PROPOSED AMENDMENTS
TO THE TAKEOVERS CODE

A DISCUSSION PAPER
ISSUED BY THE TAKEOVERS PANEL

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7 April 2003

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INTRODUCTION

1. The Takeovers Code came into force on 1 July 2001. One of the Takeovers Panel's functions, as provided by section 8(1)(a) of the Takeovers Act 1993, is to keep under review the law relating to takeovers of specified companies and to recommend to the Minister of Commerce any changes to that law that it considers necessary.

2. This paper sets out for comment certain technical aspects of the Code that the Panel considers, on the basis of its experience with administration of the Code, need amendment. The Panel has considered these aspects of the Code taking account of its own experience and the comments it has received from legal practitioners and advisory firms in the course of day-to-day administration of the Code and feedback sessions conducted over the past year.

3. **The purpose of proposing changes to the Code at this time is to make the existing Code work better by improving some of the wording, removing a few anomalies, reducing potential confusion for offerees and voting shareholders, and facilitating the efficient operation of the market for corporate control.**

4. These proposed amendments are of a technical nature and do not modify any fundamental policy underlying the Code. The Panel, in consultation with the Ministry of Economic Development, intends to review certain policy aspects of the Code over the next two years. Public consultation on any such changes will be undertaken in due course.

5. The Panel welcomes submissions on the discussion points identified in this paper. Although the Panel is outlining a number of proposed amendments to the Code that it considers are necessary or desirable, the Panel is open to alternative or opposing suggestions and comments. These will all be considered carefully.

6. Each point is discussed in approximately the order it appears in the Code. This is not always possible where more than one rule is involved. The intention is to allow the proposed changes to be seen in the context of the Code as a whole.

7. Respondents will note that for each of its proposed changes the Panel has included detailed text changes to the Code. The primary reason for this is to assist respondents to understand the Panel's proposed changes. However, respondents should note that these text changes have not been drafted by Parliamentary Counsel Office who will have responsibility for drafting any changes to the Code that may eventuate from this paper. Respondents should therefore be careful not to put too much emphasis in their comments on the specific wording used in this paper because it may well be changed in the drafting process.

8. The Government is very conscious of business compliance costs. For this reason, as part of the process that needs to be followed to have changes to regulations approved, it is necessary to consider and report on the impact any proposed changes in regulation could have on those subject to them. The discussion paper therefore seeks comments from respondents on the specific costs of particular proposals the Panel is

putting forward, including both direct and indirect compliance costs. If respondents propose alternative solutions from those articulated in this paper they should address the business compliance costs of any alternative proposals they make.

9. The technical amendments discussed in this paper concern:

A. Creep.

B. Determining all the classes of equity securities in a target company.

C. Notices of shareholders' meetings – statement of voting securities held by acquirers or allottees.

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Q. Certificate in takeover notices and offer documents.

R. Material contracts.

S. Unlisted Code companies.

Invitation to Comment

10. The Panel invites submissions on the proposed changes to the Takeovers Code set out in this paper. The closing date for submissions is **Monday 19 May 2003**. Submissions should be sent to:

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11. The Panel would also be pleased to receive any views, observations or comments about other matters relating to the Code.

12. Any submissions received are subject to the Official Information Act 1982. The Panel may make submissions available upon request under that Act. If any submitter wishes any information in a submission to be withheld, the submission should contain an appropriate request (together with a clear identification of the relevant information and the reasons for the request). Any such request will be considered in accordance with the Official Information Act 1982.

PROPOSED AMENDMENTS TO THE TAKEOVERS CODE

A: Creep

13. Rule 7(e) of the Takeovers Code permits holders or controllers of between 50% and 90% of the voting rights in a Code company to increase their control percentage by "*creeping*" if:

> (i) the person holds or controls more than 50%, but less than 90%, of the voting rights in the code company; and
>
> (ii) the resulting percentage held by the person does not exceed by more than 5 the lowest percentage of the total voting rights in the code company held or controlled by the person in the 12-month period ending on, and inclusive of, the date of the increase

14. The increase may be no more than 5% of the Code company's total voting rights in a 12-month period, calculated by reference to the lowest holding during the last 12 months. The effect is that a person cannot take advantage of rule 7(e) if his or her control percentage has already increased by 5% or more from its lowest point over the last year, regardless of how that increase in control percentage came about.

15. As the Panel explained in *Code Word 5*:

> If a shareholder's control percentage of a Code company went from 0% to 75% by a shareholder-approved allotment made on 31 March 2002, that shareholder is not able to increase its control percentage again until after 31 March 2003 (unless it made a Code offer or obtained shareholder approval). It could then move up to 80% during the next twelve months.

<u>Object of proposed change</u>

16. Some market participants have reported uncertainty as to whether rule 7(e) requires the 5% increase to be calculated by reference to the Code company's total voting rights (the correct interpretation) or the holder's total voting rights in the Code company (the incorrect interpretation). This is solely a question of the wording and construction of the rule.

17. The object of seeking a change to the wording of the rule is simply one of achieving greater clarity.

18. Note that the issue has also been raised with the Panel as to whether the rule itself should be altered, for example, by reducing the period for creeping from twelve months to six months. That would be a policy change and it is not the purpose of this discussion paper to review or open up the fundamental parameters of the Code for consideration.

Proposed change

19. The Panel does not consider rule 7(e) to be ambiguous. However, to avoid further confusion, the Panel proposes that rule 7(e)(ii) be replaced by a new rule 7(e)(ii) as follows:

> the resulting percentage of the total voting rights in the code company held or controlled by the person does not exceed the lowest percentage of the total voting rights in the code company held or controlled by the person in the 12-month period ending on (and inclusive of) the date of the increase by more than 5.

Compliance costs

20. Amending rule 7(e) as proposed should not involve any compliance costs, direct or indirect, as it would simply involve a change in wording.

Questions for comment

1. Do you consider there is any need to amend rule 7(e) to clarify its meaning?
2. Do you consider that the Panel's preferred solution for rule 7(e) clarifies the meaning of the rule?
3. Would you like to suggest any alternatives to improve the clarity of the rule, bearing in mind that the text is subject to final drafting by Parliamentary Counsel Office?

B: Determining all the classes of equity securities in a target company

21. Rule 8(2) requires an offeror making a full offer to determine all the classes of equity securities in a target company that may be on issue at the time the takeover notice is sent to the target company:

> A full offer must include offers in respect of all the securities in each class of equity securities, whether voting or non voting, of the target company (other than those that are already held by the offeror)

22. Rule 9(2) requires an offeror making a partial offer to determine all the classes of voting securities in a target company that may be on issue at the time the takeover notice is sent to the target company:

> A partial offer must be extended to all holders of voting securities of the target company other than the offeror.

23. Rule 44(1)(b) requires the offer document to be on the same terms and conditions as the takeover notice except for any variations to which the directors of the target company have given their prior written approval.

Object of proposed change

24. When planning an offer it can be difficult to ascertain all the classes of equity securities (or voting securities, in the case of a partial offer) on issue, as a Code company may have some classes of securities which are on issue to only a few people (for example, employees) and which may have been made since the last published financial statement or annual report. This can give rise to difficulties under rules 8(3), 8(4) and 9(5), which require the "*consideration and terms*" of an offer to be "*fair and reasonable*" as between the classes required to be included in the offer. In addition, rule 22 requires an independent adviser to report on the fairness and reasonableness between these classes, and this report is required to accompany both the notice and the offer.

25. In the case of a hostile takeover the potential offeror simply may not be able to ascertain all the classes of relevant securities before making an offer. The Panel considers that the rules of the Code should not operate to prevent offers being made for fear the offeror has not made an offer to holders of all classes of equity securities in a Code company.

26. The object of the proposed change to the Code discussed below is to remove a provision in the Code that could currently be having the effect of preventing offerors from making Code offers, particularly hostile Code offers, because of fear of non-compliance with rule 8(2).

Alternative approaches to the problem

27. The Panel considered a number of possible approaches to this problem where an offeror gives notice of its intention to make a full offer for a Code company that has a

number of classes of equity securities on issue, but the indicated offer does not include an offer to every class of equity security holder, including:

(a) Require the takeover procedure to start again once it becomes known that an offer has not been made to the holders of one or more class of equity securities; or

(b) Allow the takeover to proceed in accordance with the normal rules of the Code provided the offeror can satisfy the Panel that it used its best endeavours to ascertain all the classes of equity securities on issue before issuing its takeover notice, and with:

(i) a parallel offer being made to the holders of the omitted class or classes of equity securities just as soon as it can be made;

(ii) a supplementary report under rule 22 of the Code being distributed along with the supplementary offer document; or

(c) Impose an obligation on the target company to advise the offeror, as soon as it receives a notice of takeover, of the identity of all its classes of equity securities. If the offeror's intended offer does not include an offer to holders of all classes of equity securities then the offeror would be allowed, within the minimum fourteen day period between giving its takeover notice and being able to despatch its offer document, to amend its offer document to cover the additional class or classes of equity securities issued by the target company. The independent adviser's report required under rule 22 would be able to be amended to deal with the additional class or classes of securities.

28. Issues that the Panel believes need to be taken into account include:

(a) The desirability of maintaining the bidder's strategic position, which could be adversely affected if it were required to restart the offer procedure;

(b) The importance of giving confidence to potential bidders that an offer cannot be foiled by a failure to make an offer for all classes of equity security in a target company;

(c) The need to minimise compliance costs.

Proposed change

29. The Panel's preferred solution would be an amendment to the Code to require the target company to advise the potential offeror within two days of receipt of a takeover notice either that there are no other relevant classes of equity securities or, if there are, of the relevant details of those classes. The offeror could then be allowed five days within which to vary its proposed offer without needing the target company's approval, insofar as it concerned extending the offer to classes of equity securities of which it had not been previously aware. The independent adviser would also have the same time in which to amend its rule 22 report. The Panel considers that there would be no need to change the other Code timeframes.

30. It is accordingly proposed that a new rule 42(1A) be introduced along the following lines:

Notification of additional classes

If the offer notified in a takeover notice does not extend to each class of the target company's equity securities (in the case of a full offer) or each class of the target company's voting securities (in the case of a partial offer), the target company must, no later than 2 days after receiving the takeover notice, provide to the offeror a notice containing a description of each class of the target company's equity securities (in the case of a full offer) or voting securities (in the case of a partial offer) not already included in that offer, and containing sufficient information about each such class (including, in particular, the terms of each such class and the number of securities in each such class on issue) to enable an offer for each such class to be formulated and to enable an independent adviser to provide a certificate or a revised certificate (as the case may be) under rule 22(2).

31. It is also proposed that a new rule 42(1B) be introduced along the following lines:

Notification of no additional classes

If the offer notified in a takeover notice does extend to each class of the target company's equity securities (in the case of a full offer) or each class of the target company's voting securities (in the case of a partial offer), the target company must, no later than 2 days after receiving the takeover notice, provide to the offeror a notice confirming that all relevant securities have been identified in the takeover notice.

32. It is also proposed that a new rule 44(1)(b)(iv) be introduced along the following lines:

any variation which provides for the offer to be extended to any additional class of securities identified in a notice given under rule 42(1A) (and any explanation of, and/or additional information required to be included in or accompany the notice as a result of that extension), provided that notice of the variation, accompanied by a report or amended report (as the case may be) under rule 22, is given to the target company within 5 days of the offeror receiving that notice;

Compliance costs

33. The Code already imposes compliance costs on bidders by requiring them to make offers to all classes of equity security when making a full offer, and by requiring the commissioning of a report from an independent adviser under rule 22.

34. The Panel's proposal would result in a very small cost to target companies, in that they would be required to advise the bidder of the classes of equity security they have on issue. However, its main effect should be to avoid the significant costs that would be involved if a bidder had to restart its offer procedure because it had omitted to include an offer for all classes of equity security in a full offer. While in some circumstances (for example, a friendly takeover) a target company might permit a bidder to amend its offer document in this way, in a hostile situation the directors of the target company could require the bidder to recommence its offer. They would do this by refusing consent to change the terms of the offer document from those set out in the takeover notice.

Questions for comment

4. Do you consider that the requirement in rule 8(2) that a full offer must include an offer for every class of equity security could discourage parties from making a full bid for a company for fear of not knowing the existence of, or characteristics of, every class of a target company's equity securities? Have you any evidence of this?

5. Do you think the Code should be changed to allow full offers that do not include an offer to holders of every class of equity security on issue to be amended within the timing structure of the Code, or should such offerors be required to start the offer process again by issuing a new takeover notice?

6. If you consider that it is desirable to change the Code for this purpose, do you support the Panel's proposed change? Do you prefer an alternative approach to the problem? If so, please outline your preferred alternative.

7. Do you have any comments on the drafting of the Panel's proposed solution (bearing in mind that this text is still subject to final drafting by Parliamentary Counsel Office)?

8. Do you consider there are any significant compliance cost issues with the Panel's proposed solution to this problem? If so, please detail these costs, distinguishing between direct and indirect costs.

C: Notices of shareholders' meetings – statement of voting securities held by acquirers or allottees

35. Rule 15(b) requires the notice of meeting containing a proposed resolution in respect of an acquisition of voting securities under rule 7(c) to contain or be accompanied by:

> particulars of the voting securities to be acquired, including—
>
> (i) the number being acquired; and
>
> (ii) the percentage of all voting securities that that number represents; and
>
> (iii) the percentage of all voting securities that will be held or controlled by the person acquiring the voting securities after completion of the acquisition

36. Similarly, rule 16(b) requires the notice of meeting containing a proposed resolution in respect of an allotment of voting securities under rule 7(d) to contain or be accompanied by:

> particulars of the voting securities to be allotted, including—
>
> (i) the number being allotted; and
>
> (ii) the percentage of the aggregate of all existing voting securities and all voting securities being allotted that that number represents; and
>
> (iii) the percentage of all voting securities that will be held or controlled by the person to whom the voting securities are being allotted after completion of the allotment;

Object of proposed change

37. Rules 15(b)(iii) and 16(b)(iii) only require disclosure in the notice of meeting of the percentage of all voting securities that will be held or controlled by the person acquiring securities, or to whom securities are being allotted. In contrast, the fundamental rule of the Code is triggered by the holdings of a person and his or her associates. This means that shareholders are being advised and will be voting on a change in the control position of the acquiring or allottee shareholder that does not take into account the full extent of the acquirer or allottee's interests in the subject company. On the other hand, some rights under the Code, for example the "creep" rights under rule 7(e), are only triggered by voting rights actually held or controlled and do not take account of the holdings of associates.

38. The object of the proposed change is to improve the information provided to shareholders when they have the opportunity to vote to approve an acquisition or allotment for the purposes of the Code. This would be achieved by ensuring that shareholders are advised in the notice of meeting of:

(a) the voting rights that the acquirer or allottee itself would hold or control, and

(b) the aggregate voting rights that the acquirer or allottee and its associates would hold or control,

if the proposed acquisition or allotment is approved by shareholders.

Alternative approaches to the issue

39. The current rules of the Code require disclosure in the notice of meeting of the outcome of an acquisition or allotment in terms of the voting rights that would be held or controlled by the allottee or acquirer if shareholders approve the acquisition or allotment. The solutions would include:

(a) Make no change to the current rules;

(b) Change the rule so that all disclosures focus on the voting rights held or controlled by the allottee or acquirer and its associates;

(c) Change the rule so that disclosure is required of both the voting rights held or controlled by the allottee or acquirer, as well as the voting rights that would be held by the allottee or acquirer and its associates.

Proposed change

40. The Panel proposes that rules 15(b) and 16(b) should be amended to require disclosure of the aggregate of the voting securities that would be held or controlled by the acquirer or allottee and that person's associates in addition to requiring disclosure of the voting rights that would be held or controlled by the acquirer or allottee itself.

41. It is accordingly proposed that a new rule 15(b)(iv) be introduced as follows:

> the aggregate of the percentages of all voting securities in the Code company that will be held or controlled by that person and that person's associates after completion of the acquisition.

42. It is also proposed that a new rule 16(b)(iv) be introduced as follows:

> the aggregate of the percentages of all voting securities in the Code company that will be held or controlled by that person and that person's associates after completion of the allotment.

Compliance costs

43. The effect of the Panel's proposed change to rules 15(b)(iv) and 16(b)(iv) on compliance costs would appear to be minimal. The proposed change would mean an additional disclosure in the notice of meeting. In order for the acquirer or allottee to satisfy itself that it is complying with the Code it must be aware of the holdings of both itself and its associates. It is possible some additional costs may be incurred in verifying specific holdings of all associates in some cases.

Questions for comment

9. Do you consider that it would improve the information provided to shareholders voting on resolutions to approve acquisitions or allotments under the Code if rules 15(b)(iv) and 16(b)(iv) were amended to require disclosure of the aggregate voting rights that would be held or controlled after the acquisition or allotment by the allottee or acquirer and its associates?

10. If your answer to 9 is "yes", do you consider this information should be disclosed in addition to information on the voting rights that would be held or controlled by the allottee or acquirer, or instead of that information? Why?

11. Do you have any comments on the wording of the Panel's proposed change to the rules, bearing in mind that final drafting will be undertaken by Parliamentary Counsel Office?

12. Do you consider the Panel's proposed change would increase compliance costs for subject companies, or prospective allottees or acquirers? If so, can you give an order of magnitude to the increased costs? Please distinguish between direct and indirect costs.

D: Independent advisers' reports on fairness between classes

44. Under rule 22:

> (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).

45. Clause 17 of Schedule 1 of the Code requires the takeover notice and offer document to contain or be accompanied by:

> (1) If an independent adviser's report is required under rule 22,—
>
> (a) the identity of the independent adviser; and
>
> (b) a copy of the adviser's full report or a summary of the full report prepared by the adviser; and
>
> (c) if only a summary of the full report is provided under paragraph (b),—
>
> (i) a statement that the full report is available for inspection in New Zealand at the registered office or principal place of business of the offeror; and
>
> (ii) a statement that a copy of the full report will be sent to any offeree on request; and
>
> (iii) a statement that the summary report is a fair summary and not misleading.
>
> (2) The full report and summary report must include—
>
> (a) a statement of the qualifications and expertise of the adviser; and
>
> (b) a statement that the adviser has no conflict of interest that could affect the adviser's ability to provide an unbiased report.

46. The effect of rule 22 is to require an independent adviser's report on the fairness of the consideration being offered as between two or more different classes of securities. The report is obtained by the offeror and is currently attached to the takeover notice when provided to the target company and then to the offer document when it is despatched to target company shareholders. The target company statement, which is sent to shareholders at either the same time or up to 14 days after the offer document, includes or is accompanied by a separate report under rule 21, from a different independent adviser, on the "*merits*" of the offer.

Object of proposed change

47. The Panel understands there has been confusion on the part of some shareholders in receipt of offer documents accompanied by rule 22 reports. Shareholders have in their hands a report stating that the offer is "*fair and reasonable as between classes*", and may mistakenly believe that an independent adviser considers the offer to be fair. They may not appreciate that a further report on the "*merits of the offer*" is

forthcoming together with the target company response to the offer. This problem was highlighted in one case where an offeror specifically drew attention to the rule 22 report when distributing the offer document to the target company shareholders.

48. This confusion led to the Panel issuing the following policy statement on 24 October 2001:

> That persons approved under rule 22 as an independent adviser be asked to make a statement on the front of their report advising that:
>
> "(a) the report is not a report on the merits of the offer.
>
> (b) the report has been commissioned by the offeror.
>
> EITHER
>
> (c) [in respect of reports required for the purposes of rule 8(3) of the Code] the report is solely to compare the terms and conditions offered for each class of voting securities with those offered for the other class(es) of voting securities.
>
> OR
>
> (c) [in respect of reports required for the purposes of rule 8(4) or 9(5) of the Code] the report is solely to compare the terms and conditions offered for non-voting securities with those offered for voting securities.
>
> (d) **a separate independent report on the merits of the offer commissioned by the independent directors of the target company will be distributed to shareholders shortly along with a statement by the target company.**"

49. There has also been some confusion in respect of the disclosure in the offer document required by clause 17 of Schedule 1. Where a rule 22 report has not been required, the offeror has sometimes simply stated that "*there is no rule 22 report*" or "*there is no independent adviser's report*". The Panel has attempted to address this by encouraging offerors to make a statement to the effect that "*while there is no report under rule 22, a report on the merits of the offer under rule 21 will be sent to shareholders with the target company statement.*"

50. The primary objective of the proposed change is to retain the concept of the rule 22 report while trying to avoid the potentially confusing or misleading consequences of having the report distributed to shareholders in the target company at the same time as the offer document.

51. A further issue arose in the course of considering this rule. The Code currently allows the offeror to include a summary of the rule 22 report with its offer document, rather than the full report, on certain conditions. In practice, where rule 22 reports are required they tend to be brief and the Panel has not yet seen a summary report.

52. In the interests of well-informed shareholders the secondary objective of these proposed changes is to ensure that shareholders receive the full rule 22 report on each occasion it is required.

<u>Alternative approaches to the issue</u>

53. There are a number of possible alternative approaches to the issue. These include:

(a) Remove the requirement for preparation of a rule 22 report. There could be a requirement that the directors of the offeror certify that they believe that the consideration offered to holders of different classes of equity securities is fair and reasonable as between the classes. The question of confirming the fairness of an offer between different classes of equity securities could be left to the independent adviser appointed by the target company under rule 21 of the Code;

(b) Still have the rule 22 report prepared by the independent adviser before the offer is made, but have it distributed to offerees along with the target company statement and rule 21 report on the merits of the takeover, and try and prevent offerees being informed of the conclusion of the rule 22 report prior to its distribution;

(c) Change the designation of the rule 22 report so that it is no longer styled an "independent adviser's" report, but perhaps as a "Fairness Report".

Proposed change

54. The Panel considers the potential for confusion between the two independent advisers' reports should be removed if this can be practically achieved. The Panel considers it is still essential for the offeror to commission a separate report on the fairness between classes so that, before the offer is made to shareholders, an independent assessment is made as to whether the offer complies with rules 8(3), 8(4) or 9(5) (as applicable). These rules require the consideration and terms offered for each relevant class of securities to be fair and reasonable as between those classes. Under rule 22(3), this requirement is deemed to be satisfied if a rule 22 report so concludes.

55. If an offer were allowed to be made and accepted, and then 10 days later an independent adviser states that in its opinion the offer is not fair as between different classes of equity security, this would be a very unsatisfactory situation. Would the offer have to be withdrawn and started again? Would the offer be in breach of the Code? Would all such offers have to be conditional on certification by the independent adviser?

56. The Panel proposes that the rule 22 report be provided to the target company and to the Panel at the time the takeover notice is given, but that it not be provided to shareholders at that time. Rather, it should accompany the rule 21 report (on the merits of the offer) when the target company statement is sent to offerees, so that offerees do not confuse the nature and purpose of the two reports.

57. However, the offeror could then be required in its takeover notice and offer document to explain how its calculation of the terms and consideration as between classes complies with the "fairness and reasonableness between classes" requirement, and to confirm that it has received a report under rule 22 of the Code.

58. It is accordingly proposed that a new rule 22(4) be introduced as follows:

The report must contain the information specified in Schedule 3.

59. It is also proposed that a new rule 41(1)(c) be introduced as follows:

if a report is required under rule 22, it is accompanied by that report.

60. It is proposed that rule 41(2) be amended as follows:

Subject to rule 41(3), the [The] notice may contain, or be accompanied by, any additional information that the directors of the offeror determine could affect the decision of the offerees to accept or reject the offer.

61. It is also proposed that a new rule 41(3) be introduced as follows:

The notice may not contain, or be accompanied by, any reference to the report (if any) required under rule 22, except as specified in clause 17 of Schedule 1.

62. It is proposed that rule 44(2) be amended as follows:

Subject to rule 44(3), the [The] offer may contain, or be accompanied by, additional information of the kind described in rule 41(2).

63. It is also proposed that a new rule 44(3) be introduced as follows:

The offer may not contain, or be accompanied by, any report, or any reference to any report, required under rule 22, except as specified in clause 17 of Schedule 1.

64. It is also proposed that clause 17 of Schedule 1 of the Code be replaced by a new clause 17 as follows:

17 Different classes of securities

(1) If the offer extends to more than one class of securities,-

(a) a statement as to how the consideration and terms of the offer have been calculated so as to be fair and reasonable as between the classes of securities; and

(b) a statement that an independent report by [*name of independent adviser preparing rule 22 report*] concerning the fairness and reasonableness of the consideration and terms of the offer as between the different classes of securities will be sent to offerees by the target company with the target company statement.

(2) If the offer does not extend to more than one class of securities, the following statement:

"No report is required under rule 22 of the Code (which relates to the fairness and reasonableness of the consideration and terms of the offer as between different classes of securities). A report on the merits of the offer from an independent adviser under rule 21 of the Code will be sent to shareholders with the target company statement."

65. This proposed amendment would remove the ability for a summary of the rule 22 report to be provided to target company shareholders, with copies of the full report being available on request. In the Panel's experience, such reports are by their nature relatively brief as they have a much narrower focus than do rule 21 reports on the merits of offers. The Panel therefore considers it would be appropriate that the full

rule 22 report be required to be provided to target company shareholders in all cases where such a report is required.

66. It is also proposed that a new clause 19A be introduced in Schedule 2 as follows:

> **19A Different classes of securities**
>
> If a report is required under rule 22, the identity of the independent adviser who has provided that report and a copy of that adviser's full report.

67. It is also proposed that a new Schedule 3 be introduced as follows:

> **Schedule 3**
>
> **Independent adviser's report on fairness and reasonableness between classes of equity securities**
>
> (1) The identity of the adviser who prepared the report.
>
> (2) A statement of the qualifications and expertise of the adviser.
>
> (3) A statement that the adviser has no conflict of interest that could affect the adviser's ability to provide an unbiased report.
>
> (4) A statement in the following form, to be set out in a prominent position at the front of the report:
>
> "1. This report is **not** a report on the merits of the offer.
>
> 2. This report has been commissioned by the offeror.
>
> EITHER
>
> 3. [*In respect of reports required for the purposes of rule 8(3) or 9(5) of the Code*] The purpose of this report is solely to compare the terms and consideration offered for each class of voting securities with those offered for the other class(es) of voting securities.
>
> OR
>
> 3. [*In respect of reports required for the purposes of rule 8(4) of the Code*] The purpose of this report is solely to compare the terms and consideration offered for non-voting securities with those offered for voting securities.
>
> 4. **A separate independent report on the merits of the offer, commissioned by the independent directors of the target company, is required to accompany the target company statement.**"

Compliance costs

68. The Panel does not believe that its proposed approach to this issue would involve any material compliance costs. A rule 22 report would still be required from an independent adviser. It would now be distributed with the target company statement rather than the offer document. The offeror is obliged to meet the costs in both cases. There is unlikely to be any change in postage costs.

69. Although removing the ability to provide a summary of the independent adviser's report with the offer documents may appear to impose an additional compliance cost,

in practice the Panel does not believe this to be the case. Full rule 22 reports are usually only a few pages long and are almost incapable of summary.

Questions for comment

13 Do you consider there is any need to change the present operation of rule 22 of the Code? If so, how and why?

14. Do you consider that distributing the rule 22 report with the offer document could cause confusion to offerees who may misinterpret it as a report on the merits of the offer? Have you any evidence that this has occurred?

15. Do you consider that a separate report under rule 22 should continue to be required for a full offer where there is more than one class of equity security of the target company?

16. Do you consider that the requirement for a rule 22 report should be removed, with reliance for establishing that the offer is fair and reasonable between classes being placed on a certificate from the directors of the offeror and a positive assurance from the independent adviser preparing the rule 21 report? If yes, please explain why you support this approach, and how you would deal with the uncertainty created by the assurance of fairness not being given until the offer document is dispatched, or not being given at all.

17. Do you consider the Panel's proposed change to the Code is a practicable way of resolving the problem of confusion that could be caused to some shareholders? If so, do you consider that it would be helpful to impose requirements that restrict the way in which offerors can refer to rule 22 reports in their takeover documents and related material?

18. Do you have any comments on the wording of the Panel's proposed change to the Code, bearing in mind that final drafting will be undertaken by Parliamentary Counsel Office?

19. Do you consider that the Panel's proposed change to the Code should increase the cost of compliance with the Code? If so, how? Please identify and quantify any specific costs, both direct and indirect, that may be involved.

E: Partial offers

70. Rule 9(3) of the Code provides that:

> If there is only 1 class of voting securities of the target company, a partial offer must be made for a specified percentage of the voting securities of the target company not already held or controlled by the offeror.

71. Rule 10(1)(a) of the Code provides that:

> If, on the date of a partial offer, the offeror does not hold or control more than 50% of the voting rights in the target company, the partial offer must be for voting securities that, when taken together with voting securities already held or controlled by the offeror, confer—
>
> (a) more than 50% of the voting rights in the target company; or
>
> (b) a lesser percentage of the voting rights in the target company if approval is obtained in accordance with the following provisions…

72. Rule 23(1) provides that:

> If, on the date of an offer, the offeror does not hold or control more than 50% of the voting rights in the target company, the offer must be conditional on the offeror receiving acceptances in respect of voting securities that, when taken together with voting securities already held or controlled by the offeror, confer—
>
> (a) more than 50% of the voting rights in the target company; or
>
> (b) in the case of a partial offer, any lesser percentage approved under rule 10(1)(b).

Object of proposed change

73. Some market participants have suggested that one partial offer could include alternative proposals under both rule 10(1)(a) and (b) – that is, that it could be for voting securities taking the offer above 50%, with an alternative that allowed (with shareholder approval) the taking of acceptances for a lesser percentage. Participants have also argued that the shareholder approval required for an offeror to achieve control of less than 50% could seek approval for a range of percentages - in the particular case, between 30% and 50%, the "*specified percentage*" being the percentage which would result from the actual acceptances received. This approach treats the higher percentage as the "*specified percentage*" for the purposes of the Code, with the lower range being accommodated within the concept of the "*lower percentage*" by reference to the provision for a minimum acceptance level to be stipulated for the purposes of rule 23(1)(b).

74. The Panel does not accept this interpretation. The Panel considers that rules 9 and 10 provide for a single offer, involving an election by an offeror as to the actual percentage figure sought by the offeror. This in turn will determine which of rule 10(1)(a) or (b) applies. The Code does not contemplate that alternative offers can be made under both. Nevertheless, the Panel wishes to make this even clearer in the Code.

75. The object of the proposed change is to improve the clarity of the existing wording of the Code in relation to partial offers.

Alternative approaches to the issue

76. The options that appear to be available to deal with this issue are to either:

(a) Make no change, on the basis that the existing wording should be sufficiently clear and that to change the Code may indicate some uncertainty about the existing meaning of the rules; or

(b) Make some wording changes to make the meaning of the rules clearer to the market.

77. On balance, the Panel believes it is preferable to amend the current wording of the rules to make their effect clearer.

Proposed change

78. It is accordingly proposed that rule 10(1) be replaced by a new rule 10(1) as follows:

> If, on the date of a partial offer, the offeror does not hold or control more than 50% of the voting rights in the target company, the partial offer must be for a specified percentage of the voting securities of each class not already held or controlled by the offeror which, when taken together with the voting securities already held or controlled by the offeror, will confer either—
>
> (a) more than 50% of the voting rights in the target company; or
>
> (b) a lesser percentage of the voting rights in the target company if approval is obtained in accordance with the following provisions [… *continue remainder of rule 10(1) as presently drafted*]

Compliance costs

79. There would appear to be no negative compliance cost issues with this proposal. If changing the wording of rule 10(1) improves its clarity then this should reduce costs for the market in terms of legal advice to parties interested in making partial bids.

Questions for comment

20. Do you consider that rule 10(1) of the Code requires amendment to make its meaning clearer?

21. Do you support the change proposed by the Panel, bearing in mind that final drafting will be the responsibility of Parliamentary Counsel Office?

22. Do you have an alternative suggestion for amending rule 10(1)? If so, please elaborate.

23. What effect, if any, do you consider that improving the clarity of the rule would have on the costs, whether direct or indirect, of complying with the Code?

F: Offers unconditional as to levels of acceptance

80. Under rule 24(3):

> If the offer is a full offer, and there are no conditions in the offer requiring a minimum level of acceptances, or any such conditions have been satisfied, then the offer period may be extended beyond the maximum period otherwise permitted under subclause (2) by up to a further 60 days (and the additional period is deemed to be included in the offer period for the purposes of this code unless otherwise expressly provided).

81. Rule 29 provides that:

> Timing of variation—
>
> (1) An offer may not be varied, and a variation notice may not be sent, later than 14 days before the end of the offer period.
>
> (2) The offer must remain open for at least 14 days after a variation notice has been sent.
>
> (3) Subclause (1) does not apply if, before the end of the offer period, the offer period is extended under rule 24(3).

82. The effect of these rules is that offers unconditional as to level of acceptances may be extended without the 14 days' notice otherwise required by rule 29(1), provided that, through the application of rule 24(3), the offer period is already greater than 90 days or the extension takes the offer period into the 60-day additional offer period available to these offerees.

83. There has been some confusion over the interpretation of these rules and their interrelationship. The Panel has granted a class exemption - *Takeovers Code (Offers Unconditional as to Level of Acceptance) Exemption Notice S.R. 2002/87* – in respect of rule 29(1). However, this exemption is limited in its scope, and the Panel considers that more comprehensive reform of these rules is appropriate.

84. The object of suggesting a change to these rules is to provide for reasonably equal treatment of takeovers offers that are, or that become, unconditional as to levels of acceptance. This would remove a current illogicality in the Code in relation to the notice of extension that is required for offers that are unconditional as to the level of acceptances, and should also promote the expeditious completion of takeover transactions.

<u>Alternative approaches to the issue</u>

85. There are a number of alternative approaches to the issue, including:

(a) Make no change to the Code and leave the current class exemption in place. This ameliorates the problem to some degree, but means that all offers that are unconditional at the end of 90 days, even those that were unconditional as to level of acceptances from the start of the offer period, can be extended to a full 150 days offer period;

(b) Amend the Code so that all offers under the Code:

(i) can be extended to a minimum offer period of 90 days, even if unconditional as to level of acceptances from the start;

(ii) can be extended without notice once they are unconditional as to levels of acceptance, but only up to a maximum offer period of 90 days, or for up to sixty days beyond the date the offer becomes unconditional as to level of acceptances (subject to a maximum offer period of 150 days).

Proposed change

86. The Panel proposes that the Code should provide as follows:

(a) Offers which have become unconditional as to the level of acceptances should be able to be extended without notice.

(b) If an offer becomes unconditional as to the level of acceptances within the offer period, it should be able to be extended for the remainder of the 90 day period or by up to 60 days from the day it became unconditional as to level of acceptances (even if this extends the offer beyond 90 days).

(c) Offers which have never been conditional as to the level of acceptances should not be able to be extended beyond the 90 day period.

87. It is accordingly proposed that rule 24(3) be replaced by a new rule 24(3) as follows:

> If the offer is a full offer subject to conditions requiring a minimum level of acceptances, all of which have been satisfied or waived before the expiry of the maximum period permitted under subclause (2), the offer period may be extended beyond that maximum period, but no further beyond that period than the date which is 60 days from the date on which the last of such conditions to be satisfied or waived is satisfied or waived (and the additional period is deemed to be included in the offer period for the purposes of this Code unless otherwise expressly provided).

88. It is also proposed that rule 29(3) be replaced by a new rule 29(3) as follows:

> Subclause (1) does not apply to any variation of an offer solely for the purposes of extending the offer period (or solely for the purposes of extending the offer period and the date by which the offer is to become unconditional) if -
>
> (a) the offer was not subject to any conditions requiring a minimum level of acceptances; or
>
> (b) any such conditions have been satisfied or waived.

89. The inclusion of the words in parentheses is explained in the next section of the paper.

Compliance costs

90. The Panel does not consider that changing the Code in the manner proposed has any compliance cost implications. To the extent they changes promote the earlier completion of takeover offers the proposed changes to the Code could result in reduced compliance costs.

Questions for comment

24. Do you consider that the Code deals satisfactorily with offers that are unconditional as to level of acceptances, particularly in relation to the period of notice for extensions of the offer period? If not, in what respects is the Code unsatisfactory?

25. Do you consider that offers that are unconditional as to level of acceptances from the time they are first made should be able to be extended to a full 150 day period, or, alternatively, should such offers not be able to be extended beyond a total offer period of 90 days?

26. Do you consider that offers that are unconditional as to levels of acceptance should be able to be extended without notice (within any overall limitations on offer periods)? If you consider that notice of extension should be required in some cases, please explain.

27. Do you consider that once an offer has become unconditional as to level of acceptances, it should be able to be extended without notice for a maximum of a further 60 days, subject to a maximum total offer period of 150 days?

28. Do you have any comments on the proposed changes to rules 24(3) and 29(3), bearing in mind that the drafting of any changes to the Code is the responsibility of Parliamentary Counsel Office?

29. Do you have any other comments or proposals in relation to offers that are unconditional as to the level of acceptances?

30. Do you consider the Panel's proposed change would have any compliance cost implications? If so, please elaborate. Please distinguish between direct and indirect costs.

G: Date by which an offer is to become unconditional

91. Rule 25(2) provides that:

> An offer that is subject to any conditions must specify a date by which the offer is to become unconditional.

92. Rule 25(3) provides that:

> The specified date referred to in subclause (2) must not be later than 14 days, or, if the acquisition requires statutory approval, 30 days, after the end of the offer period (excluding any part of the offer period that is extended under rule 24(3) beyond the maximum period otherwise permitted under rule 24(2)).

93. Rule 33 provides that:

> Offer to specify date for payment of consideration—
>
> (1) The offer must specify a date by which the consideration for the offer must be sent to the persons whose securities are taken up under the offer.
>
> (2) The date referred to in subclause (1) must not be later than 7 days after the later of—
>
> (a) the date on which the offer becomes unconditional; or
>
> (b) the date on which an acceptance is received; or
>
> (c) the end of the offer period first specified in the offer under rule 24(2).

94. The effect of these rules is to require offerors to specify a date by which an offer is to become unconditional and by which consideration must be sent to accepting shareholders.

Object of proposed change

95. In practice, Code offers generally have a formula for determining the date by which the offer is to become unconditional, usually being 14 days after the end of the offer period as specified in the notice or as extended under the Code. Formulas are used by offerors to provide for the possibility that they may decide to extend the offer period. Arguably these formulas do not comply with the Code, but without them the Code's provisions that allow for extension of the offer period are unworkable. This is because a change in the date by which an offer must be unconditional is not a permitted variation allowed by rule 27.

96. The object of the proposed change is to provide for a suitable mechanism in the Code to enable the date by which an offer must become unconditional to be specified in the offer document and varied when an offer period itself is changed.

Alternative approaches to the issue

97. There are a number of possible approaches to this issue, including:

(a) Make no change to the Code. This could effectively mean that the offeror would have to stipulate the date by which an offer has to become

unconditional at the time the offer is made (being no more than 14 days after the end of the offer period), and the offer could then be extended (other than by a few days) only if the offer were unconditional;

(b) Change the Code to allow the date by which an offer has to become unconditional to be amended at the same time that an offer period is extended.

98. The Panel believes that offerors should have the flexibility to amend the offer periods in their takeover offers within the rules provided by the Code, and be able to change the date by which the offer has to become unconditional when doing so, subject to the date being no later than 14 days after the end of the amended offer period.

Proposed change

99. The Panel proposes that these rules be amended to make it clear that, where an offer is required to specify a date by which it is to become unconditional, that date may be extended if the offer is extended, provided notice of this is given as a variation to the offer and that the extension to the unconditional date is no longer than the extension to the offer period.

100. The Panel proposes that rules 27 (concerning permissible variations to offers) and 28 (concerning notice of variations) therefore be amended to explicitly permit extension of the conditionality date if the offer is extended.

101. It is accordingly proposed that a new rule 27(e) be introduced as follows:

> (e) if the offer period is extended, to extend the date by which the offer is to become unconditional, provided that:
>
> (i) that extension may be no longer than the extension of the offer period; and
>
> (ii) the extended date must not be later than the latest date permitted under rule 25(3).

102. It is also proposed that a new rule 28(3) be introduced as follows:

> If the offer is subject to conditions which have not been satisfied or waived and the variation extends the offer period, the notice referred to in subclause (1) must specify the date by which the offer is to become unconditional.

103. It is in connection with these changes that the words in parentheses are included in the proposed new rule 29(3) (see section F of this paper, above).

104. The Panel considers that changes along these lines would make it clear that rule 25(2) requires specification of an actual date (as opposed to a formula), but that this date may be varied.

Compliance costs

105. The Panel does not consider that amending the Code as proposed should have any compliance cost implications.

Questions for comment

31. Do you consider that the Code should provide the flexibility to explicitly allow the specified date by which an offer must be declared unconditional to be changed at the same time that a takeover offer is extended? Alternatively, should an offer only be able to be extended if it is already unconditional by the date it must be declared unconditional?

32. Do you consider that the Code currently allows the use of a formula to accommodate changes in the date by which an offer must become unconditional to take account of changes in the offer period?

33. Do you have any comments on the Panel's suggested changes to rule 27(e) and addition of a new rule 28(3), bearing in mind that responsibility for drafting any changes to the Code is the responsibility of Parliamentary Counsel Office?

34. Do you consider that there are any compliance cost implications of the Panel's proposal? If so, please distinguish between direct and indirect costs.

35. Do you have any other comments on the unconditional date for an offer?

H: Variations to offers that alter consideration alternatives

106. Rule 31 provides that:

> (1) If a variation to an offer increases the consideration offered, the offeror must provide the increased consideration to each person whose securities are taken up, whether or not the person accepted the offer before or after the variation was made.
>
> (2) If a variation to an offer includes a cash alternative in the offer, the offeror must give all acceptors, including those who have accepted the offer before the variation is made, the opportunity to take the cash alternative as consideration.

Object of proposed change

107. The effect of this rule is that, if a variation to an offer adds a cash alternative, then acceptors of the original scrip offer are entitled to accept the new cash alternative. However, if an offer provides that acceptances are irrevocable and a cash alternative is increased (rather than added), those who have already accepted the cash component will have the benefit of the increase but those who have accepted the scrip alternative will not be automatically entitled to accept the cash instead. Similarly, if a scrip alternative is increased, those who have accepted a cash alternative will not be automatically entitled to accept the scrip instead.

108. The Panel has accordingly issued a Practice Note – see "*Practice Note – Variations of Code Offers*" (December 2002).

109. The object of the proposed change to the Code is to address the inconsistency between the treatment of non-cash and cash alternatives in a takeover offer.

Alternative approaches to this issue

110. There are a number of alternative approaches to this issue, including:

(a) Make no change to the present rules of the Code. This would mean that where an offer includes scrip and cash alternatives as consideration, and part-way through the offer period the scrip alternative is changed (to avoid contravening rule 20 this could probably only occur where the market value of shares being offered as consideration had fallen since the offer began) those shareholders who had already accepted the cash offer would not be able to revoke their acceptances and take the scrip option unless the offer document provided that option;

(b) Change the present rules so that if a non-cash alternative consideration is changed during the course of a takeover, then those who have already accepted the cash alternative consideration would be entitled to revoke their acceptances of the cash alternative (not of the offer as a whole) and take the scrip alternative.

111. There seems to be no logic in allowing those who have accepted a non-cash alternative to take an increased cash alternative, but not vice versa.

Proposed change

112. The Panel proposes that the Code be amended to allow offerees who have already accepted a scrip alternative to be given the opportunity to revoke that acceptance and instead accept an increased cash alternative, where that cash alternative has either been introduced or increased. Similarly, offerees who have already accepted a cash alternative should be given the opportunity to revoke that acceptance and instead accept an increased scrip alternative.

113. It is accordingly proposed that rule 31(2) be replaced with a new rule 31(2) as follows:

> If a variation to an offer includes a cash alternative in the offer, or increases an existing cash alternative in the offer, the offeror must give all acceptors, including those who have accepted any alternative consideration before the variation is made, the opportunity to take the cash alternative as consideration.

114. It is also proposed that a new rule 31(3) be introduced as follows:

> If a variation to an offer increases a non-cash alternative in the offer, the offeror must give all acceptors, including those who have accepted any cash alternative before the variation is made, the opportunity to take the non-cash alternative as consideration.

Compliance costs

115. The Panel does not believe there would be any compliance costs involved with this proposed amendment. Its purpose would be to permit more flexibility to bidders who make takeover offers containing alternative forms of consideration.

Questions for comment

36. Do you consider that the Code should provide that offerees who have accepted the cash component of an offer which includes both cash and non-cash components be given the right to switch to accepting the non-cash component of the offer in the event that that component is increased during the course of the offer?

37. Do you have any comments on the wording of the suggested changes to rule 31, bearing in mind that final responsibility for drafting any changes to the Code is the responsibility of Parliamentary Counsel Office?

38. Do you consider changing rule 31 as suggested would have any compliance cost implications for bidders? If so, please elaborate and quantify where possible. Please distinguish between direct and indirect costs.

I: *"Intention"* of the offeror to acquire equity securities other than under the offer

116. Rule 36 provides that:

> During the offer period, the offeror, any related company of the offeror, any person acting jointly or in concert with the offeror, or any of the directors of any of them, must not acquire any equity securities in the target company otherwise than under the offer unless—
>
> (a) the offeror has made a full offer for cash, or a full offer with a cash alternative; and
>
> (b) the possibility of an acquisition as permitted by this rule is disclosed in the offer document; and
>
> (c) the acquisition is made no later than 14 days before the expiration of the offer period; and
>
> (d) the acquisition is made only for cash; and
>
> (e) the acquisition of any equity securities will not result in the offeror's and the offeror's associates' holding or controlling in total more than 20% of the voting rights in the target company (excluding any equity securities in respect of which the offeror has received acceptances of the offeror's offer) unless the offer has become unconditional; and
>
> (f) the acquisition is notified to the Panel immediately.

117. Clause 13 of Schedule 1 provides that the takeover notice and offer document must contain or be accompanied by:

> If the offer is a full offer for cash or with a cash alternative, a statement as to whether or not any person intends to acquire equity securities in the target company under rule 36.

118. The effect of clause 13 of Schedule 1 and rule 36 is that the offeror must state in its takeover notice and offer document whether it intends to acquire equity securities under rule 36.

Object of proposed change

119. The Panel has noted in its Practice Note on clause 13 of Schedule 1 of the Code (see paragraph 108) that:

> Some confusion has arisen because of an apparent inconsistency between clause 13 of Schedule 1, which refers to an intention to acquire, and condition (b) of rule 36 which (referring to clause 13) requires disclosure in the offer document of the possibility of an acquisition under that rule. The question arises whether clause 13 of Schedule 1, by using the word "intends", requires the offeror to have formed a definite intention, at the time it dispatches its offer document, that it or any of its related parties, will acquire, or will not acquire, equity securities using the exception provided in rule 36. Alternatively, does the wording of rule 36, which requires only that disclosure of the "possibility" of an acquisition under rule 36 be disclosed in the offer document, mean that the offeror and its associated parties do not have to have formed a definite intention to acquire or not to acquire securities outside of the offer at the time the offer document is dispatched, but can legitimately form such an intention later?
>
> The Panel recognises that, while the offeror may not have formed the intention at the time it dispatches the offer document of acquiring securities outside the offer under

> rule 36, it may not wish to be precluded from doing so as the takeover runs its course. Circumstances in a takeover can change rapidly, particularly in a contested takeover, and the Panel accepts that parties' intentions can legitimately change.

120. The Panel stated in its Practice Note that:

> The Panel considers that it is permissible for the offeror to satisfy the requirements of clause 13 of Schedule 1, and rule 36, by stating in the offer document that "the offeror has no present intention to acquire equity securities in the target company under rule 36 during the offer period but that there is a possibility that it may do so."

121. The object of the proposed change is to remove the present apparent inconsistency in the Code and clarify the flexibility available to bidders during the offer period while at the same time improving disclosures to the market about transactions that occur outside the offer itself.

Alternative approaches to the issue

122. There are a number of approaches to the issue, including, among others:

(a) Make no change to the present rules of the Code. This would place reliance on the Panel's current Practice Note to provide bidders with the capacity to make an equivocal statement of intention to acquire securities during the offer period and then proceed to purchase securities on-market. There would be no requirement to disclose purchases unless they can within the scope of the substantial security holder disclosure requirements of the Securities Markets Act 1988;

(b) Amend rule 36 and clause 13 of Schedule 1 of the Code to make it clear that an offeror cannot purchase shares of the target company during the offer period outside the offer unless it has clearly stated its intention to do so in its offer document;

(c) Amend rule 36 and clause 13 of Schedule 1 to the Code to remove the requirement for the bidder to have to make a statement about its intention to purchase shares during the offer period outside the offer, so that as circumstances change the bidder can decide if it wishes to purchase outside the offer itself (but still subject to all the other constraints of rule 36);

(d) As for (c), but with an additional requirement that purchases by the offeror outside the offer period are to be notified not just to the Panel but also to the market generally.

Proposed change

123. The Panel proposes that the issue be resolved by revoking rule 36(b) and clause 13 of Schedule 1 of the Code. The Panel also proposes that relevant acquisitions should be advised to the market and not just to the Panel, and that rule 36(f) should be amended to reflect this.

124. It is accordingly proposed that rule 36 be amended by revoking subclause (b) (and renumbering the remaining subclauses accordingly) and replacing the existing subclause (f) with a new subclause (e) as follows:

> The day following the day on which any such acquisition takes place, the offeror notifies the aggregate number of securities acquired on that day and the average price paid under those acquisitions to the target company and the Panel, and, on the same day as such notice is given -
>
> (i) if any voting securities of the target company or offeror or any holding company of the offeror are quoted on a registered exchange's market, the offeror notifies the registered exchange of such information; or
>
> (ii) if no voting securities of the target company or offeror or any holding company of the offeror are quoted on a registered exchange's market, the offeror releases such information to the principal daily newspapers in New Zealand.

125. It is also proposed that clause 13 of Schedule 1 should be deleted.

Compliance costs

126. The proposed requirement for public notification of purchases undertaken by the offeror during an offer period outside the offer period would have some compliance cost implications.

127. Where the offeror or target company is listed on a registered exchange, these costs would be minimal as all that would be required is release of a statement to the exchange of the details of transactions as they occur (maximum of one announcement per day). However, if the offeror and target companies are unlisted a requirement to publicly notify acquisitions through newspaper announcements should increase compliance costs for offerors.

128. In a recent takeover involving a listed target company the offeror purchased six or seven parcels of shares spread over a similar number of days.

Questions for comment

39. Do you consider that offerors should have to state in their offer documents that they intend to purchase securities of the target company outside of the offer during the offer period before being permitted to do so under rule 36 of the Code?

40. Alternatively, do you consider that offerors should be allowed to purchase shares outside an offer during the offer period (but still subject to all the other constraints and implications of such purchases) without having to first have stated a direct intention to do so in the offer document?

41. Where offerors purchase shares during the offer period other than in accordance with the offer do you consider that such purchases should be notified to the market? Please give reasons.

42. If offerors were required to notify the market of purchases made outside the offer how should this be done and how often? Is notification to a registered exchange appropriate where one party is listed on that exchange? Is notification in national and local newspapers appropriate where the offeror and the target are unlisted? Should notification occur each day transactions take place, or could purchases be aggregated? If purchases are aggregated how often should notification be made? Weekly?

43. Public notification of purchases would involve compliance costs for offerors. What is your view on the likely costs of having to give public notification of purchases made during an offer period outside the offer? Please distinguish between direct and indirect costs.

44. Do you have any comments on the suggested wording of a new subclause to rule 36 as set out above, bearing in mind that Parliamentary Counsel Office has the final responsibility for drafting any changes to the Code?

J: Prospectuses for scrip offers

129. Rule 41(2) of the Code provides in respect of takeover notices that:

> The notice may contain, or be accompanied by, any additional information that the directors of the offeror determine could affect the decision of the offerees to accept or reject the offer.

130. Any information which is included in the takeover notice is normally also included in the offer document under rule 44(1)(b).

Object of proposed change

131. The Code does not appear to prevent an offeror which is intending to make a scrip offer from giving its takeover notice before it has registered its prospectus. Rule 41(2) of the Code is permissive but not mandatory in respect of information accompanying the takeover notice. There is no requirement that any prospectus required for a scrip offer has to be provided to the target company at the time the takeover notice is given. As a consequence, neither the target company nor the independent adviser may have the information contained in the prospectus when preparing the target company statement or the independent adviser's report.

132. The object of the proposed change is to ensure that wherever a scrip offer is made the prospectus or comparable document for the offer of securities is provided to the target company and the independent adviser at the same time that the notice of intention to make a takeover is given.

Alternative approaches to this issue

133. There are a number of alternative approaches to this issue including:

(a) Seek a modification to the current *Securities Act (Takeovers) Exemption Notice S.R. 2001/217* to require issuers making use of that exemption to provide a copy of their prospectus to the target company along with their takeover notice. This modification has already been sought and agreed to by the Securities Commission. However this does not deal with scrip offers for shares that would be issued by offerors outside New Zealand, who may be offering shares in New Zealand under one of the Commission's other class exemptions;

(b) Amend the Code so that in all cases where an offeror is proposing to offer securities (whether debt or equity) as consideration in a takeover offer the notice of intention to make the offer must be accompanied by the relevant prosepectus or comparable offer document. This would provide for equal treatment of all scrip offers, regardless of the country of origin of the issuer of the scrip, and would ensure that the directors of the target company and the independent adviser have comprehensive information about the scrip being offered;

(c) Make no change to the current rules of the Code, and ask the Commission not to implement the change to its exemption notice that has been agreed, so that

offerors intending to offer scrip do not have to finalise and register their prospectuses until they make their actual offer.

Proposed change

134. The Panel believes that the information contained in any prospectus is significant and that it should accompany the takeover notice as well as the offer document. As noted above, the Panel has obtained an amendment from the Securities Commission to require persons relying on the *Securities Act (Takeovers) Exemption Notice S.R. 2001/217* to provide their prospectus to the target company with their takeover notice.

135. The Panel proposes that rule 41 should be amended to require persons making scrip offers to have a registered prospectus, or its equivalent, accompany their takeover notice.

136. It is accordingly proposed that a new rule 41(4) be included as follows:

> Where securities are offered as consideration or part consideration for the offer, the notice in respect of the offer must be accompanied by each prospectus and/or investment statement and/or other offering document which is required, in New Zealand or under the law of any other jurisdiction in which the offer of the securities is to be made, to be provided to persons offered those securities or to be deposited or registered with any governmental body in respect of that offering.

137. It is also proposed that rule 44(1)(d)(ii) be amended as follows:

> any additional information contained in, or that accompanied, the takeover notice under rule 41(2) (but need not contain or be accompanied by any document required to accompany the takeover notice under rule 41(4), except to the extent required pursuant to the Securities Act 1978 or any other applicable law);

Compliance costs

138. The requirement to issue a prospectus in respect of a scrip offer is an obligation under the Securities Act, not the Takeovers Act. The Commission's existing class exemption was aimed at reducing compliance costs for New Zealand issuers by modifying some of the disclosures required to made in the prospectus (and investment statement) in recognition of the information already being provided to target company shareholders in the takeover offer document and target company statement.

139. The proposed change to the Code is only likely to have compliance cost implications in those cases where a prospective offeror gives notice of its intention to make a scrip offer and then for whatever reason does not proceed to make the offer. With any prospective scrip offer the offeror would have had to have done most of the work on the preparation of the prospectus and other offer documents before the notice of the takeover is given. However, if the offer were not actually made, there would be a saving (when compared with the Panel's proposed change) because it would not be necessary to conduct final due diligence and have the directors sign the prospectus.

Questions for comment

45. Do you consider that for takeovers involving securities as consideration a registered prospectus should be provided to the target company at the time that the takeover notice is given? Please comment.

46. Do you have any comments on the wording of the suggested changes to rules 41 and 44 set out above, bearing in mind that Parliamentary Counsel Office has final responsibility for drafting any changes to the Code?

47. A requirement to have a registered prospectus available at the time a takeover notice is given to the target company could involve some compliance costs, particularly in the event that the takeover offer does not then proceed. Do you have any comment on the likely compliance costs of this proposal? Please be as specific about costs as you can, and distinguish between indirect and direct costs.

K: Notification obligations of the target company

140. Rule 42(1) provides that:

> **Notification obligations of target company**
>
> (1) Immediately on receipt of a takeover notice, the target company must,—
>
> (a) if its voting securities are quoted on a registered exchange's market, inform the registered exchange in writing that a takeover notice has been received; or
>
> (b) if its voting securities are not quoted on a registered exchange's market, do all that is reasonably practicable to ensure that all persons who will be offerees under the offer are informed in writing that the takeover notice has been received.

Object of proposed change

141. Rule 42(1) does not require an offeror to immediately notify the relevant registered exchange when it sends a takeover notice in respect of a listed target company. The obligation under the Code to inform the registered exchange and the market is an obligation of the target company, which only arises when it has received the takeover notice.

142. Moreover, rule 42(1) only requires the target company to advise shareholders that a takeover notice has been received. It does not expressly provide that shareholders should be informed of the terms and conditions of the proposed offer. In theory, a target company could simply advise its shareholders that a takeover notice "*has been received*".

143. There is often interest from parties, including competing parties, in obtaining copies of takeover notices prior to the offer being made. To date, takeover notices have been treated by the Panel as being non-public documents. However, there seems to be no reason why the full takeover notice should not be available from the target company on request.

144. The object of the proposed change is to ensure the market is fully and promptly informed of the details of an intended takeover offer, regardless of whether the parties are listed on a registered exchange or not.

Alternative approaches to the issue

145. There are a number of possible approaches to this issue, including:

(a) Make no change to the Code, and rely on the present target company notification and Stock Exchange disclosure rules to inform target company shareholders and the market adequately;

(b) Amend the Code so that all listed offerors are required to provide copies of any takeover notice that they issue to the registered exchange; and

(c) Amend the Code so that the target company is required to give more extensive and useful information to its shareholders when it has received a takeover notice; and

(d) Amend the Code to provide that both the target company and the offeror are required to make copies of the takeover notice available on request; and/or

(e) Amend the Code to explicitly authorise the Panel to make copies of takeover notices available on request.

Proposed change

146. The Panel proposes that the Code should be amended to:

(a) Require offerors to immediately send their takeover notice to the relevant registered exchange if the target company is listed;

(b) Require the target company to advise shareholders of the identity of the offeror and the principal terms and conditions of the proposed offer; and

(c) Require the full takeover notice to be available on request from both the offeror and the target.

147. It is accordingly proposed that a new rule 41(5) be included as follows:

> If voting securities of the target company or offeror or any holding company of the offeror are quoted on any registered exchange's market, the offeror must, on sending the notice under subclause (1), immediately send a copy of the notice (and any other document sent to the prospective target company under rule 41) to the registered exchange. Each copy shall, where possible, be provided electronically.

148. It is also proposed that a new rule 41(6) be included as follows:

> The offeror must send a copy of the notice (and/or any other document sent to the prospective target company under rule 41), without charge, to any person requesting it within 1 day of receiving the request. Each copy shall, if requested, where possible, be provided electronically.

149. It is also proposed that rule 42(1) be amended as follows:

> Immediately on receipt of a takeover notice, the target company must,—
>
> (a) if any of its voting securities are quoted on a registered exchange's market, inform the registered exchange in writing that a takeover notice has been received and provide a copy of the notice (and any other document sent to the target company under rule 41) to the registered exchange (where possible, electronically); and
>
> (b) if its voting securities are not quoted on a registered exchange's market, do all that is reasonably practicable to ensure that all persons who will be offerees under the offer are informed in writing that a takeover notice has been received.

150. It is also proposed that a new rule 42(3) be included as follows:

> The target company must send a copy of the notice (and/or any other document sent to the prospective target company under rule 41), without charge, to any person requesting it within

1 working day of receiving such a request. Each copy shall, if requested, where possible be provided electronically.

Compliance costs

151. This proposed change should involve some modest compliance costs in that:

(a) In a very few, if any, instances, a listed offeror would be required to notify a registered exchange that it had given notice of intention to make a takeover offer. In nearly all cases, exchange listing and continuous disclosure rules would ensure this already occurs;

(b) The target company is already required to advise offerees that the company has received a takeover offer. The amended requirement would ensure that this disclosure was more meaningful. There would be no additional postage costs;

(c) The target company and offeror would be required to make copies of the takeover notice available on request. This could involve photocopying a few copies of the document and mailing them to people requesting them. If the documents were available in electronic form costs should be minimal.

Questions for comment

48. Do you consider that the current provisions in the Code relating to the supply of information about intended takeovers to offerees, and the market generally, are adequate? Please amplify your response.

49. Should listed offerors be required as a matter of course to notify the relevant registered exchange that they have given notice of intention to make a takeover under the Code, regardless of the status of the target company?

50. Should offerors and target companies be required to make available on request copies of any takeover notice given or received? If so, on what terms?

51. Do you have any comment on the wording of the suggested changes to the Code, bearing in mind that final responsibility for drafting any changes to the Code is with Parliamentary Counsel Office?

52. Do you have any comments to make on the potential compliance costs of these suggested changes to the Code? Please be specific if you can. Please distinguish between direct and indirect costs.

L: Record dates

152. Rule 43(2) provides that:

> The record date must be not more than 10 days before the date of the offer.

153. The effect of this rule is to establish an offer timeline which cannot then be altered if the circumstances of the offeror or the target company change after the record date has been finalised.

154. The purpose of the rule is to ensure that the offerees to whom the offer is made comprise a reasonably current list of shareholders. Under rule 42(2) the target company must, no later than two days after the record date, provide the offeror with an electronic copy of its securities register.

Object of proposed change

155. An offer must be dated no more than ten days after the record date and must be sent to the offerees within thirteen days of the record date. There is currently no provision in the Code to change the record date once it has been set. If for some reason the offeror is not able to make its offer within 13 days of the record date, but is still within the 14 to 30 day period for making an offer prescribed in rule 43(5)(b), then it cannot proceed with its offer and must give another takeover notice. In a competitive situation this seems an unnecessarily harsh outcome.

156. The object of the proposed change is to provide a means to change the record date within the existing 14 to 30-day period in which the offeror must make its takeover offer after having given its takeover notice.

Alternative approaches to the issue

157. There are a number of alternative approaches to this issue, including:

(a) Make no change to the present provisions of the Code, so that once the record date has been set the offer must be dated within 10 days of that date and sent to shareholders within 13 days;

(b) Amend the Code to provide that the first record date given can be revoked by the offeror and replaced by another date, but only with the target company's consent, and with any expense borne by the offeror;

(c) Amend the Code to provide that the first record date given can be revoked by the offeror and replaced by another date, without requiring the target company's consent, but with any costs borne by the offeror.

Proposed approach

158. The Panel considers that the record date should not be a key date in a takeover, and suggests that the Code be amended to permit the record date to be changed if

circumstances necessitate a change. The offeror would, of course, in accordance with rule 49, have to bear the target company's costs, if any, resulting from such a change.

159. The Panel does not consider that this change should require the consent of the target company, since it could give the target of a hostile bid the capacity to frustrate an offer for a short while and possibly favour another bid.

160. It is accordingly proposed that the definition of "*record date*" in rule 3(1) be replaced with a new definition of "*record date"* as follows:

> **record date**, in relation to an offer, means, at any time, the date at that time most recently specified by an offeror under rule 43(3)

161. It is also proposed that rule 42(2) be replaced by a new rule 42(2) as follows:

> No later than 2 days after any record date, the target company must provide to the offeror a copy of the target company's securities register relating to the securities to which the offer relates as at that record date in electronic form (or in such other form as the target company and the offeror agree).

162. It is also proposed that rule 43(3) be replaced by a new rule 43(3) as follows:

> The offeror must send to the target company a notice in writing that specifies the date which is to be the record date for the purposes of the offer. The offeror may give further notices under this rule specifying a replacement date as the record date for the purposes of the offer.

163. It is also proposed that rule 43(4) be replaced by a new rule 43(4) as follows:

> Each notice referred to in subclause (3) must be given no later than 2 days before the record date to which the notice relates.

Compliance costs

164. The Code already imposes compliance costs in that the target company must provide a copy of its list of shareholders in electronic form to the offeror within two days of receiving notice of the record date. The proposed change could result in additional compliance costs for the target company if it has to provide more than one copy of its share register to the offeror, but these costs are likely to be minimal and are covered by the offeror.

165. For the offeror there is the potential for considerable compliance cost savings because the need to restart the offer process in certain circumstances should be averted.

Questions for comment

53. Do you consider that the offeror should be able to change the record date, while still remaining within the period during which an offer must be made after the takeover notice has been given?

54. Do you have any comments on the approach taken in this paper to provide flexibility in setting the record date, bearing in mind that the final responsibility for drafting any changes to the Code lies with Parliamentary Counsel Office?

55. Do you consider there are any compliance costs implications with the suggested change to the Code? Please quantify what costs you consider might be incurred, and by whom.

M: Documents being required to be sent to the Panel

166. Rule 47 provides that:

> At the time that a person sends any of the documents referred to in rules 41 to 46, the person must also send a copy of the document to the Panel.

Object of proposed change

167. Rules 41 to 46 refer to certain documents sent during Code offers. They do not relate to any documents sent in respect of shareholders' meetings and they do not relate to any documents sent to offerees that are not specified in the Code, such as letters sent to shareholders. As a result the Code does not require documents such as notices of meetings and independent advisers' reports prepared for acquisitions or allotments being effected under rules 7(c) and (d) to be provided to the Panel.

168. Rule 47 has been interpreted to apply to securities registers that must be given to the offeror under rule 46. The Panel is not normally interested in receiving electronic copies of target companies' securities registers, and it has accordingly granted a class exemption (clause 26 of the *Takeovers Code (Class Exemptions) Notice (No 2) 2001*) so that offerees are no longer required, subject to certain conditions, to provide this material to the Panel.

169. The Panel has a responsibility to keep under review market practices relating to takeovers. At the present time it is not able to carry out this role effectively because a lot of material provided to target company shareholders in a takeover does not have to be provided to the Panel. The Panel now routinely requests this information and offerors and target companies have been reasonably diligent in complying with the Panel's requests. However the Panel believes that offerors and target companies should be required by the Code to provide this information to the Panel.

170. The Panel also routinely reviews documents provided for shareholders' meetings being carried out under the Code, including independent advisers' reports. However there is no requirement in the Code that these documents be provided to the Panel. This seems anomalous and inconsistent with the document requirements in relation to takeover offers. While the Panel generally requests the supply of this material, and it is usually forthcoming, the Panel believes that the Code should be amended to make it a legal requirement for meeting documents to be provided to the Panel.

171. The objects of the proposed changes are to remove an inconsistency in the Code between the requirements to supply takeover documents to the Panel and meeting documents, and to improve the Panel's ability to carry out its function of reviewing market practice relating to takeovers.

Alternative approaches to the issue

172. The alternative approaches to this issue include:

(a) Make no change to the present provisions of the Code, thus leaving it to the Panel to request material that it wants (when it is aware of it) and to offerors,

target companies and companies involved in meetings to comply with the Panel's requests as they choose;

(b) Amend the Code to require copies of meeting documents and independent advisers' reports relating to company meetings to be provided to the Panel, but make no change in respect of the provision to the Panel of other material distributed to target company shareholders;

(c) Amend the Code to require:

(i) copies of meeting documents and independent advisers' reports relating to company meetings to be provided to the Panel; and also

(ii) copies of any material distributed by offerors or target companies to target company shareholders concerning a takeover that is not already covered by the Code to be provided to the Panel.

Proposed change

173. The Panel considers that a new rule should be introduced to require all documents relating to shareholders' meetings that are sent to shareholders to be sent to the Panel at the same time as they are distributed to shareholders.

174. The Panel also considers that all documents sent under this new rule or under rule 47 should be required to be provided to the Panel in hard copy form and, where practicable, in electronic form.

175. Finally, the Panel considers that rule 47 should be amended to take account of the exemption in clause 26 of the *Takeovers Code (Class Exemptions) Notice (No 2) 2001* from the requirement to provide the target company's securities register under rule 42(2) of the Code.

176. It is accordingly proposed that a new rule 19A be included as follows:

Documents for Panel in respect of shareholder meetings

(1) At the time that a notice of meeting is sent under rule 15 or rule 16, the Code company must send a copy of the notice of meeting and any document accompanying that notice to the Panel.

(2) At the time that any person sends any other document to the holders of voting securities in respect of a meeting required by rule 15 or rule 16, the person must also send a copy of the document to the Panel.

(3) At the same time as any document is sent to the Panel under subclause (1) or (2), an electronic copy of the document must, if practicable, be sent to the Panel.

177. It is proposed that rule 47 be replaced by a new rule 47 as follows:

Documents for Panel in respect of Code offers

(1) At the time that a person sends any document referred to in rules 41 to 46 (other than rule 42(2)), the person must also send a copy of the document to the Panel.

(2) At the time that any target company or offeror sends any document to the holders of voting securities in respect of an offer, it must also send a copy of the document to the Panel.

(3) At the same time as any document is sent to the Panel under subclause (1) or (2), an electronic copy of the document must, if practicable, be sent to the Panel.

(4) Any securities register provided to an offeror under rule 42(2) must, upon request by the Panel, be sent to the Panel in electronic form (or in such other form as was agreed between the target company and the offeror).

178. It is also proposed that clause 26 of the *Takeovers Code (Class Exemptions) Notice (No 2) 2001* be revoked.

Compliance costs

179. The proposals in this section of the paper appear to increase compliance costs for offerors, target companies and companies conducting meetings for Code purposes in that they would require those parties to provide more material to the Panel. However, these increased costs may be more apparent than real because, as noted, the Panel is already:

(a) Requesting parties to a takeover to provide it with copies of material distributed to shareholders outside the formal offer documents and target company response; and

(b) Requesting parties to a shareholders' meeting to provide it with copies of the notice of meeting and independent adviser's report.

Questions for comment

56. Do you consider that offerors and target companies should be required by the Code to provide the Panel with copies of all material relating to a takeover that is distributed to target company shareholders? Any comments would be welcome.

57. Do you consider that companies conducting shareholder meetings for Code purposes, and any relevant independent advisers, should be required by the Code to provide their notices of meeting and reports to the Panel? Any comments would be welcome.

58. Do you have any comments on the proposed changes to the Code to improve the supply of information about takeovers and meetings to the Panel, bearing in mind that the final responsibility for drafting any changes to the Code lies with Parliamentary Counsel Office?

59. Do you consider that the Panel's proposals would impose any additional compliance costs on offerors, target companies, independent advisers, or companies conducting shareholders' meetings for Code purposes, having regard to the Panel's current policy of requesting most of this information? Please be specific as to any additional costs that may be involved. Please distinguish between direct and indirect costs.

N: Compulsory acquisitions

180. Rule 54 provides that:

> (1) The dominant owner must, not later than 30 days after becoming the dominant owner, send a notice in writing to the outstanding security holders that complies with rule 55.
>
> (2) A copy of the notice referred to in subclause (1) must be—
>
> (a) sent immediately to the code company, the Panel, and the registered exchange (if the voting securities of the code company are quoted on the registered exchange's market); and
>
> (b) delivered immediately to the Registrar of Companies for registration.

181. Rule 56 provides that:

> (1) If a person becomes the dominant owner by reason of acceptances of an offer (whether or not the dominant owner has also acquired equity securities under rule 36), the consideration payable in respect of equity securities in any class must be the same as the consideration provided under the offer for equity securities in the same class.
>
> (2) Subclause (1) applies only if acceptances of the offer were received in respect of more than 50% of the equity securities that were the subject of the offer in the class in respect of which the consideration is to be determined.
>
> (3) If the offer provided for alternative considerations, then the consideration payable under subclause (1) is the consideration payable under the offer if an accepting offeree failed to choose an alternative or, if no provision to that effect was included in the offer, is the alternative consideration containing the greatest cash component.

182. The effect of rule 54 is to require a person who becomes a dominant owner to send a compulsory acquisition notice to all outstanding security holders within 30 days of becoming the dominant owner. Rule 56 provides that where a person becomes a dominant owner by way of a Code offer, the person must pay the same consideration to all outstanding security holders unless acceptances were received in respect of less than 50% of the equity securities that were the subject of the offer.

183. If acceptances were received in respect of less than 50% of the equity securities that were the subject of the offer, then the offeror must appoint an independent adviser under rule 57 to certify that the consideration specified in the acquisition notice is fair and reasonable.

Object of proposed change

184. Difficulties may arise where a person holding close to 90% of a Code company makes an offer for the remaining securities in the company and provides for, say, a two-month offer period. If the offeror quickly receives acceptances sufficient to take it over 90% of the Code company's voting rights, it may well be required under rule 54 to issue its acquisition notice before the offer is closed, so that the acquisition notice

and the offer document will both be with the outstanding security holders, and capable of acceptance, at the same time. This may create some confusion.

185. More significantly, it may not be known at the time the acquisition notice is sent whether the offeror will receive acceptances in respect of 50% of the equity securities that were the subject of the offer for the purposes of rule 56(2). As such, the offeror may not know right up to the time that it must specify the consideration payable for any compulsorily acquired shares:

(a) whether it must pay the same amount for any outstanding equity securities as it paid under the offer; or

(b) whether it can specify a different price, one that has been certified as fair and reasonable by an independent adviser.

186. The object of the proposed change is to correct an unforeseen problem in the Code which can arise where the offeror starts an offer already holding close to 90% of the voting rights in the target company, and reaches the 90% dominant ownership threshold with a few days. In those circumstances the offeror must give an acquisition notice without knowing if it will obtain acceptances for 50% of the shares under offer.

Alternative approaches to this issue

187. There are a number of alternative approaches to this issue, including:

(a) Make no change to the wording of the Code, leaving open the possibility that some offerors achieving dominant ownership either:

(i) Will not know by the time they have to issue an acquisition notice whether they have received acceptances in respect of 50% of the shares under offer, so will not know whether they have to appoint an independent adviser; or

(ii) Could have an offer still open at one price when they issue an acquisition notice signalling payment of a different price for compulsorily acquired shares;

(b) Where dominant ownership is achieved through acceptances of an offer, allow the issuing of the acquisition notice to be delayed until 30 days after the end of the offer period, by which time the offeror will know whether it needs to obtain an independent adviser to certify that the consideration being provided is fair and reasonable;

(c) Where dominant ownership is achieved through acceptances of an offer, provide that the offer will terminate 30 days after dominant ownership has been achieved (which could mean either shortening or lengthening the offer period), with the acquisition notice having to be issued within 30 days of the end of the modified offer period.

Proposed change

188. It is proposed that rule 54 be replaced with a new rule 54 as follows:

> (1) The dominant owner must send a notice in writing to the outstanding security holders that complies with rule 55.
>
> (2) If the dominant owner becomes the dominant owner by reason of acceptances of an offer, the notice referred to in subclause (1) must be sent not later than 30 days after the end of the offer period.
>
> (3) If subclause (2) does not apply, the notice referred to in subclause (1) must be sent not later than 30 days after the dominant owner became the dominant owner.
>
> (4) A copy of the notice referred to in subclause (1) must be—
>
> (a) sent immediately to the code company, the Panel, and the registered exchange (if the voting securities of the code company are quoted on the registered exchange's market); and
>
> (b) delivered immediately to the Registrar of Companies for registration.

Compliance costs

189. The object of the proposed changes is to remove an anomaly in the Code where Code offers are made when the offeror already has close to 90% control of voting rights at the time the offer is made. As such the Panel believes the effect on compliance costs should be either neutral or positive. That is, compliance costs could be reduced quite significantly by avoiding the unnecessary appointment of an independent adviser in some circumstances.

Questions for comment

60. Do you consider that the current structure of rule 54 of the Code is workable where at the time an offer is made the offeror already holds or controls close to 90% of the voting rights of the target company, and reaches that level soon after the commencement of the offer? Any comments would be welcome.

61. Do you consider it is appropriate in circumstances where dominant ownership is achieved through a Code offer to amend the Code so as to delay the sending of the acquisition notice until 30 days after the end of the offer period? Any comments would be welcome.

62. Do you consider it would be preferable to provide that an offer will close 30 days from the date the offeror reaches 90% control, regardless of when it was due to close, with the acquisition notice having to be sent within 30 days of the end of the modified offer period? Any comments would be welcome.

63. Do you have any comments on the proposed changes to the Code regarding acquisition notices and compulsory acquisition, bearing in mind that the final responsibility for drafting any changes to the Code lies with Parliamentary Counsel Office?

64. Do you consider there are any compliance cost implications arising from this proposed change? Please be as specific as you can, and distinguish between any direct and indirect costs.

O: The advice statement on the cover of the offer document

190. Clause 4 of Schedule 1 provides that the takeover notice and offer document must contain or be accompanied by:

> A statement in the following form, to be set out in a prominent position at the front of the offer document:
>
> ``IMPORTANT
>
> If you are in doubt as to any aspect of this offer, you should consult a person authorised to undertake trading activities by [*name of registered* exchange] or a financial or legal adviser.
>
> If you have sold all your shares in [name of target company], you should immediately hand this offer document and the accompanying acceptance form to the purchaser, or to the person authorised to undertake trading activities by [*name of registered* exchange] or other agent through whom the sale was made, to be passed to the purchaser."

Object of proposed change

191. This statement does not advise shareholders that they will also be receiving a statement from the target company and an independent adviser's report. The Panel's experience has indicated that some target company shareholders may not appreciate when they receive an offer document that there will be a target company statement, independent adviser's report and directors' recommendation following later. While the directors of the target company may be expected to advise shareholders not to accept an offer pending receipt of the target company statement and independent adviser's report, it could be preferable to amend the warning statement on the front of the offer document to expressly warn that there are more documents to come.

192. The object of the proposed change is to try and ensure that recipients of takeover offers are well informed about the material they can expect to receive before they need to consider accepting the offer.

Alternative approaches to dealing with the issue

193. There are a number of alternative approaches to dealing with this issue, including:

(a) Make no change to the prescribed warning statement, relying on the directors of the target company to warn shareholders that there will be a target company statement and independent adviser's report to be distributed within 14 days; or

(b) Amend the prescribed statement to add a reference to the fact that the shareholder will be receiving additional material in the near future.

Proposed change

194. The Panel considers that the advice statement should be amended to refer to the fact that a target company statement and independent adviser's report will be provided. The Panel also considers that a statement should be required, where a rule 22 report

had been obtained by the offeror, "*that a report on the fairness between classes has been obtained and will be provided to you with the target company statement*".

195. It is accordingly proposed that clause 4 of Schedule 1 be amended as follows:

> A statement in the following form, to be set out in a prominent position at the front of the offer document:
>
> ``IMPORTANT
>
> If you are in doubt as to any aspect of this offer, you should consult a person authorised to undertake trading activities by [*name of registered* exchange] or a financial or legal adviser.
>
> If you have sold all your shares in [name of target company], you should immediately hand this offer document and the accompanying acceptance form to the purchaser, or to the person authorised to undertake trading activities by [*name of registered* exchange] or other agent through whom the sale was made, to be passed to the purchaser.'
>
> [Name of target company]'s target company statement, together with an independent adviser's report on the merits of this offer [and another independent adviser's report on the fairness and reasonableness of the consideration and terms of this offer as between classes of securities [*if rule 22 report required*]] will either accompany this offer or be sent to you within 14 days and should be read in conjunction with this offer."

Compliance costs

196. The proposed change to the required statement to be included on the front of each offer document should have no compliance cost implications.

Questions for comment

65. Do you consider that the advice statement on the front of each offer document should be expanded to include advice to recipients that they will be receiving a target company statement and independent adviser's report either with the offer document or in the next two weeks?

66. Should it be the sole responsibility of the directors of the target company to give advice to their shareholders that a target company statement and independent adviser's report will be forthcoming?

67. Do you have any comments on the proposed wording of the amended advice statement, bearing in mind that Parliamentary Counsel Office has the final responsibility for drafting any changes to the Code?

68. Do you consider this proposal has any compliance cost implications? If so, please be specific, and distinguish between any direct and indirect costs.

P: Disclosure in the takeover documents of share holding and share trading by certain classes of person

197. Clauses 6 and 7 of Schedule 1 of the Code require disclosure in the takeover notice and the offer document of trading in the target company's securities by the offeror, its related persons and the target company's substantial security holders.

198. Clause 6 of Schedule 1 requires the takeover notice and offer document to contain or be accompanied by:

> (1) The number, designation, and percentage of equity securities of any class of the target company held or controlled by—
>
> (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 holding or controlling more than 5% of the class, if within the knowledge of the offeror.
>
> (2) If any of the persons referred to in subclause (1) do not hold or control equity securities of the target company, a statement to that effect.

199. Clause 7 of Schedule 1 requires the takeover notice and offer document to contain or be accompanied by:

> (1) If any of the persons referred to in clause 6(1) have, during the 6-month period before the date of the offer, acquired or disposed of any equity securities of the target company,—
>
> (a) the number and designation of the equity securities; and
>
> (b) the consideration for, and the date of, every transaction to which this subclause applies.
>
> (2) If no such equity securities were acquired or disposed of, a statement to that effect.

<u>Object of proposed change</u>

200. In the Panel's Practice Note on clauses 6 and 7 of Schedule 1 of the Code, (*Practice Note – Clauses 6 and 7 of Schedule 1 of the Code*, issued on 29 August 2002) it was noted that offerors often face difficulties when attempting to comply with clause 6(2):

> 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.

201. In one offer document approximately ten pages of information about share trading by substantial security holders was disclosed under clause 7.

202. The objects of the proposed changes are:

(a) To ensure the responsibility for providing share trading and share holding information is placed on the party best placed to produce the information; and

(b) To clarify one of the requirements of the schedule to avoid unnecessary statements being made in respect of those who do not hold securities in the target company.

Alternative approaches to the issue

203. There are a number of alternative approaches to these issues, including:

(a) Make no changes to the present form of the Code;

(b) Shift the responsibility for providing share holding and share trading information for substantial security holders from the offeror to the target company. This recognises that prior to a takeover notice being issued, particularly for a hostile or surprise takeover, the offeror will not wish to signal its interest in the target company by enquiring of substantial security holders about their share holding and share trading. It would also recognise that the target company, to whom any substantial security holder notices have to be provided (if the target is listed), but particularly where the target company is not listed, will be better placed than the offeror to provide details of shareholding and share trading by larger (but not related party) shareholders;

(c) Clarify the wording of the requirement so that it is clear that separate disclosures of non-shareholdings are not required for each person acting in concert with the offeror, each related party, and particularly each director of each related company of the offeror (which with a global conglomerate could amount to a large number of people) who do not hold shares in the target company.

Proposed change

204. The Panel considers that clause 6(2) of Schedule 1 should be amended to make it clear that a separate statement is not needed to be made for each relevant person who does not hold securities in the target company.

205. The Panel also considers that it is not necessary to require disclosure in the offer document of detailed trading by persons in clause 6(1)(e) of Schedule 1 of the Code, and that such persons should also be excluded from the ambit of clause 6(2) of Schedule 1. Rather, the Panel considers that this disclosure should instead be made in the target company statement under clause 6 of Schedule 2, because the target company is in a much better position than the offeror to provide this information.

206. It is accordingly proposed that clause 6 of Schedule 1 be replaced by a new clause 6 as follows:

> (1) In schedule form, the number, designation, and percentage of equity securities of any class of the target company held or controlled by—
>
> (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 holding or controlling more than 5% of the class, to the knowledge of the offeror.
>
> (2) A statement immediately following that schedule to the effect that, except as specified in that schedule, no person coming within any of clauses 6(1)(a) to (d) (inclusive) holds or controls any equity securities in the target company.

207. It is also proposed that clause 7(1) of Schedule 1 be amended as follows:

> If any of the persons referred to in <u>any of</u> clause<u>s</u> 6(1)<u>(a) to (d) (inclusive)</u> have, during the 6-month period before the date of the offer, acquired or disposed of any equity securities of the target company,—
>
> (a) the number and designation of the equity securities; and
>
> (b) the consideration for, and the date of, every transaction to which this subclause applies.

208. It is also proposed that clause 6(1) of Schedule 2 (specifying required disclosures to be made in the target company statement) be amended as follows:

> The number and designation of any equity securities of the target company acquired or disposed of by the persons referred to in clause 5(1)(a) <u>and by the persons referred to in clause 5(1)(b)</u> during the 6-month period before the latest practicable date before the date of the target company statement, including the consideration for, and the date of, each such transaction.

Compliance costs

209. This proposal should have minimal effect on compliance costs because the obligation to prepare some information that is required to be provided to target company shareholders has been shifted from the offeror to the target company. These costs are all ultimately borne by the offeror, even if met initially by the target company. To the extent that it is easier for the target company to collate this information, the overall compliance costs of a takeover should be reduced.

Questions for comment

69. Do you consider that it is useful to provide to target company shareholders details of shareholdings at the date of the offer, and share trading in the six month period preceding the offer, by the substantial security holders of the company, that is those with more than 5% of the voting rights?

70. If the answer to the preceding question is “yes”, do you consider this information should be provided in the offer document or in the target company statement? Please explain your response.

71. Do you consider that the current wording of the Code requires a separate statement to be made in respect of each person covered by rule 6(1)(a) that the person does not hold or control any shares in the target company? Do you consider that such a requirement is appropriate? Do you consider that the Code should be amended so that this disclosure can be covered by an “exception statement” for those persons who do not hold securities?

72. Do you have any comments on the suggested wording changes to the Code, bearing in mind that Parliamentary Counsel Office has the final responsibility for drafting changes to the Code?

73. Do you consider the Panel’s proposed changes have any compliance cost implications for (a) offerors and (b) target companies? Please be as specific as you can. Please also distinguish between direct and indirect costs.

Q: Certificate in takeover notices and offer documents

210. Clause 19 of Schedule 1 provides that the takeover notice and offer document must contain or be accompanied by:

> (1) A certificate in the following form signed by the persons specified in subclause (2):
>
> "To the best of our knowledge and belief, after making proper enquiry, the information contained in the offer document is, in all material respects, 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 offeror under the Takeovers Code."
>
> (2) The persons referred to in subclause (1) are,—
>
> (a) if the offeror is an individual, the offeror or the offeror's agent authorised in writing; or
>
> (b) if the offeror is not an individual,—
>
> (i) the chief executive officer and the chief financial officer of the offeror, or their respective agents authorised in writing, or, if there is no chief executive officer or chief financial officer, the person or persons fulfilling those roles respectively, or their respective agents authorised in writing; and
>
> (ii) 2 directors of the offeror (or the sole director of the offeror), not being the chief executive officer or the chief financial officer unless there is an insufficient number of other directors who must sign on behalf of the board of directors with the authority of a resolution of the board of directors.

Object of proposed change

211. Most of the takeover notices provided to the Panel have not been signed. The solicitors for a number of offerors have taken the view that because clause 19 uses the word "*offeror*" throughout and refers to the "*offer document*" it does not require the takeover notice to be signed. The signatories to the certificate cannot possibly certify that the offer document is correct when at the time of giving the takeover notice the offer document will not have been finalised.

212. The takeover notice forms an important part of the takeover process because the target company statement and the independent advisers' reports are prepared on the basis of the information in the notice.

213. The object of the proposed change is to ensure that the board and management of the offeror take responsibility for the contents of the takeover notice, as well as of the offer document once the offer is made.

Alternative approaches to the issue

214. There are a number of approaches to the issue, including:

(a) Make no change to the Code, leaving it to offerors to decide (as some do) whether or not to have the takeover notice signed by two directors and two members of senior management, reading into the wording of the Code that at that point the certificate must relate to the notice rather than the future offer document;

(b) Amend the Code so that the wording of the prescribed certificate is applicable to either the notice or the offer document, meaning that in each case a certificate has to be signed by the designated persons in the company;

(c) Require the takeover notice to be signed, but with a certificate and signing requirement that is less onerous than that required for the offer document.

Proposed change

215. The Panel considers that the Code should be amended to make it clear that signed certificates are required for both takeover notices and offer documents, and that the signing requirements and certification should be the same in each case.

216. It is accordingly proposed that rule 41(1)(b) be replaced with a new rule 41(1)(b) as follows:

> (b) contains, or is accompanied by, a certificate in the form specified in clause 19(1) of Schedule 1 signed by the persons specified in clause 19(2) of Schedule 1, together with all other information specified in Schedule 1 (except clause 1 and 4) stated as at the date of the notice.

217. It is also proposed that rule 44(1)(d) be replaced with a new rule 44(1)(d) as follows:

> (d) contain, or be accompanied by, —
>
> (i) the information specified in Schedule 1 (other than clause 19) stated as at the date of the offer; and
>
> (ii) any additional information contained in, or that accompanied, the takeover notice under rule 41(2); and
>
> (iii) a copy of the target company statement (if the target company statement has been given to the offeror under rule 46(a)); and
>
> (iv) a certificate in the following form, signed by the persons specified in clause 19(2) of Schedule 1:
>
> "To the best of our knowledge and belief, after making proper enquiry, the information contained in and accompanying the offer document is, in all material respects, 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 offeror under the Takeovers Code."

218. It is also proposed that clause 19(1) of Schedule 1 be replaced by a new clause 19(1) as follows:

> (1) A certificate in the following form signed by the persons specified in subclause (2):

> "To the best of our knowledge and belief, after making proper enquiry, the information contained in and accompanying this takeover notice is, in all material respects, 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 offeror under the Takeovers Code."

Compliance costs

219. This proposal may involve a modest increase in compliance costs to the extent that those now required to sign the takeover notice may need to be given a higher degree of assurance from the professional advisers as to the contents of the notice than was the case when the notice did not have to be signed. However any such costs have only arisen because of unintentional error in the Code. The Panel believes that it was always intended that takeover notices should be signed.

Questions for comment

74. Do you interpret the current wording of the Code as requiring the takeover notice to have a certificate signed in accordance with clause 19 of Schedule 1 to the Code? If so, please explain.

75. Do you consider that the takeover notice should be signed for the prospective offeror in the same way and with the same form of certification as is required for offer documents?

76. Do you consider that the takeover notice should be signed for the prospective offeror, but with a less rigorous signature requirement than that for the offer document (management only, two directors only, one management and one director)? Please explain your response.

77. Do you have any comments on the wording of the proposed changes to the Code set out above, bearing in mind that Parliamentary Counsel Office has the final responsibility for drafting changes to the Code?

78. Do you consider there are any compliance cost implications for the proposal to require the takeover notice to be certified in the same manner as the offer document? Please be as specific as you can. Please distinguish between any direct and indirect costs.

R: Material contracts

220. Clause 13 of Schedule 2 provides that the target company statement must contain or be accompanied by:

> A statement as to whether any of the following persons have any interest in any material contract to which the offeror, or any related company of the offeror, is a party, and the particulars of the nature and extent of such interest—
>
> (a) any director or senior officer of the target company or their associates:
>
> (b) any person who, to the knowledge of the directors or the senior officers of the target company, holds or controls more than 5% of any class of equity securities of the target company.

Object of proposed change

221. It has proved difficult to determine what a "*material contract*" is and how a "*material contract*" should be quantified. Questions have arisen as to who should determine that a contract is material to the offeror or a related party of the offeror. Questions have arisen as to whether monetary values should be attributed to contracts. For example, if the material contract is an employment contract is it necessary to disclose the level of remuneration, or is it sufficient to disclose the significance of the employment relationship (chief executive, chief financial officer)?

222. The disclosure is in the target company statement. This implies that it is up to the directors of the target company to decide whether or not a contract is material or not. However the Panel has seen one instance where the counter-party to the relevant contract, a related company of the offeror, decided that a particular contract was not material and refused to disclose details to the target company directors.

223. The object of the proposed change is to improve the level of disclosure to target company shareholders by removing the uncertainty inherent in the expression "material" and clarifying the manner in which contract details should be quantified.

Alternative approaches to these issues

224. There are a number of approaches to these issues including:

(a) Make no change to the present wording of the Code; or

(b) Remove the reference to "material" in the clause, so that disclosure is required in respect of all contracts to which the offeror or a related party of the offeror is a party and in which any director or senior officer of the target company, or their associates, or any substantial security holder of the target company, has an interest; and

(c) Insert a reference in the clause requiring disclosure of the monetary value of contracts where this is capable of quantification; or

(d) Leave the reference in the clause to "material" but add a requirement that the monetary value of contracts be disclosed where this is possible.

Proposed change

225. The Panel considers that the word "*material*" should be removed to avoid difficulties in determining whether a contract is "*material*" or not. It could be just as important to indicate a pattern of contractual relations between offeror and target as to disclose only "large" contracts.

226. The Panel believes the contracts should also be required to be quantified in monetary terms if this is possible. The Panel has been told that there is ambiguity in the present terms of clause 13 of Schedule 2 as to whether the "extent" of an interest refers to disclosure in monetary terms.

227. It is accordingly proposed that clause 13 of Schedule 2 be amended as follows:

> **13 Interests of directors and officers of target company in contracts of the offeror**
>
> A statement as to whether any of the following persons have any interest in any contract to which the offeror, or any related company of the offeror, is a party, together with particulars of the nature and extent of any such interest and its monetary value (if capable of quantification)—
>
> (a) any director or senior officer of the target company or their associates:
>
> (b) any person who, to the knowledge of the directors or the senior officers of the target company, holds or controls more than 5% of any class of equity securities of the target company.

Compliance costs

228. It can be expected that there will be some compliance costs with this proposal because it brings the possibility of an increased level of disclosure in the target company statement. These costs would arise from the need for scrutiny of the details of a larger number of contracts than would otherwise be the case, followed by disclosure of those details. These would be "due diligence" costs. They will be borne by the offeror. There could also be additional printing costs, if increased disclosures are material.

229. If there are no contracts involving directors and officers of the target company and the offeror and its related parties then there will be no compliance cost implications. However, because many takeover offers are made by companies that are already significant shareholders in the target company, there may often be common directors between the bidder and the target.

Questions for comment

79. Do you consider that disclosure of contractual ties between directors and officers of the target company, and the offeror and its related companies, should continue to be limited to interests in material contracts, or should the need for materiality be removed? Please explain your response.

80. Do you consider there is any difficulty determining whether a contract is material or not?

81. Do you consider that the monetary value of the relevant contracts should be disclosed in the target company statement, where possible? Do you think the current wording of clause 13 requires this? Are there some occasions where monetary values should not be disclosed i.e. employment contracts?

82. Do you have any comments on the proposed wording change to clause 13 of Schedule 2, bearing in mind that Parliamentary Counsel Office has the responsibility for drafting any changes to the Code?

83. Do you agree that the proposal to require disclosure of all relevant contracts, not just those that are material, is likely to have compliance costs implications? From your experience are you able to quantify what these costs could be? Please be as specific as you can. Please distinguish between direct and indirect costs.

S: Unlisted Code companies

230. There is no rule which requires offerors who are making an offer for an unlisted Code company to update the Panel and shareholders about the level of acceptances that they receive on a periodic basis during the course of the takeover offer. At present the market is kept informed in respect of listed companies via substantial security holder disclosure, because acceptances of Code offers are considered to create "*relevant interests*" in the securities even if the offer has unsatisfied conditions. There are no such requirements for disclosure in respect of unlisted companies.

Object of proposed change

231. It is currently impossible for the market (including prospective competing bidders), and the Panel, to follow an offer's progress. It is desirable that securities markets, including target companies and their shareholders, be fully informed about levels of acceptances received.

232. A further issue arises because the substantial security holder regulations concentrate on relevant interests in voting securities, including securities with future voting rights. The Code is concerned with currently exercisable voting rights. In the case of the PPCS/Richmond takeover offer PPCS Limited filed regular substantial security holder notices which disclosed the company's interest in Richmond Limited's total issued shares, even though the High Court had ordered the forfeiture of one block of shares, with PPCS being unable to vote those shares in the meantime. This resulted in the disclosed relevant interest being higher than PPCS's control of voting rights.

233. The object of the proposed change is to provide a mechanism to ensure that the market is informed regularly about the progress of takeover offers during the offer period, with disclosures being provided on the basis of future control of currently exercisable voting rights.

Alternative approaches to the issue

234. There are a number of possible approaches to this issue, including:

(a) Make no change to the rules of the Code, instead relying on the offeror's obligations under the Securities Markets Act 1988 to disclose each 1% change of relevant interest in the voting securities of the target company when that is a listed company;

(b) Require offerors to provide notices to the Stock Exchange where either the offeror or the target company are listed companies, or to give news releases where neither offeror nor target are listed companies, in respect of each 1% of acceptances of the offer that has been received;

(c) Require offerors to give notices to the Exchange or publicly on the progress of a takeover offer but less frequently, say at each 2% or 5% of acceptances received, or on a time basis, say every week.

Proposed change

235. The Panel considers that a new rule should be included in the Code to require offerors who are making an offer for a Code company to periodically update the Panel and target company shareholders about the level of acceptances received.

236. The Panel considers that this requirement should apply to all offers, whether for listed or unlisted target companies, and that disclosure should be required each time acceptances for an additional 1% of the voting securities of the target company are received.

237. It is accordingly proposed that a new rule 47(5) be introduced as follows:

> Each time the level of acceptances in respect of an offer increases by more than 1 percent of the total voting rights in the target company, the offeror must notify the total level of acceptances received (for each class of equity securities subject to the offer) to the Panel, and –
>
> (i) if any voting securities of the target company or the offeror or any holding company of the offeror are quoted on a registered exchange's market, the offeror must at the same time notify the registered exchange of such information; or
>
> (ii) if no voting securities of the target company or offeror or any holding company of the offeror are quoted on a registered exchange's market, the offeror must release the total level of acceptances to the principal daily newspapers in New Zealand.

Compliance costs

238. This proposal involves additional compliance costs for offerors because:

(a) Where either the offeror or a holding company of the offeror, or the target company, are listed on a registered exchange there will be an additional disclosure obligation to that already required under the Securities Markets Act 1988 (the substantial security holder obligations);

(b) Where neither the offeror or the target company are listed on a registered exchange there would be an obligation for the offeror to provide a news release to the major metropolitan daily newspapers each time the level of acceptances increases by 1% of the total voting rights of the target company. This would involve some costs for preparation and distribution of relevant news releases.

Questions for comment

84. Do you consider that the market should be informed of the progress of takeover offers throughout their course?

85. Do you consider that the current disclosure mechanisms, principally under the substantial security holder disclosure requirements, are adequate?

86. Do you consider that offerors should have obligations imposed by the Code to publicise the progress of their takeover offers separately from any obligations they may have under the substantial security holder regulations?

87. Do you consider that for takeover offers where the offeror (or its holding company) and the target company are not listed the offeror should be required to keep the market informed in respect of the acceptances that it receives?

88. Should notices to the relevant registered exchange, or public news releases, be required for each 1% of acceptances received? Should the requirement for disclosure be less frequent, say every 2% or 5% of acceptances received? Please comment on your response.

89. Do you have any comments on the proposed wording of changes to the Code, bearing in mind that Parliamentary Counsel Office has the final responsibility for drafting changes to the Code?

90. The Panel's proposed changes to the Code appear to have compliance cost implications for offerors. Do you have a view on the likely additional costs for offerors (a) where one of the parties to the takeover is a listed company and (b) where neither party to the takeover is listed? Please be as specific as you can on any likely additional costs. Please distinguish between direct and indirect costs.

Takeovers Panel
P O Box 1171
WELLINGTON
7 April 2003

APPENDIX 1 – THE CURRENT TAKEOVERS CODE

Takeovers Code Approval Order 2000

Contents

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1. **Title**
   This code is the Takeovers Code.

2. **Commencement**
   This code comes into force on 1 July 2001.

Part 1
Preliminary provisions

Interpretation

3. **Interpretation**

1. In this code, unless the context otherwise requires,—
   acquisition notice has the meaning set out in rule 50
   Act means the Takeovers Act 1993
   code company means a company that—
   a. is a party to a listing agreement with a registered exchange:
   b. is not a party to a listing agreement with a registered exchange but that was a party to a listing agreement with a registered exchange at any time during the period of 12 months before any date or the occurrence of any event referred to in this code:
   c. has 50 or more shareholders and $20,000,000 or more of assets
   company has the same meaning as in section 2(1) of the Companies Act 1993
   compulsory sale has the meaning set out in rule 50
   control, in relation to a voting right, means having, directly or indirectly, effective control of the voting right; and **controller** has a corresponding meaning
   despatch notice means the notice referred to in rule 45
   director,—
   a. in relation to a company, means a person occupying the position of a director of the company, by whatever name called; and
   b. in relation to a partnership (other than a special partnership), means a partner; and
   c. in relation to a special partnership, means a general partner; and
   d. in relation to a body corporate, or unincorporate, other than a company, partnership, or special partnership, means a person occupying a position in the body that is comparable with that of a director of a company; and

e. in relation to any other person, means that person; and
f. includes a person in accordance with whose directions or instructions a person referred to in paragraphs (a) to (d) may be required or is accustomed to act in respect of the exercise of duties or powers as, or comparable to those of, a director

dominant owner has the meaning set out in rule 50

equity security—

a. means any interest in or right to a share in, or in the share capital of, a company (whether carrying voting rights or not); and
b. includes an option or right to acquire any such interest or right unless that option or right is exercisable only with the agreement of the issuer; but
c. does not include redeemable securities that are redeemable only for cash

full offer means an offer under rule 8

further required voting securities has the meaning set out in rule 12(3)

independent adviser means an adviser whom the Panel considers is independent and who is approved by the Panel for the purposes of this code

offer means an offer to which this code applies for voting securities and any other securities to which the offer is required to extend under this code

offer document means the offer and all accompanying information referred to in rule 44

offer period means the period referred to in rule 24

offeree means a person to whom an offer is made

offeror means a person who makes an offer

ordinary resolution, in relation to a code company, means a resolution that is passed at a meeting of the holders of voting securities of the code company by a simple majority of the votes of those holders who voted on the resolution

outstanding securities has the meaning set out in rule 50

outstanding security holders has the meaning set out in rule 50

Panel means the Takeovers Panel established under Part I of the Act

partial offer means an offer under rule 9

record date, in relation to an offer, means the date specified by an offeror under rule 43(3)

registered exchange has the meaning set out in section 2(1) of the Securities Markets Act 1988

registered exchange's market has the meaning set out in section 2(1) of the Securities Markets Act 1988

related company has the same meaning as in section 2(3) of the Companies Act 1993

specified percentage means the percentage referred to in rule 9

subsidiary has the same meaning as in sections 5 to 8 of the Companies Act 1993

surplus acceptance voting securities has the meaning set out in rule 12(3)

takeover notice means the notice referred to in rule 41

target company means a code company—

a. whose voting securities are the subject of an offer; or
b. that has received a takeover notice

target company statement means the statement referred to in rule 46

variation notice means the notice referred to in rule 28

voluntary sale has the meaning set out in rule 50

voting right means a currently exercisable right to cast a vote at meetings of shareholders of a company, not being a right to vote that is exercisable only in 1 or more of the following circumstances:

a. during a period in which a payment or distribution (or part of a payment or distribution) in respect of the security that confers the voting right is in arrears or some other default exists:
b. on a proposal that affects rights attached to the security that confers the voting right:
c. on a proposal to put the company into liquidation:
d. on a proposal for the disposal of the whole, or a material part, of the property, business, and undertaking of the company:
e. during the liquidation of the company:
f. in respect of a special, immaterial, or remote matter that is inconsequential to control of the company

voting security means an equity security that confers a voting right.

2. If, under this code, the time within which or the day on which any thing is to be done expires or falls on a day other than a working day as defined in section 2 of the Companies Act 1993, the time so limited is extended to, and such thing may be done, on the next day that is a working day as so defined.

4. **Meaning of associate**

1. For the purposes of this code, a person is an **associate** of another person if—
   a. the persons are acting jointly or in concert; or
   b. the first person acts, or is accustomed to act, in accordance with the wishes of the other person; or
   c. the persons are related companies; or
   d. the persons have a business relationship, personal relationship, or an ownership relationship such that they should, under the circumstances, be regarded as associates; or
   e. the first person is an associate of a third person who is an associate of the other person (in both cases under any of paragraphs (a) to (d)) and the nature of the relationships between the first person, the third person, and the other person (or any of them) is such that, under the circumstances, the first person should be regarded as an associate of the other person.
2. A director of a company or other body corporate is not an associate of that company or body corporate merely because he or she is a director of that company or body corporate.

No contracting out of code

5. **No contracting out of code**

This code has effect despite any provision to the contrary in any agreement, constitution of a company or similar document relating to another body corporate, resolution of the security holders of a company or of any other body corporate, deed, or otherwise.

Part 2
Fundamental rule and exceptions

Contents

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6. **Fundamental rule**

1. Except as provided in rule 7, a person who holds or controls—
    a. No voting rights, or less than 20% of the voting rights, in a code company may not become the holder or controller of an increased percentage of the voting rights in the code company unless, after that event, that person and that person's associates hold or control in total not more than 20% of the voting rights in the code company:
    b. 20% or more of the voting rights in a code company may not become the holder or controller of an increased percentage of the voting rights in the code company.
2. For the purposes of subclause (1), if—
    a. a person and any other person or persons acting jointly or in concert together become the holders or controllers of voting rights, that person is deemed to have become the holder or controller of those voting rights:
    b. a person or persons together hold or control voting rights and another person joins that person or all or any of those persons in the holding or controlling of those voting rights as associates, the other person is deemed to have become the holder or controller of those voting rights:
    c. 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.

7. **Exceptions to fundamental rule**

A person may become the holder or controller of an increased percentage of the voting rights in a code company—

a. by an acquisition under a full offer (the main provisions are contained in rule 8, Parts 4 to 6, and Schedules 1 and 2):
b. by an acquisition under a partial offer (the main provisions are contained in rules 9 to 14, Parts 4 to 6, and Schedules 1 and 2):
c. by an acquisition by the person of voting securities in the code company or in any other body corporate from 1 or more other persons if the acquisition has been approved by an ordinary resolution of the code company in accordance with this code (the main provisions are contained in rules 15 and 17 to 19):
d. by an allotment to the person of voting securities in the code company or in any other body corporate if the allotment has been approved by an ordinary resolution of the code company in accordance with this code (the main provisions are contained in rules 16 to 19):
e. if—
    i. the person holds or controls more than 50%, but less than 90%, of the voting rights in the code company; and

ii. the resulting percentage held by the person does not exceed by more than 5 the lowest percentage of the total voting rights in the code company held or controlled by the person in the 12-month period ending on, and inclusive of, the date of the increase:

f. if the person already holds or controls 90% or more of the voting rights in the code company.

Part 3
Specific requirements for exceptions to fundamental rule

Contents

Subpart 1— Full offers

8. **Full offer**

1. An offer may be made under this code for all the voting securities of the target company not already held by the offeror.
2. A full offer must include offers in respect of all the securities in each class of equity securities, whether voting or non-voting, of the target company (other than those that are already held by the offeror).
3. If there is more than 1 class of voting securities included in a full offer, the consideration and terms offered for each class of voting securities must be fair and reasonable as between the classes of voting securities.
4. If non-voting securities are included in a full offer, the consideration and terms offered for non-voting securities must be fair and reasonable in comparison with the consideration and terms offered for voting securities and as between classes of non-voting securities.

Subpart 2— Partial offers

General provisions

9. **Partial offer**

1. An offer may be made under this code for less than all the voting securities of a target company.
2. A partial offer must be extended to all holders of voting securities of the target company other than the offeror.
3. If there is only 1 class of voting securities of the target company, a partial offer must be made for a specified percentage of the voting securities of the target company not already held or controlled by the offeror.
4. If there is more than 1 class of voting securities of the target company, a partial offer must be made for a specified percentage of the voting securities of each class not already held or controlled by the offeror, and such specified percentage must be the same percentage in respect of each class.
5. The consideration and terms offered for each class of voting securities of the target company must be fair and reasonable as between the classes of voting securities.

10. **When offeror does not hold or control more than 50% of voting rights**

1. If, on the date of a partial offer, the offeror does not hold or control more than 50% of the voting rights in the target company, the partial offer must be for voting securities that, when taken together with voting securities already held or controlled by the offeror, confer—
    a. more than 50% of the voting rights in the target company; or
    b. a lesser percentage of the voting rights in the target company if approval is obtained in accordance with the following provisions:
        i. the takeover notice and the offer must include a statement that approval is sought under rule 10 of the Takeovers Code and that the offer is conditional on approval being obtained:
        ii. the offer must be accompanied by a separate approval document providing for the offeree to approve or object to the offeror making an offer for the lesser percentage:
        iii. approval under this rule is obtained if the offerees so approving hold more voting rights in the target company than are held by offerees so objecting:
        iv. for the purposes of subparagraph (iii), voting rights held by the offeror and its associates must be disregarded:
        v. for an approval or objection to be valid for the purposes of this rule, the completed approval document must be received by the target company or its agent before the expiration of the offer period.
    c. A target company, or its agent, that receives an approval or objection before the expiration of the offer period must, if requested by the offeror, send a copy of the approval or objection to the offeror within 2 days of its receipt.

Excess acceptances

11. **Excess acceptances: application**

If a partial offer is accepted in respect of more securities than those sought by the offeror, rules 12 and 13 apply.

12. **Excess acceptances: 1 class of voting securities**

1. If there is only 1 class of voting securities included in the partial offer, the offeror must take up from each offeree the lesser of—
    a. the number of the offeree's securities that represents the specified percentage of the voting securities held by the offeree; or
    b. the number of securities in respect of which the offeree has accepted the offer.
2. If the number of voting securities that the offeror takes up under subclause (1) is less than the number of voting securities sought by the offeror under the offer, the offeror must acquire the further required voting securities by taking up, from each offeree with surplus acceptance voting securities, voting securities bearing the same proportion to the offeree's surplus acceptance voting securities as the further required voting securities bear to the total surplus acceptance voting securities.
3. For the purposes of this rule and rule 13,—
   further required voting securities means the balance of voting securities required by an offeror
   surplus acceptance voting securities means the voting securities in respect of which an offer has been accepted, but that have not been taken up under subclause (1).

13. **Excess acceptances: more than 1 class of voting securities**

If there is more than 1 class of voting securities included in the partial offer,—

a. rule 12 applies in respect of each class of voting securities separately; and
b. if the application of paragraph (a) does not provide the offeror with the voting securities sought by the offeror under the partial offer, rule 12(2) and (3) applies (with any necessary modifications) in relation to the—
    i. total remaining surplus acceptance voting securities of all classes; and
    ii. total remaining further required voting securities of all classes needed to bring the voting rights acquired under the partial offer up to the total voting rights conferred by the voting securities sought under the partial offer; and
c. if the voting securities confer different voting rights as between classes, the number of surplus acceptance voting securities taken up from each offeree under paragraph (b) must be calculated by reference to the—
    i. voting rights conferred by each remaining surplus acceptance voting security; and
    ii. voting rights conferred by the total remaining surplus acceptance voting securities; and
    iii. remaining voting rights sought under the partial offer.

14. **Voting securities subject to disposition**

The number of voting securities that may be disposed of by an offeree under a partial offer in accordance with the terms of the offer and this code must be determined by reference to the number of voting securities of each class under offer held by the offeree at the expiration of the offer period, as recorded in the securities register of the target company.

Subpart 3— Acquisitions and allotments

Notice of meeting

15. **Notice of meeting: acquisition of voting securities**

The notice of meeting containing the proposed resolution in respect of an acquisition of voting securities referred to in rule 7(c) must contain, or be accompanied by,—

a. the identity of the persons acquiring and disposing of the voting securities; and
b. particulars of the voting securities to be acquired, including—
    i. the number being acquired; and
    ii. the percentage of all voting securities that that number represents; and
c. the percentage of all voting securities that will be held or controlled by the person acquiring the voting securities after completion of the acquisition;if the voting securities being acquired are voting securities of a body corporate other than the code company,—
    i. the number of voting securities in the code company that are held or controlled by that body corporate; and
    ii. the percentage of the total voting securities of the code company that that number represents; and
d. the consideration for the acquisition or the manner in which the consideration will be determined and when the consideration is payable; and
e. the reasons for the transaction; and
f. a statement to the effect that the acquisition, if approved, will be permitted under rule 7(c) of the Takeovers Code as an exception to rule 6 of the Takeovers Code; and
g. a statement by the person acquiring the voting securities setting out particulars of any agreement or arrangement (whether or not legally enforceable) that has been, or is intended to be, entered into between the person and any other person (other than between that person and the person disposing of the voting securities in respect of the matters referred to in paragraphs (a) to (e)) relating to the acquisition, holding, or control of the voting securities to be acquired, or to the exercise of voting rights in the code company; and
h. the report from an independent adviser that complies with rule 18; and
i. the statement by the directors of the code company referred to in rule 19.

16. **Notice of meeting: allotment of voting securities**

The notice of meeting containing the proposed resolution in respect of an allotment of voting securities referred to in rule 7(d) must contain, or be accompanied by,—

a. the identity of the allottee; and
b. particulars of the voting securities to be allotted, including—
    i. the number being allotted; and
    ii. the percentage of the aggregate of all existing voting securities and all voting securities being allotted that that number represents; and
c. the percentage of all voting securities that will be held or controlled by the person to whom the voting securities are being allotted after completion of the allotment;if the voting securities being allotted are voting securities of a body corporate other than the code company—
    i. the number of voting securities in the code company that are held or controlled by that body corporate; and

ii. the percentage of the total voting securities of the code company that that number represents; and

d. the issue price for the voting securities to be allotted and when it is payable; and

e. the reasons for the allotment; and

f. a statement to the effect that the allotment, if approved, will be permitted under rule 7(d) of the Takeovers Code as an exception to rule 6 of the Takeovers Code; and

g. a statement by the allottee setting out particulars of any agreement or arrangement (whether legally enforceable or not) that has been, or is intended to be, entered into between the allottee and any other person (other than between the allottee and the code company in respect of the matters referred to in paragraphs (a) to (e)) relating to the allotment, holding, or control of the voting securities to be allotted, or to the exercise of voting rights in the code company; and

h. the report from an independent adviser that complies with rule 18; and

i. the statement by the directors of the code company referred to in rule 19.

Voting restrictions

17. **Voting restrictions**

1. The persons acquiring and disposing of the securities and their associates must not vote on a resolution for the approval of the acquisition referred to in rule 7(c).
2. The allottee and its associates must not vote on a resolution for the approval of the allotment referred to in rule 7(d).

Independent adviser's report

18. **Independent adviser's report**

1. 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.
2. The report that is to be contained in, or to accompany, the notice of meeting referred to in rule 15 or rule 16 (as the case may be) may be either the full report given by the independent adviser or a summary report prepared by the adviser.
3. If only a summary of the independent adviser's full report is contained in, or accompanies, the notice of meeting,—
    a. the full report must be available for inspection at the registered office of the code company on and after the date of the notice of meeting; and
    b. a copy of the full report must be provided to any person entitled to attend the meeting on request.
4. The full report and any summary report of an independent adviser must include—
    a. a statement of the qualifications and expertise of the adviser; and
    b. a statement that the adviser has no conflict of interest that could affect the adviser's ability to provide an unbiased report; and
    c. if the report is a summary report, a statement that—
        i. the summary report is a fair summary and not misleading; and
        ii. the full report is available for inspection at the registered office of the code company on and after the date of the notice of meeting; and

iii. a copy of the full report will be sent to any person entitled to attend the meeting on request.

Directors' statement

19. **Directors' statement**

1. The directors of the code company must—
    a. provide a written statement as to whether they recommend approval or disapproval of any proposed acquisition under rule 7(c) or allotment under rule 7(d) and give their reasons; or
    b. provide a written statement that the directors of the code company are unable to make, or are not making, a recommendation and give their reasons.
2. If any of the directors dissent from a recommendation or from any statement under subclause (1)(b) made by the directors or abstain from making a recommendation or any statement under subclause (1)(b), their names and their reasons for dissenting or abstaining must be stated.

Part 4
Code offers
General provisions

Contents

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20. **Same terms and consideration**
An offer must be made on the same terms and provide the same consideration for all securities belonging to the same class of equity securities under offer.

21. **Independent adviser's report**
The directors of a target company must obtain a report from an independent adviser on the merits of an offer.

22. **Independent adviser's report on fairness between classes**

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).

23. **Minimum acceptance condition**

1. If, on the date of an offer, the offeror does not hold or control more than 50% of the voting rights in the target company, the offer must be conditional on the offeror receiving acceptances in respect of voting securities that, when taken together with voting securities already held or controlled by the offeror, confer—
    a. more than 50% of the voting rights in the target company; or

b. in the case of a partial offer, any lesser percentage approved under rule 10(1)(b).

2. The offeror must not take up any equity securities under the offer unless the condition referred to in subclause (1) is satisfied by the end of the offer period.

24. **Offer period**

1. An offer must specify the period for which it will remain open and, subject to rules 25(4) and 26(1), must remain open for that period.
2. The offer period must—
   a. commence with the date of the offer; and
   b. be not shorter than 30 days, and not longer than 90 days.
3. If the offer is a full offer, and there are no conditions in the offer requiring a minimum level of acceptances, or any such conditions have been satisfied, then the offer period may be extended beyond the maximum period otherwise permitted under subclause (2) by up to a further 60 days (and the additional period is deemed to be included in the offer period for the purposes of this code unless otherwise expressly provided).

25. **Conditions**

1. An offer may be subject to any conditions, except those that depend on the judgement of the offeror or any associate of the offeror, or the fulfilment of which is in the power, or under the control, of the offeror or any associate of the offeror.
2. An offer that is subject to any conditions must specify a date by which the offer is to become unconditional.
3. The specified date referred to in subclause (2) must not be later than 14 days, or, if the acquisition requires statutory approval, 30 days, after the end of the offer period (excluding any part of the offer period that is extended under rule 24(3) beyond the maximum period otherwise permitted under rule 24(2)).
4. No condition contained in the offer has effect beyond the specified date referred to in subclause (3), and the offer lapses if it does not become unconditional by that specified date.
5. If an offer has become unconditional, both in respect of any minimum acceptance condition referred to in rule 23 and in respect of any conditions referred to in this rule, the offeror must immediately send a written notice to that effect to—
   a. the target company; and
   b. the Panel; and
   c. the registered exchange (if any voting securities of the target company are quoted on the registered exchange's market).

26. **Withdrawal or lapse of offer**

1. An offer may be withdrawn only with the consent of the Panel.
2. An offeror must immediately send a written notice that the offer is withdrawn or has lapsed in accordance with the terms of the offer to—
   a. the target company; and
   b. the Panel; and
   c. the registered exchange (if any voting securities of the target company are quoted on the registered exchange's market).

Variation of offer

27. **Permissible variations**

The offeror may vary the offeror's offer only if the variation is to do any of the following things:

a. to increase an existing component or components of the consideration:
b. to add a cash component to the consideration:
c. to include in the offer a cash alternative (if the directors of the target company have given their prior written approval):

to extend the offer period, but not beyond the maximum period permitted under rule 24.

28. **Variation notice**

1. Subject to subclause (2), an offeror must immediately send a written notice of any variation of the offeror's offer to—
    a. every offeree; and
    b. the target company; and
    c. the Panel; and
    d. the registered exchange (if any voting securities of the target company are quoted on the registered exchange's market).

If the offer is unconditional and the variation only extends the offer period, the notice referred to in subclause (1) need not be sent to offerees who have already accepted the offer.

29. **Timing of variation**

1. An offer may not be varied, and a variation notice may not be sent, later than 14 days before the end of the offer period.
2. The offer must remain open for at least 14 days after a variation notice has been sent.
3. Subclause (1) does not apply if, before the end of the offer period, the offer period is extended under rule 24(3).

30. **Further reports required for certain variations**

If any of rules 8(3) and (4) and 9(5) apply to an offer and the offer is to be varied under any of rule 27(a) to (c),—

a. a further report must be obtained by the offeror under rule 22 in relation to the offer as proposed to be varied; and
b. the variation notice must contain, or be accompanied by, the information set out in clause 17 of Schedule 1 in relation to the further report.

31. **Increases in consideration available to all accepting parties**

1. If a variation to an offer increases the consideration offered, the offeror must provide the increased consideration to each person whose securities are taken up, whether or not the person accepted the offer before or after the variation was made.
2. If a variation to an offer includes a cash alternative in the offer, the offeror must give all acceptors, including those who have accepted the offer before the variation is made, the opportunity to take the cash alternative as consideration.

32. **Additional consideration relating to variation**

If an offer is varied under rule 27(a) or (b) after the consideration has been sent to persons who have accepted the offer, the additional consideration to be provided as a

consequence of the variation must be sent to those persons no later than 7 days after the date on which the offer is varied.

Consideration

33. **Offer to specify date for payment of consideration**

1. The offer must specify a date by which the consideration for the offer must be sent to the persons whose securities are taken up under the offer.
2. The date referred to in subclause (1) must not be later than 7 days after the later of—
    a. the date on which the offer becomes unconditional; or
    b. the date on which an acceptance is received; or
    c. the end of the offer period first specified in the offer under rule 24(2).

34. **Withdrawal of acceptance for non-payment of consideration**

1. If the consideration is not sent within the period specified in the offer to any person whose securities are taken up under the offer, the person may withdraw acceptance of the offer—
    a. by notice in writing to the offeror; but only
    b. after the expiration of 7 days' written notice to the offeror of the person's intention to do so.
2. However, the right to withdraw acceptance of the offer does not apply if the person receives the consideration during the 7-day period referred to in subclause (1)(b).

Part 5
Dealings and defensive tactics
Certain dispositions and acquisitions

Contents

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35. **Dispositions**
During the offer period, neither the offeror nor any person acting jointly or in concert with the offeror may dispose of any equity securities in the target company other than to an offeror under another offer that is made under this code.

36. **Acquisitions**
During the offer period, the offeror, any related company of the offeror, any person acting jointly or in concert with the offeror, or any of the directors of any of them, must not acquire any equity securities in the target company otherwise than under the offer unless—
    a. the offeror has made a full offer for cash, or a full offer with a cash alternative; and

    the possibility of an acquisition as permitted by this rule is disclosed in the offer document; and
    b. the acquisition is made no later than 14 days before the expiration of the offer period; and
    c. the acquisition is made only for cash; and
    d. the acquisition of any equity securities will not result in the offeror's and the offeror's associates' holding or controlling in total more than 20% of the voting rights in the target company (excluding any equity securities in respect of which the offeror has received acceptances of the offeror's offer) unless the offer has become unconditional; and
    e. the acquisition is notified to the Panel immediately.

37. **Position if consideration exceeds consideration specified in offer**
If the consideration paid in any acquisition under rule 36 exceeds the cash consideration or cash alternative consideration specified in the offer,—
    a. the offer is deemed to be varied under rule 27 as from the date of the acquisition so that the cash consideration or cash alternative consideration under the offer is equal to the consideration paid for the acquisition; and
    b. the provisions of this code relating to variation of an offer apply (with any necessary modifications).

Defensive tactics

38. **Defensive tactics restricted**

1. If a code company has received a takeover notice or has reason to believe that a bona fide offer is imminent, the directors of the company must not take or permit any action, in relation to the affairs of the code company, that could effectively result in—
    a. an offer being frustrated; or
    b. the holders of equity securities of the code company being denied an opportunity to decide on the merits of an offer.
2. Subclause (1) does not prevent the directors of a code company taking steps to encourage competing bona fide offers from other persons.
3. Subclause (1) is subject to rule 39.

39. **When action permitted**

The directors of a code company may take or permit the kind of action referred to in rule 38(1) if—

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

40. **Notice of meeting**

The notice of meeting containing the proposed resolution for the approval of the action referred to in rule 39(a) must contain, or be accompanied by,—

a. full particulars of the proposed action; and
b. the reasons for it; and
c. a statement explaining the significance of the resolution under this code.

Part 6
Offer procedure

Contents

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41. **Takeover notice**

1. The offeror must send to the prospective target company a notice in writing that—
    a. states the offeror's intention to make an offer under this code; and
2. contains, or is accompanied by, the information specified in Schedule 1 (except clauses 1 and 4) stated as at the date of the notice.The notice may contain, or be accompanied by, any additional information that the directors of the offeror determine could affect the decision of the offerees to accept or reject the offer.

42. **Notification obligations of target company**

1. Immediately on receipt of a takeover notice, the target company must,—
    a. if its voting securities are quoted on a registered exchange's market, inform the registered exchange in writing that a takeover notice has been received; or
    b. if its voting securities are not quoted on a registered exchange's market, do all that is reasonably practicable to ensure that all persons who will be offerees under the offer are informed in writing that the takeover notice has been received.
2. No later than 2 days after the record date, the target company must provide to the offeror a copy of the target company's securities register relating to the securities to which the offer relates as at the record date in electronic form (or in such other form as the target company and the offeror agree).

43. **Identifying offerees and sending of offer**

1. The offerees in respect of an offer are the persons shown as the holders of securities in the target company to which the offer relates on the securities register of the target company as at the record date.
2. The record date must be not more than 10 days before the date of the offer.
3. The offeror must send to the target company a notice in writing that specifies the record date for the purposes of the offer.
4. The notice referred to in subclause (3) must be given no later than 2 days before the record date.
5. The offeror must send the offer to the offerees on a date that is—
    a. No later than 3 days after the date of the offer specified under rule 44(1)(c); and
    b. during the period beginning 14 days, and ending 30 days, after the takeover notice relating to the offer has been sent to the target company.

6. Nothing in subclause (1) prevents the offeror from sending the offer to persons who acquire securities in the target company to which the offer relates after the record date.

44. **Offer document**

1. The offer must—
    a. be in writing; and
    b. be on the same terms and conditions as those set out in the takeover notice except for—
        i. conditions that have been satisfied or waived; and
        ii. consequential amendments; and
        iii. any variations to which the directors of the target company have given their prior written approval; and
    c. be dated; and
    d. contain, or be accompanied by,—
        i. the information specified in Schedule 1 stated as at the date of the offer; and
        ii. any additional information contained in, or that accompanied, the takeover notice under rule 41(2); and
2. a copy of the target company statement (if the target company statement has been given to the offeror under rule 46(a))The offer may contain, or be accompanied by, additional information of the kind described in rule 41(2).

45. **Despatch notice**

1. Immediately on sending the offer document to the offerees, the offeror must—
    a. send to the target company—
        i. a notice in writing stating that the offer document has been sent to the offerees; and
        ii. a copy of the offer document; and
    b. send to the registered exchange a copy of—
        i. the notice referred to in paragraph (a)(i); and
        ii. the offer document; and
    c. deliver to the Registrar of Companies for registration a copy of—
        i. the notice referred to in paragraph (a)(i); and
        ii. the offer document.
2. Subclause (1)(b) applies only if the offeror's or the target company's voting securities are quoted on the registered exchange's market.

46. **Target company statement**

The target company must—

a. either,—
    i. within 14 days after it receives the takeover notice (or any longer period as the offeror may allow), send to the offeror a statement containing, or accompanied by, the information specified in Schedule 2 to accompany the offer; or
    ii. within 14 days after it receives the despatch notice, send the statement referred to in subparagraph (i) to—
        A. every offeree; and
        B. the offeror; and

C. the registered exchange (if the voting securities of the target company or the offeror are quoted on the registered exchange's market); and

b. deliver a copy of the statement referred to in paragraph (a)(i) to the Registrar of Companies for registration—

i. immediately on receipt of the despatch notice (if the target company has sent the statement referred to in paragraph (a)(i) to the offeror under paragraph (a)(i)); or

ii. immediately on sending the statement referred to in paragraph (a)(i) to the persons referred to in paragraph (a)(ii) (if subparagraph (i) does not apply).

47. **Documents for Panel**

At the time that a person sends any of the documents referred to in rules 41 to 46, the person must also send a copy of the document to the Panel.

48. **Notification of altered offer document**

The offeror must notify the target company, as soon as practicable before it sends the offer document to the offerees, of all information to be included in the offer document that is altered from, or additional to, the information that was contained in, or accompanied, the takeover notice.

49. **Reimbursement of directors and target company**

1. Despite anything in the constitution of the target company, each director of the target company is entitled to have refunded to the director by the target company any expenses properly incurred by the director on behalf, and in the interests, of holders of equity securities of the target company in relation to an offer or a takeover notice.
2. The target company may recover from the offeror, as a debt due to the target company, any expenses properly incurred by the target company in relation to an offer or a takeover notice, whether as a result of refunds made under subclause (1) or otherwise.

Part 7
Compulsory acquisitions

Contents

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50. **Interpretation**

In this Part, unless the context otherwise requires,—

acquisition notice means the notice referred to in rule 54

compulsory sale, in relation to a code company, means that the outstanding security holders must sell their equity securities in the code company to the dominant owner

dominant owner, in relation to a code company, means a person who, after this code comes into force, becomes the holder or controller, or 2 or more persons acting jointly or in concert who, after this code comes into force, become the holders or controllers, of 90% or more of the voting rights in the code company (whether by reason of acceptances of an offer or otherwise)

outstanding securities, in relation to a code company, means all the equity securities in the code company that the dominant owner does not already hold or control

outstanding security holders, in relation to a code company, means the holders of the outstanding securities

voluntary sale, in relation to a code company, means that the outstanding security holders have the right to sell their equity securities in the code company to the dominant owner.

Rights and obligations

51. **Notification of dominant ownership**

If a person becomes a dominant owner in a code company, that person must immediately send a written notice of that fact to the code company, the Panel, and the

registered exchange (if any voting securities of the code company are quoted on the registered exchange's market).

52. **Dominant owner's right**
The dominant owner has the right to acquire all the outstanding securities in the code company in accordance with this Part.

53. **Outstanding security holder's right**
The outstanding security holders have the right to sell their outstanding securities in the code company to the dominant owner in accordance with this Part.

Acquisition notice

54. **Acquisition notice**
1. The dominant owner must, not later than 30 days after becoming the dominant owner, send a notice in writing to the outstanding security holders that complies with rule 55.
2. A copy of the notice referred to in subclause (1) must be—
    1. sent immediately to the code company, the Panel, and the registered exchange (if the voting securities of the code company are quoted on the registered exchange's market); and
    2. delivered immediately to the Registrar of Companies for registration.

55. **Contents of acquisition notice**
An acquisition notice must—
    a. state that the dominant owner holds or controls 90% or more of the voting rights in the code company; and
    b. state either—
        i. that the outstanding security holders must sell their equity securities in the code company to the dominant owner; or
        ii. that the outstanding security holders have the right to sell their equity securities in the code company to the dominant owner; and
    c. specify the consideration to be provided for the outstanding securities; and
    d. set out the outstanding security holders' rights under this Part; and
    e. specify the date on which the acquisition notice is sent to the outstanding security holders; and
    f. be accompanied by an instrument of transfer for the outstanding securities held by the outstanding security holder to whom the acquisition notice is sent; and
    g. specify the return address for the instrument referred to in paragraph (f).

Determination of consideration

56. **Dominant owner through acceptances of offer**
1. If a person becomes the dominant owner by reason of acceptances of an offer (whether or not the dominant owner has also acquired equity securities under rule 36), the consideration payable in respect of equity securities in any class must be the same as the consideration provided under the offer for equity securities in the same class.
2. Subclause (1) applies only if acceptances of the offer were received in respect of more than 50% of the equity securities that were the subject of the offer in the class in respect of which the consideration is to be determined.

3. If the offer provided for alternative considerations, then the consideration payable under subclause (1) is the consideration payable under the offer if an accepting offeree failed to choose an alternative or, if no provision to that effect was included in the offer, is the alternative consideration containing the greatest cash component.

57. **Determination of consideration in other cases**

1. If the consideration cannot be established under rule 56, the consideration specified in the acquisition notice—
    a. must be a cash sum certified as fair and reasonable by an independent adviser; and
    b. is the consideration payable for the outstanding securities.
2. Subclause (1)(b) does not apply if, within 14 days after sending the acquisition notice, the dominant owner receives written objections to the specified consideration from outstanding security holders who hold the lesser of—
    a. 2% or more of a class of equity securities; or
    b. 10% or more of the outstanding securities of a class.
3. If the dominant owner receives objections that together comply in all respects with subclause (2), the dominant owner must immediately refer to expert determination the amount of the consideration to be provided for the securities of the relevant class that must be a cash sum equal to the fair and reasonable value of those securities.
4. For the purposes of this rule, the fair and reasonable value of an equity security must be calculated by—
    a. first assessing the value of all the equity securities in the class of equity securities of which the equity security forms part; and
    b. then allocating that value pro rata among all the securities of that class.
5. Immediately on receipt of the expert determination, the dominant owner must send a copy of the expert determination to the Panel and to the registered exchange (if any voting securities of the target company are quoted on the registered exchange's market).

58. **Expert determination**

1. A reference to expert determination under rule 57(3) is a reference to an independent person appointed by the Panel.
2. The independent person acts as an expert and not as an arbitrator in making the determination.
3. The dominant owner must pay the costs of the expert determination.
4. The independent person must make the expert determination within 28 days after the date of his or her appointment to make the expert determination.

Payment of consideration and transfer of outstanding securities

59. **Return of instrument of transfer**

1. An outstanding security holder who receives an acquisition notice accompanied by an instrument of transfer may, within 21 days after the date on which the acquisition notice is sent, return to the dominant owner, at the address specified in the acquisition notice, the duly executed instrument of transfer along with any other documents that are necessary to enable the dominant owner to be registered as the holder of the securities belonging to the outstanding security holder.
2. Subclause (1) applies whether or not the outstanding security holder has objected to the specified consideration under rule 57(2).

60. **Payment of consideration to outstanding security holder**

1. If an outstanding security holder returns to the dominant owner the documents referred to in rule 59, the dominant owner must send the consideration specified in the acquisition notice to the outstanding security holder within 7 days after the dominant owner receives the documents referred to in that rule.
2. Subclause (1) applies whether or not there has been a reference to expert determination under rule 57(3).

61. **Delivery of consideration to code company**

1. If an outstanding security holder does not return to the dominant owner the documents referred to in rule 59, then, in the case of a compulsory sale, the dominant owner must, within 7 days after the expiration of the 21-day period referred to in rule 59,—
    a. deliver to the code company the consideration specified in the acquisition notice for the outstanding securities in respect of which the documents referred to in rule 59 have not been returned to the dominant owner; and
    b. send to the code company an instrument of transfer for those outstanding securities, executed on behalf of the outstanding security holder by the dominant owner or its agent.
2. Any consideration received by the code company under subclause (1)(a) must be held in trust for the outstanding security holders until it is claimed.
3. If the consideration is in cash, the cash must be deposited by the code company in an interest bearing trust account with a registered bank.
4. Subclause (1) applies whether or not there has been a reference to expert determination under rule 57(3).

62. **Position if consideration fixed by expert determination**

1. If the consideration fixed by expert determination under rule 57(3) exceeds the consideration specified in the acquisition notice, the dominant owner must immediately pay, in the same manner as the consideration specified in the acquisition notice is to be paid, the balance owing to—
    a. the outstanding security holders; or
    b. the code company.
2. If the consideration fixed by expert determination is less than the consideration specified in the acquisition notice, the dominant owner may recover the excess paid from—
    a. the outstanding security holder; or
    b. the code company (if the consideration is held by the code company).

63. **Registration of dominant owner as holder of outstanding securities**

1. In the case of a compulsory sale, the directors of the code company must register the dominant owner or its nominee as the holder of the outstanding securities on receipt by the code company of—
    a. the executed instruments of transfer and related documents received by the dominant owner in accordance with rule 59; and
    b. evidence to the reasonable satisfaction of the code company that the consideration has been sent to the outstanding security holders in accordance with rule 60; and
    c. the executed instrument or instruments of transfer and the consideration in accordance with rule 61.

2. In the case of a voluntary sale, the directors of the code company must register the dominant owner or its nominee as the holder of the outstanding securities on receipt by the code company of—
    a. the executed instruments of transfer and related documents received by the dominant owner in accordance with rule 59; and
    b. evidence to the reasonable satisfaction of the code company that the consideration has been sent to the outstanding security holders in accordance with rule 60.

Schedule 1
Information required in takeover notice

Contents

1. **Date**
The date of the offer.

2. **Offeror and its directors**
1. The name and address of the offeror.
2. The names of every director of the offeror (if the offeror is not an individual).

3. **Target company**
The name of the target company.

4. **Advice statement**
A statement in the following form, to be set out in a prominent position at the front of the offer document:
"IMPORTANT
If you are in doubt as to any aspect of this offer, you should consult a person authorised to undertake trading activities by [*name of registered exchange*] or a financial or legal adviser.
If you have sold all your shares in [*name of target company*], you should immediately hand this offer document and the accompanying acceptance form to the purchaser, or to the person authorised to undertake trading activities by [*name of registered exchange*] or other agent through whom the sale was made, to be passed to the purchaser."

5. **Offer terms**
All the terms and conditions of the offer.

6. **Ownership of equity securities of target company**
1. The number, designation, and percentage of equity securities of any class of the target company held or controlled by—
    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 holding or controlling more than 5% of the class, if within the knowledge of the offeror.

2. If any of the persons referred to in subclause (1) do not hold or control equity securities of the target company, a statement to that effect.

7. **Trading in target company equity securities**

1. If any of the persons referred to in clause 6(1) have, during the 6-month period before the date of the offer, acquired or disposed of any equity securities of the target company,—
    a. the number and designation of the equity securities; and
    b. the consideration for, and the date of, every transaction to which this subclause applies.
2. If no such equity securities were acquired or disposed of, a statement to that effect.

8. **Agreements to accept offer**

The names of any person who has agreed conditionally or unconditionally to accept the offer and the material terms of the agreement.

9. **Arrangements to pay consideration**

1. Confirmation by the offeror that resources will be available to the offeror sufficient to meet the consideration to be provided on full acceptance of the offer and to pay any debts incurred in connection with the offer (including the debts arising under rule 49).
2. A statement setting out the rights of the offeree under rule 34.

10. **Arrangements between offeror and target company**

Particulars of any agreement or arrangement (whether legally enforceable or not) made, or proposed to be made, between the offeror or any associates of the offeror, and the target company or any related company of the target company, in connection with, in anticipation of, or in response to, the offer.

11. **Arrangements between offeror, and directors and officers of target company**

Particulars of any agreement or arrangement (whether legally enforceable or not) made, or proposed to be made, between the offeror or any associates of the offeror, and any of the directors or senior officers of the target company or of any related company of the target company (including particulars of any payment or other benefit proposed to be made or given by way of compensation for loss of office, or as to their remaining in or retiring from office) in connection with, in anticipation of, or in response to, the offer.

12. **Financial assistance**

Particulars of any agreement or arrangement made, or proposed to be made, under which the target company or any related company of the target company will give (directly or indirectly) financial assistance for the purpose of, or in connection with, the offer.

13. **Market acquisitions of securities**

If the offer is a full offer for cash or with a cash alternative, a statement as to whether or not any person intends to acquire equity securities in the target company under rule 36.

14. **Likelihood of changes in target company**

1. A statement as to the general nature of any material changes likely to be made by the offeror in respect of the business activities of the target company and its subsidiaries.
2. Subclause (1) does not apply if—
    a. the offer is a full offer conditional on the offeror receiving acceptances that will result in the offeror being required to give an acquisition notice under rule 54; and
    b. the condition cannot be waived or varied.

15. **Pre-emption clauses in target company's constitution**

1. Particulars of any restriction on the right to transfer equity securities to which the offer relates that—
    a. is contained in the constitution of the target company; and
    b. has the effect of requiring the holders of the securities to offer the securities for purchase to members of the target company or to any other person before transferring the securities.
2. If there is any such restriction, the arrangements (if any) being made to enable the securities to be transferred.

16. **Escalation clauses**

Particulars of any agreement or arrangement (whether legally enforceable or not) under which—

a. any existing holder of equity securities in the target company will or may receive in relation to, or as a consequence of, the offer any additional consideration or other benefit over and above the consideration set out in the offer; or
b. any prior holder of equity securities in the target company will or may receive any consideration or other benefit as a consequence of the offer.

17. **Independent adviser's report**

1. If an independent adviser's report is required under rule 22,—
    a. the identity of the independent adviser; and
    b. a copy of the adviser's full report or a summary of the full report prepared by the adviser; and
    c. if only a summary of the full report is provided under paragraph (b),—
    d. a statement that the full report is available for inspection in New Zealand at the registered office or principal place of business of the offeror; and
        i. a statement that a copy of the full report will be sent to any offeree on request; and
        ii. a statement that the summary report is a fair summary and not misleading.
2. The full report and summary report must include—
    a. a statement of the qualifications and expertise of the adviser; and

    a statement that the adviser has no conflict of interest that could affect the adviser's ability to provide an unbiased report.

18. **Additional disclosures required if consideration includes securities**

1. If the consideration offered under the offer includes securities (within the meaning of the Securities Act 1978), the issuer of which is a public issuer that has a class of

equity securities that has been quoted on the registered exchange's market for at least 12 months before the date of the offer, the offeror must—

a. make available to offerees (on request) the most recent annual report of the issuer of the securities; and
b. disclose in the offer document or send with the offer document—
    i. the name of the issuer of the securities offered as consideration and its relationship to the offeror; and
    ii. the material terms and conditions of the securities; and
    iii. a copy of the most recent half-yearly report of the issuer relating to a period after the annual report referred to in paragraph (a), if any; and
    iv. a copy of the most recent interim report of the issuer relating to a period after the annual report referred to in paragraph (a), if any, or, if a copy of a half-yearly report has been disclosed under subparagraph (iii), a copy of any interim report of the issuer relating to a period after that half-yearly report, if any; and
    v. any other information that could reasonably be expected to be material to the making of a decision by the offerees to accept or reject the offer; and
    vi. if there is no information referred to in subparagraph (v), a statement to that effect.

2. Subclause (1) does not apply if the issuer is required by the Securities Act 1978 to register a prospectus in relation to the securities offered as consideration under the offer.
3. For the purposes of subclause (1),—
annual report means the annual report and financial statements (including the auditor's report on those financial statements) that the issuer is required by the rules of the registered exchange to send to equity security holders of the issuer
half-yearly report means the half-yearly report and half-yearly financial statements (including the auditor's report on such financial statements, if any) that the issuer is required by the rules of the registered exchange to send to equity security holders of the issuer
interim report means any interim report and interim financial statements (including the auditor's report on such financial statements, if any) that the issuer has sent to equity security holders of the issuer (other than the half-yearly report).

19. **Certificate**

1. A certificate in the following form signed by the persons specified in subclause (2): "To the best of our knowledge and belief, after making proper enquiry, the information contained in the offer document is, in all material respects, 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 offeror under the Takeovers Code."
2. The persons referred to in subclause (1) are,—
    a. if the offeror is an individual, the offeror or the offeror's agent authorised in writing; or
    b. if the offeror is not an individual,—
        i. the chief executive officer and the chief financial officer of the offeror, or their respective agents authorised in writing, or, if there is no chief executive officer or chief financial officer, the person or persons

fulfilling those roles respectively, or their respective agents authorised in writing; and

ii. 2 directors of the offeror (or the sole director of the offeror), not being the chief executive officer or the chief financial officer unless there is an insufficient number of other directors who must sign on behalf of the board of directors with the authority of a resolution of the board of directors.

Schedule 2
Information required in target company statement

Contents

1. **Date**
The date of the target company statement.

2. **Offer**
A brief identification of the offer to which the statement relates.

3. **Target company**
The name of the target company.

4. **Directors of target company**
The names of the directors of the target company.

5. **Ownership of equity securities of target company**

1. The number, designation, and the percentage of equity securities of any class of the target company held or controlled by—
    a. each director or senior officer of the target company and their associates; and
    b. any other person holding or controlling more than 5% of the class, to the knowledge of the target company.
2. If any of the persons referred to in subclause (1) do not hold or control equity securities of the target company, a statement to that effect.
3. The number of equity securities of the target company—
    a. that have, during the period specified in subclause (5), been issued to the directors and senior officers of the target company or their associates; or
    b. in which the directors and senior officers or their associates have, during the period specified in subclause (5), obtained a beneficial interest under any employee share scheme or other remuneration arrangement.
4. The price at which the securities in subclause (3) were issued or provided.
5. The period referred to in subclause (3) is the 2-year period that ends with the date of the target company statement.

6. **Trading in target company equity securities**

1. The number and designation of any equity securities of the target company acquired or disposed of by the persons referred to in clause 5(1)(a) during the 6-month period before the latest practicable date before the date of the target company statement, including the consideration for, and the date of, each such transaction.
2. If no equity securities were acquired or disposed of, a statement to that effect.

7. **Acceptance of offer**

The name of every person referred to in clause 5(1)(a) who has accepted, or intends to accept, the offer, and the number of securities in respect of which the person has accepted, or intends to accept, the offer.

8. **Ownership of equity securities of offeror**

1. If the offeror is a company, the number, designation, and percentage of equity securities of any class of the offeror held or controlled by the target company and each director and senior officer of the target company and their associates.
2. If none of the persons referred to in subclause (1) hold or control any equity securities of the offeror, a statement to that effect.

9. **Trading in equity securities of offeror**

1. If the offeror is a company,—
    a. the number and designation of any equity securities of the offeror that were acquired or disposed of by the persons referred to in clause 8 during the 6-month period referred to in clause 6(1); and
    b. the consideration for, and the date of, every such transaction.
2. If no such securities were acquired or disposed of, a statement to that effect.

10. **Arrangements between offeror and target company**

Particulars of any agreement or arrangement (whether legally enforceable or not) made, or proposed to be made, between the offeror or any associates of the offeror, and the target company or any related company of the target company, in connection with, in anticipation of, or in response to, the offer.

11. **Relationship between offeror, and directors and officers of target company**

1. Particulars of any agreement or arrangement (whether legally enforceable or not) made, or proposed to be made, between the offeror or any associates of the offeror, and any of the directors or senior officers of the target company or any related company of the target company (including particulars of any payment or other benefit proposed to be made or given by way of compensation for loss of office, or as to their remaining in or retiring from office) in connection with, in anticipation of, or in response to, the offer.
2. A statement as to whether any directors or senior officers of the target company are also directors or senior officers of the offeror, or any related company of the offeror, and to identify those persons.

12. **Agreement between target company, and directors and officers**

Particulars of any agreement or arrangement (whether legally enforceable or not) made, or proposed to be made, between the target company or any related company of the target company, and any of the directors or senior officers or their associates of the target company or its related companies, under which a payment or other benefit

may be made or given by way of compensation for loss of office, or as to their remaining in or retiring from office in connection with, in anticipation of, or in response to, the offer.

13. **Interests of directors and officers of target company in material contracts of offeror**

A statement as to whether any of the following persons have any interest in any material contract to which the offeror, or any related company of the offeror, is a party, and the particulars of the nature and extent of such interest—

a. any director or senior officer of the target company or their associates:
b. any person who, to the knowledge of the directors or the senior officers of the target company, holds or controls more than 5% of any class of equity securities of the target company.

14. **Additional information**

If, in the opinion of the directors of the target company, any information in the offer document is incorrect or misleading, any additional information within the knowledge of the target company that would make the information in the offer document correct or not misleading.

15. **Recommendation**

1. Either—
    a. a recommendation by the directors of the target company to accept or reject the offer and the reasons for such recommendation; or
    b. a statement that the directors of the target company are unable to make, or are not making, a recommendation and the reasons for not making a recommendation.
2. If any of the directors dissent from a recommendation or from any statement under subclause (1)(b) made by the directors or abstain from making a recommendation or any statement under subclause (1)(b), their names and their reasons for dissenting or abstaining.
3. If no recommendation is made, but all or any of the directors of the target company propose to make a recommendation, or to reconsider their decision not to make a recommendation, a statement to that effect and, if the directors consider it appropriate, a statement to the effect that offerees should not accept the offer in the meantime.

16. **Actions of target company**

1. Particulars of any material agreement or arrangement (whether legally enforceable or not) of the target company and its related companies entered into as a consequence of, in response to, or in connection with, the offer.
2. A statement as to whether there are any negotiations underway as a consequence of, in response to, or in connection with, the offer that relate to or could result in—
    a. an extraordinary transaction, such as a merger, amalgamation, or reorganisation, involving the target company or any of its related companies; or
    b. the acquisition or disposition of material assets by the target company or any of its related companies; or
    c. an acquisition of equity securities by, or of, the target company or any related company of the target company; or

d. any material change in the equity securities on issue, or policy relating to distributions, of the target company.

17. **Equity securities of target company**

1. Details of the issued equity securities in the target company and the rights of the holders in respect of capital, distributions, and voting.
2. The material terms of equity securities that are options, or rights to acquire, equity securities.

18. **Financial information**

1. A statement that the offeree is entitled to obtain from the target company a copy of the most recent annual report of the target company.
2. A copy of the most recent half-yearly report of the target company, if any, since the annual report referred to in subclause (1).
3. A copy of the most recent interim report of the target company, if any, since the annual report referred to in subclause (1), or, if a copy of a half-yearly report has been disclosed under subclause (2), a copy of any interim report of the target company relating to a period after that half-yearly report, if any.
4. All material changes in the financial or trading position, or prospects, of the target company since the annual report referred to in subclause (1) or a statement that there are no known material changes.
5. Any other information about the assets, liabilities, profitability, and financial affairs of the target company that could reasonably be expected to be material to the making of a decision by the offerees to accept or reject the offer.
6. For the purposes of this clause,—

   annual report means,—

   a. if any voting securities of the target company are quoted on the registered exchange's market, the annual report and financial statements (including the auditor's report on those financial statements) that the target company is required by the registered exchange to send to the target company's equity security holders; or
   b. if paragraph (a) does not apply, the annual report prepared in accordance with sections 208(1) and 211(1) of the Companies Act 1993 and sent to shareholders of the target company under section 209 of the Companies Act 1993

   half-yearly report means,—

   a. if any voting securities of the target company are quoted on the registered exchange's market, the half-yearly report and half-yearly financial statements (including the auditor's report on such financial statements, if any) that the issuer is required by the rules of the registered exchange to send to equity security holders of the issuer; or
   b. if paragraph (a) does not apply, any half-yearly report and half-yearly financial statements (including the auditor's report on those financial statements, if any) that have been sent to the shareholders of the target company

   interim report means any interim report and interim financial statements (including the auditor's report on such financial statements, if any) that the issuer has sent to equity security holders of the issuer (other than the half-yearly report).

19. **Independent advice on merits of offer**

1. The identity of the independent adviser who has provided a report under rule 21 and a copy of the adviser's full report or a summary of the full report prepared by the adviser.
2. If only a summary of the full report is provided under subclause (1),—
    a. a statement that the full report is available for inspection at a specified address; and
    b. a statement that a copy of the full report will be sent to any offeree on request; and
    c. a statement that the summary report is a fair summary and not misleading.
3. The full report and summary report must include—
    a. a statement of the qualifications and expertise of the adviser; and
    b. a statement that the adviser has no conflict of interest that could affect the adviser's ability to provide an unbiased report.

20. **Asset valuation**

If any information provided in the target company statement refers to a valuation of any asset,—

a. the date of the valuation, the identity of the valuer, and a summary of the valuation, that discloses the basis of computation and the key assumptions on which the valuation is based; and
b. an address or addresses where copies of the valuation are available for inspection and a statement that a copy of the valuation will be sent to any offeree on request.

21. **Prospective financial information**

If any information provided in the target company statement refers to prospective financial information, the principal assumptions on which the prospective financial information is based.

22. **Sales of unquoted equity securities under offer**

If the equity securities that are the subject of the offer are not quoted on a stock exchange, all the information that the target company has as to the number of those equity securities that have been disposed of in the 12 months ending on the latest practicable date before the date on which the target company statement is sent by the target company, and the consideration for those dispositions.

23. **Market prices of quoted equity securities under offer**

1. The closing price on each stock exchange where they are quoted (expressed in the currency in which they are quoted) of the equity securities of the target company that are the subject of the offer—
    a. on the latest practicable working day before the date on which the target company statement is sent by the target company; and
    b. on the last day on which the exchange was open for business before the date on which the target company received the takeover notice.
2. The highest and lowest closing market prices on each exchange, with the relevant date, during the 6 months before the date on which the target company received the takeover notice.

3. Particulars of any issue of equity securities, any changes in the equity securities on issue, and any distributions that could have affected the market prices referred to in this clause.
4. Any other information about the market price of the securities that would reasonably be expected to be material to the making of a decision by the offerees to accept or reject the offer.

24. **Other information**
Any other information not required to be disclosed by this schedule that could reasonably be expected to be material to the making of a decision by the offerees to accept or reject the offer.

25. **Approval of target company statement**
1. A statement that the contents of the target company statement have been approved by the board of directors of the target company.
2. If any of the directors of the target company do not approve of the statement, their names and their reasons for not approving.

26. **Certificate**
1. A certificate in the following form signed by the persons specified in subclause (2): "To the best of our knowledge and belief, after making proper enquiry, the information contained in or accompanying this statement is, in all material respects, 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."
2. The persons referred to in subclause (1) are—
    a. the chief executive officer and the chief financial officer of the target company, or their respective agents authorised in writing, or, if there is no chief executive officer or chief financial officer, the person or persons fulfilling those roles respectively, or their respective agents authorised in writing; and
    b. 2 directors of the target company (or the sole director of the target company), not being the chief executive officer or the chief financial officer unless there is an insufficient number of other directors who must sign on behalf of the board of directors with the authority of a resolution of the board of directors.

Martin Bell,
for Clerk of the Executive Council.

Explanatory Note

This note is not part of the order, but is intended to indicate its general effect.

This order approves under section 28(3) of the Takeovers Act 1993 the takeovers code recommended by the Takeovers Panel to the Minister of Commerce.

In accordance with section 28(4) of the Takeovers Act 1993, the code comes into force on the date in it; that is 1 July 2001.

Issued under the authority of the Acts and Regulations Publication Act 1989.
Date of notification in *Gazette*: 19 October 2000.
This order is administered in the Ministry of Economic Development.

APPENDIX 2 – TAKEOVERS CODE MARKED-UP FOR CHANGES PROPOSED IN THIS DISCUSSION PAPER

Takeovers Code Approval Order 2000 (Incorporating proposed amendments)

Contents

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1. **Title**
   This code is the Takeovers Code.

2. **Commencement**
   This code comes into force on 1 July 2001.

Part 1
Preliminary provisions

Interpretation

3. **Interpretation**

1. In this code, unless the context otherwise requires,—
   acquisition notice has the meaning set out in rule 50
   Act means the Takeovers Act 1993
   code company means a company that—
   a. is a party to a listing agreement with a registered exchange:
   b. is not a party to a listing agreement with a registered exchange but that was a party to a listing agreement with a registered exchange at any time during the period of 12 months before any date or the occurrence of any event referred to in this code:
   c. has 50 or more shareholders and $20,000,000 or more of assets
   company has the same meaning as in section 2(1) of the Companies Act 1993
   compulsory sale has the meaning set out in rule 50
   control, in relation to a voting right, means having, directly or indirectly, effective control of the voting right; and **controller** has a corresponding meaning
   despatch notice means the notice referred to in rule 45
   director,—
   a. in relation to a company, means a person occupying the position of a director of the company, by whatever name called; and
   b. in relation to a partnership (other than a special partnership), means a partner; and
   c. in relation to a special partnership, means a general partner; and

d. in relation to a body corporate, or unincorporate, other than a company, partnership, or special partnership, means a person occupying a position in the body that is comparable with that of a director of a company; and
e. in relation to any other person, means that person; and
f. includes a person in accordance with whose directions or instructions a person referred to in paragraphs (a) to (d) may be required or is accustomed to act in respect of the exercise of duties or powers as, or comparable to those of, a director

dominant owner has the meaning set out in rule 50

equity security—

a. means any interest in or right to a share in, or in the share capital of, a company (whether carrying voting rights or not); and
b. includes an option or right to acquire any such interest or right unless that option or right is exercisable only with the agreement of the issuer; but
c. does not include redeemable securities that are redeemable only for cash

full offer means an offer under rule 8

further required voting securities has the meaning set out in rule 12(3)

independent adviser means an adviser whom the Panel considers is independent and who is approved by the Panel for the purposes of this code

offer means an offer to which this code applies for voting securities and any other securities to which the offer is required to extend under this code

offer document means the offer and all accompanying information referred to in rule 44

offer period means the period referred to in rule 24

offeree means a person to whom an offer is made

offeror means a person who makes an offer

ordinary resolution, in relation to a code company, means a resolution that is passed at a meeting of the holders of voting securities of the code company by a simple majority of the votes of those holders who voted on the resolution

outstanding securities has the meaning set out in rule 50

outstanding security holders has the meaning set out in rule 50

Panel means the Takeovers Panel established under Part I of the Act

partial offer means an offer under rule 9

record date, in relation to an offer, means,at any time, the date at that time most recently specified by an offeror under rule 43(3)

registered exchange has the meaning set out in section 2(1) of the Securities Markets Act 1988

registered exchange's market has the meaning set out in section 2(1) of the Securities Markets Act 1988

related company has the same meaning as in section 2(3) of the Companies Act 1993

specified percentage means the percentage referred to in rule 9

subsidiary has the same meaning as in sections 5 to 8 of the Companies Act 1993

surplus acceptance voting securities has the meaning set out in rule 12(3)

takeover notice means the notice referred to in rule 41

target company means a code company—

a. whose voting securities are the subject of an offer; or
b. that has received a takeover notice

target company statement means the statement referred to in rule 46

variation notice means the notice referred to in rule 28

voluntary sale has the meaning set out in rule 50

voting right means a currently exercisable right to cast a vote at meetings of shareholders of a company, not being a right to vote that is exercisable only in 1 or more of the following circumstances:

a. during a period in which a payment or distribution (or part of a payment or distribution) in respect of the security that confers the voting right is in arrears or some other default exists:
b. on a proposal that affects rights attached to the security that confers the voting right:
c. on a proposal to put the company into liquidation:
d. on a proposal for the disposal of the whole, or a material part, of the property, business, and undertaking of the company:
e. during the liquidation of the company:
f. in respect of a special, immaterial, or remote matter that is inconsequential to control of the company

voting security means an equity security that confers a voting right.

2. If, under this code, the time within which or the day on which any thing is to be done expires or falls on a day other than a working day as defined in section 2 of the Companies Act 1993, the time so limited is extended to, and such thing may be done, on the next day that is a working day as so defined.

4. **Meaning of associate**

1. For the purposes of this code, a person is an **associate** of another person if—
   a. the persons are acting jointly or in concert; or
   b. the first person acts, or is accustomed to act, in accordance with the wishes of the other person; or
   c. the persons are related companies; or
   d. the persons have a business relationship, personal relationship, or an ownership relationship such that they should, under the circumstances, be regarded as associates; or
   e. the first person is an associate of a third person who is an associate of the other person (in both cases under any of paragraphs (a) to (d)) and the nature of the relationships between the first person, the third person, and the other person (or any of them) is such that, under the circumstances, the first person should be regarded as an associate of the other person.
2. A director of a company or other body corporate is not an associate of that company or body corporate merely because he or she is a director of that company or body corporate.

No contracting out of code

5. **No contracting out of code**

This code has effect despite any provision to the contrary in any agreement, constitution of a company or similar document relating to another body corporate, resolution of the security holders of a company or of any other body corporate, deed, or otherwise.

Part 2
Fundamental rule and exceptions

Contents

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6. **Fundamental rule**

1. Except as provided in rule 7, a person who holds or controls—
    a. No voting rights, or less than 20% of the voting rights, in a code company may not become the holder or controller of an increased percentage of the voting rights in the code company unless, after that event, that person and that person's associates hold or control in total not more than 20% of the voting rights in the code company:
    b. 20% or more of the voting rights in a code company may not become the holder or controller of an increased percentage of the voting rights in the code company.
2. For the purposes of subclause (1), if—
    a. a person and any other person or persons acting jointly or in concert together become the holders or controllers of voting rights, that person is deemed to have become the holder or controller of those voting rights:
    b. a person or persons together hold or control voting rights and another person joins that person or all or any of those persons in the holding or controlling of those voting rights as associates, the other person is deemed to have become the holder or controller of those voting rights:
    c. 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.

7. **Exceptions to fundamental rule**

A person may become the holder or controller of an increased percentage of the voting rights in a code company—

a. by an acquisition under a full offer (the main provisions are contained in rule 8, Parts 4 to 6, and Schedules 1 and 2):
b. by an acquisition under a partial offer (the main provisions are contained in rules 9 to 14, Parts 4 to 6, and Schedules 1 and 2):
c. by an acquisition by the person of voting securities in the code company or in any other body corporate from 1 or more other persons if the acquisition has been approved by an ordinary resolution of the code company in accordance with this code (the main provisions are contained in rules 15 and 17 to 19):
d. by an allotment to the person of voting securities in the code company or in any other body corporate if the allotment has been approved by an ordinary resolution of the code company in accordance with this code (the main provisions are contained in rules 16 to 19):
e. if—
    i. the person holds or controls more than 50%, but less than 90%, of the voting rights in the code company; and

ii. the resulting percentage of the total voting rights in the code company held or controlled by the person does not exceed the lowest percentage of the total voting rights in the code company held or controlled by the person in the 12-month period ending on (and inclusive of) the date of the increase by more than 5 :

f. if the person already holds or controls 90% or more of the voting rights in the code company.

Part 3
Specific requirements for exceptions to fundamental rule

Contents

Subpart 1— Full offers

8. **Full offer**

1. An offer may be made under this code for all the voting securities of the target company not already held by the offeror.
2. A full offer must include offers in respect of all the securities in each class of equity securities, whether voting or non-voting, of the target company (other than those that are already held by the offeror).
3. If there is more than 1 class of voting securities included in a full offer, the consideration and terms offered for each class of voting securities must be fair and reasonable as between the classes of voting securities.
4. If non-voting securities are included in a full offer, the consideration and terms offered for non-voting securities must be fair and reasonable in comparison with the consideration and terms offered for voting securities and as between classes of non-voting securities.

Subpart 2— Partial offers

General provisions

9. **Partial offer**

1. An offer may be made under this code for less than all the voting securities of a target company.
2. A partial offer must be extended to all holders of voting securities of the target company other than the offeror.
3. If there is only 1 class of voting securities of the target company, a partial offer must be made for a specified percentage of the voting securities of the target company not already held or controlled by the offeror.
4. If there is more than 1 class of voting securities of the target company, a partial offer must be made for a specified percentage of the voting securities of each class not already held or controlled by the offeror, and such specified percentage must be the same percentage in respect of each class.
5. The consideration and terms offered for each class of voting securities of the target company must be fair and reasonable as between the classes of voting securities.

10. **When offeror does not hold or control more than 50% of voting rights**

1. If, on the date of a partial offer, the offeror does not hold or control more than 50% of the voting rights in the target company, the partial offer must be for a specified percentage of the voting securities of each class not already held or controlled by the offeror which, when taken together with the voting securities already held or controlled by the offeror, will confer either—
    a. more than 50% of the voting rights in the target company; or
    b. a lesser percentage of the voting rights in the target company if approval is obtained in accordance with the following provisions:
        i. the takeover notice and the offer must include a statement that approval is sought under rule 10 of the Takeovers Code and that the offer is conditional on approval being obtained:
        ii. the offer must be accompanied by a separate approval document providing for the offeree to approve or object to the offeror making an offer for the lesser percentage:
        iii. approval under this rule is obtained if the offerees so approving hold more voting rights in the target company than are held by offerees so objecting:
        iv. for the purposes of subparagraph (iii), voting rights held by the offeror and its associates must be disregarded:
        v. for an approval or objection to be valid for the purposes of this rule, the completed approval document must be received by the target company or its agent before the expiration of the offer period.
    c. A target company, or its agent, that receives an approval or objection before the expiration of the offer period must, if requested by the offeror, send a copy of the approval or objection to the offeror within 2 days of its receipt.

Excess acceptances

11. **Excess acceptances: application**
If a partial offer is accepted in respect of more securities than those sought by the offeror, rules 12 and 13 apply.

12. **Excess acceptances: 1 class of voting securities**

1. If there is only 1 class of voting securities included in the partial offer, the offeror must take up from each offeree the lesser of—
    a. the number of the offeree's securities that represents the specified percentage of the voting securities held by the offeree; or
    b. the number of securities in respect of which the offeree has accepted the offer.
2. If the number of voting securities that the offeror takes up under subclause (1) is less than the number of voting securities sought by the offeror under the offer, the offeror must acquire the further required voting securities by taking up, from each offeree with surplus acceptance voting securities, voting securities bearing the same proportion to the offeree's surplus acceptance voting securities as the further required voting securities bear to the total surplus acceptance voting securities.
3. For the purposes of this rule and rule 13,—
further required voting securities means the balance of voting securities required by an offeror
surplus acceptance voting securities means the voting securities in respect of which an offer has been accepted, but that have not been taken up under subclause (1).

13. **Excess acceptances: more than 1 class of voting securities**
If there is more than 1 class of voting securities included in the partial offer,—
    a. rule 12 applies in respect of each class of voting securities separately; and
    b. if the application of paragraph (a) does not provide the offeror with the voting securities sought by the offeror under the partial offer, rule 12(2) and (3) applies (with any necessary modifications) in relation to the—
        i. total remaining surplus acceptance voting securities of all classes; and
        ii. total remaining further required voting securities of all classes needed to bring the voting rights acquired under the partial offer up to the total voting rights conferred by the voting securities sought under the partial offer; and
    c. if the voting securities confer different voting rights as between classes, the number of surplus acceptance voting securities taken up from each offeree under paragraph (b) must be calculated by reference to the—
        i. voting rights conferred by each remaining surplus acceptance voting security; and
        ii. voting rights conferred by the total remaining surplus acceptance voting securities; and
        iii. remaining voting rights sought under the partial offer.

14. **Voting securities subject to disposition**
The number of voting securities that may be disposed of by an offeree under a partial offer in accordance with the terms of the offer and this code must be determined by reference to the number of voting securities of each class under offer held by the offeree at the expiration of the offer period, as recorded in the securities register of the target company.

Subpart 3— Acquisitions and allotments

Notice of meeting

15. **Notice of meeting: acquisition of voting securities**

The notice of meeting containing the proposed resolution in respect of an acquisition of voting securities referred to in rule 7(c) must contain, or be accompanied by,—

a. the identity of the persons acquiring and disposing of the voting securities; and
b. particulars of the voting securities to be acquired, including—
    i. the number being acquired; and
    ii. the percentage of all voting securities that that number represents; and
    iii. the percentage of all voting securities that will be held or controlled by the person acquiring the voting securities after completion of the acquisition;
    iv. the aggregate of the percentages of all voting securities in the Code company that will be held or controlled by that person and that person's associates after completion of the acquisition; and
c. if the voting securities being acquired are voting securities of a body corporate other than the code company,—
    i. the number of voting securities in the code company that are held or controlled by that body corporate; and
    ii. the percentage of the total voting securities of the code company that that number represents; and
d. the consideration for the acquisition or the manner in which the consideration will be determined and when the consideration is payable; and
e. the reasons for the transaction; and
f. a statement to the effect that the acquisition, if approved, will be permitted under rule 7(c) of the Takeovers Code as an exception to rule 6 of the Takeovers Code; and
g. a statement by the person acquiring the voting securities setting out particulars of any agreement or arrangement (whether or not legally enforceable) that has been, or is intended to be, entered into between the person and any other person (other than between that person and the person disposing of the voting securities in respect of the matters referred to in paragraphs (a) to (e)) relating to the acquisition, holding, or control of the voting securities to be acquired, or to the exercise of voting rights in the code company; and
h. the report from an independent adviser that complies with rule 18; and
i. the statement by the directors of the code company referred to in rule 19.

16. **Notice of meeting: allotment of voting securities**

The notice of meeting containing the proposed resolution in respect of an allotment of voting securities referred to in rule 7(d) must contain, or be accompanied by,—

a. the identity of the allottee; and
b. particulars of the voting securities to be allotted, including—
    i. the number being allotted; and
    ii. the percentage of the aggregate of all existing voting securities and all voting securities being allotted that that number represents; and
    iii. the percentage of all voting securities that will be held or controlled by the person to whom the voting securities are being allotted after completion of the allotment;

iv. the aggregate of the percentages of all voting securities in the Code company that will be held or controlled by that person and that person's associates after completion of the allotment; and

c. if the voting securities being allotted are voting securities of a body corporate other than the code company—
   i. the number of voting securities in the code company that are held or controlled by that body corporate; and
   ii. the percentage of the total voting securities of the code company that that number represents; and
d. the issue price for the voting securities to be allotted and when it is payable; and
e. the reasons for the allotment; and
f. a statement to the effect that the allotment, if approved, will be permitted under rule 7(d) of the Takeovers Code as an exception to rule 6 of the Takeovers Code; and
g. a statement by the allottee setting out particulars of any agreement or arrangement (whether legally enforceable or not) that has been, or is intended to be, entered into between the allottee and any other person (other than between the allottee and the code company in respect of the matters referred to in paragraphs (a) to (e)) relating to the allotment, holding, or control of the voting securities to be allotted, or to the exercise of voting rights in the code company; and
h. the report from an independent adviser that complies with rule 18; and
i. the statement by the directors of the code company referred to in rule 19.

Voting restrictions

17. **Voting restrictions**

1. The persons acquiring and disposing of the securities and their associates must not vote on a resolution for the approval of the acquisition referred to in rule 7(c).
2. The allottee and its associates must not vote on a resolution for the approval of the allotment referred to in rule 7(d).

Independent adviser's report

18. **Independent adviser's report**

1. 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.
2. The report that is to be contained in, or to accompany, the notice of meeting referred to in rule 15 or rule 16 (as the case may be) may be either the full report given by the independent adviser or a summary report prepared by the adviser.
3. If only a summary of the independent adviser's full report is contained in, or accompanies, the notice of meeting,—
   a. the full report must be available for inspection at the registered office of the code company on and after the date of the notice of meeting; and
   b. a copy of the full report must be provided to any person entitled to attend the meeting on request.
4. The full report and any summary report of an independent adviser must include—

a. a statement of the qualifications and expertise of the adviser; and
b. a statement that the adviser has no conflict of interest that could affect the adviser's ability to provide an unbiased report; and
c. if the report is a summary report, a statement that—
    i. the summary report is a fair summary and not misleading; and
    ii. the full report is available for inspection at the registered office of the code company on and after the date of the notice of meeting; and
    iii. a copy of the full report will be sent to any person entitled to attend the meeting on request.

Directors' statement

19. **Directors' statement**

1. The directors of the code company must—
    a. provide a written statement as to whether they recommend approval or disapproval of any proposed acquisition under rule 7(c) or allotment under rule 7(d) and give their reasons; or
    b. provide a written statement that the directors of the code company are unable to make, or are not making, a recommendation and give their reasons.
2. If any of the directors dissent from a recommendation or from any statement under subclause (1)(b) made by the directors or abstain from making a recommendation or any statement under subclause (1)(b), their names and their reasons for dissenting or abstaining must be stated.

19A. **Documents for Panel in respect of shareholder meetings**

1. At the time that a notice of meeting is sent under rule 15 or rule 16, the Code company must send a copy of the notice of meeting and any document accompanying that notice to the Panel.
2. At the time that any person sends any other document to the holders of voting securities in respect of a meeting required by rule 15 or rule 16, the person must also send a copy of the document to the Panel.
3. At the same time as any document is sent to the Panel under subclause (1) or (2), an electronic copy of the document must, if practicable, be sent to the Panel.

Part 4
Code offers
General provisions

Contents

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20. **Same terms and consideration**
An offer must be made on the same terms and provide the same consideration for all securities belonging to the same class of equity securities under offer.

21. **Independent adviser's report**
The directors of a target company must obtain a report from an independent adviser on the merits of an offer.

22. **Independent adviser's report on fairness between classes**

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).
4. The report must contain the information specified in Schedule 3.

23. **Minimum acceptance condition**

1. If, on the date of an offer, the offeror does not hold or control more than 50% of the voting rights in the target company, the offer must be conditional on the offeror receiving acceptances in respect of voting securities that, when taken together with voting securities already held or controlled by the offeror, confer—

a. more than 50% of the voting rights in the target company; or
b. in the case of a partial offer, any lesser percentage approved under rule 10(1)(b).

2. The offeror must not take up any equity securities under the offer unless the condition referred to in subclause (1) is satisfied by the end of the offer period.

24. **Offer period**

1. An offer must specify the period for which it will remain open and, subject to rules 25(4) and 26(1), must remain open for that period.
2. The offer period must—
   a. commence with the date of the offer; and
   b. be not shorter than 30 days, and not longer than 90 days.
3. If the offer is a full offer subject to conditions requiring a minimum level of acceptances, all of which have been satisfied or waived before the expiry of the maximum period permitted under subclause (2), the offer period may be extended beyond that maximum period, but no further beyond that period than the date which is 60 days from the date on which the last of such conditions to be satisfied or waived is satisfied or waived (and the additional period is deemed to be included in the offer period for the purposes of this Code unless otherwise expressly provided).

25. **Conditions**

1. An offer may be subject to any conditions, except those that depend on the judgement of the offeror or any associate of the offeror, or the fulfilment of which is in the power, or under the control, of the offeror or any associate of the offeror.
2. An offer that is subject to any conditions must specify a date by which the offer is to become unconditional.
3. The specified date referred to in subclause (2) must not be later than 14 days, or, if the acquisition requires statutory approval, 30 days, after the end of the offer period (excluding any part of the offer period that is extended under rule 24(3) beyond the maximum period otherwise permitted under rule 24(2)).
4. No condition contained in the offer has effect beyond the specified date referred to in subclause (3), and the offer lapses if it does not become unconditional by that specified date.
5. If an offer has become unconditional, both in respect of any minimum acceptance condition referred to in rule 23 and in respect of any conditions referred to in this rule, the offeror must immediately send a written notice to that effect to—
   a. the target company; and
   b. the Panel; and
   c. the registered exchange (if any voting securities of the target company are quoted on the registered exchange's market).

26. **Withdrawal or lapse of offer**

1. An offer may be withdrawn only with the consent of the Panel.
2. An offeror must immediately send a written notice that the offer is withdrawn or has lapsed in accordance with the terms of the offer to—
   a. the target company; and
   b. the Panel; and
   c. the registered exchange (if any voting securities of the target company are quoted on the registered exchange's market).

Variation of offer

27. **Permissible variations**

The offeror may vary the offeror's offer only if the variation is to do any of the following things:

a. to increase an existing component or components of the consideration:
b. to add a cash component to the consideration:
c. to include in the offer a cash alternative (if the directors of the target company have given their prior written approval):
d. to extend the offer period, but not beyond the maximum period permitted under rule 24:
e. if the offer period is extended, to extend the date by which the offer is to become unconditional, provided that:
    1. that extension may be no longer than the extension of the offer period; and
    2. the extended date must not be later than the latest date permitted under rule 25(3).

28. **Variation notice**

1. Subject to subclause (2), an offeror must immediately send a written notice of any variation of the offeror's offer to—
    a. every offeree; and
    b. the target company; and
    c. the Panel; and
    d. the registered exchange (if any voting securities of the target company are quoted on the registered exchange's market).
2. If the offer is unconditional and the variation only extends the offer period, the notice referred to in subclause (1) need not be sent to offerees who have already accepted the offer.
3. If the offer is subject to conditions which have not been satisfied or waived and the variation extends the offer period, the notice referred to in subclause (1) must specify the date by which the offer is to become unconditional.

29. **Timing of variation**

1. An offer may not be varied, and a variation notice may not be sent, later than 14 days before the end of the offer period.
2. The offer must remain open for at least 14 days after a variation notice has been sent.

a. Subclause (1) does not apply to any variation of an offer solely for the purposes of extending the offer period (or solely for the purposes of extending the offer period and the date by which the offer is to become unconditional) if-the offer was not subject to
    any conditions requiring a minimum level of acceptances; or

    b. any such conditions have been satisfied or waived.

30. **Further reports required for certain variations**

If any of rules 8(3) and (4) and 9(5) apply to an offer and the offer is to be varied under any of rule 27(a) to (c),—

a. a further report must be obtained by the offeror under rule 22 in relation to the offer as proposed to be varied; and

b. the variation notice must contain, or be accompanied by, the information set out in clause 17 of Schedule 1 in relation to the further report.

31. **Increases in consideration available to all accepting parties**

1. If a variation to an offer increases the consideration offered, the offeror must provide the increased consideration to each person whose securities are taken up, whether or not the person accepted the offer before or after the variation was made.
2. If a variation to an offer includes a cash alternative in the offer, or increases an existing cash alternative in the offer, the offeror must give all acceptors, including those who have accepted any alternative consideration before the variation is made, the opportunity to take the cash alternative as consideration.
3. If a variation to an offer increases a non-cash alternative in the offer, the offeror must give all acceptors, including those who have accepted any cash alternative before the variation is made, the opportunity to take the non-cash alternative as consideration.

32. **Additional consideration relating to variation**

If an offer is varied under rule 27(a) or (b) after the consideration has been sent to persons who have accepted the offer, the additional consideration to be provided as a consequence of the variation must be sent to those persons no later than 7 days after the date on which the offer is varied.

Consideration

33. **Offer to specify date for payment of consideration**

1. The offer must specify a date by which the consideration for the offer must be sent to the persons whose securities are taken up under the offer.
2. The date referred to in subclause (1) must not be later than 7 days after the later of—
    a. the date on which the offer becomes unconditional; or
    b. the date on which an acceptance is received; or
    c. the end of the offer period first specified in the offer under rule 24(2).

34. **Withdrawal of acceptance for non-payment of consideration**

1. If the consideration is not sent within the period specified in the offer to any person whose securities are taken up under the offer, the person may withdraw acceptance of the offer—
    a. by notice in writing to the offeror; but only
    b. after the expiration of 7 days' written notice to the offeror of the person's intention to do so.
2. However, the right to withdraw acceptance of the offer does not apply if the person receives the consideration during the 7-day period referred to in subclause (1)(b).

Part 5
Dealings and defensive tactics
Certain dispositions and acquisitions

Contents

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35. **Dispositions**
During the offer period, neither the offeror nor any person acting jointly or in concert with the offeror may dispose of any equity securities in the target company other than to an offeror under another offer that is made under this code.

36. **Acquisitions**
During the offer period, the offeror, any related company of the offeror, any person acting jointly or in concert with the offeror, or any of the directors of any of them, must not acquire any equity securities in the target company otherwise than under the offer unless—
a. the offeror has made a full offer for cash, or a full offer with a cash alternative; and

b. the acquisition is made no later than 14 days before the expiration of the offer period; and
c. the acquisition is made only for cash; and
d. the acquisition of any equity securities will not result in the offeror's and the offeror's associates' holding or controlling in total more than 20% of the voting rights in the target company (excluding any equity securities in respect of which the offeror has received acceptances of the offeror's offer) unless the offer has become unconditional; and
e. The day following the day on which any such acquisition takes place, the offeror notifies the aggregate number of securities acquired on that day and the average price paid under those acquisitions to the target company and the Panel, and, on the same day as such notice is given-
    1. if any voting securities of the target company or offeror or any holding company of the offeror are quoted on a registered exchange’s market, the offeror notifies the registered exchange of such information; or
    2. if no voting securities of the target company or offeror or any holding company of the offeror are quoted on a registered exchange’s market, the offeror releases such information to the principal daily newspapers in New Zealand.

37. **Position if consideration exceeds consideration specified in offer**

If the consideration paid in any acquisition under rule 36 exceeds the cash consideration or cash alternative consideration specified in the offer,—

a. the offer is deemed to be varied under rule 27 as from the date of the acquisition so that the cash consideration or cash alternative consideration under the offer is equal to the consideration paid for the acquisition; and
b. the provisions of this code relating to variation of an offer apply (with any necessary modifications).

Defensive tactics

38. **Defensive tactics restricted**

1. If a code company has received a takeover notice or has reason to believe that a bona fide offer is imminent, the directors of the company must not take or permit any action, in relation to the affairs of the code company, that could effectively result in—
    a. an offer being frustrated; or
    b. the holders of equity securities of the code company being denied an opportunity to decide on the merits of an offer.
2. Subclause (1) does not prevent the directors of a code company taking steps to encourage competing bona fide offers from other persons.
3. Subclause (1) is subject to rule 39.

39. **When action permitted**

The directors of a code company may take or permit the kind of action referred to in rule 38(1) if—

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

40. **Notice of meeting**

The notice of meeting containing the proposed resolution for the approval of the action referred to in rule 39(a) must contain, or be accompanied by,—

a. full particulars of the proposed action; and
b. the reasons for it; and
c. a statement explaining the significance of the resolution under this code.

Part 6
Offer procedure

Contents

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41. **Takeover notice**

1. The offeror must send to the prospective target company a notice in writing that—
    a. states the offeror's intention to make an offer under this code;
    b. contains, or is accompanied by, a certificate in the form specified in clause 19(1) of Schedule 1 signed by the persons specified in clause 19(2) of Schedule 1, together with all other information specified in Schedule 1 (except clauses 1 and 4) stated as at the date of the notice; and
    c. if a report is required under rule 22, it is accompanied by that report
2. Subject to rule 41(3), the notice may contain, or be accompanied by, any additional information that the directors of the offeror determine could affect the decision of the offerees to accept or reject the offer.
3. The notice may not contain, or be accompanied by, any reference to the report (if any) required under rule 22, except as specified in clause 17 of Schedule 1.
4. Where securities are offered as consideration or part consideration for the offer, the notice in respect of the offer must be accompanied by each prospectus and/or investment statement and/or other offering document which is required, in New Zealand or under the law of any other jurisdiction in which the offer of the securities is to be made, to be provided to persons offered those securities or to be deposited or registered with any governmental body in respect of that offering.
5. If voting securities of the target company or offeror or any holding company of the offeror are quoted on any registered exchange's market, the offeror must, on sending the notice under subclause (1), immediately send a copy of the notice (and any other document sent to the prospective target company under rule 41) to the registered exchange. Each copy shall, where possible, be provided electronically.
6. The offeror must send a copy of the notice (and/or any other document sent to the prospective target company under rule 41), without charge, to any person requesting it within 1 day of receiving the request. Each copy shall, if requested, where possible, be provided electronically.

42. **Notification obligations of target company**

1. Immediately on receipt of a takeover notice, the target company must,—
    a. if any of its voting securities are quoted on a registered exchange's market, inform the registered exchange in writing that a takeover notice has been received and provide a copy of the notice (and any other document sent to the target company under rule 41) to the registered exchange (where possible, electronically); and

b. if its voting securities are not quoted on a registered exchange's market, do all that is reasonably practicable to ensure that all persons who will be offerees under the offer are informed in writing that the takeover notice has been received.

1A. **Notification of additional classes**

If the offer notified in a takeover notice does not extend to each class of the target company's equity securities (in the case of a full offer) or each class of the target company's voting securities (in the case of a partial offer), the target company must, no later than 2 days after receiving the takeover notice, provide to the offeror a notice containing a description of each class of the target company's equity securities (in the case of a full offer) or voting securities (in the case of a partial offer) not already included in that offer, and containing sufficient information about each such class (including, in particular, the terms of each such class and the number of securities in each such class on issue) to enable an offer for each such class to be formulated and to enable an independent adviser to provide a certificate or a revised certificate (as the case may be) under rule 22(2).

1B. **Notification of no additional classes**

If the offer notified in a takeover notice does extend to each class of the target company's equity securities (in the case of a full offer) or each class of the target company's voting securities (in the case of a partial offer), the target company must, no later than 2 days after receiving the takeover notice, provide to the offeror a notice confirming that all relevant securities have been identified in the takeover notice.

2. No later than 2 days after any record date, the target company must provide to the offeror a copy of the target company's securities register relating to the securities to which the offer relates as at the record date in electronic form (or in such other form as the target company and the offeror agree).

3. The target company must send a copy of the notice (and/or any other document sent to the prospective target company under rule 41), without charge, to any person requesting it within 1 working day of receiving such a request. Each copy shall, if requested, where possible be provided electronically.

43. **Identifying offerees and sending of offer**

1. The offerees in respect of an offer are the persons shown as the holders of securities in the target company to which the offer relates on the securities register of the target company as at the record date.
2. The record date must be not more than 10 days before the date of the offer.
3. The offeror must send to the target company a notice in writing that specifies the date which is to be the record date for the purposes of the offer. The offeror may give further notices under this rule specifying a replacement date as the record date for the purposes of the offer .
4. Each notice referred to in subclause (3) must be given no later than 2 days before the record date to which the notice relates.
5. The offeror must send the offer to the offerees on a date that is—

a. No later than 3 days after the date of the offer specified under rule 44(1)(c); and
b. during the period beginning 14 days, and ending 30 days, after the takeover notice relating to the offer has been sent to the target company.

6. Nothing in subclause (1) prevents the offeror from sending the offer to persons who acquire securities in the target company to which the offer relates after the record date.

44. **Offer document**

1. The offer must—
    a. be in writing; and
    b. be on the same terms and conditions as those set out in the takeover notice except for—
        i. conditions that have been satisfied or waived; and
        ii. consequential amendments; and
        iii. any variations to which the directors of the target company have given their prior written approval; and
        iv. any variation which provides for the offer to be extended to any additional class of securities identified in a notice given under rule 42(1A) (and any explanation of, and/or additional information required to be included in or accompany the notice as a result of that extension), provided that notice of the variation, accompanied by a report or amended report (as the case may be) under rule 22, is given to the target company within 5 days of the offeror receiving that notice;
    c. be dated; and
    d. contain, or be accompanied by,—
        i. the information specified in Schedule 1 (other than clause 19) stated as at the date of the offer; and
        ii. any additional information contained in, or that accompanied, the takeover notice under rule 41(2) <u>(but need not contain or be accompanied by any document required to accompany the takeover notice under rule 41(4), except to the extent required pursuant to the Securities Act 1978 or any other applicable law)</u>; and
        iii. a copy of the target company statement (if the target company statement has been given to the offeror under rule 46(a));
        iv. <u>a certificate in the following form, signed by the persons specified in clause 19(2) of Schedule 1:</u>
        "To the best of our knowledge and belief, after making proper enquiry, the information contained in and accompanying the offer document is, in all material respects, 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 offeror under the Takeovers Code."
2. <u>Subject to rule 44(3), the</u> offer may contain, or be accompanied by, additional information of the kind described in rule 41(2).
3. The offer may not contain, or be accompanied by, any report, or any reference to any report, required under rule 22, except as specified in clause 17 of Schedule 1.

45. **Despatch notice**

1. Immediately on sending the offer document to the offerees, the offeror must—
    a. send to the target company—
        i. a notice in writing stating that the offer document has been sent to the offerees; and
        ii. a copy of the offer document; and
    b. send to the registered exchange a copy of—
        i. the notice referred to in paragraph (a)(i); and
        ii. the offer document; and
    c. deliver to the Registrar of Companies for registration a copy of—
        i. the notice referred to in paragraph (a)(i); and
        ii. the offer document.
2. Subclause (1)(b) applies only if the offeror's or the target company's voting securities are quoted on the registered exchange's market.

46. **Target company statement**

The target company must—

a. either,—
    i. within 14 days after it receives the takeover notice (or any longer period as the offeror may allow), send to the offeror a statement containing, or accompanied by, the information specified in Schedule 2 to accompany the offer; or
    ii. within 14 days after it receives the despatch notice, send the statement referred to in subparagraph (i) to—
        A. every offeree; and
        B. the offeror; and
        C. the registered exchange (if the voting securities of the target company or the offeror are quoted on the registered exchange's market); and
b. deliver a copy of the statement referred to in paragraph (a)(i) to the Registrar of Companies for registration—
    i. immediately on receipt of the despatch notice (if the target company has sent the statement referred to in paragraph (a)(i) to the offeror under paragraph (a)(i)); or
    ii. immediately on sending the statement referred to in paragraph (a)(i) to the persons referred to in paragraph (a)(ii) (if subparagraph (i) does not apply).

47. **Documents for Panel in respect of Code offers**

1. At the time that a person sends any document referred to in rules 41 to 46 (other than rule 42(2), the person must also send a copy of the document to the Panel.
2. At the time that any target company or offeror sends any document to the holders of voting securities in respect of an offer, it must also send a copy of the document to the Panel.
3. At the same time as any document is sent to the Panel under subclause (1) or (2), an electronic copy of the document must, if practicable, be sent to the Panel.
4. Any securities register provided to an offeror under rule 42(2) must, upon request by the Panel, be sent to the Panel in electronic form (or in such other form as was agreed between the target company and the offeror).
5. Each time the level of acceptances in respect of an offer increases by more than 1 percent of the total voting rights in the target company, the offeror must notify the

total level of acceptances received (for each class of equity securities subject to the offer) to the Panel, and–

1. if any voting securities of the target company or the offeror or any holding company of the offeror are quoted on a registered exchange's market, the offeror must at the same time notify the registered exchange of such information; or
2. if no voting securities of the target company or offeror or any holding company of the offeror are quoted on a registered exchange's market, the offeror must release the total level of acceptances to the principal daily newspapers in New Zealand.

48. **Notification of altered offer document**

The offeror must notify the target company, as soon as practicable before it sends the offer document to the offerees, of all information to be included in the offer document that is altered from, or additional to, the information that was contained in, or accompanied, the takeover notice.

49. **Reimbursement of directors and target company**

1. Despite anything in the constitution of the target company, each director of the target company is entitled to have refunded to the director by the target company any expenses properly incurred by the director on behalf, and in the interests, of holders of equity securities of the target company in relation to an offer or a takeover notice.
2. The target company may recover from the offeror, as a debt due to the target company, any expenses properly incurred by the target company in relation to an offer or a takeover notice, whether as a result of refunds made under subclause (1) or otherwise.

Part 7
Compulsory acquisitions

Contents

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50. **Interpretation**

In this Part, unless the context otherwise requires,—

acquisition notice means the notice referred to in rule 54

compulsory sale, in relation to a code company, means that the outstanding security holders must sell their equity securities in the code company to the dominant owner

dominant owner, in relation to a code company, means a person who, after this code comes into force, becomes the holder or controller, or 2 or more persons acting jointly or in concert who, after this code comes into force, become the holders or controllers, of 90% or more of the voting rights in the code company (whether by reason of acceptances of an offer or otherwise)

outstanding securities, in relation to a code company, means all the equity securities in the code company that the dominant owner does not already hold or control

outstanding security holders, in relation to a code company, means the holders of the outstanding securities

voluntary sale, in relation to a code company, means that the outstanding security holders have the right to sell their equity securities in the code company to the dominant owner.

Rights and obligations

51. **Notification of dominant ownership**

If a person becomes a dominant owner in a code company, that person must immediately send a written notice of that fact to the code company, the Panel, and the

registered exchange (if any voting securities of the code company are quoted on the registered exchange's market).

52. **Dominant owner's right**
The dominant owner has the right to acquire all the outstanding securities in the code company in accordance with this Part.

53. **Outstanding security holder's right**
The outstanding security holders have the right to sell their outstanding securities in the code company to the dominant owner in accordance with this Part.

Acquisition notice

54. **Acquisition notice**

1. The dominant owner must send a notice in writing to the outstanding security holders that complies with rule 55.
2. If the dominant owner becomes the dominant owner by reason of acceptances of an offer, the notice referred to in subclause (1) must be sent not later than 30 days after the end of the offer period.
3. If subclause (2) does not apply, the notice referred to in subclause (1) must be sent not later than 30 days after the dominant owner became the dominant owner.
4. A copy of the notice referred to in subclause (1) must be—
    1. sent immediately to the code company, the Panel, and the registered exchange (if the voting securities of the code company are quoted on the registered exchange’s market); and
    2. delivered immediately to the Registrar of Companies for registration.

55. **Contents of acquisition notice**
An acquisition notice must—
    a. state that the dominant owner holds or controls 90% or more of the voting rights in the code company; and
    b. state either—
        i. that the outstanding security holders must sell their equity securities in the code company to the dominant owner; or
        ii. that the outstanding security holders have the right to sell their equity securities in the code company to the dominant owner; and
    c. specify the consideration to be provided for the outstanding securities; and
    d. set out the outstanding security holders' rights under this Part; and
    e. specify the date on which the acquisition notice is sent to the outstanding security holders; and
    f. be accompanied by an instrument of transfer for the outstanding securities held by the outstanding security holder to whom the acquisition notice is sent; and
    g. specify the return address for the instrument referred to in paragraph (f).

Determination of consideration

56. **Dominant owner through acceptances of offer**

1. If a person becomes the dominant owner by reason of acceptances of an offer (whether or not the dominant owner has also acquired equity securities under rule 36), the consideration payable in respect of equity securities in any class must be the same as the consideration provided under the offer for equity securities in the same class.
2. Subclause (1) applies only if acceptances of the offer were received in respect of more than 50% of the equity securities that were the subject of the offer in the class in respect of which the consideration is to be determined.
3. If the offer provided for alternative considerations, then the consideration payable under subclause (1) is the consideration payable under the offer if an accepting offeree failed to choose an alternative or, if no provision to that effect was included in the offer, is the alternative consideration containing the greatest cash component.

57. **Determination of consideration in other cases**

1. If the consideration cannot be established under rule 56, the consideration specified in the acquisition notice—
    a. must be a cash sum certified as fair and reasonable by an independent adviser; and
    b. is the consideration payable for the outstanding securities.
2. Subclause (1)(b) does not apply if, within 14 days after sending the acquisition notice, the dominant owner receives written objections to the specified consideration from outstanding security holders who hold the lesser of—
    a. 2% or more of a class of equity securities; or
    b. 10% or more of the outstanding securities of a class.
3. If the dominant owner receives objections that together comply in all respects with subclause (2), the dominant owner must immediately refer to expert determination the amount of the consideration to be provided for the securities of the relevant class that must be a cash sum equal to the fair and reasonable value of those securities.
4. For the purposes of this rule, the fair and reasonable value of an equity security must be calculated by—
    a. first assessing the value of all the equity securities in the class of equity securities of which the equity security forms part; and
    b. then allocating that value pro rata among all the securities of that class.
5. Immediately on receipt of the expert determination, the dominant owner must send a copy of the expert determination to the Panel and to the registered exchange (if any voting securities of the target company are quoted on the registered exchange's market).

58. **Expert determination**

1. A reference to expert determination under rule 57(3) is a reference to an independent person appointed by the Panel.
2. The independent person acts as an expert and not as an arbitrator in making the determination.
3. The dominant owner must pay the costs of the expert determination.
4. The independent person must make the expert determination within 28 days after the date of his or her appointment to make the expert determination.

Payment of consideration and transfer of outstanding securities

59. **Return of instrument of transfer**

1. An outstanding security holder who receives an acquisition notice accompanied by an instrument of transfer may, within 21 days after the date on which the acquisition notice is sent, return to the dominant owner, at the address specified in the acquisition notice, the duly executed instrument of transfer along with any other documents that are necessary to enable the dominant owner to be registered as the holder of the securities belonging to the outstanding security holder.
2. Subclause (1) applies whether or not the outstanding security holder has objected to the specified consideration under rule 57(2).

60. **Payment of consideration to outstanding security holder**

1. If an outstanding security holder returns to the dominant owner the documents referred to in rule 59, the dominant owner must send the consideration specified in the acquisition notice to the outstanding security holder within 7 days after the dominant owner receives the documents referred to in that rule.
2. Subclause (1) applies whether or not there has been a reference to expert determination under rule 57(3).

61. **Delivery of consideration to code company**

1. If an outstanding security holder does not return to the dominant owner the documents referred to in rule 59, then, in the case of a compulsory sale, the dominant owner must, within 7 days after the expiration of the 21-day period referred to in rule 59,—
    a. deliver to the code company the consideration specified in the acquisition notice for the outstanding securities in respect of which the documents referred to in rule 59 have not been returned to the dominant owner; and
    b. send to the code company an instrument of transfer for those outstanding securities, executed on behalf of the outstanding security holder by the dominant owner or its agent.
2. Any consideration received by the code company under subclause (1)(a) must be held in trust for the outstanding security holders until it is claimed.
3. If the consideration is in cash, the cash must be deposited by the code company in an interest bearing trust account with a registered bank.
4. Subclause (1) applies whether or not there has been a reference to expert determination under rule 57(3).

62. **Position if consideration fixed by expert determination**

1. If the consideration fixed by expert determination under rule 57(3) exceeds the consideration specified in the acquisition notice, the dominant owner must immediately pay, in the same manner as the consideration specified in the acquisition notice is to be paid, the balance owing to—
    a. the outstanding security holders; or
    b. the code company.
2. If the consideration fixed by expert determination is less than the consideration specified in the acquisition notice, the dominant owner may recover the excess paid from—
    a. the outstanding security holder; or
    b. the code company (if the consideration is held by the code company).

63. **Registration of dominant owner as holder of outstanding securities**

1. In the case of a compulsory sale, the directors of the code company must register the dominant owner or its nominee as the holder of the outstanding securities on receipt by the code company of—
    a. the executed instruments of transfer and related documents received by the dominant owner in accordance with rule 59; and
    b. evidence to the reasonable satisfaction of the code company that the consideration has been sent to the outstanding security holders in accordance with rule 60; and
    c. the executed instrument or instruments of transfer and the consideration in accordance with rule 61.
2. In the case of a voluntary sale, the directors of the code company must register the dominant owner or its nominee as the holder of the outstanding securities on receipt by the code company of—
    a. the executed instruments of transfer and related documents received by the dominant owner in accordance with rule 59; and
    b. evidence to the reasonable satisfaction of the code company that the consideration has been sent to the outstanding security holders in accordance with rule 60.

Schedule 1
Information required in takeover notice

Contents

1. **Date**
The date of the offer.

2. **Offeror and its directors**
1. The name and address of the offeror.
2. The names of every director of the offeror (if the offeror is not an individual).

3. **Target company**
The name of the target company.

4. **Advice statement**
A statement in the following form, to be set out in a prominent position at the front of the offer document:
"IMPORTANT
If you are in doubt as to any aspect of this offer, you should consult a person authorised to undertake trading activities by [*name of registered exchange*] or a financial or legal adviser.
If you have sold all your shares in [*name of target company*], you should immediately hand this offer document and the accompanying acceptance form to the purchaser, or to the person authorised to undertake trading activities by [*name of registered exchange*] or other agent through whom the sale was made, to be passed to the purchaser."
[Name of target company]'s target company statement, together with an independent adviser's report on the merits of this offer [and another independent adviser's report on the fairness and reasonableness of the consideration and terms of this offer as between classes of securities [*if rule 22 report required*]] will either accompany this offer or be sent to you within 14 days and should be read in conjunction with this offer."

5. **Offer terms**
All the terms and conditions of the offer.

6. **Ownership of equity securities of target company**
1. The number, designation, and percentage of equity securities of any class of the target company held or controlled by—
    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 holding or controlling more than 5% of the class, if within the knowledge of the offeror.

2. If any of the persons referred to in subclause (1) do not hold or control equity securities of the target company, a statement to that effect.

1. In schedule form, the number, designation, and percentage of equity securities of any class of the target company held or controlled by—
   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 holding or controlling more than 5% of the class, to the knowledge of the offeror.
2. A statement immediately following that schedule to the effect that, except as specified in that schedule, no person coming within any of clauses 6(1)(a) to (d) (inclusive) holds or controls any equity securities in the target company.

7. **Trading in target company equity securities**

1. If any of the persons referred to in any of clauses 6(1)(a) to (d) (inclusive) have, during the 6-month period before the date of the offer, acquired or disposed of any equity securities of the target company,—
   a. the number and designation of the equity securities; and
   b. the consideration for, and the date of, every transaction to which this subclause applies.
2. If no such equity securities were acquired or disposed of, a statement to that effect.

8. **Agreements to accept offer**

The names of any person who has agreed conditionally or unconditionally to accept the offer and the material terms of the agreement.

9. **Arrangements to pay consideration**

1. Confirmation by the offeror that resources will be available to the offeror sufficient to meet the consideration to be provided on full acceptance of the offer and to pay any debts incurred in connection with the offer (including the debts arising under rule 49).
2. A statement setting out the rights of the offeree under rule 34.

10. **Arrangements between offeror and target company**

Particulars of any agreement or arrangement (whether legally enforceable or not) made, or proposed to be made, between the offeror or any associates of the offeror, and the target company or any related company of the target company, in connection with, in anticipation of, or in response to, the offer.

11. **Arrangements between offeror, and directors and officers of target company**

Particulars of any agreement or arrangement (whether legally enforceable or not) made, or proposed to be made, between the offeror or any associates of the offeror, and any of the directors or senior officers of the target company or of any related company of the target company (including particulars of any payment or other benefit proposed to be made or given by way of compensation for loss of office, or as to their

remaining in or retiring from office) in connection with, in anticipation of, or in response to, the offer.

12. **Financial assistance**
Particulars of any agreement or arrangement made, or proposed to be made, under which the target company or any related company of the target company will give (directly or indirectly) financial assistance for the purpose of, or in connection with, the offer.

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14. **Likelihood of changes in target company**
1. A statement as to the general nature of any material changes likely to be made by the offeror in respect of the business activities of the target company and its subsidiaries.
2. Subclause (1) does not apply if—
    a. the offer is a full offer conditional on the offeror receiving acceptances that will result in the offeror being required to give an acquisition notice under rule 54; and
    b. the condition cannot be waived or varied.

15. **Pre-emption clauses in target company's constitution**
1. Particulars of any restriction on the right to transfer equity securities to which the offer relates that—
    a. is contained in the constitution of the target company; and
    b. has the effect of requiring the holders of the securities to offer the securities for purchase to members of the target company or to any other person before transferring the securities.
2. If there is any such restriction, the arrangements (if any) being made to enable the securities to be transferred.

16. **Escalation clauses**
Particulars of any agreement or arrangement (whether legally enforceable or not) under which—
    a. any existing holder of equity securities in the target company will or may receive in relation to, or as a consequence of, the offer any additional consideration or other benefit over and above the consideration set out in the offer; or
    b. any prior holder of equity securities in the target company will or may receive any consideration or other benefit as a consequence of the offer.

17. **Different classes of securities**
1. If the offer extends to more than one class of securities,—
    a. a statement as to how the consideration and terms of the offer have been calculated so as to be fair and reasonable as between the classes of securities ; and
    i. a statement that an independent report by [*name of independent adviser preparing rule 22 report*] concerning the fairness and reasonableness of the consideration and terms of the offer as between the different classes of

securities will be sent to offerees by the target company with the target company statement.

2. If the offer does not extend to more than one class of securities, the following statement—
    a. "No report is required under rule 22 of the Code (which relates to the fairness and reasonableness of the consideration and terms of the offer as between different classes of securities). A report on the merits of the offer from an independent adviser under rule 21 of the Code will be sent to shareholders with the target company statement."

18. **Additional disclosures required if consideration includes securities**

1. If the consideration offered under the offer includes securities (within the meaning of the Securities Act 1978), the issuer of which is a public issuer that has a class of equity securities that has been quoted on the registered exchange's market for at least 12 months before the date of the offer, the offeror must—
    a. make available to offerees (on request) the most recent annual report of the issuer of the securities; and
    b. disclose in the offer document or send with the offer document—
        i. the name of the issuer of the securities offered as consideration and its relationship to the offeror; and
        ii. the material terms and conditions of the securities; and
        iii. a copy of the most recent half-yearly report of the issuer relating to a period after the annual report referred to in paragraph (a), if any; and
        iv. a copy of the most recent interim report of the issuer relating to a period after the annual report referred to in paragraph (a), if any, or, if a copy of a half-yearly report has been disclosed under subparagraph (iii), a copy of any interim report of the issuer relating to a period after that half-yearly report, if any; and
        v. any other information that could reasonably be expected to be material to the making of a decision by the offerees to accept or reject the offer; and
        vi. if there is no information referred to in subparagraph (v), a statement to that effect.
2. Subclause (1) does not apply if the issuer is required by the Securities Act 1978 to register a prospectus in relation to the securities offered as consideration under the offer.
3. For the purposes of subclause (1),—
    annual report means the annual report and financial statements (including the auditor's report on those financial statements) that the issuer is required by the rules of the registered exchange to send to equity security holders of the issuer
    half-yearly report means the half-yearly report and half-yearly financial statements (including the auditor's report on such financial statements, if any) that the issuer is required by the rules of the registered exchange to send to equity security holders of the issuer
    interim report means any interim report and interim financial statements (including the auditor's report on such financial statements, if any) that the issuer has sent to equity security holders of the issuer (other than the half-yearly report).

19. **Certificate**

1. A certificate in the following form signed by the persons specified in subclause (2): "To the best of our knowledge and belief, after making proper enquiry, the information contained in and accompanying this takeover notice is, in all material respects, 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 offeror under the Takeovers Code."
2. The persons referred to in subclause (1) are,—
    a. if the offeror is an individual, the offeror or the offeror's agent authorised in writing; or
    b. if the offeror is not an individual,—
        i. the chief executive officer and the chief financial officer of the offeror, or their respective agents authorised in writing, or, if there is no chief executive officer or chief financial officer, the person or persons fulfilling those roles respectively, or their respective agents authorised in writing; and
        ii. 2 directors of the offeror (or the sole director of the offeror), not being the chief executive officer or the chief financial officer unless there is an insufficient number of other directors who must sign on behalf of the board of directors with the authority of a resolution of the board of directors.

Schedule 2
Information required in target company statement

Contents

1. **Date**
The date of the target company statement.

2. **Offer**
A brief identification of the offer to which the statement relates.

3. **Target company**
The name of the target company.

4. **Directors of target company**
The names of the directors of the target company.

5. **Ownership of equity securities of target company**

1. The number, designation, and the percentage of equity securities of any class of the target company held or controlled by—
    a. each director or senior officer of the target company and their associates; and
    b. any other person holding or controlling more than 5% of the class, to the knowledge of the target company.
2. If any of the persons referred to in subclause (1) do not hold or control equity securities of the target company, a statement to that effect.
3. The number of equity securities of the target company—
    a. that have, during the period specified in subclause (5), been issued to the directors and senior officers of the target company or their associates; or
    b. in which the directors and senior officers or their associates have, during the period specified in subclause (5), obtained a beneficial interest under any employee share scheme or other remuneration arrangement.
4. The price at which the securities in subclause (3) were issued or provided.
5. The period referred to in subclause (3) is the 2-year period that ends with the date of the target company statement.

6. **Trading in target company equity securities**

1. The number and designation of any equity securities of the target company acquired or disposed of by the persons referred to in clause 5(1)(a) and by the persons referred to in clause 5(1)(b) during the 6-month period before the latest practicable date before the date of the target company statement, including the consideration for, and the date of, each such transaction.
2. If no equity securities were acquired or disposed of, a statement to that effect.

7. **Acceptance of offer**
The name of every person referred to in clause 5(1)(a) who has accepted, or intends to accept, the offer, and the number of securities in respect of which the person has accepted, or intends to accept, the offer.

8. **Ownership of equity securities of offeror**
1. If the offeror is a company, the number, designation, and percentage of equity securities of any class of the offeror held or controlled by the target company and each director and senior officer of the target company and their associates.
2. If none of the persons referred to in subclause (1) hold or control any equity securities of the offeror, a statement to that effect.

9. **Trading in equity securities of offeror**
1. If the offeror is a company,—
    a. the number and designation of any equity securities of the offeror that were acquired or disposed of by the persons referred to in clause 8 during the 6-month period referred to in clause 6(1); and
    b. the consideration for, and the date of, every such transaction.
2. If no such securities were acquired or disposed of, a statement to that effect.

10. **Arrangements between offeror and target company**
Particulars of any agreement or arrangement (whether legally enforceable or not) made, or proposed to be made, between the offeror or any associates of the offeror, and the target company or any related company of the target company, in connection with, in anticipation of, or in response to, the offer.

11. **Relationship between offeror, and directors and officers of target company**
1. Particulars of any agreement or arrangement (whether legally enforceable or not) made, or proposed to be made, between the offeror or any associates of the offeror, and any of the directors or senior officers of the target company or any related company of the target company (including particulars of any payment or other benefit proposed to be made or given by way of compensation for loss of office, or as to their remaining in or retiring from office) in connection with, in anticipation of, or in response to, the offer.
2. A statement as to whether any directors or senior officers of the target company are also directors or senior officers of the offeror, or any related company of the offeror, and to identify those persons.

12. **Agreement between target company, and directors and officers**
Particulars of any agreement or arrangement (whether legally enforceable or not) made, or proposed to be made, between the target company or any related company of the target company, and any of the directors or senior officers or their associates of the target company or its related companies, under which a payment or other benefit

may be made or given by way of compensation for loss of office, or as to their remaining in or retiring from office in connection with, in anticipation of, or in response to, the offer.

13. **Interests of directors and officers of target company in contracts of the offeror**
A statement as to whether any of the following persons have any interest in any contract to which the offeror, or any related company of the offeror, is a party, together with the particulars of the nature and extent of such interest and its monetary value (if capable of quantification)—
    a. any director or senior officer of the target company or their associates:
    b. any person who, to the knowledge of the directors or the senior officers of the target company, holds or controls more than 5% of any class of equity securities of the target company.

14. **Additional information**
If, in the opinion of the directors of the target company, any information in the offer document is incorrect or misleading, any additional information within the knowledge of the target company that would make the information in the offer document correct or not misleading.

15. **Recommendation**
1. Either—
    a. a recommendation by the directors of the target company to accept or reject the offer and the reasons for such recommendation; or
    b. a statement that the directors of the target company are unable to make, or are not making, a recommendation and the reasons for not making a recommendation.
2. If any of the directors dissent from a recommendation or from any statement under subclause (1)(b) made by the directors or abstain from making a recommendation or any statement under subclause (1)(b), their names and their reasons for dissenting or abstaining.
3. If no recommendation is made, but all or any of the directors of the target company propose to make a recommendation, or to reconsider their decision not to make a recommendation, a statement to that effect and, if the directors consider it appropriate, a statement to the effect that offerees should not accept the offer in the meantime.

16. **Actions of target company**
1. Particulars of any material agreement or arrangement (whether legally enforceable or not) of the target company and its related companies entered into as a consequence of, in response to, or in connection with, the offer.
2. A statement as to whether there are any negotiations underway as a consequence of, in response to, or in connection with, the offer that relate to or could result in—
    a. an extraordinary transaction, such as a merger, amalgamation, or reorganisation, involving the target company or any of its related companies; or
    b. the acquisition or disposition of material assets by the target company or any of its related companies; or
    c. an acquisition of equity securities by, or of, the target company or any related company of the target company; or

d. any material change in the equity securities on issue, or policy relating to distributions, of the target company.

17. **Equity securities of target company**

1. Details of the issued equity securities in the target company and the rights of the holders in respect of capital, distributions, and voting.
2. The material terms of equity securities that are options, or rights to acquire, equity securities.

18. **Financial information**

1. A statement that the offeree is entitled to obtain from the target company a copy of the most recent annual report of the target company.
2. A copy of the most recent half-yearly report of the target company, if any, since the annual report referred to in subclause (1).
3. A copy of the most recent interim report of the target company, if any, since the annual report referred to in subclause (1), or, if a copy of a half-yearly report has been disclosed under subclause (2), a copy of any interim report of the target company relating to a period after that half-yearly report, if any.
4. All material changes in the financial or trading position, or prospects, of the target company since the annual report referred to in subclause (1) or a statement that there are no known material changes.
5. Any other information about the assets, liabilities, profitability, and financial affairs of the target company that could reasonably be expected to be material to the making of a decision by the offerees to accept or reject the offer.
6. For the purposes of this clause,—

   annual report means,—

   a. if any voting securities of the target company are quoted on the registered exchange's market, the annual report and financial statements (including the auditor's report on those financial statements) that the target company is required by the registered exchange to send to the target company's equity security holders; or
   b. if paragraph (a) does not apply, the annual report prepared in accordance with sections 208(1) and 211(1) of the Companies Act 1993 and sent to shareholders of the target company under section 209 of the Companies Act 1993

   half-yearly report means,—

   a. if any voting securities of the target company are quoted on the registered exchange's market, the half-yearly report and half-yearly financial statements (including the auditor's report on such financial statements, if any) that the issuer is required by the rules of the registered exchange to send to equity security holders of the issuer; or
   b. if paragraph (a) does not apply, any half-yearly report and half-yearly financial statements (including the auditor's report on those financial statements, if any) that have been sent to the shareholders of the target company

   interim report means any interim report and interim financial statements (including the auditor's report on such financial statements, if any) that the issuer has sent to equity security holders of the issuer (other than the half-yearly report).

19. **Independent advice on merits of offer**

1. The identity of the independent adviser who has provided a report under rule 21 and a copy of the adviser's full report or a summary of the full report prepared by the adviser.
2. If only a summary of the full report is provided under subclause (1),—
    a. a statement that the full report is available for inspection at a specified address; and
    b. a statement that a copy of the full report will be sent to any offeree on request; and
    c. a statement that the summary report is a fair summary and not misleading.
3. The full report and summary report must include—
    a. a statement of the qualifications and expertise of the adviser; and
    b. a statement that the adviser has no conflict of interest that could affect the adviser's ability to provide an unbiased report.

19A **Different classes of securities**

If a report is required under rule 22, the identity of the independent adviser who has provided that report and a copy of that adviser’s full report.

20. **Asset valuation**

If any information provided in the target company statement refers to a valuation of any asset,—

    a. the date of the valuation, the identity of the valuer, and a summary of the valuation, that discloses the basis of computation and the key assumptions on which the valuation is based; and
    b. an address or addresses where copies of the valuation are available for inspection and a statement that a copy of the valuation will be sent to any offeree on request.

21. **Prospective financial information**

If any information provided in the target company statement refers to prospective financial information, the principal assumptions on which the prospective financial information is based.

22. **Sales of unquoted equity securities under offer**

If the equity securities that are the subject of the offer are not quoted on a stock exchange, all the information that the target company has as to the number of those equity securities that have been disposed of in the 12 months ending on the latest practicable date before the date on which the target company statement is sent by the target company, and the consideration for those dispositions.

23. **Market prices of quoted equity securities under offer**

1. The closing price on each stock exchange where they are quoted (expressed in the currency in which they are quoted) of the equity securities of the target company that are the subject of the offer—
    a. on the latest practicable working day before the date on which the target company statement is sent by the target company; and
    b. on the last day on which the exchange was open for business before the date on which the target company received the takeover notice.

2. The highest and lowest closing market prices on each exchange, with the relevant date, during the 6 months before the date on which the target company received the takeover notice.
3. Particulars of any issue of equity securities, any changes in the equity securities on issue, and any distributions that could have affected the market prices referred to in this clause.
4. Any other information about the market price of the securities that would reasonably be expected to be material to the making of a decision by the offerees to accept or reject the offer.

24. **Other information**

Any other information not required to be disclosed by this schedule that could reasonably be expected to be material to the making of a decision by the offerees to accept or reject the offer.

25. **Approval of target company statement**

1. A statement that the contents of the target company statement have been approved by the board of directors of the target company.
2. If any of the directors of the target company do not approve of the statement, their names and their reasons for not approving.

26. **Certificate**

1. A certificate in the following form signed by the persons specified in subclause (2): "To the best of our knowledge and belief, after making proper enquiry, the information contained in or accompanying this statement is, in all material respects, 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."
2. The persons referred to in subclause (1) are—
    a. the chief executive officer and the chief financial officer of the target company, or their respective agents authorised in writing, or, if there is no chief executive officer or chief financial officer, the person or persons fulfilling those roles respectively, or their respective agents authorised in writing; and
    b. 2 directors of the target company (or the sole director of the target company), not being the chief executive officer or the chief financial officer unless there is an insufficient number of other directors who must sign on behalf of the board of directors with the authority of a resolution of the board of directors.

Schedule 3

Independent adviser's report on fairness and reasonableness between classes of equity securities

1. The identity of the adviser who prepared the report.
2. A statement of the qualifications and expertise of the adviser.
3. A statement that the adviser has no conflict of interest that could affect the adviser's ability to provide an unbiased report.
4. A statement in the following form, to be set out in a prominent position at the front of the report:

> 1. This report is **not** a report on the merits of the offer.
> 2. This report has been commissioned by the offeror.
>
> EITHER
>
> 3. [*In respect of reports required for the purposes of rule 8(3) or 9(5) of the Code*] The purpose of this report is solely to compare the terms and consideration offered for each class of voting securities with those offered for the other class(es) of voting securities.
>
> OR
>
> 3. [*In respect of reports required for the purposes of rule 8(4) of the Code*] The purpose of this report is solely to compare the terms and consideration offered for non-voting securities with those offered for voting securities.
> 4. **A separate independent report on the merits of the offer, commissioned by the independent directors of the target company, is required to accompany the target company statement.**"

Explanatory Note

This note is not part of the order, but is intended to indicate its general effect.