

**GUIDANCE NOTE ABOUT THE ROLE OF
INDEPENDENT ADVISERS**

FOR THE PURPOSES OF THE TAKEOVERS CODE

TAKEOVERS PANEL

March 2003

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PURPOSE OF THIS GUIDANCE NOTE

1. The purpose of this note is to assist those whose appointments as independent advisers have been approved by the Panel for the purposes of a report under any of rules 18, 21 or 22 of the Code or under a class exemption or specific exemption granted by the Panel from the Code. It should be considered an *aide memoire*. It is not intended to be a prescription by the Panel as to the matters an independent adviser must address in any report prepared for the purposes of the Code. It is expressed in general terms only and should not be regarded as comprehensive in any particular case. It should not be regarded as definitive and may be amended by the Panel from time to time.
2. The Code requires the adviser to give an assessment of the “merits” of the particular offer (takeover), acquisition (share transfer or buyback), or allotment from the point of view of the recipient (in the case of a takeover offer) or of the person who is required to vote on the proposal (acquisition or allotment).
3. Philosophically the Code is concerned with the effect of changes in control between recognised points – 20% to 50%, 50% to 90%, and above 90%. The Code provides rights for shareholders at each stage. A primary focus of a Code report would often be the merits of incremental changes in voting control. These issues may have particular relevance in changes of control in the 20% to 50% zone which was recognised in formulating the Code as a critical area.
4. The Panel believes that an important role of the independent adviser is to advise shareholders of their rights under the Code, and suggests the adviser should be careful not to imply a proposal is meritorious, particularly in the 20% to 50% zone, simply because there are few negatives. It may well be that continuation of the status quo may be the more desirable outcome unless there are good reasons why the shareholders should vote to approve a departure from it.

5. The Panel has now reviewed most independent adviser reports prepared under the Code. The Panel has been concerned that some reports have not fully addressed what the Panel sees as important elements of the proposals being considered. The Panel recently initiated a trial policy of reviewing advisers' reports in draft form before they are finally distributed to shareholders. This process has prompted the Panel to prepare this note. The matter of most concern to the Panel is that advisers have not always informed shareholders of the protections and rights available to them under the Code or of the options available to the acquirer/bidder as a result of the Code.
6. In all cases the report must be an independent adviser's report and as such the directors of the target company, the offeror, the acquirer, the seller, the allottee or the allotter should not influence the findings.
7. The Panel does not wish to prescribe the meaning of "merits" in relation to any particular transaction and nor does it wish to express a view of various valuation methodologies. The Panel makes the following suggestions in relation to some of the types of report that an adviser may be called on to complete.

INTRODUCTORY COMMENTS ON THE APPOINTMENT OF ADVISERS

8. Independent advisers' reports play an important role in the scheme of the Code. The Panel takes its responsibilities for approving the appointment of independent advisers very seriously. Frequently, because of the timeframes stipulated in the Code, the approval of the appointment of the adviser by the Panel, and the preparation of the report itself, have to be undertaken in very compressed time periods. This has a number of implications:
 - (a) When making application to the Panel for approval as an independent adviser it is important that the application is complete in all respects. The Panel's policy for the approval of independent advisers is set out on its website at www.takeovers.govt.nz;
 - (b) It is important that the adviser has the resources available to it to complete all the work necessary to finalise its report to an appropriate standard in the limited time available;
 - (c) It is also important that the target or subject company itself has the information and personnel available to provide the independent adviser with the information necessary to complete its report, and also has the resources to be able to respond to the report itself.
9. The process of preparing and distributing independent advisers' reports within the timeframes stipulated in the Code (at least in relation to takeover offers) creates a tension between providing a report that is sufficiently comprehensive so that the target company shareholders are well-informed, while also providing the directors of the target company with enough time to give full consideration to the contents of the report. This underlines how important it is for the adviser, and the target company, to be adequately resourced to cope with their responsibilities and deal with any issues that are necessary.

REPORTS REQUIRED IN RELATION TO TAKEOVER OFFERS

10. The Code requires independent advisers' reports to be prepared at the request of the target company for the offerees in all takeover offers made under the Code. In every case a report requested by the independent directors of the target company under rule 21 of the Code is required to accompany the target company statement. In some cases, where full or partial offers have been made and there is more than one class of equity security (full offers) or more than one class of voting security (partial offers) an additional report under rule 22 of the Code is required (obtained at the request of the offeror) to certify the fairness of the consideration being offered for different classes of shares.
11. We make some observations about the requirements of these various reports in the next section of this paper. In all cases we recommend that the adviser ensures it has a thorough knowledge of how the relevant rules of the Code work.

Rule 22 Report - on the fairness between classes of a takeover offer

12. Under rule 22 of the Code:
 - (1) An offeror must obtain a report from an independent adviser if any of rules 8(3) and (4) and 9(5) apply.
 - (2) In the report, the independent adviser must certify that, in the adviser's opinion, the offer complies with the relevant rule specified in subclause (1).
 - (3) If an independent adviser's report is obtained, the offer is deemed to comply with the relevant rule specified in subclause (1).
13. Rule 8 of the Code states that where a person is making a full offer for all the voting securities of a company it must also make an offer for all the other classes of equity securities of the company. That offer must be "fair and reasonable" as between the

various classes of equity securities¹. In order to ensure that the offer satisfies this requirement an independent adviser is required to certify that this is the case. Once the adviser has given this certificate then the offer is deemed to comply with the relevant rule. (Under rule 9 of the Code, dealing with partial offers, if there is more than one class of voting securities similar provisions apply.)

14. A rule 22 report is probably the narrowest of all in scope. It is not a report on the merits of the offer, but only on the relativity between the offers being made for each class of equity securities. It is likely to be quite technical in nature, starting with the consideration being offered for the target company's primary securities, and then assessing the relationship between that price and the value of the consideration being offered for other classes of equity security.
15. Issues that might arise in the report could include the conversion price that has to be paid to exercise any options or convertible notes in order for them to be converted into voting securities, and the period the options or conversion rights have to run.
16. Even if options are apparently worthless, because their exercise price exceeds current market value, the offeror under a full offer must still offer to purchase such securities. An assessment of the fairness of the price offered might include an assessment of the likelihood of the options having positive value in the future.

¹ The offer must be fair and reasonable as between classes of voting securities, and as between voting and non-voting securities, where applicable.

Rule 21 report - on the merits of a takeover offer

17. Rule 21 of the Code states:

The directors of a target company must obtain a report from an independent adviser on the merits of an offer

Full offers

18. At its simplest an independent adviser's report on a full takeover offer may be a valuation exercise comparing the consideration being offered by the offeror or bidder against various measures of the value of the target company. Questions the adviser could address, among others, include:

- (a) If a cash offer, is it worth more to the target company shareholder to stay in the company or to realise his or her investment for the price offered?
- (b) If the offer is a scrip offer, what is the value and the prospects of the company whose shares are being offered, against the value and the prospects of the target company?
- (c) Is it appropriate to include a premium for control? Does the offeror already have control?

19. In preparing its report, particularly one involving a valuation, it is likely that an important issue for the adviser in making its valuation would be the reliance it should place on the forecast financial information available from the target company. This in turn could have a significant bearing on the quality of its final report. Issues that the adviser may need to consider could include, among others:

- (a) Should the adviser rely on forecasts of future financial performance prepared by the target company without question?
- (b) Should the adviser carry out its own "reasonableness tests" of prospective financial information provided by the target company before using that information in its valuation and report?

- (c) Should the adviser prepare its own financial forecasts for the target company based on its own analysis (but using source data from the target company)?
 - (d) The time period over which any prospective financial information available from the company extends. Could the adviser request the company to prepare prospective financial information extending beyond the next financial year?
20. The adviser may need to consider the position of the offerees if they opt not to accept the offer. These comments could cover, among others, matters such as:
- (a) If the offer is conditional on the offer reaching 90%, can this condition be waived at the discretion of the bidder?
 - (b) What are the prospects of the consideration under the offer being increased if acceptances are coming in at a low level?
 - (c) If the offer falls short of 90% acceptance, and/or the offeror waives any 90% condition that may have been part of the offer, where would this leave the minority shareholder?
 - (i) Could they be left as part of a small minority of shareholders, with an illiquid stock?
 - (ii) What are the offeror's plans for the target company once it has control, but there remain minority shareholders? Should these plans add value to the company?
 - (iii) How does the offeror propose to deal with conflicts of interest if it is an existing competitor of the target company and that company remains with minority shareholders?
21. The adviser may need to comment on the options available to the bidder under the Code if it reaches, or does not reach, the compulsory acquisition threshold. These comments could cover such matters, among others, as:
- (a) Can the offeror subsequently acquire sufficient shares through "creeping" under rule 7(e) to reach that threshold? If so, the adviser could note that

“creeping” is not possible for approximately twelve months from the conclusion of the offer period;

- (b) What are the consequences for the shareholder under such a compulsory acquisition, having regard to Part 7 of the Code?
22. The situation of competing bids may also need to be addressed. The adviser’s comments could cover such matters, among others, as:
- (a) If there are no competing bids, what is the likelihood of such bids emerging?
 - (b) If there are competing bids how do these compare with the offer that is the subject of the report? What is the likelihood of one bid or the other being increased? Have the parties made public statements of their intentions?
 - (c) How is the competition for control affected by the timing rules of the Code? When should an offeree accept one offer or the other?

Partial offers

23. With a partial bid the bidder must stipulate the percentage it is bidding for and must obtain that percentage to be successful. If acceptances fall short of the stipulated percentage the offer will fail. If acceptances exceed the stipulated percentage they will be scaled back. In some cases shareholders may be successful in selling all their holdings into a partial offer but a more realistic assumption may be that current shareholders will be left with some shares in the target company. If the offeror is seeking to acquire shares in the target company that would increase its control percentage to between 20% and 50% of the voting rights the offer must be approved by a majority of the non-associated shareholders of the company that register their vote.

Accepting or rejecting the offer

24. In advising offerees as to the merits of accepting or rejecting the offer again the adviser could be undertaking a valuation exercise of the target company and, in the case of a scrip bid, of the offeror. The adviser may need to make a decision about how to value a partial interest in the target company. This in turn may depend on whether the bidder is seeking more than 50% of the voting securities or somewhere in the 20 – 50% range with shareholder support.
25. Some of the same considerations may apply as in a full offer, but there are likely to be additional complexities with a partial offer. Comments could cover matters, among others, such as:
 - (a) What are the reasons for a partial bid as opposed to a full bid?
 - (b) Having regard to the percentage of voting rights that the bidder is seeking to control, could that be beneficial to the company and the shareholders who retain their shares?
 - (c) What are the prospects of a shareholder being able to sell all or most of his or her shares into the offer, having regard to the scaling rules of the Code?
26. The adviser could discuss the consequences for a shareholder if it were to choose not to accept the offer. Might this lead to the bidder increasing its offer, or alternatively to making a full offer for all the company?
27. The adviser may need to comment on any plans the bidder may have for the target company. These intentions should be disclosed in the offer document, at least insofar as the bidder proposes to make any material changes in respect of the business activities of the target company (clause 14, Schedule 1, of the Code). The adviser may comment on whether it considers the bidder will add value to the company over time. It may also be relevant to comment on how the bidder intends to deal with any conflicts of interest if it is already a competitor of the target company.

28. Having regard to the Code, the adviser could also comment on future prospects for the remaining shareholders after a successful partial offer. These comments could cover matters, among others, such as:
- (a) The controlling shareholder's "creep" rights under rule 7(e) of the Code (if it has control of over 50% of voting rights);
 - (b) The likelihood of future takeover offers under the Code from the controlling shareholder, or from other bidders;
 - (c) The likelihood of enhancement to the value of target company shares for the minority shareholders.

The right to vote for or against a partial offer

29. If the bidder is seeking to acquire a voting percentage between 20 and 50% of the target company it can only do so with the approval of a majority of the non-associated shareholders of the target company. This is a special right given to shareholders under the Code, and the Panel believes it is important that shareholders are well advised of the merits of voting for or against a particular partial offer made in that range. The adviser may need to comment on any positive reasons why a shareholder should be allowed to increase its control percentage in the 20 – 50% of control range without having to make an offer for at least 50% of the target company.
30. In addition, as with any offer, the offeree shareholder also has to decide whether or not to accept the offer. In making this decision a shareholder has to take into account that, regardless of his or her own voting position, the bidder could well get approval to make a bid in the 20 – 50% range. This is a complex situation, and one that we encourage advisers to explain well to target company shareholders.
31. The intended control outcome in the company may be an important consideration in discussing the merits of the shareholders' choice whether or not to vote in favour of a partial offer that is seeking less than 50% control. Comments in the adviser's report could cover matters, among others, such as:

- (a) The effect of the offeror having the target percentage, say, 35% of the voting rights, in the target. Does this holding give the bidder effective control of the company taking into account other shareholding blocks?
- (b) The benefits that the bidder may bring to the company to justify approving the percentage sought.
- (c) Any reasons why a shareholder might vote to approve the offeror obtaining a controlling stake without having to make an offer for all, or at least the majority, of the company's voting shares.
- (d) Whether there is a premium in the price, or are there counterbalancing value enhancements?
- (e) The likely effects on the shareholder's own shareholding, given the Code's scaling rules?

REPORTS REQUIRED FOR SHAREHOLDER MEETINGS UNDER THE CODE

32. The Code is not only about takeover offers. The Code's provisions also apply where shareholders increase their control percentages above 20% by acquisitions from other shareholders approved by a meeting of shareholders under rule 7(c) of the Code, and by allotments approved by shareholders under rule 7(d) of the Code.
33. Under rules 7(c) and 7(d), and also under the terms of some analogous Panel exemptions, a report from an independent adviser on the merits of the acquisition or allotment is required to be provided to the voting shareholders.
34. In each case the non-associated shareholders are given a special right to approve or reject proposals for another shareholder to increase its control percentage of the code company. The Panel believes this right to approve should be exercised by the relevant shareholders with care and on the basis of good advice.
35. The Panel believes that it is an important part of the adviser's role to ensure that shareholders are properly advised of their rights under the Code. For example, shareholders should be made aware that it is not necessary to approve a proposal simply because there are few negatives. Shareholders can vote to allow the status quo to continue having taken into account reasons for and against that course of action.
36. We now comment specifically on some of the main reports prepared for shareholder meetings conducted under the Code.

Rule 18 report - on an acquisition under rule 7(c) or a Panel exemption

37. Under rule 18 of the Code:

The directors of the code company must obtain a report from an independent adviser on the merits of any proposed acquisition under rule 7(c) or allotment under rule 7(d) having regard to the interests of those persons who may vote to approve the acquisition or allotment.

38. A rule 7(c) acquisition is one where shareholder approval is being sought to an acquisition of a parcel of shares by one shareholder from another existing holder. The acquiring shareholder will be obtaining a shareholding of over 20%, or increasing an existing shareholding to somewhere between 20% and 90% from another party or parties. The acquisition may be of target company shares, or it may be of the shares of another company, generally an upstream controlling company.

39. The independent adviser is not advising the parties to the transaction, but instead those who have the right to vote to approve or otherwise the acquisition. As such, valuation is unlikely to be the key issue. However the consideration for the transaction may well be an issue if it could impact on the market value of the holdings of existing shareholders. Is the value of the voting shareholders' shares likely to be affected by the level of consideration?

40. The shareholders of the Code company, other than the buyer(s) and the seller(s), must approve any changes in holdings of shares that increase the acquirer' s holding² above 20%³ unless the acquiring shareholder makes either a full or a partial bid for the target company in which all shareholders would have the right to participate.

41. Factors covered in a report might include, among others:

- (a) if the shareholders vote against the acquisition what are the prospects of the acquirer making a full or partial bid for the company?
- (b) What benefits will the acquiring shareholder bring to the company?

² The acquirer' s holdings are aggregated with those of all its associates when determining whether the 20% threshold is going to be exceeded.

³ If the acquirer already holds or controls more than 50% of the voting rights it may be able to "creep" by 5% under rule 7(e) without needing shareholder approval.

- (c) How will control of the company be affected? What would the shareholding blocks be after the acquisition? Who would have effective control?
- (d) Is the acquiring shareholder obtaining control of the company without paying a control premium, or by paying a control premium from which only a few shareholders are going to benefit?
- (e) Is the target company in such a dire financial condition that a new controlling shareholder is essential to the company's survival?

Rule 18 report - on an allotment under rule 7(d) of the Code or a Panel exemption

42. A rule 7(d) allotment is one where the allotting company is going to allot sufficient shares to the allottee that its control of voting rights in the allotting company following the allotment⁴ will be greater than 20%.
43. The independent adviser is required to report on the merits of the allotment from the point of view of those entitled to vote on it. Those entitled to vote are the non-associated shareholders of the allottee. As such they are likely to be minority shareholders whose interest in the Code company is being diluted. Depending on the nature of the allotment these shareholders may also have the right to participate in the offer being made, for example if there is a pro-rata offer being made to all shareholders but underwritten by a major shareholder.
44. If the allotment being made is one where all shareholders have the right to participate then the merits of the allotment could include, among others:
- (a) How does the allotment price relate to a number of different reference points, including, but not limited to:
 - (i) The recent market values of the allotter's shares;
 - (ii) a valuation of the whole company;
 - (iii) discounts employed in other allotments or placements in the market?
 - (b) What is the likely value of any rights to acquire shares that the shareholder may receive, are they tradeable, and what is the impact on a shareholder's existing holding if the rights are not exercised (and an underwriting shareholder increases its control)⁵?

⁴ As with an acquisition, the allottee's prospective holding will be aggregated with the holdings of its associates for the purpose of determining if the Code applies to the allotment.

⁵ Note that as a matter of policy, where the Panel grants an exemption from rules 7(d) and 16 to allow an underwriting shareholder to increase its control percentage through taking up a shortfall in a rights issue it will be a condition of the exemption that the underwriting shareholder is not able to purchase rights in the market, whether it intends to exercise those rights or not.

- (c) What is the purpose or purposes to which the proceeds of the allotment are intended to be put?
 - (d) If there is a major shareholder underwriter of the issue:
 - (i) what was the process the target company followed before deciding to enter into an underwriting agreement with the major shareholder?
 - (ii) what was the basis on which the underwriting terms were agreed with the underwriting shareholder?
 - (iii) what is the likelihood of the underwriter being called upon?
 - (iv) what is the ongoing effect on the control and direction of the company if there is a significant shortfall in subscriptions to the issue to be taken up by the underwriter?
 - (e) What is the effect on control of the company if the non-associated shareholders participate, or do not participate, in the offer?
 - (f) What could the consequences be for the non-associated shareholders and the allotting company if the shareholders vote against the allotment, having regard to the provisions of the Code and the existing voting blocks within the company?
45. If the allotment is one in which the non-associated shareholders will not have the right to participate, but is one where the principal allottee is intended to obtain a significant stake, or increase an existing stake, in the allotting company, the issue for the non-associated shareholders to decide is whether to vote for or against the proposed allotment. The independent adviser's role is to advise the voting shareholders on the merits of voting for or against the proposed allotment. Factors that the adviser could consider in such a report may include, among others:
- (a) What are the purposes to which the proceeds of the allotment (if cash) will be put?

- (b) If the allottee is contributing business assets rather than cash, how will these change the existing business of the company? What are the assets worth? Are there other benefits of a strategic or marketing nature?
- (c) What is the effect on the control position of the company if the allotment proceeds?
- (d) How does the allotment price compare to recent market prices for the shares of the allotter and the value of the company, and what is its likely effect on the future market value of the non-associated shareholders' shareholdings(diluting effect)?
- (e) What are the consequences for the company and the non-associated shareholders if the allotment is not approved? Could the company fail? Could the company be foregoing a valuable opportunity that may not arise again?

Report for the purposes of a buyback under clause 4 of class exemptions

46. Clause 4(2)(d) of the Takeovers Code (Class Exemptions) Notice (No 2) 2001, relating to exemptions for buybacks approved by shareholders, provides, as a condition of the exemption:

Rules 18 and 19 of the Code are complied with in relation to the proposed acquisition⁶ (as if the references in those rules to acquisition under rule 7(c) of the Code and notice of meeting referred to in rule 15 of the Code were references to the acquisition and the notice, respectively).

47. Existing shareholders may increase their control percentage through a buyback undertaken by a Code company in which they do not participate, either because the offer is not made to them (selective buy-back) or they opt not to accept the offer.
48. If the non-associated shareholders approve the buyback for the purposes of the Code under clause 4 of the class exemptions the shareholder may retain its resultant increased control percentage. If the shareholders do not approve the buyback for the purposes of the Code (either because they were not asked to approve the buyback, or were asked to but did not approve it) then the subject shareholder must, within six months of increasing its control percentage, sell down its shareholding so that its control percentage reverts to pre-buyback levels (see clause 5 of the class exemptions).
49. For the purposes of the class exemption the adviser is required to provide the non-associated shareholders with a report on the merits of the “acquisition”, which in this case is the buyback by the company of its own shares, from the point of view of those shareholders voting on the acquisition. However, since this is a report for the purposes of the Code a significant issue to be discussed is the change in control percentage that is expected to occur for the principal shareholder or shareholders that are not receiving, or have decided not to accept, the buyback, and thus would increase their control percentage.

⁶ In the case of a buyback the “acquisition” referred to is the company’s acquisition of its own shares

50. A buyback is approved by the directors of the company under the Companies Act 1993 and cannot proceed unless the buyback is considered to be in the best interests of the company and its shareholders (s63(1)(b)) and fair and reasonable to the company and its shareholders (s63(1)(c)).
51. A buyback may take several forms:
- (a) an offer in which all shareholders have the potential to participate and achieved through on-market transactions at then-current market prices over a period of up to twelve months; or
 - (b) a discreet offer at a fixed price made to all shareholders;
 - (c) a discreet offer at a fixed price to a selected group of shareholders.
52. It will be helpful for the adviser to distinguish between:
- (a) the buyback itself, which under the Companies Act 1993 and the Stock Exchange's Listing Rules the shareholders may not have to approve; and
 - (b) the potential for an increase in the control percentage of one or more major shareholders if the acquisition (buyback) is approved by the non-associated shareholders for the purposes of the Code.
53. If the buyback is one for a fixed price over a short period of time, with the offer made to all shareholders, or a selected group of shareholders, off-market, the adviser will need to consider, among other matters:
- (a) The merits of the buyback transaction itself from the point of view of the shareholder as a person who will have to consider whether or not to accept the offer; and
 - (b) The merits of the buyback transaction as concerns its impact on the control of the company from the point of view of the shareholder who has to decide whether or not to approve the buyback and thus allow the major shareholder to increase its control percentage.

54. From the perspective of the shareholder as a recipient of the offer the issues could include, among others:
- (a) How does the price being offered for each share compare with the value of each share pre-buyback offer? What is likely to be the impact on the value of shares after the buyback? Is net tangible asset backing a useful comparison? Will the NTA of the shares remaining in the company after the buyback be higher or lower than their value before the buyback?
 - (b) Will the buyback affect the liquidity of the shares? Will the buyback provide an opportunity for the shareholder to cash-up its shareholding without impacting the market value of the shares, but possibly at the cost of significantly reduced liquidity after the buyback (when the pool of available shares is likely to be significantly reduced)?
 - (c) What is the company's capacity to fund the buyback? Is this a way of utilising otherwise surplus cash? Will the company have to borrow to fund the buyback? If so, what impact will this have on debt/equity ratios?
55. From the point of view of the shareholder as someone who has the opportunity to vote to approve or reject the Takeovers Code element of the buyback, that is to say the change in control percentage of the significant shareholder who is not receiving, or who has signaled that it does not intend to accept the buyback, the issues could include, among others:
- (a) Is this a means by which the shareholder can obtain increased control without having to pay a premium for the level of control to be achieved?
 - (b) If the shareholders vote against the proposal, will the buyback still go ahead, but without the significant shareholder being able to retain its increased control percentage?
 - (c) If the shareholders vote against the proposal, what are the prospects of the significant shareholder making a Code offer to all shareholders instead?

56. If the buyback is one where shareholder consent is not required under the Companies Act or the Listing Rules, and where acquisitions can take place at market prices at any time over the next twelve months, the issues may be slightly different. The buyback transactions will occur at prevailing market prices when the directors consider it is in the best interests of the shareholders and the company for the company to buy its own shares. There is thus no fixed reference point against which to assess value. In this case comments could cover matters, among others, such as:
- (a) How does current market price compare with assessed value or net tangible asset value, if relevant? What would be the effects on the assessed value or the NTA of remaining shares if the buyback proceeds at current market value?
 - (b) What are the benefits for shareholders if the buyback proceeds?
 - (c) Is the buyback likely to proceed anyway if the shareholders vote against the buyback for the purposes of the Code?
 - (d) What are the prospects of all shareholders being able to participate in the buyback? Not all shareholders are likely to have the opportunity to sell into the buyback. It will depend on which shareholders want to sell when the company is offering to buy;
 - (e) What are the implications for control of the company if the buyback is approved?
 - (f) What are the options available to the shareholder seeking to increase control if the shareholders vote against the buyback? Is the shareholder able to “creep” under rule 7(e)? Might the shareholder make a full or partial offer for the company?
57. In all buybacks the fundamental reason for the meeting under clause 4 of the class exemptions is for the non-associated shareholders to approve a significant shareholder obtaining an increased level of control of the company. A significant issue for the report is the identification of the reasons that justify the waiving of the Code restrictions on increases in control.

CONCLUSION

58. The Panel considers the role of the independent adviser is critical to the effectiveness of the Code in regulating the market for the control of companies. The independent adviser helps ensure that there are well-informed shareholders wherever a takeover offer is made or another transaction is occurring that requires shareholder approval under the Code. For this reason the Panel takes a close interest in the skills as well as the independence of any company or individual proposed for appointment as an independent adviser. The quality of previous reports prepared for the purposes of the Code will be taken into account when approving new appointments.
59. The Panel believes some advisers have not fully appreciated the philosophy of the Code, the rights it creates for shareholders, and/or the importance of their role in the process. The Panel considers some advisers need to improve the balance and quality of their reports. Advisers should not assume, just because the Panel has approved them as an independent adviser in the past, that they will necessarily be approved again. This will depend to a significant extent on how they fulfill their responsibilities under the Code.
60. The Panel intends to continue with its current policy of reviewing reports prepared by independent advisers for the purposes of the Code and will comment on these where it considers necessary. No adviser that had been previously approved by the Panel would be subsequently considered unsuitable for appointment without the opportunity to make submissions to the Panel on the question.
61. The independent directors of the target or allotting company also have important responsibilities in the process. The Panel believes, on the basis of some of the reports it has seen, that not all independent company directors have appreciated the extent of those responsibilities. They need to ensure that the appointed adviser is given all the information necessary to provide a comprehensive report. They should, in the course of reviewing the independent adviser's draft report, satisfy themselves that it is sufficiently comprehensive and covers all the relevant issues.

62. The Panel is interested in feedback from independent advisers on this paper. For this purpose the Panel intends to organise meetings later in the year with advisers, probably in groups, to canvass the issues covered in the paper.

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