to allow the Panel to meet in divisions.

*Allowing the Commission to use these additional powers to respond to overseas requests for assistance*

110 The Commission currently has the power to take evidence for equivalent overseas commissions or bodies. This power replicates the Commission's powers to take evidence in relation to its own functions. It is suggested that the power in relation to overseas bodies should continue to reflect the Commission's other powers, so that the Commission can effectively undertake investigations for overseas organisations.

Takeovers Panel

*What additional powers will the Panel need to be given if it is to be the main enforcer of takeovers law?*

111 When the Takeovers Code comes into effect on 1 July 2001, the Takeovers Panel will be the sole enforcement body responsible for ensuring the Code is complied with. This role is fundamentally important to the strengthening of our sharemarket in New Zealand.

112 In undertaking this enforcement role, it is important that the Panel has the necessary powers under its Act to ensure it is able to effectively carry out its enforcement functions, and gain credibility in the market place.

113 When the Takeovers Code (Implementation and Enforcement) Bill comes into force, the Registrar of Companies will have the power to undertake inspections on behalf of the Panel. This will enable the Panel to access information necessary to investigate and determine whether a breach of the Takeovers Code has occurred.

114 Under the Takeovers Act 1993, the Panel has the same general powers in relation to obtaining evidence and summoning witnesses as discussed above in relation to the Securities Commission. However, as with the Commission, the Panel's current powers under the Act are not as extensive as they could be. The following areas have been identified as potential areas where the Panel's current investigation and monitoring functions do not effectively fulfil the criteria for adequate and effective evidence gathering powers and could be improved:

- Giving the Panel express power to undertake inspections (as opposed to the Registrar of Companies who will do this from 1 July this year);
- Giving the Panel the ability to act in response to requests for assistance from overseas regulators;
- Allowing the Panel to impose conditions on confidentiality orders; and
- Removing the requirement that evidence must be received "at a meeting of the Panel".

*Enabling the Panel to undertake inspections in relation to takeovers matters*

115 This option would involve shifting responsibility for undertaking inspections in relation to the Takeovers Act 1993 from the Registrar of Companies to the Panel.

116 Currently, the Panel, like the Commission, is unable to execute an inspection or search itself in relation to a breach of the Takeovers Act. In order to gain credibility in the market as the enforcer of the Takeovers Code, there is a reasonable case for the Panel being given like inspection/search powers. Doing this would have the added advantage of having the officers responsible for the Panel's investigation actually undertaking the inspection/search, therefore ensuring the most pertinent information is obtained. It would also enable the Commission to carry out inspections more efficiently. This is particularly important in the area of takeovers as takeovers happen in a short period of time and it is important that information can be obtained quickly.

117 The Panel, like the Securities Commission and the Commerce Commission carries out work in areas where there will be a need to obtain vital information, quickly, from the company that is being investigated. For this reason, it is appropriate that such powers are given to the Panel.

*Giving the Panel the ability to act in response to requests for assistance from overseas regulators*

118 It is suggested that the Takeovers Panel should be given a power to co-operate with overseas takeovers bodies. This power would be equivalent to proposed revised powers to be given to the Securities Commission for assisting overseas bodies. Such a section would facilitate the investigation of takeovers breaches by both Australia and New Zealand. In giving the Panel such a function, it may also be appropriate to include international liaison with international regulatory bodies within the list of the Panel's functions.

119 This change will be important for the Panel to be able to respond efficiently and appropriately to any request for assistance by an overseas body. It also provides more scope for co-operation between regulators on particular enforcement matters. This ensures that cross-border takeover transactions can be adequately covered by the regulation and that New Zealand's regulatory integrity is maintained by its ability to reciprocate and respond to requests for assistance.

*Allowing the Panel to impose conditions on confidentiality orders*

120 Section 13(1) of the Takeovers Act 1993 gives the Panel the power to make an order prohibiting the publication or communication of any information given to, or obtained by the Panel in connection with its inquiry or proceedings.

121 It is suggested that the Panel be given the ability to specify conditions in relation to such confidentiality orders for similar reasons as those given above for giving the Securities Commission the ability to impose conditions.

*Removing the requirement that evidence must be received at a meeting*

122 Section 9 of the Takeovers Act 1993 requires that the Takeovers Panel receive evidence "at any meeting of the Panel".

123 It is suggested that the requirement that the evidence be received "at a meeting" be removed for similar reasons as those given above for removing the requirement for the Commission.

**Questions for Submissions**

1. Should the Securities Commission be able to undertake inspections to ascertain whether a breach of the Securities Amendment Act 1988 has occurred? Should the Securities Commission also be able to undertake inspections in relation to the Securities Act 1978?
2. Should the Registrar retain its current inspection powers in relation to the Securities Act 1978? Should these powers be extended to secondary market inspections?
3. Should the requirement that the "Responsible Minister" agree to the Securities Commission complying with an overseas request for inquiry be removed?
4. Should the Commission be given the ability to specify conditions in relation to confidentiality orders under section 19(5) of the Securities Act 1978?
5. Should section 28 of the Securities Act 1978 be extended to include protection of information held by the Commission?
6. Should section 15 of the Securities Act 1978 be amended to allow the Commission to convene meetings using telecommunication equipment?
7. Should the Securities Commission be given the ability to meet in divisions?
8. Should the requirement under section 18 and section 18A of the Securities Act 1978 that evidence be received "at any meeting of the Commission" be removed?
9. Are there any other improvements or additions that might be made to the Commission's monitoring and investigative functions that could assist the Securities Commission in better monitoring and investigating breaches of securities law?
10. Should the Commission's powers in relation to responses to overseas requests for assistance, be extended to accord with any new powers in relation to monitoring and investigation that the Commission is given domestically?
11. Should the Takeovers Panel, rather than the Registrar of Companies, be able to undertake inspections to ascertain or establish whether a breach of the Takeovers Act 1993 has occurred?

12. Should the Takeovers Panel be given the power to co-operate with overseas takeovers bodies?
13. Should the Takeovers Panel be given the ability to specify conditions in relation to confidentiality orders under section 13(1) of the Takeovers Act 1993?
14. Should the requirement under section 9 of the Takeovers Act 1993 that evidence be received “at any meeting of the Panel” be removed?
15. Are there any other improvements or additions that might be made to the Panel’s monitoring and investigative functions that could assist the Panel in better monitoring and investigating breaches of takeovers law?
16. If the Panel were to be given the power to co-operate with overseas takeovers bodies, should any powers the Panel is given be made to accord with the powers in relation to monitoring and investigation that the Panel is given domestically?



## Enforcement

124 This section raises two issues for comment:

- The possibility of giving the Panel and the Commission the ability to issue policy statements/guidelines etc; and
- The possibility of increasing the Takeovers Panel enforcement powers.

### *Policy statements and guidelines*

125 Many overseas regulators, which carry out enforcement in the securities area, have an ability to issue policy statements or guidelines. These guidelines or policy statements provide securities market participants with some guidance into how, and in which situations, a regulator may carry out its enforcement functions and what conduct may fall foul of the law.

126 These statements and guidelines take many forms. These include:

- Policy Statements: statements issued as formal declaration of the regulators policies. They indicate how the regulator will administer the legislation for which it is responsible (the ASIC has the ability to issue such statements);
- Practice Notes: notes issued for the guidance of practitioners on reporting and compliance matters (ASIC can also issue practice notes)<sup>9</sup>;
- Rules: The Corporations and Securities Panel (“CSP”), the equivalent to our Takeovers Panel, may make rules, not inconsistent with the law to clarify or supplement the operation of the law. The rules are then gazetted and given to the Minister, who may disallow all or part of the rule. The Court may give directions for compliance with a rule<sup>10</sup>;
- Codes of Conduct: The United Kingdom’s Financial Services Authority (“FSA”) has the power to promulgate a code of conduct which will indicate in broad terms the types of conduct which are likely to fall foul of the statutory precepts and the types of conduct which are not. The Code carries evidential weight in that a breach of the Code will be evidence (but not conclusive evidence) of a breach of the law and compliance with the Code will likewise be evidence that no breach has occurred;
- No action letter: The United States Securities and Exchange Commission (“SEC”) uses no-action letters to issue guidance in a more formal manner. A company seeks a no-action letter from the staff of the SEC when it plans to enter uncharted legal territory in the securities industry. For example if a company wants to try a

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<sup>9</sup> ASIC does not have an express power in legislation to issue policy statements and practice notes but has these under its general powers.

<sup>10</sup> It should be noted that the CSP, unlike the Securities Commission and the Takeovers Panel, does not have the ability to issue exemptions.

new marketing or financial technique, it can ask the staff to write a letter indicating whether it would or would not recommend that the Commission take action against the company for engaging in its new practice. Any law relating to non-action letters will have to be carefully defined in order to prevent the bodies from relying on selective and inaccurate information; and

- **Written Undertakings:** the CSP also has the ability to accept written undertakings from a person affected, or likely to be affected, by the proceedings about a matter relevant to the proceedings. This type of undertaking is reflected in New Zealand by like provisions in the Commerce Act 1986. The Commission can modify behaviour by accepting an undertaking as part of the settlement or authorisation process and exercising their discretion not to take enforcement action. These undertakings enable a regulatory body to modify market behaviour before enforcement action is necessary and ensure better compliance with the law. Should the parties not comply with their undertaking, specific procedures and penalties are provided for in legislation. For instance, a regulatory body could apply to the court for an order directing the party to comply with the term of the undertaking or requiring compensation for those who have suffered loss or damage.

127 All of these types of policy statements generally deal with matters in respect of which the regulator has powers of enforcement. They afford market participants the opportunity to obtain an advance statement of the regulator's view on any possible enforcement action it might take on proposed transactions or whether certain actions will be considered an infringement of the law. In all of these cases the statements are not binding and the regulator is the primary enforcer of the securities law.

128 In the middle of last year the Securities Commission released a discussion document on binding rulings. The discussion document sought comments on whether it would be appropriate to extend the Commission's statutory functions to include a power to make binding rulings on questions of interpretation of securities law more generally. The Securities Commission has informed us that responses to the discussion document were divided quite strongly for and against the proposal and that the Commission is currently exploring other options. The binding ruling scheme described in the Commission's paper was very different from the rulings regimes that exist in other jurisdictions and that are listed above.

129 As the Commission has carried out work in this area we do not intend to revisit the issue of binding rulings again in this paper.

130 Currently the Securities Commission and the Takeovers Panel do not have an express statutory function that allows them to provide policy statements, guidelines, undertakings etc.

131 The Securities Commission does issue exemption notes on new exemptions. These exemption notes describe briefly the reasons or the principal considerations taken into account in deciding to grant each exemption. However, the Commission does keep the policies under review and it will not be bound by prior decisions.

132 Section 15 of the Takeovers Act 1993 gives the Panel such powers as are reasonably necessary or desirable to enable it to carry out its functions. This is a broad discretionary power and, upon legal advice, the Panel has determined that this allows them to issue practice notes in relation to how they will operate or make decisions on the law.

133 It may be appropriate to consider whether the Panel and the Commission should be given an express statutory power to issue one or more of the statements and guidelines discussed above. Such statements may give the market more certainty as to when the regulators may carry out their enforcement functions and when conduct may fall foul of the law.

#### *A privative provision for the Takeovers Panel*

134 Many submissions on the Takeovers Code and the Takeovers Code (Implementation and Enforcement) Bill suggested that the Takeovers Panel should be given further enforcement functions in relation to takeovers. In particular, submitters suggested inserting privative provisions similar to those used in the Australian Corporations Law into the Takeovers Act 1993.

135 As this paper looks at the form and functions of the Takeovers Panel and the Securities Commission it is an appropriate vehicle in which to consider this issue.

#### Privative Provisions in the Australian Corporations Law

136 The Australian Corporations Law includes a series of privative provisions geared at restricting the Court remedies of various parties. Under the Corporations Law private parties to a takeover may not commence civil litigation, or seek injunctive relief from the Court in relation to a takeover, while the takeover is current. This means that the majority of disputes, which were previously resolved in the civil jurisdiction of the Courts, are now resolved by the CSP.

137 The CSP considers disputes and may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of the Corporations Law. Following such a declaration the CSP can make any order that it thinks appropriate to:

- protect the rights or interests of any person affected by the circumstances; or
- ensure that a takeover or a proposed takeover bid in relation to securities proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred; or
- specify in greater detail the requirements of an order made under this subsection; or
- determine who is to bear the costs of the parties to the proceedings before the Panel.

138 The CSP's decisions and orders are final during the offer period. Private parties to a takeover may not commence civil litigation, or seek injunctive relief from the Court in relation to a takeover, while the takeover is current.

139 The Corporations Law also provides the CSP with the ability to review determinations made by it or the Australian Securities and Investment Commission ("ASIC") in relation to takeover bids. When the CSP is reviewing a decision made by it, the group responsible for doing this must comprise a fresh group of members. There may be only one review of an original Panel decision. The Corporations Law also enables the Panel to issue declarations and orders in relation to its review of a decision previously taken. These provisions provide a type of appeal for aggrieved parties (or the Panel or ASIC) where it is considered that a decision needs to be reviewed.

140 Another aspect of the Australian regime is that it enables the Court that is reviewing a decision of the Panel to refer that review to the Corporations and Securities Panel. In addition, the Court can make an order requiring a party to comply with a Panel order under the Corporations law.

141 These provisions have not only created a Panel review process but also made the CSP the main dispute resolution forum for a takeover bid during the life of a takeover bid.

142 These privative provisions were included in the Australian Corporations Law in order to resolve the problems Australia was having with people using "tactical litigation" to frustrate takeover offers. People were taking civil takeover disputes to the Court during the bid period to buy more time. Takeovers is a litigious area of securities law and privative provisions restrict the court remedies of various parties in the hope of deterring parties from using such tactics.

#### The Current New Zealand Situation

143 Currently, under the Takeovers Act 1993, where the Panel suspects there has been a breach or intended breach of the Code, the Panel can call a meeting to determine to exercise its powers. Where notice of such a meeting has been given, an interim restraining order may be made which may remain in force until two days after the date of the meeting.

144 After a meeting if the Panel is not satisfied that the Code has been, or is intended to be, complied with it can extend or issue a restraining order and apply to the Court for a wide range of orders for:

- Disposal or forfeiture of shares;
- Removal of voting rights;
- Avoidance of agreements; and
- Payment of compensation.

145 The Court may have regard to any determination or recommendation made by the Panel, including any recommendation made at the request of the Court.

146 Only after the Panel has made a determination that it is not satisfied that someone has acted, or is intending to act in compliance with the Code, can a party (specified in section 35 of the Takeovers Act 1993) make an application to the Court for an order. The party must also receive the consent of the Panel to make such an application unless the party has requested in writing that the Panel make an application, and the Panel has failed to do so within 10 days of the request. In addition, a party (specified in section 35(3)) can apply to the Court to make an order if they have requested that the Panel hold a meeting and the Panel has not made a determination within 14 days of the request.

147 These provisions in the Takeovers Act are designed to ensure that the Panel is the main dispute resolution forum for a takeover bid and are aimed at limiting the ability of parties to go to Court to frustrate a takeover offer.

148 However, while the Panel has the ability to make restraining orders, it does not have the ability to make final declarations and enforcement orders like the CSP to remedy situations, this is the function of the Court.

149 Further, although Part III of the Takeovers Act does give the Panel enforcement powers, it does not give the Panel the ability to review its own decisions or have review decisions referred from the Court to the Takeovers Panel for consideration.

#### Increasing the Panel's Enforcement Functions

150 Many submitters on the Takeovers Code and the Takeovers (Implementation and Enforcement) Bill suggested that privative provisions like those in Australia should be introduced in New Zealand. This raises several issues.

151 First it is noted that the provisions in the Takeovers Act 1993 do currently ensure that the Panel is the main dispute resolution forum for a takeover bid and limits the ability of parties to go to Court, even though it is the Court that makes the final declarations and orders. This already goes some way to ensuring that people cannot go to the Courts to frustrate a takeover offer in New Zealand.

152 Secondly, unless the Panel is given the ability to make final declarations and orders, there may be limited benefit in enabling the Panel to review its own decisions. This is because it is the Court who makes the orders or final enforcement decisions. On this basis, a review or appeal of the Court decision, rather than the Panels' determination, would be more appropriate.

153 The only decision of the Panel that it may be useful to review is the Panel's decision that it is satisfied that someone has complied with the Code. If the Panel has made such a decision no further action can be taken or the decision reviewed. However, there is no reason why, if more information came to light after such a decision, that the Panel could not call another meeting to determine whether on the basis of new evidence they are, or are not, satisfied that someone is complying with

the Code. Further, allowing someone to review such a decision may also lead to a risk that people could use the review process to frustrate a takeover offer.

154 Should the Panel acquire the ability to make final declarations and orders and/or the power to review its own decisions and have decisions referred to it from the Court, it would necessarily enhance its current enforcement role under the Act. However, in being able to review its own decisions and those of the court it would potentially be acting as both the regulator and appeal authority in those scenarios. Issues of access to justice would therefore need to be considered.

155 Issues around the size of the membership of the New Zealand Takeovers Panel would also have to be considered. The Australian CSP currently has 28 members (and this number may increase). Because the CSP has a large number of members it will not have difficulty in finding a fresh division of Panel members to review one of its decisions. Once the Takeovers Code (Implementation and Enforcement) Bill comes into effect on 1 June 2001 the New Zealand Takeovers Panel will have the ability to meet in divisions. Although the Panel will be able to meet in divisions, it may be more difficult for our Panel, with a smaller number of members and a smaller market, to find a fresh division of members (without conflicts of interest) to review its decisions<sup>11</sup>.

156 Finally, it would also be necessary to consider how extending the Panel's enforcement functions to allow privative actions will potentially impact on its law reform function. Currently, the Panel has sole responsibility for formulating and recommending amendments to the Takeovers Code. In this role, the Panel is the sole policy developer in relation to New Zealand's takeovers regulation. Should the Panel's role be extended to enable it to act as the appeal authority in relation to takeovers matters as well this would mean that the Panel was acting in a legislative, executive and judicial role. Further, this could lead to a risk that the Panel could be accused of pre-determination and capture in relation to its review decisions.<sup>12</sup>

#### Questions for Submission

17. Should the Securities Commission be given the ability to issue one/more of the policy statements, undertakings, guidelines etc outlined in this section?
18. Should the Takeovers Panel be given the ability to issue one/more of the policy statements, undertakings, guidelines etc outlined in this section?
19. Should the Takeovers Panel be able to make unacceptable circumstances declarations and orders like the Australian Corporations and Securities Panel?
20. Should the Takeovers Panel have the power to review its own decisions and have

<sup>11</sup> Although it should be noted that under the Takeovers Act 1993 the Panel can appoint associate members to sit on a matter.

<sup>12</sup> It is noted that while the Corporation and Securities Panel in Australia does have the ability to review its own decisions and make determinations and orders with respect to them, this Panel does not have the primary responsibility for recommending takeovers regulatory policy (this role resides with the Commonwealth government).

decisions referred to it from the Court?

## **Other Issues and the General Efficiency of the Operation of Securities Market Regulators**

157 It is important that securities market agencies have the ability to carry out their functions effectively and efficiently. Specific initiatives for improving the effectiveness of the Commission's and the Panel's functions are raised elsewhere in the discussion document. However, we are also interested in identifying whether there are any outstanding issues in relation to the other functions of these regulators and the efficiency of the operation of securities market regulators that could be addressed in the course of this review.

### ***Securities Commission***

158 This discussion document has addressed issues relating to the investigation, monitoring, enforcement and law reform functions of the Commission. The Commission also has public awareness, international liaison, market authorisation and exemption functions.

#### **Questions for Submissions**

21. We would be interested in any views you may have about whether there are any problems with the operation of these functions of the Securities Commission. If you can identify any problems, what changes could be made to address these problems?

### ***Takeovers Panel***

159 This discussion document has also addressed issues relating to the investigation, monitoring, enforcement and law reform functions of the Panel. The Panel also has public awareness and exemption functions.

#### **Questions for Submissions**

22. We would be interested in any views you may have about whether there could be any problems with the operation of the functions of the Takeovers Panel. If you can identify any problems, what changes could be made to address these problems?

### ***Efficiency and co-ordination of regulatory bodies in the securities market***

160 In Part I we identified a number of government organisations with a role in the regulation of securities markets, specifically:

- The Registrar of Companies;



- The Ministry of Economic Development;
- The Reserve Bank of New Zealand;
- The Serious Fraud Office; and
- The Commerce Commission.

### Questions for Submissions

23. We would be interested in any comments or suggestions you may have in relation to:
- Whether there are any changes that could be made to the powers/functions of these organisations in relation to their role in securities market issues, to ensure that they are able to operate effectively and efficiently?; and
  - Whether there are changes that could be made to ensure that these organisations work together effectively to facilitate efficient regulation of the market?

### Funding

161 If accepted some of the proposals contained in this discussion document would give the Commission and Panel greater general powers of investigation and enforcement. These powers will be used in relation to specific investigative and enforcement activities, for example, the Commission's new role in relation to the enforcement of insider trading breaches. There is also a possibility that an increased opportunity to enforce the law creates an expectation, in the mind of the public, that a greater enforcement effort might result.

162 This means that additional funding may be required by the Commission and Panel when they are given a role in relation to a particular substantive area (i.e. insider trading) and if they are given greater investigation and enforcement obligations.

163 If and when the Commission and Panel are given additional substantive role/s, we will need to consider how the role/s should be funded. Options for funding could include increased appropriations and third party funding mechanisms. The amount and method of funding in any particular case would depend on both the level of increased activity and the public good component of the activity. Funding for additional roles will be considered at the time government decides to give the regulatory bodies these additional roles.

## PART IV: LAW REFORM AND ENFORCEMENT

### *Introduction*

164 As stated above by giving the Commission a civil enforcement role in relation to insider trading, the government is shifting the Commission from its focus on monitoring our existing law and providing administrative comment towards a more active enforcement role ensuring compliance with our securities law.

165 Now that the Commission is to carry out a civil enforcement role in relation to insider trading, and possibly other areas of securities law, it is appropriate to examine whether these new functions are compatible with its existing functions. One of the questions that needs to be raised for discussion is whether it is still legitimate for the Commission to retain its current law reform function.

166 There must be consistency and accountability in relation to the operation of a body's functions in order for it to be robust. It is important to determine whether there is consistency and accountability in relation to not only the Commission's enforcement and law reform responsibilities but also those of the Takeovers Panel. Part IV invites comment on the benefits and costs of an enforcement body having both enforcement and law reform functions and asks what sort of law reform role is appropriate for the regulatory bodies.

### *Current Law Reform Responsibilities*

167 Currently the Commission has an express role under section 10(b) of the Securities Act 1978 "*to keep under review the law relating to bodies corporate, securities and unincorporated issuers of securities and to recommend to the Minister any changes thereto that it considers necessary*".

168 The Commission also has a function under section 10(c) to keep under review practices relating to securities and to comment thereon to the appropriate body. The Commission is authorised under section 28A of the Act to publish any report or comment made by it in the course of the exercise of its functions under section 10(c).

169 This gives the Commission a general law reform function in relation to the securities area.

170 The Commission also has an exclusive statutory power to make recommendations for regulations or amendments to regulations under section 70 of the Securities Act 1978 to the Governor-General. Before the Commission can exercise this power it must consult with all parties that would be affected by the draft regulations.

171 As outlined in Part I the Takeovers Panel has the exclusive power to recommend a Takeovers Code, and any amendments and modifications to the Code, to government. The government can only accept or reject these recommendations. This gives the Panel the primary responsibility for takeovers law reform in New Zealand.

## ***The Costs and Benefits of a Body holding both Law Reform and Enforcement Responsibilities***

172 There are arguments raised both for and against law reform functions and operational and enforcement functions residing in the same body.

### Benefits

173 The following benefits have been identified with an independent authority having both a law reform and enforcement function:

- Competitive and contestable advice: it may not be desirable for law reform to be the responsibility of only one agency. There may be advantages of receiving competitive and contestable advice from more than one source. Some creative tension between agencies with different perspectives on an issue may improve the quality of the advice given to the Minister and the quality of the resulting decision;
- Contact with market participants: in order to be able to assess the effectiveness of existing institutional arrangements and propose any appropriate changes, a law reform agency should have close links with market participants and be able to facilitate direct involvement by those participants. There is likely to be better compliance with regulations if private participants in the securities market consider they have some degree of ownership in regulations through involvement in their formulation. Further, communications with key stakeholders can result in higher quality regulation by obtaining more information about facts and how the law will work in reality, the consequences of regulatory action, more creative alternatives, and ways to keep compliance and administration costs to a minimum. An agency that operates and enforces the law will have greater contact with market participants and may be better able to obtain comments and advice on changes required to the law; and
- Independence: a body independent from government may also have the advantage of being perceived as apolitical, because of the independence of its Members. Therefore, market participants may be more likely to believe that their views will be heard and taken into account.

### Costs

174 The following conflicts, tensions and issues of accountability have been identified with law reform and enforcement functions being the role of one body:

- Issues of capture: The combination of enforcement and law reform functions may lead to confusion over who the clients of the regulator are, whether it is ministers to whom advice is given or a particular sectoral group the organisation deals with on a day to day basis. This can result in advice being given, which is not independent or fails to take into account wider policy objectives and the public interest. As a law reform agency should have a regard to the wider public interest, it is important that the regulator not be captured by either external groups who

may benefit from its policy decisions, or by its own internal needs if it is giving advice on policies which affect its own resources and role;

- Restrictive approach to regulation development: any ability to pursue illegal conduct effectively, after it has happened, produces pressure for rules that prevent illegal conduct recurring. The safest course for the agency is to adopt a restrictive approach, which may involve prohibiting all activity unless authorised after an assessment by the agency, or imposing unnecessarily high standards for the activity. These restrictions on activity can impose substantial unnecessary costs;
- Staff prejudice: the disillusioning experience of regulatory agency enforcement staff constantly dealing with the complaints and failures of the securities market, coupled with their interest in underscoring the authority of their agency, can result in rules acquiring a life of their own, unrelated to the efficiency of the markets or the original objectives of the rules; and
- Distortion of functions: the enforcement role can come to dominate the functions and culture of a regulatory agency to the exclusion of its other roles. If the primary focus of a regulatory agency is enforcement, resources are likely to be diverted from other areas of work. Free enforcement may be a good for which there is infinite market demand.

#### *Other issues*

175 Market views can be obtained in a number of ways, besides a body having contact with the market through its operation and enforcement of the law. These include secondment of personnel from the private sector, departmental advisory groups, release of public discussion documents seeking submissions, multi-stakeholder negotiations, focus groups, targeted briefings, policy workshops, questionnaires and public notice and comment procedures. Currently the government makes use of ad hoc working groups to provide recommendations on issues, consults widely with the public on all securities market issues through discussion documents and targeted consultation and utilises a Capital Markets Technical Advisory Group<sup>13</sup>.

176 Competitive and contestable advice can also be received by setting up agencies or statutory bodies that provide law reform advice to government that do not have an operational or enforcement focus and, therefore, do not have the conflicts of interest highlighted in the costs section above. For example, in Australia, the Companies and Securities Advisory Committee provides competitive and contestable law reform advice to the government but does not have any operational or enforcement role.

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<sup>13</sup> The Capital Market Technical Advisory Group comprises people with experience in the securities market and related issues (for example accountants, lawyers, academics, investment analysts, directors). The group provides advice on technical issues and practical implications upon request during the policy making process.

## ***Different types of Law Reform Function***

177 There are many different types of law reform function that a body can exercise. Following are several types of law reform function that have been identified:

- **High Level Law Reform**: Developing proposals, consulting with interested parties and responsibility for presenting detailed proposals to the responsible Minister as fully worked up proposals with draft legislation or regulations. Currently the Ministry of Economic Development carries out this role in relation to securities. However, the Takeovers Panel carries out this role exclusively in relation to takeovers and the Securities Commission exclusively in relation to the Securities Regulations 1983. Such a law reform function for these entities may lead to the issues raised in the costs and benefits section described above if an agency has both law reform and enforcement responsibilities;
- **General Law Reform**: Identifying areas requiring law reform, consulting with interested parties and presenting proposals to the relevant Minister. This is the Securities Commission's current law reform role in relation to securities market issues. Such a law reform function may lead to the issues raised in the costs and benefits described above if an agency has both law reform and enforcement responsibilities;
- **Operational Law Reform**: functions in relation to law reform are confined to recommending to government fine tuning of existing legislation and regulation to deal with issues which have arisen in the regulatory body's administration and enforcement of the legislation or regulation. This law reform function is operational in focus and will enable the regulatory bodies to operate or regulate the law more effectively. As the regulator is the body that will learn through the operation of its functions the ways in which the law could be improved, to enable them to work more effectively, it is the body best able to make such recommendations to government. This law reform role recognises that the information provided by the regulatory body is of an operational or enforcement focus. It does not try to provide general law reform or policy advice and, therefore, does not raise the costs discussed above for a body carrying out both law reform and enforcement functions; and
- **Commenting Role**: this law reform function enables a body to comment on proposals given to them which are initiated by other law reform agencies. This ensures that the body's viewpoint is taken into consideration, along with the other viewpoints received. This law reform function does not raise the issues in the costs section above for a body carrying out both law reform and enforcement functions.

178 It may also be considered that the issuing of exemptions from compliance with the law has a law reform component and could be described as a law reform role. Exemptions, however, are generally technical regulation of an operational nature. They involve very low level policy content and make changes that enable the law to be flexible. Exemptions must generally be consistent with the overall objectives of the legislation. It is often more appropriate for a body operating and enforcing the law to

hold such a function, as it is in the best position to know how the law works in practice.

179 While these different types of function are a useful way of thinking of law reform, in reality these functions often overlap, with a body potentially exercising one or several types of law reform function.

### ***International and Domestic Experience***

180 Internationally, law reform and enforcement functions are generally separated. The majority of overseas jurisdictions have a securities regulator that carries out the enforcement of the law when securities market infringements occur. These bodies are empowered to take enforcement actions on behalf of companies and persons who have had breaches of securities law committed against them and monitor and investigate possible securities market infringements. Unlike our Securities Commission and Takeovers Panel these regulators do not have general law reform responsibilities, instead law reform is the responsibility of the government. Any responsibilities that the regulatory bodies do have in relation to law reform is usually limited to commenting on government law reform proposals as required, or providing recommendations to government on how to make the regulatory bodies operate or regulate the law more effectively.

181 Examples of such regulatory bodies include the ASIC, the United Kingdom Financial Services Authority ("FSA"), the Malaysian Securities Commission and the Japanese Financial Supervisory Authority.

182 Very few international securities organisations have general law reform and enforcement responsibilities. However, those regulatory agencies that do have addressed conflicts of interest by clearly separating accountabilities within the regulatory agency and minimising crossover of staff between the functions.

183 As an illustration of the way in which other countries and New Zealand have split enforcement and law reform functions, outlined below are case studies of the ASIC, CSP the FSA, SEC and New Zealand's Commerce Commission.

#### The Commerce Commission

184 A prime example of an enforcement regulator in New Zealand is the Commerce Commission. The Commerce Commission is essentially an enforcement body, and as such is focussed wholly on enforcing the Fair Trading Act 1986, the Commerce Act 1986 and the Electricity Industry Reform Act 1998. In addition to its primary enforcement role, the Commission does provide the government with information on how the law could be improved in relation to the performance of its functions, where appropriate, but it has no law reform function generally for the law it administers. This works well in practice, enabling the Commission to concentrate on enforcement of consumer and competition legislation.

185 It is the government in New Zealand that formulates the policy and carries out general law reform in relation to the law that the Commerce Commission administers.

### The Australian Investments and Securities Commission

186 In Australia the majority of law reform and policy in relation to the securities markets is carried out by the Department of Treasury.

187 The ASIC is the main securities regulator in Australia. ASIC carries out a range of administrative, civil and criminal enforcement actions in relation to market activity and activity of participants in the financial services industry.

188 The ASIC does not have a formal law reform function, it has primarily an enforcement role. In carrying out this enforcement role it also advise the Minister of difficulties and anomalies in the law and how the practical implementation of law cannot achieve the desired objectives. Unlike the Securities Commission it does not have the ability to generally comment on securities law and practices and issue reports to the public.

189 The Companies Advisory and Securities Advisory Committee is established under the Australian Securities and Investment Commission Act 1989 to inquire into and advise the government on issues relevant to the Corporations Law. The Committee is a small independent body that may on its own initiative, or when requested by the Minister, make recommendations on law reform. The Minister appoints the members of the Committee. The Chairperson of ASIC is appointed as a member of the Committee, however, the Chairperson of ASIC cannot be the Convenor of the Advisory Committee. The Committee has a law reform function only and does not exercise any enforcement or operational responsibilities.

### The Corporations and Securities Panel

190 The Department of Treasury undertakes policy development and advice in relation to takeovers in Australia.

191 The CSP is the main regulator of takeovers in Australia. It carries out the enforcement of takeovers legislation. It has greater enforcement responsibilities than the New Zealand Takeovers Panel and has many of the responsibilities that a Court would carry out in relation to takeovers in New Zealand.

192 The CSP can produce policy statements on the Corporations Law. The policy statements relate to how it will carry out its functions and enforce the law. The CSP has no responsibilities in relation to general law reform of takeovers legislation.

### The Financial Services Authority

193 Her Majesty's Treasury is the main body carrying out law reform in the United Kingdom.

194 The Financial Services Authority regulates the financial services industry in the United Kingdom. The United Kingdom has gone one step further than many other countries in relation to the enforcement powers it has given its regulator. The FSA has the ability to impose civil sanctions itself on people who engage in market abuse.

195 In order to give further guidance and certainty to those who would be affected by the FSA's powers, the FSA was given the power to promulgate a Code of Conduct. The Code indicates in broad terms the types of conduct which are likely to fall foul of the statutory precepts and the types of conduct which do not. The Code carries evidential weight in that a breach of the Code will be evidence (but not conclusive evidence) of a breach of the law and compliance with the Code will likewise be evidence that no breach has occurred.

196 The FSA is very much like the ASIC in that its functions in relation to law reform are limited to recommending to the Treasury law reform that may aid it in its operation of the law and issuing this code of conduct which provides policy guidelines on how it will carry out the operation of the law.

### The Securities and Exchange Commission

197 Unlike the FSA, ASIC and the majority of overseas securities market regulators, the SEC does carry out both general law reform and has enforcement functions.

198 The Federal Government carries out the policy work and implements the major pieces of legislation that govern the securities market in the United States. These statutes are broadly drafted and establish basic principles and objectives.

199 The Market Regulation Division of the SEC then has a law reform role in that it alters or creates new regulations under these pieces of legislation to keep up with developments in the securities area. A separate Enforcement Division then investigates possible violations of securities laws and recommends Commission action where appropriate.

200 The Securities and Exchange Commission is a large organisation by international standards. It has the numbers of people and resources to maintain these separate divisions and minimise crossover of staff. This clearly separates accountabilities and ensures tensions and issues of conflicts of interest are minimised.

### **Questions for Submissions**

24. What, if any, sort of law reform function should the Securities Commission have?
25. What, if any, sort of law reform function should the Takeovers Panel have?