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# CODE WORD



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THIS ISSUE OF CODE WORD LOOKS AT ASPECTS OF THE TAKEOVERS CODE ARISING FROM RECENT DECISIONS MADE BY THE TAKEOVERS PANEL. THESE CASE STUDIES AIM TO MAKE KNOWN THE PANEL'S THINKING ON THE CODE AND ITS APPLICATION IN CERTAIN CIRCUMSTANCES.

## Independent Advisers

### LOWE CORPORATION LIMITED AND RULE 20

On 9 October 2002 Lowe Corporation Limited (Lowe) made a full takeover offer under the Code for all the shares in Blue Sky Meats (N.Z.) Limited (Blue Sky). Blue Sky is a meat processing company based in Southland. It is not a listed company but qualifies as a Code company because of its size and number of shareholders.

An independent adviser's report on the merits of the offer was provided to the shareholders of Blue Sky as required by rule 21 of the Code.

A key feature of the Code is that a takeover offer must *"be on the same terms and provide the same consideration for all securities belonging to the same class of equity securities under offer"* (rule 20).

An issue arose in the Lowe takeover in relation to rule 20 because of an existing contract between Blue Sky and Horizon Meats New Zealand Limited (Horizon). Horizon, a 37% shareholder in Blue Sky, had an exclusive marketing contract with that company under which all of Blue Sky's meat products were sold through Horizon.

As part of negotiations leading up to the takeover offer Lowe and Horizon agreed that Horizon would accept Lowe's offer once it was made, and Lowe would procure Blue Sky to pay Horizon some \$2.7 million for terminating the marketing contract early.

Horizon was a substantial shareholder in Blue Sky so the proposed termination payment of \$2.7 million raised the issue of whether Lowe's offer complied with rule 20.

The independent adviser's comments on the termination payment included:

*In our view it is not unreasonable to expect a payment to be made to Horizon to buy out this contract. However we do not have access to any further information to verify this and therefore we cannot make a determination as to whether \$2.7 million is a fair value for this transaction.*

...

*The effect of any overcompensation for terminating this contract could result in additional consideration being received by Horizon. Notwithstanding this, the offer for the shares to Horizon and all other shareholders is the same, ie \$4.50, and considered by us to be fair.*

These comments left open the question whether Lowe's offer was in breach of rule 20. The independent adviser did not assess the proposed payment of \$2.7 million to Horizon. This was of concern to the Panel because without an assessment shareholders would not be fully informed of the merits of the bid, particularly in relation to rule 20. The Panel also considered that the independent directors of Blue Sky had a responsibility to see that the issue was properly addressed.

The Panel held a meeting under section 32 of the Takeovers Act to determine whether Lowe's offer complied with rule 20. The Panel retained its own expert valuer. After considering evidence received from Lowe, Blue Sky and Horizon the Panel determined that the consideration offered for terminating the marketing contract was reasonable and did not include additional consideration to Horizon for the purchase of its shares. The Panel was satisfied that there was no breach of rule 20 and that the same consideration was being provided to all holders of securities of Blue Sky.

The full text of the Panel's determination is on the Panel's website.

This was the first time the Panel had determined an issue relating to rule 20 involving the payment of consideration to a

shareholder that was related to an offer but was not a payment for shares. The Panel was compelled to hold the meeting because the independent adviser had not properly dealt with the issue in its report.

Independent advisers and target company directors are reminded of the importance of rule 20 and of the need to address issues that arise under that rule.

## Buyback Class Exemption

### TRUSTPOWER LIMITED

In March 2003 TrustPower Limited (TrustPower), an electricity generating and retail company based in Tauranga, made a pro-rata buyback offer to purchase 2 shares of every 7 held by each shareholder.

In making this offer TrustPower sought to rely on clause 4 of the *Takeovers Code (Class Exemptions) Notice (No 2) 2001* (the buyback exemption)). This exemption provides a means for shareholders to retain increases of voting control where a company acquires shares through a buyback that has been approved by the shareholders.

#### Buyback procedure

The process that TrustPower sought to follow for its buyback was:

- distribute the offer document requiring irrevocable responses from all shareholders;
- after the offer closed, prepare a notice of meeting setting out the exact increased control percentages requiring approval of the non-associated shareholders and send it, with an independent adviser's report, to shareholders;
- hold the meeting of the company at which shareholders would vote to approve the increased control percentages arising from the buyback.

The Panel considered that this procedure did not comply with the buyback exemption. The buyback proposal, and the resulting potential increases in control percentage for each major shareholder, should have been put to shareholders with the independent adviser's report at a meeting held before the offer was made.

The procedure followed by TrustPower meant that shareholders were required to irrevocably commit to the buyback offer without having any advice on the merits of the buyback, including its control implications.

The terms of the buyback exemption are designed to ensure that shareholders receive advice on the merits of the buyback, including its control implications, before they are required to decide whether or not to accept the offer.

The Panel convened a meeting under section 32 to determine the application of the buyback class exemption. Representatives and counsel for TrustPower's four major shareholders and TrustPower attended the meeting.

The Panel determined that the procedure for the buyback used by TrustPower did not comply with the terms of the buyback exemption. However, the buyback offer was underway and had already been accepted by many shareholders. The Panel's

determination indicated that it would consider an exemption for TrustPower and the major shareholders intending to increase their voting control in TrustPower.

The full text of the Panel's determination can be seen on the Panel's website.

#### The exemption

TrustPower applied for an exemption. The Panel granted an exemption to allow the buyback to proceed but give shareholders who had accepted the buyback the opportunity to withdraw acceptances. This ensured that shareholders would have the benefit of the independent adviser's report and the information in the notice of meeting before they made their final decision as to whether to accept the buyback offer.

The exemption from rule 6(1) of the Code in respect of any increase in the voting rights they would hold or control in TrustPower as a result of the buyback was granted to TrustPower's four major shareholders, Alliant International New Zealand Limited (Alliant), Infratil Limited (Infratil), The Australian Gaslight Company (AGL) and the Tauranga Energy Consumer Trust (TECT). AGL was included in the exemption even though it transpired that AGL sold out its entire holding in TrustPower as a result of the buyback.

The exemption was subject to conditions including:

- that shareholders of TrustPower had to approve the potential increase by separate resolution in respect of each of Alliant, Infratil, AGL and TECT;
- that neither the shareholder whose voting control was to increase nor any of its associates could vote in respect of that shareholder's potential increase in voting rights;
- that, as mentioned above, any shareholder who had accepted TrustPower's buyback offer (other than any of the four beneficiaries of the exemption) would have up until 5 working days after the date of the shareholders' meeting to rescind their acceptances without penalty; and
- that for a short period after the meeting TrustPower would assist any shareholders who had previously rejected the offer to sell their TrustPower shares.

Other conditions related to the contents of the notice of meeting.

The exemption was granted because this was the first case where the application of the buyback exemption had come before the Panel and the Panel was satisfied that TrustPower had acted in good faith and on the basis of legal advice in the approach that it had taken.

The full text of the exemption is published on the Panel's website.

#### Associates

A further issue arose concerning the eligibility of the major shareholders to vote in favour of the resolutions approving the increases in voting control.

TrustPower's major shareholders at 31 March 2003 were:

Infratil	27.93%
Alliant	18.87%
TECT	22.67%
AGL	20.47%

Infratil and Alliant were parties to an investment agreement making them “associates” for the purposes of the Code. However the Panel was concerned, on the basis of the evidence, that all four major shareholders may have been associated with each other and with TrustPower in respect of the increased voting control being sought by TECT, Infratil and Alliant.

The four major shareholders offered to give the Panel enforceable undertakings under section 31T of the Act that they would not exercise their voting rights at TrustPower’s meeting. The Panel accepted these undertakings as an efficient way to deal with its concerns while allowing the buyback transaction to proceed in accordance with its contractual timetable.

#### **Future buyback offers**

This was the first time the Panel had intervened in a buyback transaction carried out under the buyback class exemption. The Panel’s determination settled the procedure for buyback offers involving shareholder approval under the buyback class exemption. The shareholder meeting to approve the potential increases in voting control must be held before the buyback offer is made to shareholders. Shareholders who wish to increase their control percentages must disclose their intention before the meeting takes place. This enables the notice of meeting and the independent adviser’s report to be prepared on a proper basis.

The need for the type of exemption granted to TrustPower should not arise in the future.

## **Rule 6(2) – Associates**

### **DESIGNER TEXTILES (NZ) LIMITED – GOULD HOLDINGS LIMITED**

Rule 6(2) has provisions designed to ensure that the fundamental rule is not defeated by the manner in which company shareholdings are structured.

Designer Textiles (N.Z.) Limited (DTL) is a Code company. Its major shareholder is Gould Holdings Limited (GHL), an investment company controlled by Mr George Gould, with a 24.69% stake.

Mr Gould has had a long association with the Rutherford family. In the latter part of 2002 the members of the Rutherford family sold their investment company, Amuri Securities Limited (ASL) to GHL in exchange for shares and convertible notes in GHL.

After Mr Gould had subscribed some additional capital in GHL the Rutherford family held 21.24% of GHL while Mr Gould, through a separate company Gould Investments Limited (GIL), held 78.76%.

The Panel was concerned that the Rutherford family interests may have joined Mr Gould in “holding or controlling” GHL’s 24.69% stake in DTL in breach of the Code. The issue was the effect of rule 6(2)(b) which states that if:

(b) a person or persons together hold or control voting rights and another person joins that person or all or any of those persons in the holding or controlling of those voting rights as associates, the other person is deemed to have become the holder or controller of those voting rights:

To come within rule 6(2)(b) the Rutherfords first had to have joined Mr Gould/GIL in the control of GHL and therefore the

control of GHL’s shareholding in DTL.

The Panel examined the relationship between the Rutherford family and Mr Gould to decide whether the Rutherfords may have joined Mr Gould/GIL in controlling GHL. Of particular note to the Panel were:

- the Rutherfords had no board representation on GHL;
- the Rutherfords acquired their interest in GHL accepting that they had no right to influence Mr Gould’s control of that company; and
- there was no shareholder agreement to provide the Rutherfords with any control in the decision-making process of GHL.

The Panel accepted that the Rutherford family had not joined Mr Gould/GIL in the controlling of GHL’s 24.69% holding in DTL. The Panel noted that it would be unusual for an investment of 21.24% to be made in a closely-held company on an entirely “sleeping partner” basis with no checks and balances on the conduct of that company. However, in this case the evidence indicated that

- Mr Gould was intent on retaining control of GHL; and
- the Rutherford family bought their shares in GHL accepting that they had no rights to influence GHL’s governance, either in controlling the votes in DTL, or otherwise.

The second part of rule 6(2)(b) requires that parties are joined in the holding or controlling of the voting rights as associates. As the Panel determined the requirements of the first part of rule 6(2)(b) had not been met, there was no need to consider whether the Rutherfords and Mr Gould/GIL were associates.

## **Associates – Aggregation of Holdings**

### **DESIGNER TEXTILES (N.Z.) LIMITED – RUTHERFORD FAMILY**

The question of association between the Rutherford family and Mr Gould did arise in connection with various acquisitions of shares in DTL itself by members of the family.

Several family members had acquired direct investments in DTL and by February 2003 these holdings amounted to some 8.8% of the total voting rights in DTL. They were in addition to the 24.69% held by GHL.

The issue was that if the Rutherford family were associates of Mr Gould or GIL at the time they had acquired these parcels of shares then the acquisitions would have been in breach of the Code.

The Code defines “associate” in rule 4 as follows:

For the purposes of this code, a person is an associate of another person if—

- (a) the persons are acting jointly or in concert; or
- (b) the first person acts, or is accustomed to act, in accordance with the wishes of the other person; or
- (c) the persons are related companies; or
- (d) the persons have a business relationship, personal

relationship, or an ownership relationship such that they should, under the circumstances, be regarded as associates; or

- (e) the first person is an associate of a third person who is an associate of the other person (in both cases under any of paragraphs (a) to (d)) and the nature of the relationships between the first person, the third person, and the other person (or any of them) is such that, under the circumstances, the first person should be regarded as an associate of the other person.

The Panel considered a number of factors, including:

- the historical business relationship through companies in which both the Rutherfords and Mr Gould had an involvement;
- the Rutherfords had previously contracted Mr Gould to manage certain investments in ASL on their behalf;
- the Rutherford investment in GHL was very informal with minimum documentation and was characterised by a high degree of trust on the part of the Rutherford family;
- the Rutherford family agreed not to take part in the governance of GHL; and
- the relevant investment monies of the Rutherfords were kept together over many years, and they adopted a common approach to the investment in GHL.

The Panel was satisfied that the strands of all three elements (business, personal and ownership relationships) of the extended definition of “associate” in rule 4(1)(d) satisfied the requirements for association between Mr Gould and the Rutherford family. The rule 4(1)(d) relationships did not need to exhibit any agreement over control or any particular form of undertaking relating to the voting rights attached to shareholdings in the company. In particular, the expression “in the circumstances” enabled all factors to be considered in assessing the relationship, taking into account the importance of the associate status.

The Panel determined that the associate status crystallized on 11 September 2002 and that consequently all acquisitions of DTL securities by Rutherford family members after that date were in breach of rule 6(1)(a). The parties at fault were required to divest those holdings that had been acquired in breach of the Code.

The family members gave enforceable undertakings that the relevant shares would be sold within six months of the Panel’s decision and subsequently confirmed that this had been done.

Even small acquisitions of voting rights in a Code company can be in breach of the Code if an associate of the person acquiring the voting rights already holds more than 20% of the voting rights in the company. The provision is designed to ensure that controlling shareholders cannot increase their level of control in a Code company through associates when they would be unable to acquire the additional voting rights themselves.

# Initial Public Offering

## EXEMPTION FOR JADE SOFTWARE CORPORATION LIMITED

The IPO class exemption (clause 7, *Takeovers Code (Class Exemptions) Notice (No 2) 2001*) relates to voting rights obtained through initial public offerings by newly listed companies

It provides exemptions from the fundamental rule (rule 6(1)) for increased control percentages arising from allotments of shares that occur within six months of the IPO. A condition of the exemption is that the offer complies with the Securities Act and that the potential control outcomes are clearly stated in the prospectus and investment statement.

During 2002 Jade Software Corporation Limited (Jade) was developing an IPO involving the issue of shares in what would become a Code company. Certain bonus share allotments that could be made after the IPO could not comply with the Panel’s IPO class exemption because they could occur up to eight years after the initial share issue. Jade sought a specific exemption from the Panel from the fundamental rule.

The bonus share allotments would arise from the issue of a separate outperformance share (OPS) for the benefit of shareholders who were listed on Jade’s register as at 14 December 2001. These allotments could be made in three separate tranches over eight years, depending on Jade reaching certain specified profitability targets.

Specific allotments under the OPS could probably have been approved by non-associated shareholders under rule 7(d) of the Code at the time they were to be made. However, this would have defeated their purpose and exposed the original OPS shareholders to the risk that non-associated shareholders of Jade, although they knew about the OPS when they acquired Jade shares, may decline to approve the allotments.

Jade’s situation was similar to the situation envisaged by the IPO class exemption. The basic premise of the IPO exemption is that subscribers are, by making the decision to subscribe, implicitly approving the control outcome set out in the offer document.

The exemption sought by Jade was granted subject to conditions, including that:

- any investment statement and prospectus for the IPO includes a summary of the terms of the OPS which clearly explains the terms of the bonus issues, and the dilutionary effects if one or more of the bonus issues were triggered;
- Jade’s annual report in each year the OPS is on issue includes a summary of the terms of the OPS and how these affect shareholders; and
- the key terms and conditions of the OPS could not be altered.

Although shareholders could not vote to approve the allotment of the bonus shares under the OPS at the date of allotment (which might otherwise have occurred under rule 7(d) of the Code) those shareholders would have accepted the OPS and its terms and conditions by deciding to invest in Jade either through the IPO or at a later time.

Recent announcements from Jade indicate that the IPO is unlikely to proceed.

# Underwriting

## GUINNESS PEAT GROUP PLC – TOWER LIMITED EXEMPTION

In July 2003 Tower Limited (Tower), a Code company, was undertaking a recapitalisation through making a large pro rata rights offer to existing shareholders. Guinness Peat Group plc (GPG), already Tower's largest single shareholder, entered into an agreement with Tower to underwrite the offer. GPG and Tower also agreed, in part to comply with decisions of the NZX's Market Surveillance Panel, to appoint a panel of sub-underwriters.

GPG had the potential, albeit reasonably remote, to obtain in excess of 20% of the voting rights in Tower as a consequence of its underwriting of Tower's rights issue. If this occurred, GPG intended to rely on the class exemption for underwriters set out in clause 19 of the *Takeovers Code (Class Exemptions) Notice (No 2) 2001* (the underwriter's class exemption). That exemption provides that:

- 19(1) Every person who is, or is an upstream party of, an underwriter is exempted from rule 6(1) of the Code in respect of any increase in the person's voting control.
- (2) The exemption is subject to the condition that—
- (a) the increase in the person's voting control results only from the allotment or transfer to the underwriter of voting securities in a Code company under a bona fide underwriting or subunderwriting contract entered into in the underwriter's ordinary course of business; and
- (b) the control percentage of the person is decreased within 6 months after the increase in the person's voting control to, or below, either—
- (i) the control percentage of the person immediately before the increase in the person's voting control; or
- (ii) if—
- (A) ...; or
- (B) the aggregate of the control percentages of the person and the person's associates immediately before the increase was less than 20%, 20% less the aggregate of the control percentages of the person's associates at the time of the decrease; and
- (c) the additional voting rights of the person are not exercised before the decrease.

An underwriter is defined in the exemption as:

a person whose ordinary business includes entering into bona fide underwriting or subunderwriting contracts with respect to offers of securities.

The Panel's preliminary view was that GPG would be unable to rely on that class exemption because GPG's ordinary business did not include "entering into bona fide underwriting or sub-underwriting contracts with respect to offers of equity securities". GPG did not accept that it was unable to rely on the class exemption.

As an alternative to purporting to rely on the class exemption GPG, at the invitation of the Panel, applied for a specific exemption from the fundamental rule to enable the underwriting agreement to proceed.

The exemption was granted subject to the conditions that-

- the aggregate control percentage of GPG and Ithaca (its subsidiary) was decreased to, or below, 20% within the period that ended with the earlier of:
  - (i) the day that was 30 days from the date on which GPG and Ithaca increase their voting control under the agreement; and
  - (ii) the day that Tower held its next general meeting; and
- the voting rights attached to the voting securities that must be disposed of are not exercised by GPG or Ithaca.

These conditions were tighter than those contained in the underwriter's class exemption and were intended to ensure that GPG, which had demonstrated its desire to increase its control in Tower, had a relatively brief period in which to dispose of any shares it obtained above the 20% Code threshold.

GPG notified the NZX that, after having fulfilled its underwriting obligations, it had acquired only 17.1% of the total voting securities of Tower. Consequently the exemption was not required and was revoked.

The policy behind the underwriters class exemption was to provide professional underwriters with a reasonably generous period in which to sell down shareholdings in excess of 20% obtained through fulfilment of their underwriting obligations. It was not intended to extend the benefit of the underwriters class exemption to parties who used underwriting arrangements as a means of increasing their control of target companies.

The Panel is reviewing its underwriters class exemption notice to ensure the wording of the exemption reflects the Panel's policy intentions.

## Defensive Tactics

### TOLL GROUP (NZ) LIMITED AND TRANZ RAIL HOLDINGS LIMITED

The Panel dealt with two issues involving alleged or possible defensive tactics being used by the directors of Tranz Rail Holdings Limited (Tranz Rail).

The first concerned the agreement between the Crown and Toll Group (NZ) Limited/Toll Holdings Limited (Toll) relating to the sale of the rail network to the Crown once Toll obtained control of Tranz Rail. The Panel received a complaint that this action amounted to a defensive action by the "directors" of Tranz Rail.

The second concerned Tranz Rail's wish to sell the Wellington Railway Station to the Crown during the course of Toll's takeover offer for Tranz Rail. Tranz Rail sought the approval of the Panel to the proposed sale.

Rules 38 and 39 of the Code deal with defensive tactics by the directors of a target company. Rule 38 aims to ensure that directors of Code companies do not take action which could, once notice of an offer has been given or an offer is believed to be imminent, effectively frustrate that offer. Rule 39 specifies the circumstances in which the directors of a Code company can take defensive actions.

On 7 July 2003 the Crown and Toll entered into an agreement which provided that, if a takeover offer to be made by Toll in July became unconditional:

- Toll would use its best endeavours to procure Tranz Rail to enter an agreement with the Crown under which Tranz Rail would sell its rail network to the Crown; and
- the Crown would commit to improving that rail network and rolling stock (an investment of \$300 million).

Under the Toll/Crown agreement neither party could enter into a similar agreement with any other party until Toll's July takeover offer was withdrawn or lapsed.

Infratil Limited was a shareholder of Tranz Rail. Infratil alleged that Toll's entry into the agreement constituted a defensive tactic under rule 38 because:

- the agreement conferred significant economic benefits on Tranz Rail; and
- the exclusive nature of the agreement effectively denied those benefits to any potential rival bidders.

Neither Tranz Rail nor its then current directors were a party to the Toll/Crown Agreement. However Infratil argued that Toll could be considered to be acting as the directors of Tranz Rail for the purposes of the Code because the directors of Tranz Rail may be required to act in accordance with Toll's directions or instructions.

The Panel held a meeting under s32 of the Act to consider the issue. The Panel did not agree with the interpretation of the term "director" put forward by Infratil. For the Toll/Crown Agreement to have constituted defensive tactics under rule 38, it must have been shown that the agreement was the result of action taken or permitted by the directors of Tranz Rail.

The Panel did not accept that "directors" for the purposes of rule 38 can include persons in accordance with whose instructions the directors of Tranz Rail may have been required to act at some point in the future, particularly if that "requirement" to act could only occur after control has passed.

Rule 38 required the directors of Tranz Rail to take some action in relation to that company's affairs which frustrated the offer or denied its shareholders the opportunity to decide on the merits of the offer. The directors of Tranz Rail did not take any such action.

Notwithstanding that Infratil's complaint failed, the Panel expressed concern that the agreement between Toll and the Crown may effectively frustrate rival bidders. Subsequently the Crown announced that it considered that it was free to negotiate with parties other than Toll.

Later Tranz Rail directors sought the Panel's approval under Rule 39 of the Code of its prospective sale of the Wellington Railway Station to the Crown.

Under Rule 39 there are certain circumstances where apparently defensive tactics by a Code company during the course of a takeover can still proceed. These circumstances are:

- (a) if the action has been approved by an ordinary resolution of the Code company; or
- (b) the action is taken or permitted under a contractual obligation entered into by the Code company, or in the implementation of proposals approved by the directors of the Code company, and the obligations were entered into, or the proposals were approved, before the Code company received the takeover proposal or became aware that the offer was imminent;
- (c) *if paragraphs (a) and (b) do not apply, the action is taken or permitted for reasons unrelated to the offer with the prior approval of the Panel.*

The issue with the sale of the station was that Toll Holdings' offer for Tranz Rail included a condition that:

Neither Tranz Rail or any of its subsidiaries enters into any agreement or incurs any commitment or liability in connection with the business of Tranz Rail or its subsidiaries having a value or involving an amount, or providing for payments over its term, which are in excess of \$5,000,000.

Tranz Rail told the Panel that

- the sale price of the station exceeded that \$5m level and that it needed to complete the transaction within a short period; and
- that Toll Holdings would not consent to waive its condition to allow the transaction to proceed without jeopardising the offer.

The Panel sought the views of Toll Holdings on Tranz Rail's request. It also told both parties it would make the request public and seek the views of Tranz Rail's shareholders on how it should deal with the request.

In the end the Panel did not need to decide the matter because Toll Holdings withdrew its opposition to the sale.

The Panel makes the following points:

- the Code does not prescribe the approach that the Panel should take when considering an application for approval under rule 39;
- competitors may try to use takeovers to frustrate the legitimate commercial aspirations of target companies, potentially for lengthy periods;
- the Panel will generally seek the views of the offeror and the target company shareholders, before approving an application under rule 39; and
- in considering an application under rule 39 the Panel will take into account whether the transaction is being undertaken in the normal course of the target company's business and the application has been necessitated by a particularly restrictive condition in the offer.

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