



Appendix B Case Studies and Examples of Declined Exemptions Involving Rule 6(2) of the Code

The following case studies and examples are illustrative only. Not all of the facts which may have been relevant to the Panel's decision have been included. Market participants are encouraged to consult with the Panel in relation to any potential fact situation.

1 Case Studies

Case study: AMP / AXA Asia Pacific / AMP NZ Office

- 1.1 In 2011, the Panel granted an exemption from rule 6(1) of the Code to AMP Limited (and certain of its related entities) (**AMP**) in relation to the proposed merger of AMP with the Australasian business of AXA Asia Pacific Holdings Limited (**AXA**). One component of AXA's business was a funds management operation that held approximately 2.8% of the shares in AMP NZ Office Limited (**ANZO**), an NZX-listed Code company. At the time of the proposed merger, AMP (through a subsidiary) already held or controlled a percentage of voting rights in ANZO that was, when aggregated with one of AMP's associates, slightly more than 20%. Therefore, the merger would have resulted in AMP becoming the holder or controller, through the upstream acquisition of AXA, of an increased percentage of voting rights in ANZO in breach of rule 6(1) of the Code.
- 1.2 The exemption involved the application of the Value Test as a proxy for the No Downstream Purpose Test (see paragraph 3.4(a) above). The Panel decided that the proposed transaction fell squarely within the policy for an unconditional exemption under the Guidance Note. In terms of the Value Test, the value of AXA's holding in ANZO represented less than 0.1% of AXA's business and, following the merger, the holding would equate to approximately 0.2% of AMP's business. Therefore, in each case the value of the interest held by the upstream company in ANZO as a result of the merger was significantly less than the 25% threshold set out in the Guidance Note.
- 1.3 See the [Takeovers Code \(AMP NZ Office Limited\) Exemption Notice 2011](#).

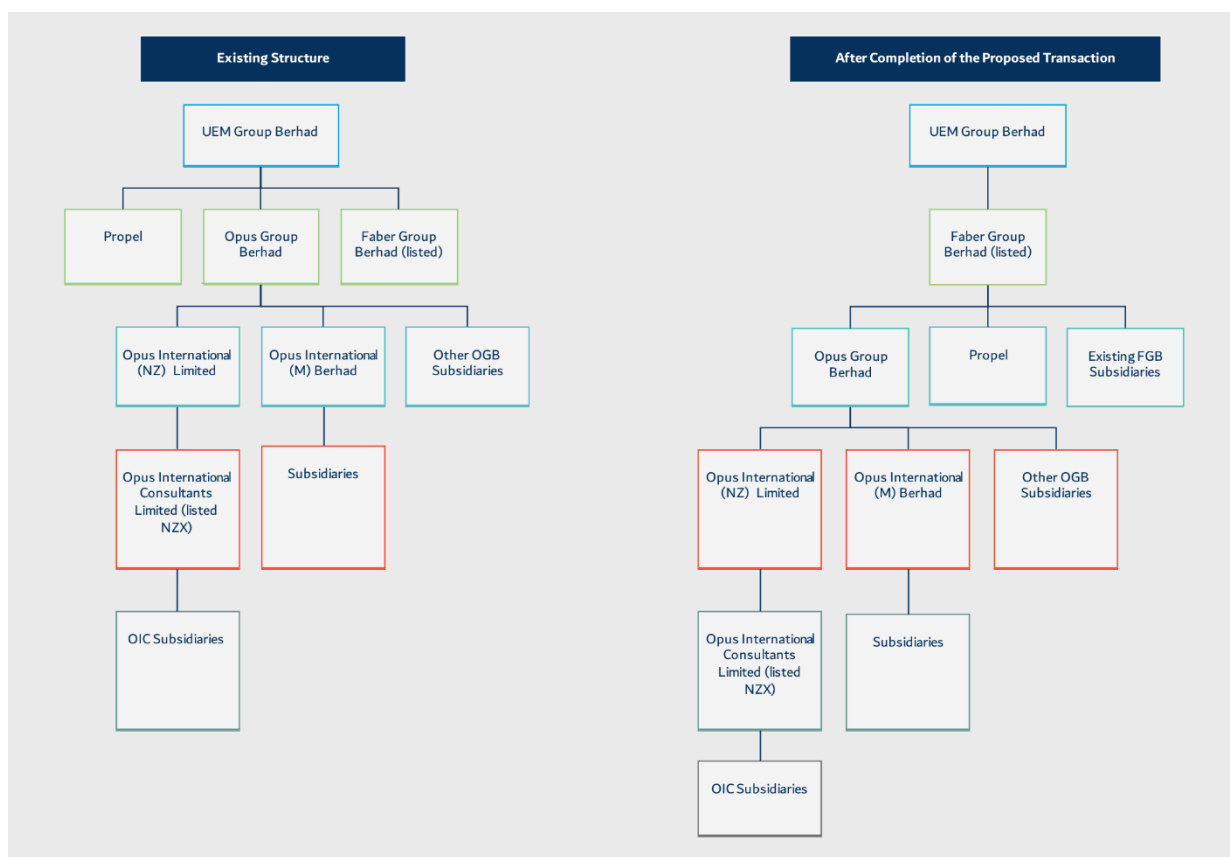
Case study: Opus International Consultants Limited

- 1.4 The Panel approved the granting of an unconditional exemption from rule 6(1) of the Code in relation to the proposed acquisition of 100% of the voting rights in Opus Group Berhad (**OGB**) by Faber Group Berhad (**Faber**), with both being Malaysian companies - see the diagram below (the **Proposed Transaction**). In granting its exemption, the Panel applied its policy for dealing with upstream acquisitions.
- 1.5 The Proposed Transaction had downstream implications on the control of voting rights in Opus International Consultants Limited, a New Zealand Code company (**Opus NZ**).
- 1.6 The acquisition of OGB by Faber would (indirectly, through its wholly owned subsidiaries) result in Faber becoming the controller of more than 20% of the voting rights in Opus NZ and, as such, required compliance with rule 6 of the Code. In the absence of an exemption, Faber would have had to obtain the approval of Opus NZ's shareholders for the Proposed Transaction, by ordinary resolution.
- 1.7 OGB was not listed on a recognised exchange, and therefore did not meet the Listing Standard. However, the Panel took into account the fact that Faber was listed on a recognised exchange, and information regarding the Proposed Transaction had been disseminated through, and was available on, that exchange.
- 1.8 The Proposed Transaction did not meet the Value Test, but the Panel considered that a reasonable person would not regard acquiring control of the voting rights in Opus NZ as a "significant purpose" of the Proposed Transaction. In reaching this view, the Panel noted that the Proposed Transaction was, at its most basic, a consequence of the "reverse takeover" of Faber by UEMG Group Berhad (the group parent).



- 1.9 See the [Takeovers Code \(Opus International Consultants Limited\) Exemption Notice 2014](#).

Opus International Consultants Structure



Case study: Terra Vitae Vineyards Limited

- 1.10 Terra Vitae Vineyards Limited (**TVL**) was an unlisted Code company whose shares were traded on the Unlisted Securities Exchange. Villa Maria Estate Limited (**VMEL**) held 21.89% of the shares in TVL (the **VMEL Parcel**). TVL and VMEL were parties to a long-term grape supply and vineyard management agreement (the **Agreement**).
- 1.11 VMEL was wholly owned by FFWL Limited (in Receivership) (**FFWL**). Indevin Group Limited (**IGL**) proposed to acquire 100% of the shares in VMEL from FFWL, which would result in IGL and certain of its upstream parties gaining effective control of the VMEL Parcel. Accordingly, the proposed acquisition was subject to the Code.
- 1.12 VMEL was not listed on a recognised exchange, and so did not meet the Listing Standard. However, the Panel was satisfied that acquiring control of VMEL's holding in TVL was not a significant purpose of the proposed transaction, for two reasons. Firstly, the Value Test was met, as the value of the VMEL Parcel represented a small percentage of VMEL's enterprise value, falling significantly under the 25% threshold. Secondly, VMEL's control of TVL flowed largely from the Agreement rather than its holding in TVL.
- 1.13 The Panel granted IGL and certain of its upstream parties an exemption from rule 6(1) of the Code subject only to a disclosure condition, to provide for TVL's shareholders to be appropriately informed of the material terms of the upstream acquisition.
- 1.14 See the [Takeovers Code \(Terra Vitae Vineyards Limited\) Exemption Notice 2021](#).



2 Examples of Declined Exemptions Involving Rule 6(2) of the Code

General Information

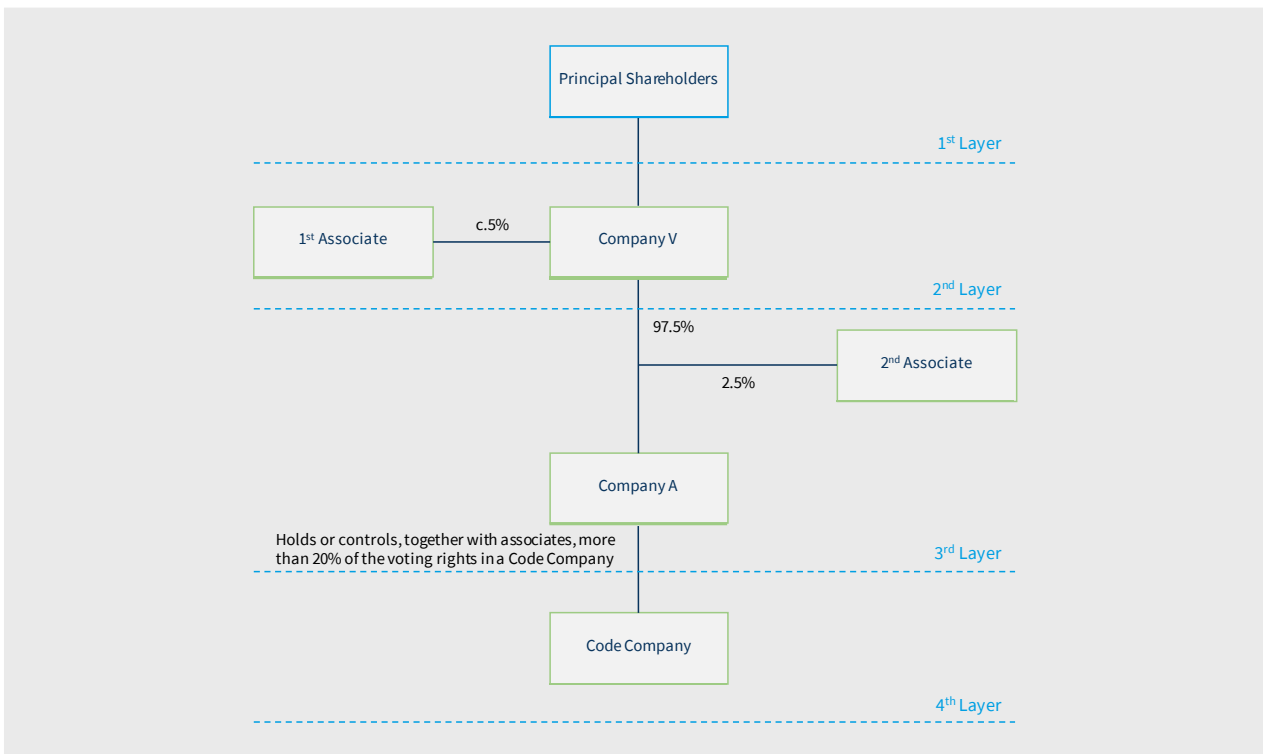
- 2.1 This part of the Guidance Note describes two applications for exemptions that were declined by the Panel on the basis that the relevant transactions did not infringe a deeming rule in rule 6(2) of the Code and therefore could be put into effect without the need for an exemption from the fundamental rule. The applications are illustrative of the Panel’s interpretation of rule 6(2).
- 2.2 The names of the parties involved have been omitted to protect commercial confidentiality.

Restructuring of family investment structure – rule 6(2)(b) – joining in control as associates

- 2.3 The diagrams below illustrate the transaction:

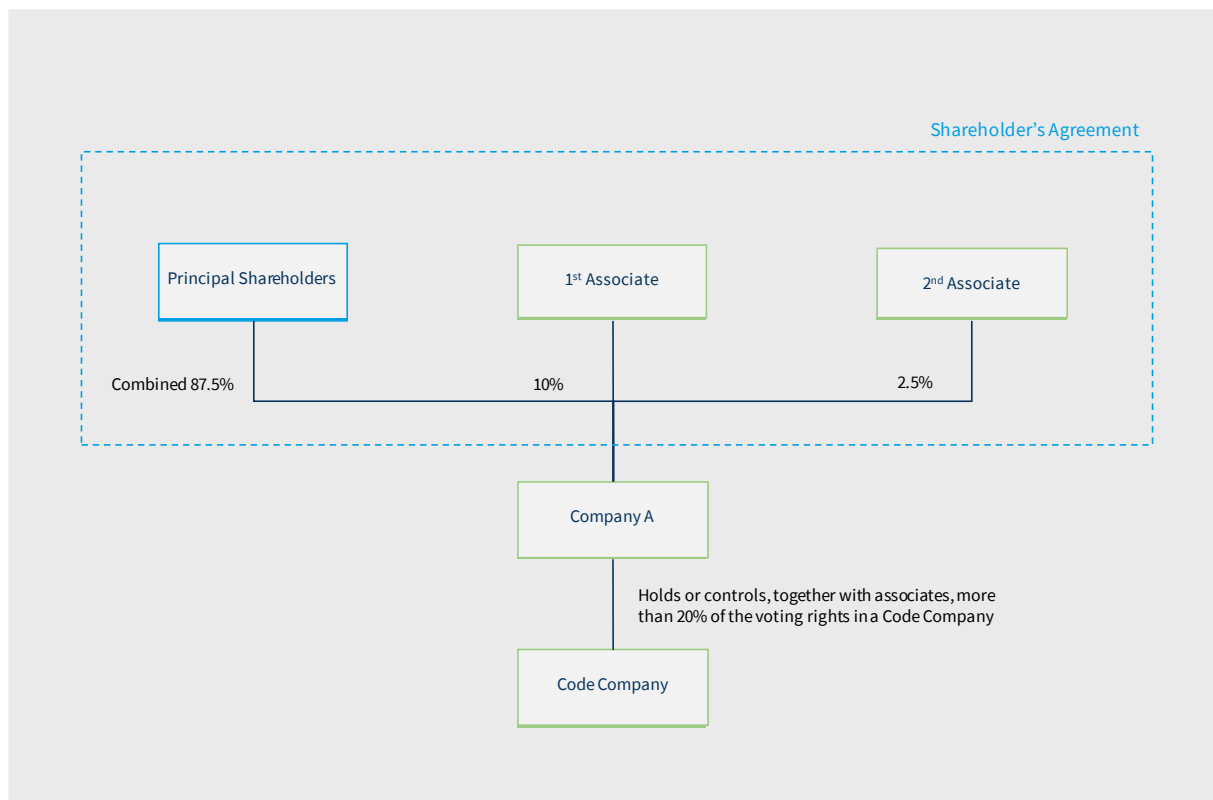
Example 1:

Pre-restructure





Post-restructure



Background

- 2.4 The family's investment interest in the Code company was structured into four layers. The first layer essentially comprised separate entities which operated for the benefit of family members (the **Principal Shareholders**).
- 2.5 The Principal Shareholders held approximately 95% of the shares in an investment holding company, Company V (the second layer). The remaining 5% of the shares were held by an associate of the family (the **First Associate**). Company V held a range of different investments interests.
- 2.6 One of those interests was a 97.5% holding in Company A (the third layer). The remaining shares in Company A were held by another associate who was connected to the family (the **Second Associate**). Company A held or controlled, together with its associates, more than 20% of the voting rights in a Code company.
- 2.7 This structure effectively gave the Principal Shareholders control of more than 20% of the voting rights in the Code company.

Proposed restructuring

- 2.8 The family wished to simplify the structure. The proposed restructuring involved Company V disposing of its 97.5% interest in Company A to the Principal Shareholders and the First Associate. As a result, the Principal Shareholders would hold a combined 87.5% of the shares in Company A, the First Associate would hold 10% and the Second Associate would continue to hold 2.5%. The shareholders of Company A would then enter into a shareholders' agreement whereby (among other things):
- the director of Company A would be nominated by the Principal Shareholders; and
 - Company A could not enter into significant transactions without the approval of the Principal Shareholders.

The Panel's decision

- 2.9 The Principal Shareholders sought an exemption from rule 6(1) of the Code to allow the restructuring without obtaining the approval of the shareholders of the Code company.



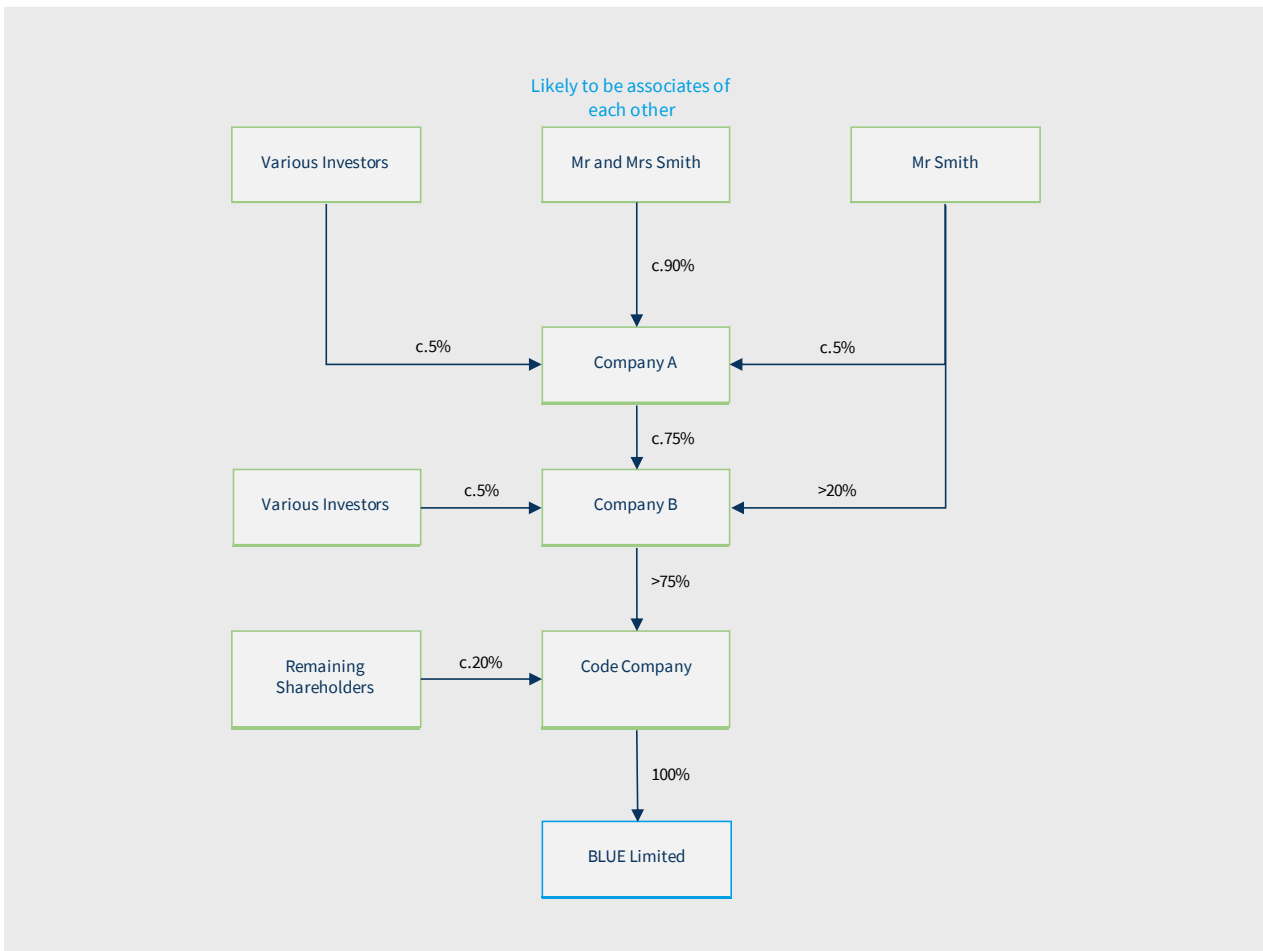
- 2.10 The Panel noted that the proposed restructuring was not going to result in the Principal Shareholders increasing the percentage of voting rights that they already controlled in the Code company. The issue for the Panel was whether the First Associate, by becoming a 10% shareholder in Company A, would be deemed by rule 6(2)(b) of the Code to increase its voting control in the Code company above 20%.
- 2.11 Rule 6(2)(b) provides that if “a person or persons together hold or control voting rights and another person joins that person or all or any of those persons in the holding or controlling of those voting rights as associates, the other person is deemed to have become the holder or controller of those voting rights”. The key consideration for the Panel was whether the First Associate was going to join the Principal Shareholders in the control of voting rights held by them in the Code company. The Panel concluded that the shareholder agreement effectively vested effective control in the Principal Shareholders, and therefore, the First Associate would not join them in the control of the voting rights. Accordingly, rule 6(2)(b) did not apply.
- 2.12 Given the Code would not have applied to any persons involved in the proposed restructuring transaction, the Panel declined to grant the exemption, on the basis that no exemption was necessary.

Proposed merger – rule 6(2)(c) – upstream companies

- 2.13 The second example relates to the proposed merger of two upstream companies. This is depicted below in Example 2.

Example 2:

Post-merger





Background

- 2.14 Mr and Mrs Smith jointly held 90% of the shares in Company A. Mr Smith, held in his own name 5% of the shares, and the remaining shareholders of Company A were various other investors, all of whom were likely to have been associates of the Smiths for the purposes of the Code.
- 2.15 Company A held approximately 75% of the shares in another company, Company B. Mr Smith held 20% of the shares in Company B and the remaining shares were held by various investors. Mr Smith and these investors were all likely to have been associates of Company A and of the Smiths for the purposes of the Code.

Proposed transactions

- 2.16 Company B held all the shares in Blue Limited (**Blue**). It was proposed that Company B would merge with a Code company (the **Merger**). The proposed transaction would involve Company B selling all of its shares in Blue to the Code company and the Code company issuing shares to Company B as consideration for the shares in Blue. Company B would also subscribe for additional shares in the Code company. It was expected that after the Merger, Company B would hold more than 75% of the Code company and that the remaining shareholders of the Code company would hold more than 20%.
- 2.17 Company A was also proposing to make an unrelated business acquisition (the **Proposed Acquisition**) following the Merger. To assist completion of this transaction, the Smiths intended to make a financial contribution into Company A which would result in the Smiths increasing their ownership of Company A by less than 1%.
- 2.18 Company A and Company B, the Smiths (Mr and Mrs Smith together) and Mr Smith in his own capacity (together, the **Applicants**) were concerned that the Proposed Acquisition, and any potential future share transactions in Company A and Company B, would be caught by rule 6(1) of the Code. An exemption was sought from rule 6(1) in respect of the Proposed Acquisition so that the applicants could obtain certainty as to the application of rule 6(1) in the particular circumstances. The Applicants requested that the Panel decline the exemption on the express basis that the Code was not applicable to the circumstances.
- 2.19 The Applicants submitted that despite the Proposed Acquisition (or any other similar future transaction) the Smiths already controlled Company A and the less than 1% increase in the Smiths' shareholding in Company A would have no impact on the Smiths' effective control of the Code company if the Merger proceeded.

The Panel's decision

- 2.20 Rule 6(2)(c) appeared to be the only rule that may have applied to the proposed transactions. Rule 6(2)(c) provides that if "voting rights are held or controlled by a person together with associates, any increase in the extent to which that person shares in the holding or controlling of those voting rights with associates is deemed to be an increase in the percentage of the voting rights held or controlled by that person".
- 2.21 The issue in question was whether, as a result of the shareholding arrangements relating to Company A and Company B, the Smiths and the other investors would be regarded as sharing in the control of the voting rights in the Code company following the Merger. It was accepted by the Applicants that the Smiths and the other investors were likely to be associates of each other for the purposes of the Code.
- 2.22 If the Smiths and the other investors would be regarded as sharing in the control of the voting rights in the Code company, rule 6(2)(c) would apply to the proposed transactions, and would have the effect of preventing any of the shareholders in Company A and Company B from increasing their voting rights in Company A or Company B (except in accordance with the Code). This is because an acquisition of voting rights in Company A or Company B would result in the acquirer of those voting rights increasing the extent to which they shared in the control of the voting rights in the Code company. Rule 6(2)(c) would deem that increase to be an increase in the acquirer's voting control in the Code company. That increase would be subject to the Code.
- 2.23 The Panel noted that there were no shareholder agreements in place in respect of Company A and Company B and that the shareholders in those companies only had their statutory rights as shareholders. Given the structure of Company A and Company B, the Panel considered that the Smiths had complete and unfettered control of



Company A and likewise, Company A and the Smiths (together) had absolute control of Company B. Once the Merger was complete, the Smiths would, in turn, control the voting rights held by Company B in the Code company. Furthermore, the Panel considered that the minority shareholders in the upstream companies (Company A and Company B) did not appear to have any share in the control of the voting rights of those upstream companies, and therefore the Smiths would not share control of the voting rights in the Code company with those minority shareholders as contemplated by rule 6(2)(c) of the Code.

- 2.24 For these reasons, the Panel declined the application for an exemption on the basis that the Code did not apply so no exemption was necessary.