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TAKEOVERS PANEL

IN THIS ISSUE

Small Code companies class exemption notice

On 1 December 2016 a new exemption for 'small' unlisted Code companies came into force: *Takeovers Code (Small Code Companies) Exemption Notice 2016*. The new small Code companies class exemption extends the scope of the original exemption to any person who increases their holding or control of voting rights in a small Code company, not only as a result of an allotment (which was covered in the original exemption), but also as a result of an acquisition of voting securities in the small Code company, or as a result of a buyback of voting securities carried out by the small Code company. The exemption allows the small Code company to opt out of full Code compliance for the transaction.

Timing rules calculator

A digital Timing Rules Calculator is now available to assist parties to comply with the Code's prescribed time limits. The calculator can be found on the Takeovers Panel website, or by clicking *here*. Please note that while all care has been taken to ensure that the calculator works properly, compliance with the Code's time limits remains strictly the responsibility of persons who are bound by the Code.

Update: Technical amendments to the Code

In November 2016 the Panel published the consultation paper "Proposed Amendments to the Takeovers Code". Public consultation closed on 2 December 2016. Once it has considered the submissions received, the Panel will make recommendations to the Minister of Commerce and Consumer Affairs on its proposed amendments to the Takeovers Code.

The meaning of "effective control"

In May 2016, the Panel had the opportunity to consider the meaning of "effective control" in relation to an exemption application in the context of the Trustpower Limited scheme of arrangement. This was the first time that the Panel has formally considered the meaning of effective control since the Panel's determination under section 32 of the Takeovers Act 1993 in respect of *Gould Holdings Limited* in 2003.

Trustpower was planning to demerge into two listed companies by way of a scheme of arrangement under the Companies Act 1993. For each share in Trustpower, shareholders would receive one share in each of the two companies by way of an in specie distribution. Trustpower would then be liquidated. Prior to the distribution of voting rights in the two newly-listed companies, the two companies were wholly-owned (unlisted) subsidiaries of Trustpower.

Infratil Limited controlled 50.59% of the voting rights in Trustpower. As a controller of between 50% and 90% of the voting rights in Trustpower, Infratil had the right under rule 7(e) of the Code to increase its control of voting rights in Trustpower by up to 5% per year ("creep right").[1] With the demerger in sight, Infratil applied to the Panel for an exemption to enable it to retain its creep right after the demerger, but in respect of the two newly-listed companies.[2] As part of its exemption application, Infratil submitted to the Panel that an exemption was not necessary because Infratil's control of 50.59% of the voting rights in Trustpower gave Infratil effective control of Trustpower, and therefore effective control over 100% of the voting rights in Trustpower's two (then) subsidiary companies.

In the context of considering whether to grant the exemption, the Panel considered whether Infratil had effective control over Trustpower's voting rights in the two companies.

In considering the meaning of effective control, the Panel discussed the broad coverage of the definition of "control" as defined in rule 3(1).[3] The Panel was mindful that the definition of "control" was drafted into the Code as an anti-avoidance measure to catch changes in control in entities upstream of the Code company.

The Panel considered that effective control was about whether an entity or a person has the power to effect or make changes in a company, such as the power to appoint and remove directors. The power to appoint and remove directors was considered more relevant than whether or not the power had in fact been exercised.

In respect of the Infratil exemption, the Panel agreed that Infratil, by virtue of controlling 50.59% of the voting rights in Trustpower, had effective control of Trustpower. With effective control of Trustpower, Infratil had effective control of Trustpower's two subsidiaries because Infratil could effectively direct how Trustpower voted its shares in those subsidiaries. The exemption was therefore declined on the basis that there would be no change in effective control, and that Infratil would retain its creep right in the newly-listed companies.

The Panel's decision highlights that each situation depends on its own facts, and care should be taken because the Panel will look through shareholding structures to find where effective control lies. The Panel recommends engaging with the Panel executive early when a proposed transaction raises questions about possible changes of control, so that issues of effective control can be considered by the Panel outside of an enforcement context.

1 Rule 7(e) of the Code allows a person who holds or controls more than 50% but less than 90% of the voting rights in a Code company to increase their holding or control by up to 5% of the Code company's total voting rights in a 12-month period, from the lowest percentage of voting rights in that Code company.

2 If Infratil controlled 0% of the voting rights in the newly-listed companies prior to implementation of the scheme, then Infratil would have to wait for 12 months before it could creep under rule 7(e).

3 "Control" is defined in rule 3(1) of the Code as "control, in relation to a voting right, means having, directly or indirectly, effective control of the voting right."

Appointments and departures

The Panel welcomes the appointment of Nathanael Starrenburg to the Panel from 25 October 2016. Nathanael is a director of Harmos Horton Lusk, and specialises in domestic and cross-border mergers and acquisitions, private equity investments, equity capital markets, private securities offerings and complex joint venture arrangements.

On 1 October 2016 the Panel welcomed the appointment of Andy Coupe as Chairman of the Panel, and Carl Blanchard as Deputy Chairman. This follows the departure of David Jones, long-standing Chairman of the Panel, and David Flacks, who served the Panel as a member for five years. The Panel thanks Mr Jones and Mr Flacks for their service.

Christmas closedown

The Takeovers Panel offices will be closed from 24 December 2016, and will reopen on 9 January 2017. While the offices are closed, the Panel's senior executive staff will be monitoring their emails and can be contacted on the *phone numbers listed* on the Panel's website.

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