

Practice Note - Clauses 6 and 7 of Schedule 1 of the Code

Schedule 1 of the Takeovers Code prescribes information that must be included in an offeror's takeover notice and offer document. Clause 7(1) provides (by reference to clause 6) that if any of:

- a) the offeror; and
- b) any related company of the offeror; and
- c) any person acting jointly or in concert with the offeror; and
- d) any director of any of the persons described in paragraphs (a) to (c); and
- e) any other person (within the knowledge of the offeror) holding or controlling more than 5% of any class of equity securities of the target company

have, during the 6-month period before the date of the offer, acquired or disposed of any equity securities of the target company then:

- the number and designation of the equity securities; and
 - the consideration for, and the date of, every such acquisition or disposition
- must be stated in the offeror's takeover notice and offer document.

Three issues concerning the application of the requirements of clause 7 of Schedule 1 have arisen in the course of the Panel's review of takeover notices received to date.

First, offerors have experienced difficulty in disclosing the required information about the share trading carried out by those persons holding or controlling more than 5% of the class of equity securities in category (e). These shareholders would be "substantial security holders" in a listed company but many Code companies are not listed. Information about these parties' trading in the shares of Code companies, and the consideration that they have paid or received for equity securities, is not always publicly available even for listed companies. The Code requires disclosure of the consideration for and date of every transaction in the preceding six months. Substantial security holder notices, in respect of listed companies, only have to be filed where there is a change of more than 1% in a person's shareholding, and consideration is not always shown in these notices.

The Panel recognises that it may be impossible for offerors, when they are preparing their takeover notice, to obtain the information required by clause 7 before the notice is sent to the target company and to the Panel. Sometimes this information may only be held by the target company, in other cases only by the relevant shareholders. The Panel recognises that in most cases it would be inappropriate for the offeror to make enquiries about historic share trading of either the target company or its substantial security holders prior to a takeover notice being given as this would signal an imminent takeover.

The Panel will not consider taking any enforcement action against an offeror where it has been unable to provide the information required by clause 7 in the offeror's takeover notice in relation to the holders or controllers of more than 5% of any class of equity securities of the target company, unless this information is publicly available. The position is different in relation to the actual offer document. Clause 19 of Schedule 1 requires the offeror, or where the offeror is a company, the offeror's chief executive officer, chief financial officer and two directors, to certify that, in respect of the information contained in the offer document, they have made "proper enquiry". The Panel considers that, once the takeover notice is sent, the offeror is then obliged to make "proper enquiry" of the target company and the transacting shareholders to see if they will provide the information required by clause 7 in relation to their shareholding and share transactions. This information must then be included in the offer document. If, despite making proper enquiry, the offeror is still unable to find the information required by clause 7, the offer document should include a statement that appropriate enquiries have been made.

The second issue the Panel has encountered in respect of clause 7 concerns the separate disclosure of the holders and controllers of shares in the target company. The particular issue concerns disclosures about "the offeror" and "any related company of the offeror" in categories (a) and (b). The Code uses the Companies Act 1993's definition of "related company", which generally means all holding companies, sister subsidiaries and own subsidiaries of the offeror.

Example: Able Limited owns all the shares of Beta Limited which in turn owns all the shares in Candy Limited. Candy Limited owns 19% of the shares in Dragon Limited and is making a full takeover for Dragon Limited.

In its takeover notice Candy Limited will disclose that it is the holder of 19% of the shares in Dragon Limited. However, the Panel interprets clause 7 of Schedule 1 to mean that both Able Limited and Beta Limited should be disclosed in the takeover notice as the controllers of the parcel of shares held by Candy Limited.

Care needs to be taken to ensure there is no confusion as to the level of shares held by the offeror and its related companies. However the Panel considers it is important, and consistent with the requirements of clause 7 and the philosophy of the Code, that upstream parties of actual shareholders are disclosed in offer documents.

The third issue the Panel has encountered in respect of clauses 6 and 7 relates to disclosure where the persons referred to in categories (a) to (e) do not hold or control equity securities in

the target company. Clause 6(2) provides that, if any of the persons referred to in categories (a) to (e) do not hold or control equity securities in the target company, then a “statement to that effect” should be included in the offer document.

The question arises as to whether clause 6(2) requires disclosure of the identity of all persons in each of category (a) to (e) who do not hold or control equity securities in the target company. Such disclosure would require, for example under category (d), the offeror naming all of the directors of the offeror (category (a)), the directors of all related companies of the offeror (category (b)) and the directors of any person acting jointly or in concert with the offeror (category (c)) and then stating that each of those named directors did not hold or control equity securities in the target company. The Panel notes that such disclosure could involve naming a very large number of people and companies, particularly if the offeror is part of a global group. The Panel does not consider that such disclosure is practical or necessary.

Typically a takeover notice will list one or more companies or persons who hold equity securities in the target company. The Panel considers that it is then permissible to state that, “apart from the persons listed in the schedule above, none of following hold or control equity securities” in the target company and to then list each of categories (a) to (e) as a generic statement. It is not however necessary to name all the persons and companies which comprise each of the categories.

This Practice Note is provided for guidance only. While it signals the attitude of the Takeovers Panel at this time the Panel is not bound by this or any other guidance note.