

EXEMPTIONS

Guidance Note



4 April 2016



**TAKEOVERS
PANEL**

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1 Introduction

- 1.1 Since the introduction of the Takeovers Code, the Panel has considered a large number of applications for exemptions from compliance with the Code. The purpose of, and the limitations on, the Panel's exemption power have become better understood by the market over time. This has been reflected in a fall in the number of exemptions that are declined by the Panel. The Panel has also been successful in implementing changes to the Code which have removed the need for some of the most common exemptions.
- 1.2 The purpose of this Guidance Note is to remind market participants about the Panel's exemption power, to assist them in their appreciation of when exemptions are likely to be granted and to consolidate into a single document the Panel's other guidance publications which relate to exemptions. This Guidance Note replaces the Panel's earlier guidance publications on exemptions. The Panel's key comments in the previous publications have been retained in this Guidance Note, but some of the material has been revised and updated.

2 The Panel's exemption power

- 2.1 The Panel has power under section 45 of the Takeovers Act 1993 to grant exemptions from compliance with the Code. The Code is broad in its effect and in some areas it is quite prescriptive. As a consequence the Code can have unintended consequences or may not adequately provide for unexpected or unusual circumstances. The exemption power is, therefore, necessary to deal with these situations to ensure that the Code operates effectively and efficiently and fulfils its objectives.
- 2.2 However, the Panel is constrained in granting exemptions by section 45(6) which requires that the Panel's reasons for granting an exemption must include:
- (a) why it is appropriate that the exemption is granted; and
 - (b) how the exemption is consistent with the objectives of the Code.
- 2.3 It is clear that the Panel's exemption power is not intended to facilitate the avoidance or modification of the Code to support a transaction structure that does not comply with the Code, or to achieve a particular commercial outcome or benefit.
- 2.4 Some applicants for exemption seek in support of their applications to refer solely to the objectives of the Code contained in section 20 of the Act. However, these were the objectives required to be considered by the Panel in formulating the Code. The way in which these objectives were interpreted and balanced against each other can be seen in the Code that ultimately became law.
- 2.5 For the purposes of an exemption application the objectives of the Code are found in the obligations and requirements of the Code itself. For example, the objective in section 20 of the Act of "*assisting in ensuring that the holders of securities in a takeover are treated fairly*" is reflected in rule 20 of the Code which provides that an offer must be made on the same terms and offer the same consideration to all shareholders of the same class.
- 2.6 The Panel will, therefore, in deciding whether an exemption is appropriate, consider whether compliance with the Code is possible and whether compliance would create an inappropriate, unreasonable or unintended result.
- 2.7 Furthermore, the exemption must be consistent with the objectives of the Code as embodied in the provisions of the Code. Consequently the conditions upon which exemptions are granted are designed to preserve the purpose and intent of the relevant provisions of the Code.

- 2.8 The class exemptions contained in the *Takeovers Code (Class Exemptions) Notice (No 2) 2001* demonstrate the types of situations that the Panel's exemption power is intended to address. For example, a shareholder who increases its level of voting control above 20% in a Code company as a result of a buyback by a company of its own shares cannot do so in compliance with the Code. This is because the Code provides no mechanism in rule 7 to deal with increases in voting control that are caused by a buyback of voting securities by a Code company. The Panel granted a class exemption to address this situation. The conditions of that exemption ensure that the purpose and intent of the Code are preserved by requiring either that the relevant shareholder eliminates the increase within a specified time or the other shareholders of the Code company give their prior approval to the maximum potential increase in the relevant shareholder's voting control resulting from the buyback, having been provided with information similar to that required for meetings under rules 7(c) and (d).
- 2.9 Individual exemptions granted by the Panel show the same approach in a range of different circumstances.
- 2.10 A guide to applying for an exemption – whether an individual exemption or a class exemption – is set out in Appendix A to this Guidance Note.

3 Cases for individual exemptions

- 3.1 Examples of some of the individual exemptions which have been considered by the Panel are set out below.

Rectifying breaches of the Code

- 3.2 The Panel has used its exemption power to assist in the rectification of breaches of the Code where this is appropriate in the interests of all parties to a takeover transaction. The Panel even has the power under section 45(2) of the Takeovers Act to grant exemptions from compliance with the Code in respect of past acts or omissions. This power enables the Panel to “cure” a breach of the Code that has occurred which, if left unresolved, may leave transactions at the risk of opportunistic litigation.
- 3.3 An example of such a use of the exemption power was the exemption from the compulsory acquisition provisions of the Code granted to SK Foods International (SK Foods) in relation to its takeover offer for Cedenco Foods Limited. SK Foods had failed to comply strictly with certain rules of the Code in seeking to enforce its compulsory acquisition rights and consequently was in breach of the Code. The Panel took the view that it was in the interests of all parties to allow the compulsory acquisition to proceed by way of exemption but subject to conditions which ensured that the policy and intent of the Code in relation to the compulsory acquisition procedure were fulfilled.
- 3.4 Another example is an exemption in relation to a partial takeover offer for voting securities in Auckland International Airport Limited. As a result of an incorrect calculation, the offer period specified by the offeror in the offer document was one day longer than the maximum period permitted under rule 24(2) of the Code. The Panel granted an exemption from rule 24(2) which enabled the offer to close on the date originally specified in the offer document. The exemption was granted because the mistake was discovered on the day before the offer was due to close.
- 3.5 The Panel has also used its exemption power to grant individual exemptions which effectively enable retrospective shareholder approval of transactions which contravened the Code.¹ An example of this was the exemption granted by the Panel for the benefit of the Fulton family in respect of shareholdings by the various family members in Fulton Hogan Limited.² Between September 2001 and July 2007, a

¹ Rule 7(c) of the Code permits a person to increase their control in excess of the 20%-threshold by means of a share acquisition, provided that the acquisition is approved in advance by the shareholders of the company. Rule 7(d) provides for a similar mechanism in respect of share allotments.

² *Takeovers Code (Fulton Hogan Limited) Exemption Notice 2007*

number of transactions took place between members of the Fulton family and their associates. While these transfers did not result in an increase in the total voting control held by the Fulton family shareholders, they resulted in each transferee increasing their voting control in circumstances that appeared to have breached the Code.

- 3.6 The Panel exempted the past acts of the Fulton family from rule 6(1) on the condition that the past transactions were retrospectively approved by an ordinary resolution of the shareholders of the company. The conditions provided for a meeting process similar to that which is required under rules 7(c) and 7(d) of the Code (although no independent adviser's report was required). The conditions ensured that the retrospective approval occurred in a manner that was consistent with the Code.

Upstream Acquisitions

- 3.7 The Code was deliberately constructed to capture the acquisition of voting rights in Code companies by means of a transaction upstream from the direct holder of voting rights in the Code company.
- 3.8 The Panel has issued specific guidance on the use of the exemption power in situations where an upstream transaction would result in the acquirer obtaining increased control of a Code company. See the Panel's *Guidance Note on Upstream Acquisitions*.

Differential offers in a takeover

- 3.9 Rule 20 of the Code requires an offer to be made on the same terms and provide the same consideration to all shareholders of the same class. The Panel has received applications for exemptions from rule 20 from offerors wishing, with the consent of the major shareholder of a Code company, to offer less consideration to that shareholder than what is offered to the remaining shareholders. These applicants have argued that smaller shareholders are not prejudiced by such an exemption and consequently it should be granted.
- 3.10 One example was the application by Vector Limited in respect of its proposed takeover offer for NGC Holdings Limited in 2005. Vector proposed to offer \$2.91 per share plus a preferential entitlement to an allocation of Vector shares in the event that Vector made a public offering of its own shares. Vector had agreed with NGC's controlling shareholder, The Australian Gas Light Company (**AGL**), that its New Zealand holding company would waive its rights to the preferential entitlement and such entitlement would not be offered to it under the takeover offer. Vector sought an exemption from rule 20 to allow the differential consideration to be offered.
- 3.11 In support of its application Vector argued that such an exemption would be consistent with the objective contained in section 20 of the Takeovers Act of "*assisting in ensuring that the holders of securities in a takeover are treated fairly*". Vector argued that because AGL was a large shareholder with a strong negotiating position that it should be allowed to agree to receive less consideration provided that this did not disadvantage other shareholders. Vector also argued that the proposed differential offer would result in remaining shareholders being treated fairly as they would be offered an additional element of consideration.
- 3.12 The Panel declined the application for the exemption. Rule 20 is a fundamental requirement of the Code and compliance with it will not be exempted on the basis of the desirability of the commercial outcome for a particular group of shareholders. Such an exemption would not be consistent with the objectives of the Code.

Scrip offers and overseas shareholders

- 3.13 A number of offerors making scrip offers have sought exemptions from rule 20 to allow them to offer overseas shareholders cash only rather than scrip. In the absence of such exemptions offerors would be required to ensure that their offer complies with securities laws in every country where target company

shareholders reside. Compliance with such overseas requirements as well as New Zealand securities law requirements increases the cost and complexity of making a scrip offer for a New Zealand Code company.

- 3.14 In contrast with the applications regarding differential offers, exemptions in respect of scrip offers and overseas shareholders are an example of addressing a situation where the provisions of the Code have an unintended or undesirable outcome. Scrip offers are an important part of the takeovers market and yet, without an exemption, the existence of overseas shareholders inhibits the ability to make scrip offers.
- 3.15 The Panel grants exemptions from rule 20 to allow cash to be offered to overseas shareholders as an alternative to scrip (see, for example, the [Takeovers Code \(Delegat's Wine Estate Limited\) Exemption Notice 2010](#)).
- 3.16 The Panel's policy is that it will generally consider it appropriate to grant an exemption from rule 20 of the Code for a scrip offer if it is satisfied of the following:
- (a) the percentage of target company securities held by shareholders in each overseas jurisdiction is a small percentage of the total issued securities;
 - (b) the scrip offer cannot be made in each overseas jurisdiction using the New Zealand takeover offer and securities offer documents. Note that due to the reciprocal arrangements between New Zealand and Australia for offer of securities, the Panel expects scrip consideration to be offered to Australian resident shareholders;
 - (c) compliance with securities laws in each jurisdiction would be impractical or unreasonably expensive in the context of the offer; and
 - (d) the alternative consideration to be offered to overseas shareholders is appropriate. This aspect of the policy requires the offeror to allot securities which would have been offered to overseas shareholders to a nominee company which sells those securities and transfers the proceeds to the overseas shareholders.
- 3.17 In order to meet the above policy, an applicant must include as part of its application for exemption disclosure of the number and locations of overseas target company shareholders and the percentage of the target company's shares held by them as a group in each overseas jurisdiction.
- 3.18 In order to better facilitate the making of scrip offers, the Panel has decided that applicants seeking an exemption from rule 20 in relation to a scrip offer are not required to take the step of obtaining legal advice on compliance with securities legislation in overseas jurisdictions.
- 3.19 The Panel still expects the scrip to be offered in Australia and in other jurisdictions where comparatively large numbers/percentage holdings of target company shareholders reside.
- 3.20 An example where this policy has been applied was the exemption granted to [Independent Newspapers Limited](#). In this case, the cash offered to overseas shareholders was the net proceeds of the sale by a nominee of the scrip that would otherwise have been allotted under the offer to each overseas shareholder. This ensured that overseas shareholders were in the same position as New Zealand shareholders who immediately sold the scrip received by them under the takeover offer. The scrip offered by the offeror was listed at the time the offer was made so was easily realisable in an established market.
- 3.21 Another example was the exemption granted to [Prime Infrastructure Networks \(New Zealand\) Limited](#) in respect of an offer for Powerco Limited. The exemption allowed certain overseas shareholders, who at the time of the application held less than 1% of Powerco's total issued shares, to be offered cash

provided that an independent adviser certified that the cash amount to be offered was of an equivalent value to the cash and scrip consideration offered to New Zealand shareholders. The Panel took this approach because the scrip offered was new and was not listed and it was considered that the nominee approach adopted in respect of Independent Newspapers was not appropriate. Although the certificate as to equivalence was obtained, the exemption was exploited because of the view, supported by the rule 21 adviser and actively promoted by brokers and advisers, that the fixed cash amount was better than the cash and scrip consideration offered to New Zealand shareholders. The number of “overseas” shareholders increased dramatically as shareholders sought to obtain the benefit of the exemption. The Panel now ensures that the conditions of exemptions from rule 20 in respect of overseas shareholders do not provide the opportunity for such exploitation.

3.22 The Panel has required the use of the nominee process for these exemptions in all cases since Powerco.

Offers for convertible securities

3.23 When a full takeover offer is made the Code requires that the offer be made for all equity securities of the target company. Some convertible securities fall within the definition of “equity security” but they will be a different class of equity security from the company’s ordinary shares.

3.24 If an offeror acquires convertible securities under an offer it may still be required to obtain shareholder approval under rule 7(d) before it can exercise the convertible securities and be allotted the underlying voting rights.

3.25 The Panel considers that if an offeror is required by the Code to include an offer for convertible securities it acquires under its takeover offer it should have the benefit of the rights attaching to them, including the right to convert those securities in accordance with their terms, without the need for shareholder approval.

3.26 Accordingly, the Panel grants exemptions from compliance with rule 6(1) of the Code in respect of convertible securities that may be acquired under a takeover offer. The Panel considers these exemptions to be appropriate because the increase in the applicant’s percentage of voting rights would be the result of the exercise of rights attaching to securities obtained under the offer and the offeror was obliged under the Code to include those convertible securities in its offer. In addition, the increase in voting rights resulting from the exercise of the convertible securities would be the same as if the holders of the convertible securities had first converted them into shares and then accepted the offer in respect of those shares.

3.27 However, the power to convert convertible securities acquired in a takeover offer may affect the outcome of an offer if, for example, those securities can be converted during the offer period and this would enable an offer to reach a critical acceptance threshold. The power to convert convertible securities during the offer period is material information for shareholders and disclosure needs to be made in the offer document. Failure to make this disclosure may impact the Panel’s decision to approve or not approve an application for an exemption to allow conversion of securities taken up in an offer.

3.28 For an example of an exemption of this nature see the [Takeovers Code \(ING Property Trust Holdings Limited\) Exemption Notice 2005](#).

Certification of target company statements

3.29 Rule 46 of the Code requires a target company, on receipt of a takeover offer, to prepare a target company statement for distribution to its shareholders. That statement must be certified by two directors and two senior executives of the company in accordance with clause 26 of Schedule 2 of the Code.

- 3.30 Clause 26 requires the chief executive officer, the chief financial officer, and two directors of the target company to certify that to the best of their knowledge and belief, after making proper enquiry, the information contained in or accompanying the target company statement is true and correct and not misleading, whether by omission of any information or otherwise, and includes all the information required to be disclosed by the target company under the Takeovers Code.
- 3.31 The intention of clause 26 is to ensure that the target company's two most relevant senior executives share responsibility for the factual accuracy of the target company statement. The chief executive officer and chief financial officer must be involved in this process because of their detailed knowledge of the affairs of the company; knowledge which directors may not have.

Exemptions declined

- 3.32 Two representative examples of applications for exemption from clause 26 which the Panel has declined are discussed below.
- 3.33 One unsuccessful application was for an exemption in respect of the chief executive officer and the chief financial officer of a target company, who also held the same positions with the offeror. The offeror had over 80% of the shares in the target company when the takeover offer was made. The applicant submitted that it would be inappropriate, and contrary to usual practices of good corporate governance, for the senior executives to certify the target company statement. The Panel would not grant the exemption to the two senior executives because, as a consequence, no senior executive of the target company would be taking responsibility for the information contained in or accompanying the target company statement. The Panel invited the target company to provide specific reasons why one or other of the senior executives should be exempted. No specific reasons, other than a perceived conflict of interest, were given and the Panel therefore declined the application.
- 3.34 A second unsuccessful application sought a retrospective exemption for the chief financial officer not to have to sign the clause 26 certificate. The Panel was told that the chief financial officer was on secondment to the target company and was prevented by the terms of his engagement from making any public statement relating to the target company. It was proposed that the next most senior financial officer of the target company could certify instead. In response, the Panel said that the chief financial officer could not avoid the clause 26 requirement because the secondment contract was subject to the overriding effect of rule 5 of the Code (which prevents parties from contracting out of the Code).
- 3.35 In at least two other takeovers the target company was managed by the offeror and employed no executive staff of its own. In both these cases senior executives of the offeror signed the target company statement in their capacity as persons fulfilling the roles of senior executives of the target company. Although they had conflicts of interest, these people were responsible for the executive functions of the target company, including briefing the independent adviser about the target company's prospects, so it would not be appropriate to exempt them from the obligation to sign the certificate.

Exemptions granted

- 3.36 The Panel has only granted one exemption from clause 26: the [Takeovers Code \(Trans Tasman Properties Limited\) Exemption Notice 2004](#). SEA Holdings New Zealand Limited (**SEA Holdings**) made a takeover offer for Trans Tasman Properties Limited (**Trans Tasman**). At the time of the exemption application, the independent directors of Trans Tasman were expected to reject the takeover offer. The independent adviser's report prepared under rule 21 of the Code had concluded that the offer was neither fair nor reasonable. There were several shareholders who had indicated their opposition to SEA Holdings increasing its interest in Trans Tasman.

- 3.37 Trans Tasman applied for an exemption from the clause 26 requirement that the chief executive officer certify the target company statement. The same person was chief executive officer of both Trans Tasman and SEA Holdings. He was also chairman of Trans Tasman and a director of SEA Holdings.
- 3.38 The Panel granted the exemption for the stated reason that it was necessary to take into account the conflict of interest inherent in [the same person's] roles as the chief executive officer of the offeror and also of the target company.
- 3.39 This reason should not be interpreted as meaning that an exemption from clause 26 will be appropriate in every case where a chief executive officer or chief financial officer is conflicted.
- 3.40 The circumstances of the SEA Holdings takeover offer were unusual and the Panel granted the exemption in recognition of the particular difficulties faced by the chief executive officer, which went beyond the conflict of roles.
- 3.41 The exemption was subject to the condition that the chief executive officer sign a modified form of certificate, stating that he had provided all relevant information that Trans Tasman was obliged to disclose under the Code and necessary to enable Trans Tasman directors to sign the clause 26 certificate. The modified certificate also required the chief executive officer to state that the information he had provided was true and correct and not misleading.

Rule 22 independent adviser's reports

- 3.42 A rule 22 report must be contained in or accompany a takeover offer if:
- (a) the target company has more than one class of voting securities; or
 - (b) non-voting securities are included in the offer.
- 3.43 The independent adviser must certify in the report that, in its opinion, the consideration offered is fair and reasonable as between the different classes. Once the independent adviser has given this certification the offer is deemed to comply with rule 8(3), 8(4) or 9(5), whichever is applicable. The purpose of rule 22 is to:
- (a) advise shareholders that the price offered for the securities held by them is fair and reasonable compared with the amount offered to holders of securities of a different class; and
 - (b) avoid a legal challenge to a takeover on the grounds that the consideration offered for different classes of security is not fair and reasonable as between the classes.
- 3.44 Consistent with the purpose of rule 22, the Panel would only be likely to grant an exemption from the requirement for a rule 22 report if it was satisfied that in the circumstances of the relevant Code company there was, in effect, only one class of voting securities under offer.
- 3.45 These circumstances were demonstrated by St Laurence Property & Finance Limited (**St Laurence**) in its offers for parcels of shares and mortgage bonds in Capital Office Fund Limited and Mt Wellington Industrial Fund Limited.
- 3.46 The offers related to two classes of securities, one voting and one non-voting, which were "stapled" together. Without an exemption St Laurence would have had to obtain a rule 22 report on the fairness of the considerations offered as between these two classes. However, the shares and bonds had been issued by each of the Code companies in parcels which could not be separated. The consideration offered by St Laurence related to each parcel and did not distinguish between the components of the parcel.

- 3.47 The Panel considered that because the parcels of shares and bonds were inseparable there was effectively only one class of security holder i.e., holders of parcels of shares and mortgage bonds. No shareholder would, in effect, hold a different class of securities from other shareholders. Also, because security holders could not sell only their shares or only their bonds, the shares and bonds did not have a value independent of the parcel of which they were part. In these circumstances the Panel considered that a rule 22 report on fairness between the shares and the bonds would have no meaning, and that an exemption from rule 22 was appropriate. The exemption is available [here](#)
- 3.48 .However, the Panel is unlikely to consider that there is, in effect, only one class of voting securities merely because two different classes of securities that are quite similar in nature are regarded by the market (based on price) as being virtually the same. If the Panel were to grant an exemption from rule 22 in these circumstances it would, in effect, itself be certifying that the differences between the classes of security had no effect on the value of the securities. The Panel is not in a position to do this.
- 3.49 Even in circumstances where the securities are substantially similar a rule 22 report gives useful information for shareholders. For example, in the offer by Rubicon Forests Limited for Tenon Limited, Tenon had two types of share on issue, ordinary shares and preference shares. Both classes of share carried identical voting rights but one class had a temporary preferential status upon liquidation. Although the two classes of shares had recently traded at the same price, it was not certain that this would always be the case. The rule 22 report told shareholders that, in the opinion of the independent adviser, the (identical) consideration offered by Rubicon for each type of share was fair and reasonable as between the two classes of shares.
- 3.50 Another circumstance would be where identical securities were on issue, but some were issued to employee shareholders subject to loan obligations to the company, or on a partly paid-up basis. A rule 22 report is likely to be required in such circumstances.

Initial public offerings (IPOs)

- 3.51 In 2006, the Panel revoked the class exemption for initial public offerings (**IPOs**) contained in clause 7 of the *Takeovers Code (Class Exemptions) Notice (No 2) 2001* (the **IPO class exemption**). The Panel considered that the class exemption was not being used appropriately.
- 3.52 The IPO class exemption had provided an exemption from rule 6(1) of the Code for any person who increased their voting control in a Code company as the result of an allotment of shares under a public offer (which complied with the Securities Act 1978). The exemption was subject to conditions which required the prospectus and investment statement for the offer to state the potential shareholding level and control percentage of the person (and that person's associates) that was relying on the exemption. The relevant allotment had to occur within six months of the IPO.
- 3.53 The Panel now considers exemptions for IPOs on a case-by-case basis. An example was the exemption granted in advance of the IPO of Trade Me Group Limited (**Trade Me**) in 2011.³ Trade Me was a subsidiary of Fairfax Media Limited (**Fairfax**). Under the terms of the proposed IPO, Trade Me offered 34% of the shares to the public. The remaining 64% was allotted to another Fairfax subsidiary.
- 3.54 The Panel granted an exemption from rule 6(1) of the Code for a number of entities in the Fairfax group of companies. The conditions of the exemption required the prospectus for the IPO to state the maximum control percentage in Trade Me that could have been obtained by each of the various Fairfax parties as a result of the allotment to them. The Panel considered that the exemption was appropriate and consistent with the objectives of the Code because:

³ [Takeovers Code \(Trade Me Group Limited\) Exemption Notice 2011](#)

- (a) new shareholders could take into account the allotment to the Fairfax parties when subscribing for shares in Trade Me;
- (b) if a shareholder subscribed for shares in Trade Me on the basis of the prospectus (which disclosed the allotment and the maximum control percentage of the Fairfax parties), then the shareholder could be taken to approve the allotment to the Fairfax parties; and
- (c) the exemption facilitated the IPO because Trade Me would only become a Code company as a consequence of the IPO. The exemption was effectively a preliminary step towards Trade Me becoming a Code company.

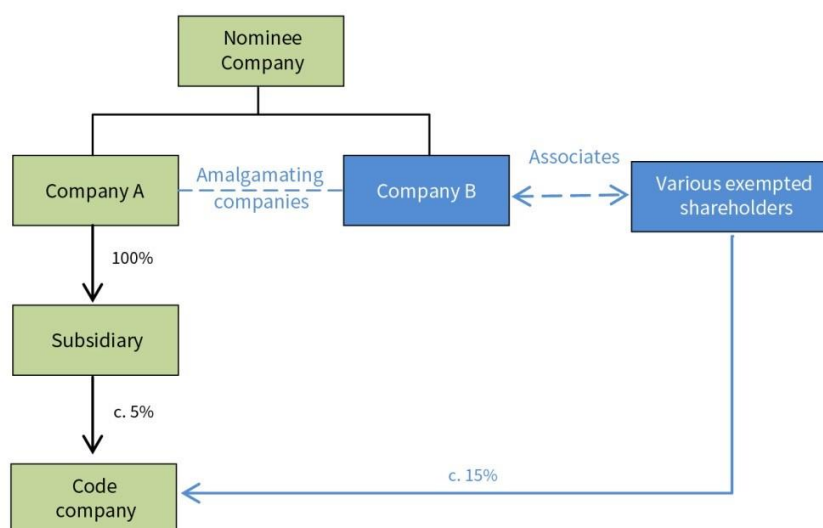
3.55 The Panel considers applications for individual exemptions for IPOs on a case-by-case basis on terms similar to those of the exemption for Trade Me. However, the terms and conditions may be altered for a particular exemption in order to better align them with the particular transaction. An example is the [Takeovers Code \(Synlait Milk Limited\) Exemption Notice 2013](#), which related to an IPO and had specific provisions that took account of potential “top-up” acquisitions by the major shareholder.

Amalgamated companies – pre-existing exemption

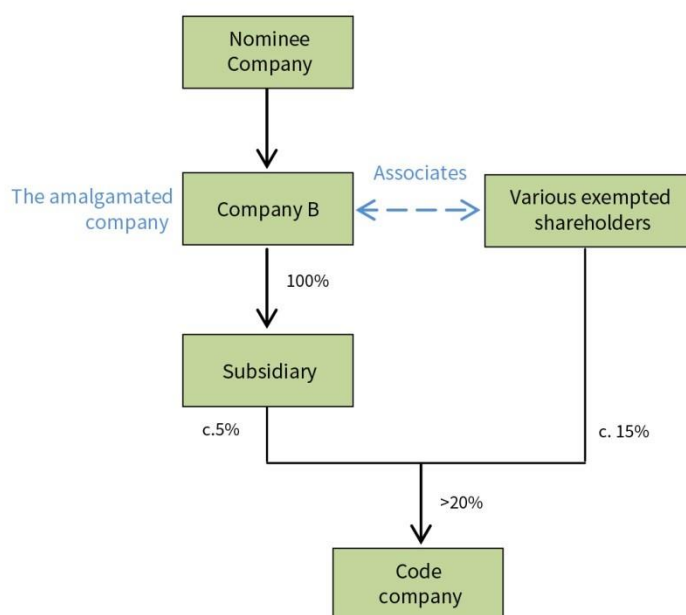
3.56 The following paragraphs describe an application for an exemption that was declined by the Panel. The issue was whether an amalgamated company retained the benefits (including a prior exemption granted by the Panel) of the amalgamating companies.

3.57 The diagram below illustrates the facts:

Pre-Amalgamation:



Post-Amalgamation:



Background

- 3.58 A group of shareholders who together owned approximately 15% of a Code company, had the benefit of an exemption which allowed them to increase their voting control in the Code company through ongoing transactions (the **ongoing transactions**).
- 3.59 Company A and Company B were both subsidiaries of a nominee company. Company A and Company B proposed to undertake an amalgamation under Part 13 of the Companies Act 1993. Under these provisions, Company B would become the amalgamated (i.e., the continuing) company.
- 3.60 The group of exempted shareholders were associates of Company B for the purposes of the Code. Company B controlled approximately 5% of the voting rights in the Code company. Together, therefore, the exempted shareholders and their associate, Company B, held or controlled more than 20% of the voting rights in the Code company.
- 3.61 As a result of the amalgamation, Company B would become the new controller of the voting rights in the Code company that were owned by Company A before the amalgamation. There would not be a change in the ultimate control in the voting rights attaching to the Code company shares, because Company B would still be wholly owned by the nominee company.
- 3.62 At the time of the proposed amalgamation, there was a possibility that the exempted shareholders' control percentage would increase through the ongoing transactions and may continue to increase after the amalgamation.
- 3.63 The Panel had granted an exemption from rule 7(d) and rule 16(b) of the Code to Company A that allowed (among other things) Company A to increase its shareholding in the Code company as a result of the ongoing transactions, up to a maximum percentage that had been approved by the shareholders of the Code company. The exempted shareholders also had the benefit of this exemption.
- 3.64 As a result of the ongoing transactions, it was likely that the voting control in the Code company of Company B (as the amalgamated company) together with the exempted shareholders would increase to 20% or more.

- 3.65 Company B sought an exemption from rule 6(1) of the Code in respect of any increase in its voting control as a result of the ongoing transactions. Company B sought the exemption because it was concerned that it would not have the benefit of the shareholder approval previously given to Company A under the prior exemption.

The Panel's decision

- 3.66 The Panel noted that the amalgamation would not change the ultimate control of the voting rights in the Code company which were previously owned by Company A. The shareholders of the Code company had in substance already approved the potential increases in the voting rights, by Company A, as a result of the ongoing transactions. This shareholder approval had been required by the terms of the prior exemption.
- 3.67 The Panel noted relevant case law and commentary in relation to amalgamations (*Carter Holt Harvey Limited v McKernan* [1988] 3 NZLR 403). The Panel considered that an amalgamated company would stand in the same position as each of the amalgamating companies in respect of their rights and obligations. Accordingly, the Panel concluded that Company B (the amalgamated company) would effectively assume the benefit of the shareholder approvals under the prior exemption in respect of Company A.
- 3.68 On this basis, the Panel declined to grant an exemption to Company B because the Code would not be triggered by Company B's post-amalgamation increases in voting control of the Code company under the ongoing transactions.

4 The Takeovers Code (Class Exemptions) Notice (No 2) 2001

Overview

- 4.1 The Takeovers Code (Class Exemptions) Notice (No 2) 2001 came into force on 1 July 2001 at the same time as the Takeovers Code.
- 4.2 The class exemptions provide a standard form of exemption to apply to common classes of transactions. This reduces significantly the need for applications for individual exemptions for particular transactions. The terms and conditions of the class exemptions are designed to ensure that the underlying purpose and intent of the Code are fulfilled.
- 4.3 If the terms and conditions of the class exemptions do not fit the circumstances of a particular case an individual exemption can be sought.
- 4.4 The key areas covered by the class exemptions relate to:
- (a) buybacks by Code companies of voting securities;
 - (b) allotments by Code companies of voting securities; and
 - (c) transactions involving lenders and receivers, proxies and corporate representatives, brokers, underwriters, nominee companies and bare trustees, executors, trustees and administrators of deceased estates, and intragroup transfers.
- 4.5 If a transaction falls within one of the class exemptions, increases that might otherwise be in breach of rule 6(1) of the Code will be exempted if certain conditions are met.
- 4.6 An overview of the various class exemptions is set out below. Note that this is only a broad summary of the class exemptions.

Buybacks and allotments

4.7 The purpose of the class exemptions for buybacks and allotments is to facilitate these common commercial transactions. In the absence of an exemption, transactions of this type can lead to a breach of rule 6(1) of the Code.

Buybacks

4.8 If a person increases its control of the voting rights in a Code company as a result of the Code company acquiring its own voting securities, that person is exempted from rule (6)1 if either:

- (a) the acquisition is approved by an ordinary resolution of shareholders of the Code company, provided the notice of meeting complies with a set disclosure regime and certain voting restrictions are adhered to (this exemption in clause 4 closely mirrors the shareholder approval mechanism, which is an exception to the fundamental rule, set out in rules 7(c) and 15 of the Takeovers Code); or
- (b) the increase is eliminated (wholly or, in some cases, in part only) within six months and the additional voting rights are not exercised before that elimination (clause 5).

4.9 On the other hand, if a Code company buyback reduces a person's voting control, that person may subsequently increase its holding - i.e., top up. However, this must happen within six months of the decrease and the amount of the top up is restricted. It must only take the person's voting control percentage to the *lesser* of:

- (a) the control percentage of the person immediately before the restorative increase plus an additional 5% of the voting rights of the Code company; or
- (b) the control percentage of the person immediately before the decrease (clause 6).

4.10 Acquisitions by associates in the six months following the decrease will also need to be taken into account in calculating the thresholds permitted by this exemption.

Example

Person A holds 30% of the voting control in Company B. Company B buys back a number of its shares with the result that A's voting control reduces to 20%. Within six months of that decrease, A may increase its voting control to 25%.

Allotments

4.11 If a shareholder increases its control of the voting rights in a Code company as a result of an allotment of securities by the Code company, that shareholder is exempted from rule 6(1) if the allotment is made as a result of a pro rata offer to all shareholders, or under a dividend reinvestment scheme. However, the increased voting control must be eliminated (wholly or, in some cases, in part only) within six months and the additional voting rights are not exercised before that elimination (clause 8).

4.12 If a person's voting control *decreases* as a result of a Code company's pro rata offer or dividend reinvestment scheme, clause 9 permits that person to top up its voting control to the previous level within six months. Increases in voting control by the shareholder's associates in this period will need to be taken into account.

4.13 If the decrease is as a result of some other allotment by the Code company, clause 10 provides that the top up must only take the shareholder's voting control percentage to the lesser of:

- (a) the control percentage of the person immediately before the restorative increase plus an additional 5% of the voting rights in the Code company; or
- (b) the control percentage immediately before the decrease.

Example

Person X holds 53% of the voting control in Company Y. Company Y makes a non pro rata allotment with the result that X's voting control reduces to 50%. Within six months of that decrease, X may increase its voting control back to 53%.

- 4.14 Acquisitions by associates in the six months following the decrease will also need to be taken into account in calculating the thresholds permitted by this exemption.

Lenders and receivers

- 4.15 Lenders (including persons holding security interests for lenders) and receivers appointed by lenders, are exempted from rule 6(1) if they acquire control over voting rights in a Code company under the terms of a security interest. This is subject to the condition that the security interest is held in the lender's ordinary course of business and as part of a bona fide transaction for lending of money or provision of other financial services that does not have the purpose of circumventing the Code (clauses 11 and 12).
- 4.16 There are consequential exemptions for those who control lenders, and for relevant associates.

Proxies and corporate representatives

- 4.17 Subject to certain conditions (including that no consideration is paid to the appointer), persons who are appointed as corporate representatives or as proxies for meetings of Code companies are exempted from the rule 6(1) (clauses 13 to 16).
- 4.18 Clause 13 exempts persons who, by appointment as a proxy for a company meeting, may inadvertently breach rule 6 of the Code if their voting control in a Code company is above, or increases in excess of, the 20% threshold by virtue of being appointed a proxy.
- 4.19 The clause 13 exemption is subject to conditions that the proxy's increase results only from their appointment as a proxy, for a meeting, once notice of the meeting has been given, and that the proxy has not given valuable consideration for their appointment as the proxy for that meeting.
- 4.20 The proxies exemption is intended to apply broadly (subject to the conditions of the exemption). This means that the exemption applies to both directed and undirected proxy holders who meet the requirements of clause 13 of the Class Exemptions Notice.
- 4.21 Although an undirected proxy can vote the shares as they see fit, the Panel considers that undirected proxies are an essential feature of corporate democracy that is open to all shareholders and should not be restricted by the Code. The exemption facilitates this corporate democracy.

Brokers

- 4.22 Subject to certain conditions, brokers are exempted from rule 6(1) when, in the ordinary course of their business, they acquire control over Code company voting rights, so long as they exercise those rights only in accordance with the instructions of their clients.
- 4.23 There are consequential exemptions for those who control brokers and for their associates (clauses 17 and 18).

Executors and Trustees

4.24 Persons whose voting rights in Code companies increase to a level which would otherwise put them in breach of rule 6(1) are exempted from the fundamental rule if the increase results from:

- (a) their acting as trustee or executor of a will; or
- (b) their being left property in a will; or
- (c) their acting as an administrator of an intestate estate; or
- (d) an acquisition on intestacy

(clauses 20 to 22).

4.25 There are consequential exemptions for those who control executors and trustees and for their associates.

Nominees and bare trustees

4.26 Nominee companies and bare trustees are exempted from rule 6(1) of the Code if they hold Code company voting rights as a result of acquisitions in the ordinary course of their business and they do not control those voting rights (clauses 23 and 24).

4.27 There are consequential exemptions for associates of nominee companies and bare trustees.

Intra-group transfers

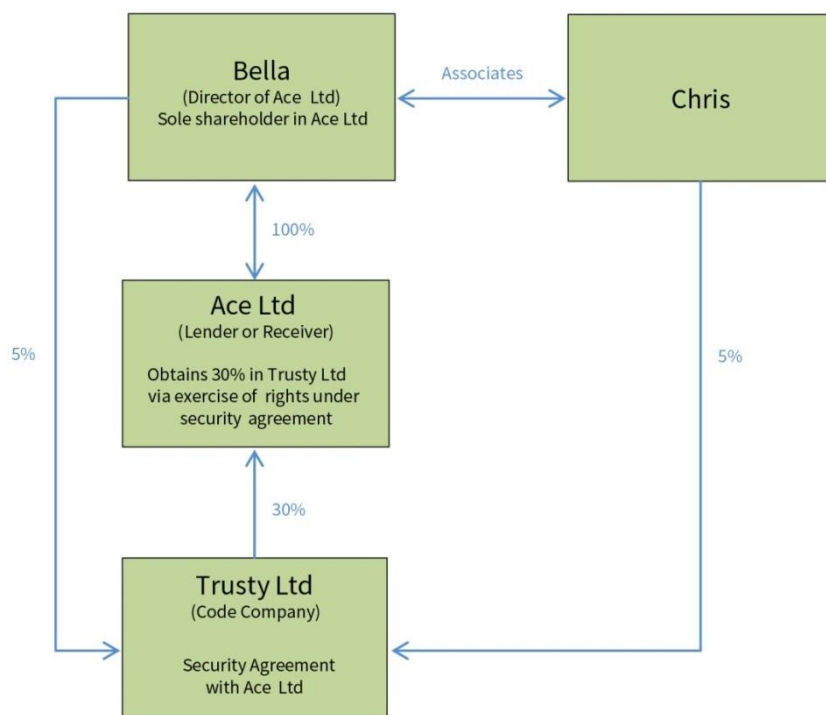
4.28 Clause 25 exempts intra-group transfers within wholly-owned groups from rule 6(1). The parent company in the group must control the relevant voting securities both before and after the transfer.

Associates

4.29 The exemptions referred to above exempt persons from rule 6(1) of the Code in respect of any increase in their voting control in a Code company that results from them acting in the ordinary course of their business (e.g., lenders or receivers) or by their appointment to act as a certain class of persons (e.g., proxies or corporate representatives) (i.e., the **Primary Exempted Person**).

4.30 Also exempted from rule 6(1) of the Code are the associates of all those Primary Exempted Persons. The associate exemptions are consequential to the exemptions for the Primary Exempted Persons and they enable associates of Primary Exempted Persons to disregard the exempted increase of the Primary Exempted Person when applying rule 6(1)(a) of the Code to the associate's own increases of voting control. The wording used across all of the associate exemptions is in substance identical. The conditions of the associate exemptions require that the associate does not control the voting rights that the Primary Exempted Person obtained under the Primary Exempted Person's exemption.

4.31 The example below illustrates the application of the associate exemptions, using the clause 12 exemption for persons who are associates of lenders or receivers (who are themselves exempted by clause 11).



- 4.32 Ace Limited is a lender which has lent money to Trusty Limited, a Code company, under a security agreement. Bella is the sole director and shareholder in Ace. Chris is an associate of Bella for the purposes of the Code. Ace exercises its rights under the security agreement and thereby increases its control of Trusty to 30% of the voting rights in Trusty. Bella and Chris each directly hold and control 5% of the voting rights in Trusty.
- 4.33 Provided that Ace meets the conditions of clause 11 of the Class Exemption Notice, i.e., the security agreement is held in Ace's ordinary course of business and with no collateral purpose of enabling Ace to increase its voting control in Trusty, then Ace is exempted from rule 6(1) of the Code in respect of its increase in voting control (30%) in Trusty.
- 4.34 As a result of Bella being an associate and a controller of Ace, and Chris being an associate of Bella, each of Bella and Chris would, prima facie, breach rule 6(1) of the Code if they were to subsequently increase their respective holding or control of Trusty. Note that this potential breach applies to Bella and Chris only for increases in their own individual voting control of Trusty after Ace exercised the security agreement. That is, they do not breach the Code if they themselves do not increase their voting control other than by virtue of the increase by Ace alone.
- 4.35 Clause 12 exempts Chris from rule 6(1) of the Code by allowing Chris to disregard Bella's control of an additional 30% of the voting rights held by Ace. This means that Chris, an associate of a person that holds or controls 35% of a Code company, can increase his voting control by up to a further 10% (up to 15%) (so that his total voting control when aggregated with Bella's personal voting control is 20% or less).
- 4.36 Clause 12 does not exempt Bella however because the conditions of clause 12 require that Bella does not have control of Ace's voting rights (which, as director and sole shareholder of Ace, she does).
- 4.37 The conditions in each exemption for the Primary Exempted Persons, in effect, limit the application of those exemptions to bona fide transactions. In the absence of the associate exemptions, certain associates would be penalised for being an associate of a Primary Exempted Person.

5 Other class exemptions

5.1 The Panel has granted several other class exemptions. An overview of these exemptions is given below.

Trustee Corporations

5.2 The [Takeovers Code \(Trustee Corporations\) Exemption Notice 2001](#) exempts trustee corporations (i.e., those defined in the Trustee Companies Act 1967 or the Public Trust Act Office Act 1957) from rule 6(1) of the Code. It enables them to treat separately (for the purposes of the Code) voting rights held or controlled by them in separate and distinct capacities.

Unmarketable parcels

5.3 A takeover offer that has, or includes, scrip for consideration is exempted from rule 20 of the Code (which requires an offer to be made on the same terms and provide the same consideration for all securities in the class under offer) to enable cash to be offered to holders of small parcels of voting securities in the target company if the listed scrip consideration would be such a small number of securities as to constitute an “unmarketable parcel”. The [Takeovers Code \(Unmarketable Parcels\) Exemption Notice 2003](#) relieves offerors and target companies of the difficulty and expense of having to deal with an unmarketable parcel of securities.

Professional underwriters

5.4 Professional underwriters who enter bona fide underwriting arrangements with a Code company are exempted under the [Takeovers Code \(Professional Underwriters\) Exemption Notice 2004](#) from rule 6(1) of the Code in respect of any increase in their voting control in the company as a result of the underwriting arrangement. The exemption only applies where the underwriter has no collateral intention of increasing its control in the Code company, the underwriter does not already hold or control more than 5% of the voting rights in the Code company, and the underwriter sells down its shareholding in the Code company to less than 20% within six months of the underwriting transaction.

5.5 There are consequential exemptions for associates and upstream parties of the professional underwriter.

Trustees of family trusts

5.6 Under the [Takeovers Code \(Trustees of Family Trusts\) Exemption Notice 2012](#), every person who increases their voting control in a Code company is exempted from rule 6(1) where:

- (a) that person is appointed a trustee of the family trust; or
- (b) that person already being a trustee, there is a reduction in the number of trustees of a family trust.

5.7 The change of trustees must relate to a bona fide reorganisation of the trust or an event beyond the trust’s control (such as the death of a trustee), must not have a collateral purpose of enabling a person to increase their voting control in the Code company, and must not increase the trust’s overall ownership of the voting rights in the Code company.

APPENDIX A - Guide for Exemption Applications

Guide for Exemption Applications

Applying for an exemption

How do I make an application for an exemption?

- 1 You apply for an exemption by sending an application in writing to the Chief Executive of the Takeovers Panel. We recommend that you follow the guide for an exemption application set out in Appendix B to ensure that you have provided all the necessary information in support of your application.

How much will it cost?

- 2 We will charge the rates prescribed by the [Takeovers \(Fees\) Regulations 2001](#) for the work undertaken on the application. You will be sent a monthly account for our fees incurred until the work is complete. You will be charged regardless of whether the exemption is granted or declined by the Panel.
- 3 Exemption notices for individual exemptions are prepared by the Panel executive and are reviewed by external legal counsel. If your application for an individual exemption is granted, part of our invoice to you will be made up of the external legal counsel's fees for reviewing the exemption notice.
- 4 We may also seek reimbursement of the costs incurred for publication of class exemptions in the Statutory Regulations series and for notification in the Gazette.

How long will it take?

- 5 The time to process your exemption application will depend on the nature and quality of your application, and the resources available within the Panel. Applications that involve difficult or novel questions of policy will take longer to process than applications which fall squarely within the policy of previous exemptions. It would be unusual for an exemption to be processed, signed and notified in the Gazette in less than four weeks and you should usually allow for up to six weeks (or more for complex exemptions).
- 6 When making your application, please specify the latest date by which the Panel's decision is required. If the application needs to be considered urgently, please provide reasons for the urgency. We will do our best to meet reasonable timeframes.

Overview of the exemption process

The Panel executive processes your application

- 7 Your application will be assigned to a member of the Panel executive to process and to prepare a report for the Panel to consider. At this stage, the Panel executive may ask you to provide further information. This stage of the process can move quickly if you provide quality information with your application and respond to queries promptly.
- 8 The Panel executive will keep you informed as to the executive's likely approach to your exemption application, including whether the executive is likely to recommend to the Panel that it grant the exemption sought.

The Panel considers your application

- 9 A division of the Panel (or the whole Panel for class exemptions) will consider the executive's analysis and recommendation and then will make its decision. The Panel executive will advise you of the

Panel's decision. You should be aware that the Panel does not necessarily follow the executive's recommendation.

The Panel executive usually drafts the exemption notice

- 10 If your exemption application is approved, the Panel executive will draft the exemption notice, using your draft as a base. External legal counsel will peer review the draft notice. Where an application for a class exemption of general application is approved, the Panel executive instructs the Parliamentary Counsel Office to draft the exemption notice.
- 11 A minimum of two weeks should be allowed for the drafting process, but complex notices and class notices may take longer. You will be invited to comment on a draft notice before the final form of the notice is settled.

Signature and publication

- 12 Once the exemption notice is finalised, it is signed by the Chairman or another Member of the Panel. The exemption is effective once the notice is signed. The Panel executive will send you a copy of the signed exemption notice.

Gazette and website

- 13 The Panel must give notice of the exemption in the Gazette. The exemption will be notified as soon as practicable unless the Panel has agreed to defer notifying an exemption on the ground of commercial confidentiality. If you consider that the notification of an exemption granted by the Panel should be deferred on the ground of commercial confidentiality, please advise the Panel executive of this in your exemption application and provide reasons.
- 14 The exemption will be published on the Panel's website as soon as practicable after it has been signed, unless the Panel has agreed to defer publication on the ground of commercial confidentiality.

APPENDIX B - Information to Support Exemption Applications

Required Information

Who is applying?

- 1 Give the full name, address, and corporate status of the person(s) seeking to be exempted from compliance with provisions of the Code.

What transaction is involved?

- 2 Provide a detailed description of the transaction for which the exemption is being sought.

What do you want an exemption from?

- 3 Identify the provisions of the Code from which an exemption is sought and any conditions of exemption you consider appropriate.

Why are you seeking this exemption?

- 4 Explain, for each provision of the Code from which the exemption is sought, why the exemption is needed and give full reasons identifying why it is appropriate that the exemption should be granted and how an exemption would be consistent with the objectives of the Code.

Are there any precedents?

- 5 Identify any exemption notices (whether current or expired) which are similar to the exemption sought and which may provide a precedent for your application. State how the notices are similar to and different from the exemption you are seeking. Note that the Panel will not be bound by previous decisions, but they are an aid.

What effects will there be on the holders or controllers of voting securities in the Code company concerned?

- 6 Describe how your proposed exemption may affect the holders or controllers of voting securities in the Code company concerned and the advantages and disadvantages (including the relative costs and benefits) to you or them of:
 - (a) the exemption being granted; and
 - (b) the exemption not being granted.

Supporting documents

- 7 You need to supply any relevant documents to support your application. These could include the following documents or most recent drafts:
 - (a) offer document;
 - (b) trust deeds;
 - (c) relevant contracts or agreements; and
 - (d) any other relevant documents.

Draft exemption notice

- 8 You should provide a draft exemption notice with a draft statement of reasons that states why it would be appropriate that the exemption is granted and how the exemption is consistent with the objectives of the Code. Here is a [draft exemption notice](#).

Time frame

- 9 You need to specify the latest date by which the Panel's decision is needed. If your application needs urgent consideration, give reasons for the urgency.

Conflicts of Interest

- 10 If there are any Panel Members you think may be conflicted from considering your application, please state their names, and potential conflict of interest.

Commercial Confidentiality

- 11 If you would like the Panel to consider deferring notification of the exemption in the Gazette and publication on its website, you must satisfy the Panel that it is proper to do so on the grounds of commercial confidentiality. You must include sufficient information for the Panel to make a decision, and specify the length of time for which the deferral should remain in place.

Fees

- 12 Please enclose the application fee (\$100 plus GST) and an advance of \$1,000 (plus GST) with the application. The advance is applied against the fees, which are billed monthly.