



11<sup>th</sup> September 2001

David Wood  
Principal Advisor  
Regulatory and Tax Policy Branch  
The Treasury  
1 The Terrace  
**WELLINGTON**

Dear David,

We refer to our meeting yesterday, and your subsequent email yesterday evening. We note that in bringing this material together we take no view on the applicability of the legislation to this situation, or the appropriateness of this legislation as a means to resolving these issues.

#### **Outline of the Steps Needed to Implement Statutory Management**

An outline of the steps needed to implement statutory management is attached, which includes the critical steps in the process, the estimated time and key players in respect of each step.

In relation to the preparation of this submission (which we have identified as being prepared by either the Company or the Treasury) we have outlined a suggested framework. In the event that the Company decides not to instigate this step itself, we would recommend that the Treasury be the most appropriate government department to make such a submission to the Commission. In this instance, the Treasury has been involved with the Company in terms of assessing and analysing its position, and we think it is best positioned to make an informed presentation based on its institutional knowledge acquired to date. You will note from the second paper (Issues Relating to the Securities Commission Process) that the Ministry of Economic Development will have a role in advising the Minister of Commerce. The Minister will need to independently assess the recommendations of the Commission before making a recommendation to the Executive Council.

#### **Issues Relating to the Securities Commission Process**

A list of indicative issues associated with the consideration to be undertaken by the Securities Commission is attached.

#### **Risks**

You have asked for an assessment of possible international and domestic reaction/behavior in the event of statutory management and measures that can be taken to mitigate any adverse effects.

We have no empirical evidence as to the exact effect of the implementation of statutory management in the past. However, our observations are as follows:

- the experience from the collapse of DFC was that the international banking community (especially Japan) indicated that they may review their risk assessment of New Zealand, however it is unclear if this did in fact occur;
- the possibility of statutory management always raises the issues of Government's willingness/ability to interfere with private property/contractual rights. This argument obviously extends to the risks that such a perception holds for foreign investors;

- some of these perceptions may be heightened if it is seen as the government both initiating the action, and then placing the Company into statutory management;
- there are some obvious key messages that can go out in the event that statutory management occurs in this instance, which you will no doubt be aware of, and which we add for the sake of completeness. They are :
  - that the government could not contemplate further uncertainty for to do so would be contrary to the public interest and unsettling for the commercial market;
  - the strategic importance of the company to New Zealand's national interest/economy overrides the disturbance of private contractual rights;
  - there may also be issues around the effective of statutory management on international and operational issues the Company has in other jurisdictions, (eg the landing rights of the company, and in particular issues as to whether those rights are specific to a legal entity and how assignable and transferable are those rights);
  - clear signals from the government that the statutory management is by way of a "rescue response" which will be of a short duration, rather than in the form of previous statutory managements which have been characterised as being a winding-up of the company's affairs.

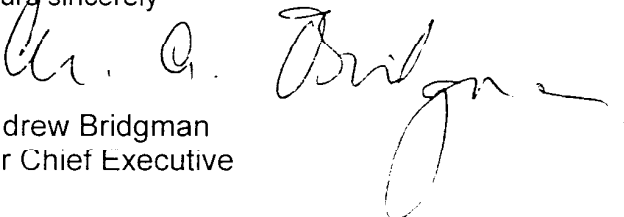
In relation to the issue of risks, our view is that the Treasury and The Reserve Bank are in the best position to assess both national and international reactions, and the consequences of those reactions, on the New Zealand economy. The assessment of the risks above is based on our experience with statutory management, and the perception of its impact, from the Registrar's perspective.

We have not considered the issue of costs involved in the statutory management from the perspective of ongoing costs associated with operating the company during the period of statutory management. Again, this an area where the Treasury will have a greater understanding as to what those costs could be, and what exposure the government has to those costs.

We have not entertained in the attached documentation the risk of the Commission declining an application for statutory management.

Please do not hesitate to contact me on 470-2502 (or 021 306 722) or Neville Harris (470-2501) should you have any further queries.

Yours sincerely

  
Andrew Bridgman  
For Chief Executive

## STATUTORY MANAGEMENT PROCESS

PROCESS	TIME	KEY PLAYERS
<p><b>1.</b> Preparation of submission to the Commission. Key issues to be traversed in the submission:</p> <ul style="list-style-type: none"> <li>• background of the financial position of the Company and current state of the Company;</li> <li>• the position of the creditors and the shareholders;</li> <li>• the options that exist for addressing the Company's difficulties, and why those options (other than Statutory Management) are not feasible;</li> <li>• information that will satisfy the particular ground on which you are seeking to put the Company into statutory management (presumably it will be "the public interest" refer section 4(b)(iii), section 5(1)(c) and section 39(c)(i). The criteria of these provisions will need to be addressed, and in particular:               <ul style="list-style-type: none"> <li>• what is the public interest in this instance;</li> <li>• how will statutory management preserve the public interest; and</li> <li>• why can't the public interest "be adequately protected under the Companies Act or in any other lawful way" (refer section 4 (b))</li> </ul> </li> </ul>		<ul style="list-style-type: none"> <li>• The Company</li> <li>• The Treasury</li> </ul>
<p><b>2.<sup>1</sup></b> Convene Commission? <i>Note: the Commission quorum is 3 members. Depending on issues of conflict/availability, it may be necessary to fly members into Wellington so as to obtain the quorum (attached copy of member profile)</i></p>	2-6 hrs	<ul style="list-style-type: none"> <li>• Jane Diplock, The Commission</li> <li>• John Farrell, The Commission</li> </ul>
<p><b>3.</b> Notify Parliamentary Counsel Office <i>Note: they should be drafting the Order in Council in anticipation of a Commission recommendation.</i></p>	2-6 hrs	<ul style="list-style-type: none"> <li>• George Tanner, Parliamentary Counsel</li> </ul>
<p><b>4.</b> Notify Cabinet Office to convene Executive Council<sup>3</sup></p>	8 hrs	<ul style="list-style-type: none"> <li>• The Treasury</li> </ul>
<p><b>5.</b> Identify Statutory Manager and clear conflicts <i>Note: the Act allows for the Order in Council to "appoint one or more persons as statutory manager". The issue of whether an industry expert should be appointed as well should be looked at.</i></p>	2-6 hrs	<ul style="list-style-type: none"> <li>• The Registrar of Companies</li> <li>• The Securities Commissions</li> </ul>

<sup>1</sup> steps 2 – 5 should be commenced in parallel.

<sup>2</sup> an additional time component will be the period that it takes the Commission to hear the submission and reach a decision. This is very difficult to predict, but could be between 4 – 8 hours.

<sup>3</sup> while 8 hours has been allocated this is dependant on the availability of relevant Ministers and the Governor-General.

## ISSUES RELATING TO THE SECURITIES COMMISSION PROCESS

- 1.** Whether the Commission considers the submission on:

  - i.** the papers alone; or
  - ii.** on the papers with representation from the parties; or
  - iii.** on the basis of inter-parties representation.
  
- 2.** The submission will need to address why it should be heard ex-parte. Grounds to argue are:

  - i.** it is a listed company (and therefore market/price sensitive information);
  - ii.** need for certainty in the public interest;
  - iii.** timing (an ex-parte application will be more expeditious than a contested hearing).
  
- 3.** The period it takes the Commission to consider the issues will depend on:

  - i.** whether or not the submission is heard ex-parte (as above);
  - ii.** how comprehensive the submission papers are;
  - iii.** the representation on delivery of the submission (if it is the Company the key individuals should be present to be able to answer any additional questions the Commission may have);
  - iv.** whether the Commission thinks it needs further information.
  
- 4.** The Commission delivers a report and recommendation to the Minister of Commerce (which will include a recommendation for an identified person(s) to be appointed as statutory manager). Note an assessment will need to be made of the consequences, and any further course of action, if the Commission declines the application.
  
- 5.** The Ministry of Economic Development advises the Minister of Commerce on the recommendations of the Commission (and provides the Minister with an Order in Council).

## MEMBER PROFILES

At balance date there were ten Commission Members.

*Have Sir Block's  
now Chair*

**MR EUAN H. ABERNETHY** LL.B. Chairperson of the Commission since April 1995. Professional: Partner of Bell Gully (and predecessor firms) 1962 to 1995 where his areas of legal practice included securities, company, banking and finance law.

**MR COLIN A.N. BEYER** LL.B, FICD. Senior partner of Simpson Grierson, Wellington. Directorships: Tower Limited (Chairman); Summit Resources Limited (Chairman); Capital Properties New Zealand Limited (Chairman); Tower Risk & Investment Management Limited. Professional: Solicitor, Wellington.

**MR FALCON R.S. CLOUSTON** B.Agr.Sc (Agricultural Economics). Business Consultant, Wellington. Directorships: Abacus Biotech Limited; Palliser Estate Wines of Martinborough Limited; also a director of a number of private companies. Professional: Member of Government Taskforce on Private Provision for Retirement 1991/1992; Past Member of New Zealand Stock Exchange.

**MR IAN F. FARRANT** B.Com (Accounting/Marketing), FCA Company Director, Dunedin. Directorships: Broadway Industries Limited (Chairman); Fulton Hogan Limited (Chairman); The New Zealand Refining Company Limited (Chairman); Skeggs Group Limited (Chairman); Airwork (N.Z.) Limited; Queenstown Airport Corporation Limited. Also a director of a number of private companies. Professional: Member of Ministerial Committee of Inquiry into the Sharemarket (The Russell Committee) 1988/1989.

**MS ELIZABETH M. HICKEY** M.Com (First Class Honours), FCA. Chartered Accountant, Auckland, specialising in financial reporting and financial investigations. Directorship: Radio New Zealand Limited. Professional: Chairman of Financial Reporting Standards Board of Institute of Chartered Accountants of New Zealand.

**MR LLOYD A.J. KAWANAGH** LL.B. Corporate Secretary/Global Manager, Legal & Secretarial, New Zealand Dairy Board. Professional: Barrister and Solicitor, Wellington.

**MS JOANNA M.G. PERRY** MA (Cantab), FCA (ICAEW), CA (ICANZ). Chartered Accountant, Auckland. Professional: Partner of KPMG; Member of Financial Reporting Standards Board of Institute of Chartered Accountants of New Zealand.

**MS CATHY A. QUINN** LL.B. Solicitor, Auckland. Professional: Partner of Rudd Watts & Stone specialising in corporate, securities and competition law. Joint author Morrison's *Company and Securities Law*.

**DR RODGER M. SPILLER** PhD, M.Com (First Class Honours), CFP, CA, Dip. Mgt., ANZIM. Personal Investment Adviser and Business Consultant, Auckland. Directorships: New Zealand Businesses for Social Responsibility; Transparency International (NZ). Professional: Managing Director of Money Matters (NZ) Limited and Rodger Spiller & Associates Limited; Executive Director of the New Zealand Business Council for Sustainable Development and the New Zealand Centre for Business Ethics and Sustainable Development. Author CCH's *Essential Guide to Financial Planning in New Zealand*.

**MR MICHAEL R.H. WEBB** LL.B, AAMINZ. Barrister, Auckland and Wellington, specialising in corporate, banking and securities law. Directorships: Fulton Hogan Limited; Tower Trust Group. Professional: Joint Convenor New Zealand Law Society/Institute of Chartered Accountants of New Zealand Joint Insolvency Committee; Past Convenor New Zealand Law Society Commercial and Business Law Committee; Member of Pacific Economic Cooperation Council Financial Markets Development Project Group.

From: Report to the House of Justice on Part III  
of the Corporations (Investigation and Management) Act 1989.  
Public Interest - Securities Commission 1991

59. The view was expressed in a number of submissions that the "public interest" ground should be expressly defined in the Act, or that the public interest ground should be deleted entirely. It was argued that greater confidence in the application of the Act would be engendered, and any overtones of political involvement would be avoided if this ground were either deleted or replaced by a clear statement of the public interest grounds.
60. We consider, however, that if the Act is to work effectively, then a general public interest ground for the application of the Act should be retained. We agree with the minority view put forward in the New Zealand Law Society's submission that it is important to retain the protection of the public interest as a ground for appointment of a statutory manager, for any attempt to define the nature of public interest would serve only to limit unduly the circumstances in which an appointment could be made. It is difficult to predict all the circumstances or types of entity that could justify an appointment on the grounds of public interest. The concerns which have been expressed to us would be better addressed if the Act is clearly confined to circumstances of an emergency and exceptional nature where the existing law cannot adequately protect the interests of those whose interests are, or are likely to be, harmed. The existing experience of the Act's application has built up a body of precedent as to the kinds of circumstances which come within the description of "the public interest". The letter dated 18 August 1989 issued by the Commission's Chairman, which was set out in our discussion paper, summarises that experience and is indicative of the policy which the Commission has followed in applying the Act.

#### Recommendation

61. We recommend that section 4 be amended to state that the grounds referred to under both paragraphs (a) and (b) of that section apply only where the affairs of the corporation cannot adequately be dealt with under

the Companies Act or in any other lawful way.

### Period of Statutory Management

62. The view most frequently expressed to the Commission has been that there should be a time limit upon the application of the statutory management regime. Various time frames were suggested to us, ranging from three to six months. Most parties considered that the statutory managers should be entitled to apply to either the Court or to the Securities Commission for an extension of the statutory management (and if it was thought necessary, the moratorium) upon the expiry of that term.
63. Those statutory managers who gave evidence to us took a different approach. In a joint submission by the statutory managers for the Equiticorp and Richmond Smart groups, it was stated that it is too difficult to determine at the outset how long a statutory management might take. It was said that if a statutory management was to be reviewed after a short period, it would be difficult for a statutory manager to commit resources to the process because it would be possible that they would be wasted if the statutory management was discontinued or radically altered.
64. Although we see some merit in this view, criticism of the lack of a "sunset" provision for application of the statutory management regime and for the moratorium has been overwhelming. We have concluded that if creditors' and other claimants' contractual rights are to be interfered with, without prior consultation and potentially to their detriment, a procedure should be established to ensure that the period of interference is limited to that which is reasonably necessary.
65. The difficulty that arises is establishing a procedure that meets those objectives but which does not threaten the utility of the statutory management process. The majority of submissions, as we noted above, favour a short (3-6 months) time frame for the statutory management while allowing the statutory manager to apply for an extension of the statutory management if he or she considers that necessary. This would establish the statutory management regime as a potentially two stage procedure. The