TECHNICAL AMENDMENTS
TO THE TAKEOVERS CODE

RECOMMENDATIONS TO
THE MINISTER OF COMMERCE
FROM THE TAKEOVERS PANEL

TAKEOVERS PANEL

5 December 2003
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TABLE OF CONTENTS

INTRODUCTION 3

RECOMMENDATIONS FOR AMENDMENTS TO THE TAKEOVERS CODE 6

A: Creep 6

B: Determining all the classes of equity securities in a target company 8

C: Notices of shareholders' meetings – statement of voting securities held by acquirers or allottees 12

E: Partial offers 21

F: Offers unconditional as to levels of acceptance 23

G: Date by which an offer is to become unconditional 26

H: Variations to offers that alter consideration alternatives 28

I: "Intention" of the offeror to acquire equity securities other than under the offer 31

J: Prospectuses for scrip offers 34

K: Notification obligations of the target company 38

L: Record dates 40

M: Documents being required to be sent to the Panel 42

N: Compulsory acquisitions 44

O: The advice statement on the cover of the offer document 47

Q: Certificate in takeover notices and offer documents 52

R: Material contracts 54

S: Unlisted Code companies 57

INTRODUCTION

1. 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. This paper relates to the Takeovers Code and contains the Panel's recommendations for a number of technical changes to the Code.

2. The Takeovers Code came into force on 1 July 2001. The Panel has been responsible for the administration of the Code since that time.

3. As could be expected with any new and comprehensive market regulation, the practical application of the Code in the first two years has brought to light a number of minor inconsistencies and anomalies in its wording or construction. There have been instances where the practical application of the Code's requirements has proved problematic.

4. The Panel is committed to making the Code work and making it work well. For this reason the Panel has spent considerable time developing detailed proposals for a number of technical amendments to the Code.

5. To ensure widespread exposure of its recommendations the Panel distributed a detailed discussion paper in April 2003 to over 300 recipients. Submissions were requested by late May 2003. A copy of the Panel's discussion paper is available from the Panel's website at www.takeovers.govt.nz .

6. To provide the greatest level of assistance to the target audience of the main professional law firms the Panel's paper included proposed drafting changes to the Code. These proposals were put forward on the basis that the final responsibility for drafting any changes to the Code remains with Parliamentary Counsel Office.

7. The Panel received seven substantive responses to its discussion paper, these being from:

   (a) The New Zealand Law Society

   (b) Harmos Horton Lusk

   (c) Quigg Partners

   (d) Bell Gully

   (e) Chapman Tripp

(f) Russell McVeagh

(g) Grant Samuel & Associates Limited.

8. This level of responses was not unexpected. The Panel's proposals are of a technical rather than a policy nature. They are of principal interest to practitioners actively involved in the takeover market.

9. The Panel has carefully considered these responses. As a result some of its original proposals have been amended or extended.

10. This paper puts forward the Panel's final proposals for amendments to the Code. It outlines the Panel's original proposals and comments on submissions received on those proposals before detailing the Panel's final recommendations.

11. In order to assist the preparation of drafting instructions to Parliamentary Counsel Office the paper includes detailed drafting suggestions for each proposed amendment to the Code put forward by the Panel.

12. 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.
D. Independent advisers' reports on fairness between classes.
E. Partial offers.
F. Offers unconditional as to levels of acceptance.
G. Date by which an offer is to become unconditional.
H. Variations to offers which add a new scrip alternative.
I. Intention of the offeror to acquire equity securities other than under the offer.
J. Prospectuses for scrip offers.
K. Notification obligations of the target company.
L. The record date.
M. Documents being required to be sent to the Panel.
N. Compulsory acquisitions.
O. The advice statement on the front of the offer document.
P. Disclosure in the takeover documents of share holding and share trading by certain classes of person.
Q. Certificate in takeover notices and offer documents.
R. Material contracts.
S. Unlisted Code companies.

Regulatory impact

13. It is not expected that the Panel's proposals will have any material regulatory impact.

14. The Takeovers Code regulates takeovers and other transactions impacting on the control of "specified companies", that is New Zealand registered companies that are parties to a listing agreement with a registered exchange or have $20 million in assets and 50 or more shareholders. This will not change as a result of the Panel's proposals.

15. Some of the proposals affect the reporting obligations of parties to a takeover, including their obligations to provide information to shareholders or to the Panel. In general the proposals should result in reduced compliance costs and a reduced regulatory impact.

Compliance costs

16. The Panel's discussion paper asked respondents to comment on any compliance cost implications of each proposed amendment to the Code put forward by the Panel. These comments are summarised in each section of this paper.

Recommendation to the Minister of Commerce

17. The Panel recommends that the Minister seek Cabinet authority to amend the Takeovers Code as proposed in this paper.

John King
Chairman

5 December 2003

RECOMMENDATIONS FOR AMENDMENTS TO THE TAKEOVERS CODE

A: Creep

Proposal

18. The Panel proposes a minor drafting change to clarify the existing rules of the Code.

Rationale for proposal

19. 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.

20. 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.

21. Some market participants have expressed 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.

22. Although the Panel does not consider the current rule to be ambiguous the object of seeking a change to the wording of the rule is simply that of achieving greater clarity.

Proposals in April 2003 discussion paper

23. The discussion paper proposed the same minor amendment to the wording of the current rule to clarify its meaning as now recommended.

Comments of respondents

24. Generally respondents considered that the current wording of rule 7(e) was already clear but agreed that the Panel's proposed amendment should put the matter beyond doubt.

Compliance costs

25. Respondents agreed with the Panel that amending rule 7(e) as recommended should not involve any increased compliance costs, direct or indirect, as it simply involved a change in wording.

Recommended change

26. The Panel recommends that rule 7(e)(ii) be replaced by an amended rule 7(e)(ii) as set out below.

Proposed amended rule 7(e)(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.

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

Proposal

27. The Panel proposes a new mechanism in the Code to oblige target companies to advise prospective offerors of the details of all classes of equity security on issue (or, in the case of a partial bid, all classes of voting security) within two days of receipt of a takeover notice. It is also proposed to permit the prospective offeror to change the terms of its offer if necessary before it is made to include offers to additional classes of security holder without requiring the consent of the target company to that change.

Rationale for proposed change

28. The Panel is concerned that difficulties an offeror may face in identifying all the classes of equity security of a target company could discourage potential takeover bids in some circumstances or, alternatively, could impose unnecessary compliance costs where an offer has to be recommenced.

29. Rule 8(2) requires (by implication) 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)

30. 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.

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

32. 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/or which may have been issued since the last published financial statements or annual report.

33. Apart from rules 8(2) and 9(2), this can also 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 takeover notice and the offer.

34. While in some circumstances (for example, a friendly takeover) a target company might permit a bidder to amend its offer document to correct the omission of a class of securities from the offer, in a hostile situation the directors of the target company could, by refusing consent to a change in the terms of the offer document from those set out in the takeover notice, effectively require the bidder to recommence its offer.

35. The Panel's proposed changes facilitate the takeover process by obliging the target company to inform the prospective offeror of the terms of all its classes of equity securities and allowing the offeror to make its offer on terms that differ from those in its takeover notice without requiring the target company's consent (where the change is to include offers for classes of security of which the offeror was not previously aware).

Proposals in April 2003 discussion paper

36. The Panel's original recommended solution was an amendment to the Code that would require the target company to advise the potential offeror within two days of receipt of a takeover notice either that there were no other relevant classes of equity securities or, if there were, of the relevant details of those classes.

37. The offeror would 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.

38. The Panel considered that there would be no need to change the other Code timeframes.

Comments of respondents

39. There were a number of comments on the Panel's original proposal. Most submitters supported the change but with some qualifications. Most submitters agreed that the requirement that an offer has to comply with rule 8(3), 8(4) or 9(5) could discourage some bids. Most submitters agreed that a bidder should not have to start the takeover process again solely for failure to include an offer to all classes of equity security in its takeover notice.

40. Submitters suggested that the offeror should have the period up to two days before making its offer during which to amend its takeover offer for any new class or classes of security identified by the target company. The Panel agreed that the time available to the offeror to amend its offer should be related to the final timing of its offer (it has from 14 to 30 days from giving its takeover notice within which to make its offer) rather than the timing of its takeover notice, but considered that the available time period should end at least seven days prior to the date of the offer.

41. Where submitters proposed more fundamental change, such as proposing that in some circumstances offers need not be made to all classes of equity security, the Panel considered such proposals were outside the scope of technical changes to the Code.

Compliance costs

42. 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.

43. The Panel's recommended change would result in a very small direct cost to target companies, in that they would be required to advise the bidder of the classes of equity security they have on issue within two days of receipt of a takeover notice. Any additional costs would be recoverable from the bidder.

44. 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 the original takeover notice.

45. Submitters did not consider compliance costs would increase significantly as a consequence of the proposed amendment. The recommended change should avert the possible compliance costs involved in a bidder having to restart the whole takeover procedure if its offer failed to include an offer for all classes of equity securities in its takeover notice.

Recommended change

46. The Panel recommends that the existing rules of the Code be amended by adding new rules 42(1A) and 44(1)(b) to provide that:

    (a) Within two days of receiving a takeover notice the target company must give the prospective 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) whether or not that class is already included in the proposed offer. The notice must contain sufficient information about each class of security to enable an offer to be formulated and to enable an independent adviser to provide a certificate under rule 22 of the Code;

    (b) The final form of a takeover offer can differ from that contained in the takeover notice without the target company's consent if the difference relates only to the addition of further classes of security not included in the takeover notice but identified in a notice given under para (a) if given to the target company at least 7 days before the date of the offer.

Proposed new rule 42(1A):

Notification of classes

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), whether or not that class is already included in the proposed offer. That notice must contain 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).

Proposed amended rule 44(1)(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) *any variation which provides for the offer to be extended to any class of securities not included in the takeover notice but 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 offer 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 at least 7 days before the date of the offer; and*

(iii) *any variations to which the directors of the target company have given their prior written approval; and*

(iv) *consequential amendments.*

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

Proposal

47. The Panel proposes that changes be made to the specified contents of notices of shareholders' meetings called to approve acquisitions or allotments under rules 7(c) and 7(d) to require disclosure of the percentage of all voting securities that will be held or controlled by an allottee or acquirer and their associates. This disclosure is to be in addition to the disclosure already required of the voting rights held or controlled by the allottee or acquirer shareholder itself.

48. Currently rules 15 (b) and 16(b) do not require disclosure in the notice of meeting of the full extent of the acquirer or allottee's interests in the target company. This is inconsistent with rule 6 which is triggered by the voting rights held or controlled by a person and his or her associates.

Rationale for proposed change

49. 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

50. 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;

51. 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. This means that shareholders are currently being advised of, 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 target company. The Panel's proposals are intended to remedy this defect.

Proposals in April 2003 discussion paper

52. The Panel's original proposal was 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. This would provide information to shareholders which would enable them to vote at the meetings with knowledge of the extent of the acquirer's or allottee's interests in the target company arising from the particular transaction.

Comments of respondents

53. Most respondents considered the Panel's proposals would be helpful to shareholders.

54. It was suggested that the information to be provided in notices of meetings should be able to be qualified by reference to it being to "the best of the acquirer's, allottee's or subject company's knowledge after due enquiry." This was because of concern that the information that would have to be provided to shareholders in notices may not be complete and accurate as the definition of "associate" is wide. This in turn could jeopardize the validity of the allotment or acquisition despite the subject company's best efforts. It is possible that a person is considered an "associate" of the allottee or acquirer without the allottee, acquirer or Code company being aware of the association.

55. The Panel rejected this submission because it believes it is important that shareholders be provided with the highest quality information when voting on Code proposals. The Panel would have considerable difficulty enforcing the provisions of the Code if the disclosure obligations were qualified as suggested.

56. It was also submitted that the present requirements that notices of meeting include actual numbers of shares to be acquired or allotted, and the actual control percentages that would be held post-acquisition or allotment should be relaxed by allowing for the inclusion in notices of meetings of maximum potential acquisitions, allotments and control percentages.

57. The Panel does not support this suggestion. The Code's meeting provisions are built around approval of transactions by known parties with known outcomes. Use of maxima rather than actual numbers can effectively permit transactions to be approved by shareholders that extend out over considerable time periods with many variables. They commonly include underwriting arrangements by major shareholders. The Panel considers any such transactions should take place under the terms of specific exemptions granted by the Panel to avoid abuse of the underlying principles of the Code.

Compliance costs

58. The Panel's recommended change to rules 15(b)(iv) and 16(b)(iv) would have some effect on compliance costs because of the need for subject companies to make enquiries about the associates of acquirers and allottees. The recommended change

would mean additional disclosure in the notice of meeting. The costs should not be significant because, in order for the acquirer or allottee to satisfy itself that it is complying with the Code, it should be aware of the holdings of both itself and its associates. It is possible some additional costs may be incurred in some cases in verifying specific holdings of all associates. Respondents did not quantify their potential costs, except where a specific exemption from the Panel may be required ($5,000).

Recommended Change

59. The Panel recommends that the current rules 15(b) and 16(b) be amended to require disclosure in the relevant notice of meeting called to approve acquisitions or allotments under the Code 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.

Proposed new rule 15(b)(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.*

Proposed new rule 16(b)(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*.

D: Independent advisers' reports on fairness between classes

Proposal

60. The Panel proposes changes to the Code that will affect the disclosure and distribution of rule 22 independent advisers' reports on fairness between classes of securities of an offer. In future, rule 22 reports would be distributed to shareholders along with the target company statement rather than with the offer document.

61. It is not proposed to change the requirement for a rule 22 report other than to remove the ability of offerors to distribute a summary report. The proposed changes are an attempt to avert the actual or potential confusion in the minds of some shareholders between a rule 21 report on "merits" of an offer and a rule 22 report on "fairness" between classes where different classes of equity securities are involved.

Rationale for proposed change

62. The effect of rule 22 is to require preparation of 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.

63. 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 itself 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 conclusion of the rule 22 report when distributing its offer document in what was an unconditional offer.

64. The Panel's proposals are aimed at avoiding this difficulty by delaying distribution of the rule 22 report and constraining the offeror's ability to refer to that report in the offer document and any accompanying material.

65. 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 in its offer document that "*there is no rule 22 report*" or "*there is no independent adviser's report*". Some shareholders may mistakenly believe that they will receive no further advice about the offer before having to decide how to respond.

66. The Panel has attempted to address this problem administratively 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." It is now proposed to correct this issue directly in the Code.

67. 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.

68. In the interests of ensuring there are well-informed shareholders the Panel proposes that the ability to provide a summary rule 22 report (with the full report being available on request) be removed from the Code.

69. A consequential change is also necessary to rule 30, which deals with the situation where the consideration for an offer is increased during the course of the offer period. It is proposed that any rule 22 report revised as a result of an increased offer price should be either distributed with the target company statement (if the original rule 22 report has not been distributed to shareholders at the time the offer is increased) or distributed to shareholders with the notice of variation given under rule 28.

Proposals in April 2003 discussion paper

70. The Panel considered the potential for confusion between the two independent advisers' reports should be removed by having both reports sent with the target company statement. The Panel also proposed that there should be constraints on the manner in which the offer document could refer to the rule 22 report.

71. The Panel considered it was still essential for the offeror to commission a separate report on the fairness of an offer 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 certifies.

Comments of respondents

72. Some respondents questioned the need to have rule 22 independent advisers' reports. They considered the issue of fairness between classes should be dealt with in the rule 21 report on the merits of the offer. Others suggested that a change to the terminology of the rule 22 report could help reduce any confusion for shareholders. They suggested that independent adviser "certification" on the fairness between the classes of voting securities may be a way of avoiding confusion in shareholders' minds between rule 21 and rule 22 reports.

73. The Panel rejects the proposal that the rule 22 report should no longer be required. If an offer were allowed to be made and accepted, and then 10 days later an independent adviser stated that in its opinion the offer was not fair as between different classes of voting security, this would be a very unsatisfactory situation.

The offer would have to be withdrawn and started again. Offerors would not be able to make such offers unconditional.

74. There was general consensus among respondents on the confusion caused by having two independent reports, although most respondents believed it was important to have a form of "fairness" valuation between classes of securities.

75. Some respondents suggested that the rule 22 report should not be distributed to shareholders at all, but only be available on request. Other respondents suggested that the requirement for a rule 22 report should be relaxed where the only alternative class of equity securities are executive options with very few holders.

76. The Panel believes that the rule 22 report is an important document that should be distributed to all shareholders. The Panel is not prepared to propose changes to the scope of rules 8(3), 8(4) and 9(5) without further public consultation.

Compliance costs

77. Most respondents agreed that the Panel's proposals would have a minimal effect on compliance costs. However, the suggestion from some respondents that the rule 22 report be abandoned would have some immediate direct savings in compliance costs. However, this approach could potentially result in much higher compliance costs if takeover offers had to be withdrawn and restarted when a rule 21 adviser found them to be not fair as between classes.

78. While the recommendation to remove the ability to provide summary rule 22 reports may appear to increase compliance costs, in practice the Panel does not expect this to be the case because rule 22 reports tend to be quite brief.

Recommended change

79. The Panel recommends that the rule 22 report continue to 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.

80. The offeror should 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. The offeror would be constrained in how it can refer to the rule 22 report in its offer documents by wording included in a proposed new clause 17 of Schedule 1.

81. The Panel also recommends a consequential change to rule 30 of the Code. Where a revised rule 22 report is required because of an increase in the offer price this report would either be distributed to shareholders with the variation notice or, if the variation to the offer is made before release of the target company statement, with the target company statement.

82. The Panel also recommends that offerees no longer have the ability to provide a summary of the rule 22 report to be provided to target company shareholders, with copies of the full report being available on request.

New rule 22(4)

The report must contain the information specified in Schedule 3

New rule 30:

(1) 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) the variation notice must contain a statement as to how the consideration and terms of the offer, as varied, have been calculated so as to be fair and reasonable as between the classes of securities;

(b) the offeror must obtain a further report under rule 22 in relation to the offer, as varied; and

(c) subject to rule 30(2), the further report must accompany the variation notice sent to each person to whom the offeror sends the variation notice under rule 28.

(2) If the target company has not sent the target company statement to either the offeror under rule 46(a)(i) or to offerees under rule 46(a)(ii) at the time the offeror sends the variation notice under rule 28, the offeror must not send the further report to any offeree.

New rule 41(1)(c)

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

Amend rule 41(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.

Proposed new rule 41(3)

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

Amend rule 44(2)

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

Proposed new rule 44(3)

The offer must 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.

Proposed new clause 17 of Schedule 1:

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)."

Proposed new clause 19A of Schedule 2:

19A Different classes of securities

(1) *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.*

(2) If any further report required under 30 has been received by the target company, and under rule 30(2) the offeror has not sent that further report to offerees, the identity of the independent adviser who has provided that further report and a copy of that adviser's full report, together with an explanation of why that report is required in addition to the report required under clause 19A(1).

Proposed new Schedule 3:

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) Where the report is required under rule 22 in relation to an offer which has not yet been made, or the report is required under rule 30 in connection with a variation to an offer and under rule 30(2) the report must not be sent to offerees, 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 [, as varied on [date of variation notice][if the report is required under rule 30]]*

2. This report has been commissioned by the offeror [,in connection with the variation to the offer [if the report is required under rule 30]]

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 directors of the target company, is required to accompany the target company statement."***

(5). Where the report is required under rule 30(1) in connection with a variation to an offer, and rule 30(2) does not apply, 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 as varied by the variation notice accompanying this report.*

2. This report has been commissioned by the offeror, in connection with the variation to the offer.

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."

E: Partial offers

Proposal

83. The Panel proposes to clarify the wording of the Code in relation to partial offers.

Rationale for proposed change

84. Rules 9 and 10 contain the Code's general provisions about partial offers. Partial offers may either be for a specified percentage of the target's company's voting rights above 50% or, with the approval of the target company's shareholders, for a specified percentage between 20% and 50%.

85. Some market participants have suggested that one partial offer could include alternative proposals under both rule 10(1)(a) and (b) – that is, that an offer could be for both voting securities taking the offeror's holdings above 50%, with an alternative that allowed (with shareholder approval) the taking of acceptances for a lesser percentage between 20 and 50 per cent.

86. The Panel does not accept these market participants' interpretation of rule 10(1)(a) and (b) and 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. The Panel is concerned that market participants have a different interpretation and propose amendment to the rules to clarify the position in relation to partial offers.

87. The Panel seeks to achieve clarity through amending the current wording of the rules to make their effect clearer.

Proposals in April 2003 discussion paper

84. The Panel's discussion paper put forward an amended wording of rule 10(1) for consideration by respondents with the aim of clarifying the meaning of the rule.

Comments of respondents

85. Respondents were supportive of the Panel's proposed changes and indicated that changing the wording of the rules should clarify the interpretation for all participants. Although supportive of the Panel's proposals, one respondent agreed with the need for change but suggested an alternative drafting approach.

86. The Panel considered that changing the wording in the rules as originally proposed by the Panel would achieve the clarity required.

Compliance costs

87. Respondents considered there would be no adverse compliance cost issues with this recommendation. 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.

Recommended change

88. The Panel recommends that rule 10(1) be replaced by a new rule 10(1) as follows:

Proposed new rule 10 (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

[… continue remainder of rule 10(1) as presently drafted]

F: Offers unconditional as to levels of acceptance

Proposal

89. The Panel proposes that the Code rules relating to the extension of and duration of, offers that are unconditional as to the levels of acceptances be amended to provide for consistency of treatment of offers that are unconditional as to levels of acceptance, to correct an anomaly in the current rules concerning the notice of extension of offer periods, and to constrain the duration of unconditional offers.

Rationale for proposal

90. Under rule 24 Code offers must be for offer periods between 30 and 90 days, but may be extended by a further 60 days if, at the end of 90 days, they are unconditional as to level of acceptances.

91. Rule 29 requires a 14-day notice period for any variation of an offer unless the offer is unconditional as to the level of acceptance and the variation is to extend the offer period beyond the 90-day period referred to in rule 24.

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

93. The effect of rules 24 and 29 in regard to the 14-day notice period is not logical. The notice period is not required if the extension takes the offer period beyond the 90-day period but is required if the extended period is still within the 90-day period.

94. The Panel has promulgated a class exemption to address this problem (*The Takeovers Code (Offers Unconditional as to Level of Acceptance) Exemption Notice 2002)*(S.R. 2002/87) so that the 14-day notice period does not apply whether the extension is within or beyond the 90-day offer period. However it is more appropriate for this to be dealt with in the Code itself.

95. However the Panel's proposed amendment also deals with another issue. The present Code allows offers which are unconditional as to level of acceptances at the outset to be extended beyond the normal 90-day period for an additional 60-day period. The basic philosophy of the Code is that 90 days should be the maximum period for takeover offers.

96. However, where an offer is made conditional on achieving a certain level of acceptances, and that condition is satisfied or waived, it is appropriate to provide a 60-day "mopping up" period. The fact that the condition is satisfied or waived is often the trigger for other shareholders to accept. If this occurs near the end of the offer period the 60-day extension may take the offer period beyond the basic 90 days.

Proposals in April 2003 discussion paper

97. The Panel in its discussion paper proposed in effect that the Code be amended so that all offers under the Code:

(a) Could not be extended beyond an offer period of 90 days, where they are unconditional as to the level of acceptances from the commencement of the offer;

(b) Could be extended without notice if they are unconditional as to the level of acceptances, but only up to a maximum period of 90 days, or for up to 60 days beyond the date the offer becomes unconditional as to level of acceptances, subject to a maximum offer period of 150 days.

Comments of respondents

98. Some respondents suggested that the Code should be amended to allow for all offers both conditional and unconditional to be able to have their offer periods extended beyond the maximum 90 days to 150 days. Others suggested that a maximum offer period of 120 days for all offers would be more appropriate. There was general support for changes to be made to the Code, with most respondents suggesting that there should be no distinction between conditional and unconditional offers as to the length of offer period or the giving of notice.

99. The Panel believes that respondents have not recognised that 90 days is intended to be the normal maximum period for takeovers. This ensures that the commercial affairs of target companies are not unnecessarily hindered by being subject to takeover offers for excessive periods.

Compliance costs

100. The Panel does not consider that changing the rules as proposed will increase compliance costs. In general shortening offer periods should lower compliance costs for target companies.

Recommended change

101. The Panel recommends that the Code should be amended to provide:

(a) Offers which are or have become unconditional as to the level of acceptances should be able to be extended without notice at any time during the offer period;

(b) Offers which are unconditional as to the level of acceptances at the outset can be extended but not beyond the 90 day period;

(c) If an offer is conditional as the level of acceptances, and that condition is satisfied or waived within the offer period, it should be able to be extended for the remainder of the 90-day period allowed in rule 24(2) or by up to no

more than 60 days from the day the condition was satisfied or waived (even if this extends the offer beyond 90 days).

Proposed replacement rule 24(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)

Proposed replacement rule 29(3)

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) such conditions have been satisfied or waived.

G: Date by which an offer is to become unconditional

Proposal

102. The Panel proposes that the existing rules in the Code relating to the unconditional date for an offer, and how this date can be varied when the offer period of an offer is extended, be clarified.

103. The Panel proposes that rule 27 (concerning permissible variations to an offer) and rule 28 (concerning notices of variation) be amended to explicitly permit extension of the unconditional date if an offer is extended.

Rationale for proposed change

104. Rule 25 provides that an offer that is subject to conditions must specify a date by which it is to become unconditional and provides limits on that date relating to the offer period. On a literal interpretation of the rule the date cannot be changed. However, as the Code allows for the offer period to be extended the date, if fixed by reference to the offer period, will in fact change if the offer period is changed.

105. The Panel's proposal is to enable the date by which an offer must become unconditional to be specified in the offer document and to provide expressly for it to be varied if the offer period is changed.

Proposals in April 2003 discussion paper

106. The discussion paper proposed changing the Code to clarify the rules in respect of an offer being required to specify a date by which it is to become unconditional. The proposed change would allow that date to be extended if the offer is extended, as a permitted variation to the offer, provided the extension to the unconditional date is no longer than the extension to the offer period.

Comments of respondents

107. There was overall support for the proposal that the specified date by which an offer is to become unconditional should be allowed to be extended at the time and in line with any extension of the offer period.

Compliance costs

108. The proposed changes should have no compliance costs implications since they would amend the Code to reflect market practice. Respondents have also indicated that they foresee no compliance costs implications.

Recommended change

109. The Panel recommends that rules 27 (concerning permissible variations to offers) and 28 (concerning notices of variation) be amended to explicitly permit extension of the conditionality date if the offer period is extended. Rule 25(2) would continue

to require specification of an actual unconditional date of a takeover offer, but by virtue of the changes to rules 27 and 28, this date may be varied if the offer period is extended, although not beyond the period permitted by rule 25(3).

Proposed new rule 27(e):

(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).

Proposed new rule 28(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.

H: Variations to offers that alter consideration alternatives

Proposal

110. There is currently an inconsistency in the Code in relation to the treatment of variations to non-cash and cash alternative components of an offer as compared to what is permitted when a cash alternative is added during the course of a takeover offer. The Panel proposes to change the current rule and add new rules to address the inconsistency such that acceptors of one alternative can switch to another alternative if that alternative has been increased. The Panel also proposes changes to tidy up the current rules relating to the time period in which an offeree can exercise the right to accept an alternative.

Rationale for proposal

111. The effect of the current rule 31 is that, if a variation to an offer adds a cash alternative form of consideration, then acceptors of the original scrip (non-cash) offer are entitled to opt for the new cash alternative. If, however, the offer provides that acceptances are irrevocable and a cash alternative is increased (rather than added), those offerees who have already accepted the cash alternative will have the benefit of the increase but those who have accepted the scrip (non-cash) alternative will not be automatically entitled to switch to accept the cash alternative.

112. Similarly, if a scrip (non-cash) alternative is increased, those who have already accepted a cash alternative will not be entitled to switch to accept the scrip alternative instead. Offerees who have not accepted the offer when the consideration is varied would still be able to accept either alternative.

113. The rationale of the proposed change to the Code is to correct the inconsistency between the treatment of a change to an offer that adds a cash alternative where none existed compared to a change to an offer that increases either a non-cash or a cash alternative in a takeover offer. There seems no good reason for allowing acceptors who have accepted a non-cash offer to take a cash alternative that is added to the offer, but not to allow offerees who have accepted one alternative consideration component of the offer to switch to an alternative that has been increased.

114. The changes proposed by the Panel would allow offerees who have already accepted one alternative form of consideration in an offer to switch to accepting the alternative consideration of the offer in the event that the alternative is increased during the course of the offer.

Proposal in April 2003 discussion paper

115. The discussion paper proposed that the Code's rules be amended to allow for offerees who have accepted a scrip (non-cash) alternative in an offer, or a cash alternative, the opportunity to revoke that acceptance and instead accept an increased cash or scrip (non-cash) alternative.

Comments of respondents

116. Most respondents were supportive of the Panel's proposed changes. The Panel has accepted a suggestion by a respondent on the need to constrain the time period during which changes to consideration alternatives can be accepted by offerees.

117. One respondent was not in favour of acceptors being able to change their acceptance to elect to receive a different form of alternative consideration. The Panel considers it is important that acceptors be able to change their decision if the consideration alternatives change, but only to switch to an alternative that has been increased, not to revoke the acceptance altogether. This will ensure equity and fairness between acceptors.

Compliance Costs

118. The proposed changes permit more flexibility to target company shareholders who receive takeover offers containing alternative forms of consideration. This should not involve an increase in compliance costs. Comments from respondents support the Panel's belief that there will be no increased compliance costs.

Recommended change

119. The Panel is proposing the replacement of rule 31(2) with a new rule 31(2) which clarifies the wording of that rule without altering its meaning.

120. A new rule 31(3) is proposed to ensure offerees are given the option, where a variation to an offer increases one or more of the consideration alternatives, to switch their acceptances from one alternative to the alternative that has been increased. Offerees would not be permitted to switch their acceptance to an alternative that has not been increased.

121. There will be some situations where an offeree has accepted an offer and has received the consideration at the time that the offer is varied. The Panel proposes a new rule 31(4) be added to deal with such a situation to protect the offeror. This covers a gap in the current wording of the Code.

122. To ensure offerees are properly informed of their rights when an offer is varied, the Panel is proposing a new rule 28(4). This rule is to provide a procedural mechanism for variations of offers which add a cash alternative to an offer or which increase one or more consideration alternatives in an offer.

123. To further clarify the procedure to be followed for variations to offers that add alternative forms of consideration the Panel proposes amendments to rule 32 and rule 27(c).

Proposed replacement rule 31(2):

If a variation to an offer adds a cash alternative to the offer, the offeror must give all offerees, including those who have accepted the offer before the variation is made, the opportunity during the offer period to take the cash alternative as consideration.

Proposed new rule 31(3):

If an offer contains alternative consideration options and a variation to the offer increases one or more of those alternatives, whether by increasing an existing component or components of the consideration, adding a cash component to the consideration or both, the offeror must give all offerees, including those who have accepted the offer before the variation is made, the opportunity during the offer period to take one of the increased alternatives as consideration.

Proposed new rule 31(4):

If an offeree has accepted an offer and been sent the consideration, no acceptance by that offeree of an alternative consideration option pursuant to this rule 31 shall be valid unless that offeree returns that consideration to the offeror within the offer period.

Proposed new rule 28(4):

If a variation is to add a cash alternative to the offer or to increase one or more alternative consideration options in the offer, the notice of variation must:-

(a) contain a prominent statement to the effect that:

(i) the cash alternative or any of the increased alternatives (as the case may be) may, within the offer period, be accepted as the consideration by all offerees, including those who accepted the offer before the variation was made; and

(ii) if an offeree has accepted the offer and been sent the consideration, no acceptance by that offeree of an alternative consideration option shall be valid unless that offeree returns that consideration to the offeror within the offer period.

(b) be accompanied by an acceptance form which is consistent with that statement and reflects the variation.

Proposed replacement rule 32:

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

Proposed amendment to rule 27(c):

(c) to add to the offer a cash alternative (if the directors of the target company have given their prior written approval):

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

Proposal

124. The Panel proposes amendments to rule 36 and deletion of clause 13 of Schedule 1 to the Code to remove an inconsistency between these two provisions. The proposal removes the obligation on the bidder to disclose in its offer document whether it intends to acquire equity securities outside of the offer under rule 36 during the course of the offer.

125. The Panel proposes further to require that relevant on-market acquisitions should be notified to the market and the target company rather than just to the Panel as at present.

Rationale for proposed change

126. Offerors are currently prevented from acquiring securities during an offer other than under the offer except in the limited circumstances detailed in rule 36.

127. The Panel is aware that there has been confusion in the market because of an apparent inconsistency about the form of statement that an offeror needs to include in its offer document if it intends to acquire securities during the course of the offer in reliance on rule 36(b).

128. Rule 36(b) provides that, in order for the offeror to be able to acquire shares under that rule, the "possibility" of an acquisition under that rule must have been disclosed in the offer document. On the other hand clause 13 of Schedule 1 to the Code, which prescribes the contents of the offer document, refers to the offeror stating an "intention" to acquire securities under rule 36.

129. The Panel considers it is not appropriate that an offeror should have to state in the offer document an unequivocal "intention" that it will acquire securities outside of an offer during the offer period. The Panel also considers that the inclusion in the offer document of the "possibility" of acquisitions being made outside of the offer during the offer period is of little value and is perhaps misleading. The Panel's preferred position is that no statement of the offeror's intention to acquire, or possibility of acquiring, securities be made at all in the offer document. However the Panel also considers that such acquisitions should, where practicable, be notified to the market.

130. The Panel issued a Practice Note in August 2002 in which it indicated that it was permissible for offerors to state in their offer document that they had no present intention to acquire securities under rule 36 but that there was a possibility that they would do so.

131. The intention for the proposed change is to remove the need for any statement of the offeror's acquisition intentions to be made in the offer document, but to provide that such acquisitions be notified to the target company, the Panel (as at present) and, for listed companies, to the registered exchange.

Proposals in April 2003 discussion paper

132. The discussion paper proposed revoking rule 36(b) and clause 13 of Schedule 1 to the Code but with the additional requirement that purchases by the offeror outside the offer were to be notified not just to the Panel but to the target company and the market generally.

133. It was also proposed that notification of market acquisitions for shares in unlisted target companies should be made in principal daily newspapers.

Comments of respondents

134. There was general support for removing the requirement that offerors state their intentions about on-market or private-treaty acquisitions under rule 36 in the offer document.

135. Most respondents did not agree with the proposal to notify market acquisitions in principal daily newspapers. There was mixed reaction from respondents to the suggestion that offerors should be required to send acquisition information to the Panel, the target company and the NZX, if either the target company or the offeror are quoted on the registered exchange. Some respondents were uncertain as to the necessity for disclosing such information regularly throughout the offer period. There was also resistance to the suggestion that the offeror advertise the level of acquisitions to date where the target is unlisted.

136. The general comment from most respondents was that there should be disclosure but not through the medium of advertising or principal daily newspapers.

137. The Panel accepts the submissions that there need be no public notification of market or private-treaty acquisitions where only unlisted companies are involved in a takeover transaction. However the Panel and the target company will be notified.

Compliance costs

138. The Panel's proposals as now formulated will involve negligible compliance costs.

Recommended change

139. It is recommended 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) detailing notification requirements for acquisitions made under rule 36. It is also recommended that clause 13 of Schedule 1 should be deleted.

140. For listed target or offeror companies all acquisitions will need to be notified to the NZX and the target, as well as the Panel. Where both parties are unlisted notification of rule 36 acquisitions would be only to the Panel and the target company. The target would have its normal duties to its shareholders to keep them informed.

Clause 13 of Schedule 1 to be revoked.

Rule 36(b) to be revoked. Remaining clauses renumbered.

Proposed new rule 36(e) (replacing existing sub clause (f)):

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 weighted average price paid under those acquisitions to:

(i) *the target company; and*
(ii) *the Panel; and*
(iii) *if any voting securities of the target company, the offeror or any holding company of the offeror are quoted on a registered exchange's market, that registered exchange.*

J: Prospectuses for scrip offers

Proposal

141. The Panel is proposing that the Code be amended to ensure that, where an offer includes the offer of securities, a copy of the relevant registered prospectus and investment statement is provided to the target company (and the Panel) along with the takeover notice required under rule 41.

142. This proposal would replace some of the existing provisions of the *Securities Act (Takeovers) Exemption Notice 2001* (as amended) under which, in order for an offeror and issuer to take advantage of the exemption, it must provide the target company with a copy of its registered prospectus and investment statement at the same time it gives its takeover notice.

143. The Panel's proposal would ensure that prospectuses for all scrip offers, whether the issuer/offeror is choosing to rely on the Commission's exemption or not, are provided to the target company along with the takeover notice. This will apply whether the securities documents are prepared to comply with New Zealand law or the law in an overseas jurisdiction.

144. The Panel is also proposing that clause 18 of Schedule 1 to the Code be revoked.

Rationale for proposed change

145. Currently rule 41(2) provides in respect of takeover notices that:

> (a) 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.

146. Rule 41(2) does not 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) 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 access to the information contained in the prospectus when preparing the target company statement or the independent adviser's report (although the target company always has a further 14 days from receipt of the offer document before it must release its target company statement).

147. The object of the recommended 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.

148. Clause 18 of Schedule 1 prescribes certain financial information that must be included in the offer document where securities are offered as consideration. It was designed to minimise financial disclosures for offerors which were providing the

securities of listed issuers as consideration in a takeover. However the construction of clause 18 is such that its provisions do not apply where the offeror is required by the Securities Act to register a prospectus in relation to the offer. In practice the clause is redundant. The Panel proposes that it be revoked.

Proposals in April 2003 Discussion Paper

149. The discussion paper proposed amending the Code to make it a requirement that in each case where a scrip offer is being made a copy of the registered prospectus or comparable document is provided to the target company along with the takeover notice.

Comments of respondents

150. There was general opposition from submitters to the proposed requirement to have registered prospectuses accompany takeover notices involving securities as consideration.

151. While respondents were sympathetic to the proposition that target company directors and independent advisers should have the best quality information available on which to prepare their target company statement and independent adviser report, they were concerned at the potential cost, loss of confidentiality and inflexibility inherent in having to have any required prospectus registered at the time of the offeror giving its takeover notice.

152. Respondents suggested, as an alternative to the Panel's proposal, that offerors be required to provide to the target company, along with their takeover notice, an advanced draft of their prospectus document. This would give the target company the benefit of the information contained in the prospectus but without the offeror having to incur the additional expense of final due diligence on the documentation and potential loss of confidentiality through involvement of external parties.

153. The Panel was very sympathetic to the views of respondents. It gave serious consideration to developing proposals that would enable offerors making scrip bids to provide the target company with an "all-but-final" version of its prospectus and investment statement. In the course of developing this proposal the Panel became aware that this approach could put offerors in the position where they would be in breach of the Securities Act 1978.

154. The particular issue under the Securities Act is that the draft prospectus, by being provided to the target company and the Panel, and (in accordance with proposals outlined later in this paper) potentially being available on request to the public at large, could be considered an "advertisement" for the purposes of that Act. The Securities Act does not permit (other than in a very limited way) an issuer to "advertise" an offer of securities unless there is a registered prospectus on issue relating to that offer. In the case of a takeover the offer of securities is prospective, but will not have occurred at the time the takeover notice is given.

155. The Panel gave consideration to proposing that the target company be prohibited by the Code from distributing the near-final version of the prospectus it would receive

with a takeover notice to anyone other than its own advisers. This might then enable the Commission to amend its existing exemption notice to allow "distribution" of the draft prospectus ahead of the final registration of the prospectus.

156. However the Panel decided that this approach was contrary to the general objective of trying to make takeover documents more generally available to the market. It would expose the target company to penalties under the Takeovers Act in relation to what was essentially a Securities Act issue for the offeror. It was also expected that the Commission might be uncomfortable to grant an exemption of the type that would be required to allow the proposed provision of the Code to work.

157. For these reasons the Panel decided to revert to its original proposal, although this may have compliance cost implications. The Panel believes it is vitally important that the target company and particularly the independent adviser be provided with the best quality information about an offer. Where that offer includes scrip as part of the consideration this information is likely to be contained in the prospectus. With respect to any confidentiality concerns the Panel notes that with continuous disclosure obligations it now seems common for takeovers to be announced to the market ahead of the actual giving of the takeover notice.

158. To the extent the proposal discourages the giving of speculative takeover notices it would be generally beneficial for the market.

Compliance costs

159. As a result of the existing Securities Act exemption (granted at the Panel's request) offerors providing New Zealand securities as consideration under an offer, and choosing to rely on the Commission's present exemption, already have to provide a copy of the registered prospectus and the investment statement when they provide the takeover notice. For these offerors the Panel's proposed Code amendment should have no adverse compliance cost implications.

160. Offerors falling outside the Commission's existing exemption would be subject to increased compliance costs, being primarily "due diligence" type costs required before directors can be expected to formally sign prospectus documents required under New Zealand or overseas securities laws. These costs would only be additional to those already imposed by the Securities Act in the event that a takeover notice is given and then an offer is not proceeded with.

Recommended change

161. The Panel recommends that where scrip offers are made under the Code the takeover notice should be accompanied by the registered prospectus and/or the investment statement and any other documents normally required to accompany the registered prospectus when it is provided to the relevant regulatory body.

162. Accordingly, the Panel recommends a new rule 41(4) be added to the Code and that a new rule 44(1)(d)(iii) be inserted (with the existing rule 44(1)(d)(iii) being renumbered as 44(1)(d)(iv)). The Panel further recommends that clause 18 of Schedule 1 be deleted. The Panel will consider requesting the Securities

Commission to amend the *Securities Act (Takeovers) Exemption Notice 2001* (SR2001/217) (as amended by SR 2003/87) by deleting clauses 8(b), 11(5), 13(3) and 16(3).

Delete clause 18 of Schedule 1

Proposed new rule 41(4):

Where securities are offered as consideration or part consideration for the offer, the notice in respect of the offer must be accompanied by –

(a) each prospectus and/or investment statement and/or other offering document which, under the law of New Zealand or any other jurisdiction in which the offer of securities is to be made, is to be provided to persons offered those securities or to be deposited or registered with any regulatory body is respect of that offering; and

(b) any other document which, under the law of New Zealand or any other jurisdiction in which the offer is to be made, is to accompany any document referred to subclause (a) above which it is provided to persons offered the securities or deposited or registered with the regulatory body (as the case may be)..

Proposed new rule 44(1)(d)(iii) (with existing rule 44(1)(d)(iii) being renumbered to 44(1)(d)(iv)

Any document required to accompany the takeover notice under rule 41(4) that is required by the Securities Act 1978 or any other applicable law to accompany the offer of securities.

K: Notification obligations of the target company

Proposal

163. The Panel proposes changes to remedy existing gaps in the Code relating to the provision of documents and details about takeovers to the relevant registered exchange and to target company shareholders.

Rationale for proposal

164. Rule 42(1) currently requires a target company, immediately on receipt of a takeover notice, if its securities are listed on a registered exchange, to advise the exchange that a takeover notice has been received. If the target company's shares are not listed then it must advise its shareholders that a takeover notice has been received. However, there is no Code obligation on an offeror to notify the NZX that it has given a takeover notice, and nor is the target company obliged to provide details of the notice it has received.

165. The Panel's proposals are intended to correct these deficiencies in the interests of shareholders and a properly informed market. Although continuous disclosure laws should generally ensure the market is fully informed where listed companies are involved, these laws do not cover unlisted companies.

Proposals in April 2003 discussion paper

166. The Panel's original proposals were that the Code should be amended to include specific obligations on the offeror to advise the relevant registered exchange of the giving of a takeover notice, and for the target company to provide better information to its shareholders about takeover notices that have been received. The Panel also proposed changes to improve the general availability of takeover documents from offerors and target companies.

Comments of respondents

167. Respondents were generally supportive of the Panel's proposed changes although some suggested that documents need be made available only from the target company (which can recover its costs from the holder) rather than from both the offeror and the target. The Panel considers that both the target company and the offeror should be obliged to make takeover documents available on request.

168. There were some suggestions that the Panel should put all takeover documents on its website. This has superficial attraction but is not feasible because of costing, resource and funding issues.

Compliance costs

169. There may be a small increase in compliance costs as target companies may have to provide further information about takeover offers to their shareholders. This is only likely to be of relevance to unlisted companies because, under the continuous

disclosure regime, listed companies are obliged to provide information about material events to the registered exchange and to shareholders.

Recommended change

170. The Panel recommends that the current rules be changed:

(a) to require offerors to immediately send their takeover notices to the relevant registered exchange if the target is listed;

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

(c) to require the full takeover notice to be available on request from both the offeror and the target company without cost to anyone who requests it.

Proposed new rule 41(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 target company under rule 41) to the registered exchange. Each copy shall, where possible, be provided electronically.

Proposed new rule 41(6):

The offeror must send a copy of the notice (and/or any other document sent to the 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.

Proposed amended rule 42(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 a takeover notice has been received.*

Proposed new rule 42(3):

The target company must send a copy of the notice (and/or any other document sent to the 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.

L: Record dates

Proposal

171. The Panel proposes that the existing rule in relation to the setting of the record date be amended to allow the offeror to change the record date within the normal Code parameters of a takeover. Under existing rules there seems to be no ability on the part of an offeror to change the record date once it has been set.

Rationale for proposed change

172. Rule 43(2) provides that the record date must be not more than 10 days before the date of the offer.

173. 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 set.

174. The purpose of the current rule is to ensure that the offerees to whom an offer is made comprise the most 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.

175. The inflexibility of the current rules has caused some offerors difficulty where, for some unexpected reason, after the notice of record date has been given, it transpires that the offer cannot be made within 13 days of the record date. (Note: offerors have 3 days from the date of their offer in which to send their offer document to offerees.)

176. 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.

177. The rationale for amending the rules 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.

Proposals in April 2003 discussion paper

178. In the discussion paper the Panel had proposed 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 to the record date.

179. The Panel did not consider that this change of record date 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.

Comments of respondents

180. Respondents were supportive of the Panel's proposals to give the offeror the ability to alter the record date.

Compliance costs

181. 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 recommended 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.

182. 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.

Recommended change

183. It is recommended that the definition of "record date" in rule 3(1) be replaced with a new definition referring to the date most recently specified by the offeror. It is also recommended that further changes be made to rules 42(2), 43(3) and 43(4) to provide a workable mechanism for the record date to be changed.

Proposed new definition of "record date" in rule 3(1):

***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)*

Proposed replacement rule 42(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 that record date in electronic form (or in such other form as the target company and the offeror agree).

Proposed replacement rule 43(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.

Proposed replacement rule 43(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.

M: Documents being required to be sent to the Panel

Proposal

184. The Panel proposes that the Code be amended to make it a legal requirement for meeting documents, and miscellaneous other documents relating to the takeover not currently covered by the Code, to be provided to the Panel.

Rationale for proposed change

185. The Panel has a responsibility to keep under review market practices relating to takeovers. The Panel 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.

186. 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 it should be a legal requirement in the Code.

187. The changes proposed are to remove an inconsistency in the Code which requires takeover documents to be supplied to the Panel but does not require meeting documents to be supplied. Meetings are held pursuant to rules 7(c) and 7(d) and also pursuant to the provisions of various class exemptions.

Proposals in April 2003 discussion paper

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

189. The Panel proposed that all documents sent under the new rule should be required to be sent in hard copy and, where practicable, in electronic form.

190. It was also considered by the Panel that rule 47 should be amended to replace the exemption currently in clause 26 of the *Takeovers Code (Class Exemptions) Notice (No 2) 2001* which is an exemption from the requirement to provide the target company's securities register to the Panel as required under rules 42(2) and 47 of the Code. The proposed changes would still enable the Panel to request this information.

Comments of respondents

191. Respondents were in favour of the Panel's proposal to legally require all documents relating to a takeover bid and in respect of relevant company meetings that are sent to shareholders to simultaneously be provided to the Panel.

Compliance costs

192. There should be little or no increase in compliance costs as currently most documents relating to takeovers and company meetings are already being provided to the Panel, albeit, some of them on a request basis. The amendments proposed by the Panel will formalise the provision of documents to the Panel by making it a legal requirement in the Code.

Recommended change

193. The Panel recommends that rule 47 be amended to remove the requirement to provide the target company's securities register to the Panel under rule 42(2) of the Code (subject to the power of the Panel to request the register). The coverage of rule 47 should also be expanded to cover the provision of documents other than formal takeover documents to the Panel. It is also recommended that a new rule 19A be added to the Code to provide for the supply of meeting documents to the Panel.

Proposed new rule 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 equity securities (or of any class of equity 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.*

Proposed replacement rule 47: (See also section S for a further change to rule 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 equity securities (or any class of equity 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).*

N: Compulsory acquisitions

Proposal

194. The Panel proposes that the Code be amended to provide that, where dominant ownership has been achieved through an offer, the process of compulsory acquisition need not commence until after the offer has finished.

Rationale for proposed change

195. The object of the Panel's proposals is to correct an unforeseen problem in the Code which can arise under the existing compulsory acquisition procedure. The difficulty can arise where an offeror reaches the 90% dominant ownership threshold when an offer still has quite a long way to run and where a person, during the offer period, acquires a large volume of securities outside of the offer under rule 36.

196. If an offeror quickly receives acceptances sufficient to take it over 90% of the Code company's voting rights under the offer or on-market it may well be required under rule 54 to issue its acquisition notice before the offer is closed. This means that the acquisition notice and the offer document will both be with the outstanding security holders, and capable of acceptance, or requiring response, at the same time. This creates confusion for offerees, particularly if the consideration offered/paid under the two alternatives are different.

197. 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).

198. As a result, the offeror, may not know right up to the time that it must specify the consideration payable for any compulsorily acquired shares (being up to 30 days after issue of the notice of dominant ownership):

(a) whether it must pay the same amount for any outstanding equity securities as it paid under the offer (which will be the case if it received acceptances in respect of 50% of the equity securities under the offer); or

(b) whether it has to appoint an independent adviser to certify that the consideration to be paid for compulsory acquisition is fair and reasonable, being a price which can be objected to by the outstanding shareholders and which can increase or decrease if expert determination is required.

199. The intention of the Panel's proposed change is to prevent confusion in the compulsory acquisition procedures by separating the offer and compulsory acquisition periods.

Proposals in April 2003 discussion paper

200. The Panel proposed in its discussion paper to amend the Code to allow the issuing of acquisition notices to be delayed until 30 days after the end of the offer period, rather than such notices having to be issued within 30 days of an offeror becoming the dominant owner.

Comments of respondents

201. Respondents were generally supportive of the Panel's proposed changes and considered they would remove confusion for offerees. A respondent supported an alternative proposal of requiring offers to be closed 30 days after a party becomes dominant owner through an offer. However, this alternative was not generally supported.

202. One submitter noted that the Code does not currently require copies of independent advisers' certificates under rule 57(1), or expert determinations under rule 57(3), to be sent to offerees, the Panel or the relevant registered exchange. The submitter suggested that these be made Code requirements. The Panel accepts this suggestion and has broadened the scope of its recommendation.

203. A submitter also noted an anomaly in rule 56(2) covering the calculation of whether an offeror has achieved 50% of acceptances of the shares under an offer when those acceptances have come from associates of the offeror. The submitter proposed and the Panel supports amendment to rule 56(2) of the Code to exclude from the calculation of the acceptance level under the offer any shares controlled by the offeror or held or controlled by associates of the offeror. It is important that the validity of the offer price for the purposes of compulsory acquisition not be distorted by acceptances from related parties or associates of the offeror.

Compliance costs

204. The Panel's proposals should result in compliance costs being reduced quite significantly by avoiding the unnecessary appointment of an independent adviser in some circumstances. The purpose of the Panel's proposed changes is to remove an impracticality in the Code and the Panel believes there will be no effect on compliance costs.

Recommended changes

205. The Panel recommends that the Code be changed to:

(a) provide that where a dominant owner achieves that position by reason of acceptances of an offer its acquisition notice must be sent no later than 30 days after the end of the offer period;

(b) exclude from the calculation of the number of voting rights obtained through acceptances of an offer for the purposes of rule 56(2) those voting rights controlled by the offeror or held or controlled by associates of the offeror;

(c) provide for disclosure of independent advisers' certificates obtained under rule 57(1) or expert determinations obtained under rule 57(3).

Proposed replacement rule 54:

(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 (whether or not the dominant owner has also acquired equity securities under rule 36), 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.

Rule 56(2) be amended:

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 and were not controlled by the offeror or held or controlled by any associate of the offeror.

Proposed new rule 57(1A):

The dominant owner must send a copy of the independent adviser's certificate –

(a) to the Panel and the registered exchange (if any voting securities of the target company are quoted on the registered exchange's market), immediately on receipt; and

(b) without charge, to any person requesting it within 1 day of receiving the request.

Proposed new rule 57(5):

The dominant owner must send a copy of the expert determination –

(a) to the Panel and the registered exchange (if any voting securities of the target company are quoted on the registered exchange's market), immediately on receipt; and

(b) without charge, to any person requesting it within 1 day of receiving the request.

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

Proposal

206. The Panel proposes amendments to the advice statement that is required to be included on the front page of each offer document to simplify some wording and to refer to the fact that a target company statement and independent adviser's report will be provided to offerees within the next 14 days.

Rationale for proposed change

207. The current statement presented by Clause 4 of Schedule 1 to the Code does not advise shareholders that they will also be receiving a statement from the target company and an independent adviser's report. 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.

208. 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, the Panel considers it would be preferable to amend the warning statement on the front of the offer document to expressly inform offerees that there are more documents to be sent to them.

209. The rationale behind 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.

Proposals in April 2003 discussion paper

210. The Panel's original discussion paper proposed that changes be made to the prescribed warning statement to add a reference to the fact that the shareholder will be receiving additional material from the target company.

Comments of respondents

211. Respondents generally supported the Panel's proposed changes. Some respondents suggested alternative plainer wording that would assist shareholders understand that there were more documents apart from the offer document. The Panel has modified its original proposal to take account of the comments from respondents.

Compliance costs

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

Recommended change

213. The Panel recommends that clause 4 of Schedule 1 to the Code be replaced by the revised statement set out below.

Replace clause 4 of Schedule 1

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 your financial or legal adviser.

If you have sold all your shares in [name of target company] to which this offer applies, you should immediately hand this offer document and the accompanying acceptance form to the purchaser, or the agent (e.g.the broker) 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]] either accompanies this offer or will be sent to you within 14 days and should be read in conjunction with this offer."

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

Proposal

214. The Panel proposes that clauses 6 and 7 of Schedule 1 and clauses 5 and 6 of schedule 2 be amended so that disclosure of share ownership or trading information of substantial security holders of the target company (not being related to the offeror) should be made in the target company statement rather than the offer document.

215. The Panel also proposes that some transactional information should be able to be aggregated for the purposes of disclosure in the target company statement.

Rationale for proposed changes

216. Clauses 6 and 7 of Schedule 1 currently prescribe disclosures that must be made in an offer document about ownership of, and trading in, securities of the target company. Clauses 5 and 6 of Schedule 2 prescribe information to be disclosed in the target company statement about ownership and trading in target company securities.

217. The reasons for the proposed changes to these clauses are:

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

(b) to clarify one of the requirements of Schedule 1 in order to avoid unnecessary statements being made in respect of those related parties of the offeror who do not hold securities in the target company;

(c) to reduce the compliance costs in relation to disclosure of information about transactions in target company shares by substantial security holders and related parties.

218. While it may be important to know the pattern of trading in the securities of the target company in the period leading up to a takeover, the requirement to disclose the consideration for, and date of, every transaction by each substantial security holder and related party to the offeror is too burdensome to comply with. In many instances the information is impossible to obtain because even the substantial security holders themselves do not have the detail required, certainly not in a readily accessible form. There is no compulsion on the substantial security holder to provide the necessary information.

219. The Panel proposes some aggregation of this information be allowed on the basis of aggregating transactions and consideration paid or received over a week for substantial security holders, and on a daily basis for the offeror and its related parties. This should reduce compliance costs without compromising the utility of the information provided to shareholders.

Proposals in April 2003 discussion paper

220. The Panel's discussion paper proposed shifting responsibility for providing share holding and share trading information for substantial security holders from the offeror to the target company. It also proposed to make it clear that any person acting in concert with the offeror, each related party of the offeror and each director of each related company of the offeror, need not be identified and make a specific disclosure where they held no shares.

Comments of respondents

221. Respondents were supportive of the Panel's proposed changes, with most agreeing that it was better that the share trading and share holding information concerning substantial security holders be provided by the target company rather than the offeror as it would have better access to information in respect of trading by these shareholders.

222. There was a suggestion from a respondent that there should be some aggregation of transactions by substantial security shareholders for disclosure purposes in the target company statement because the existing provisions of the Code are impossible to comply with. The Panel accepted the suggestion. Where the target company is large and actively traded it is conceivable that a full response to this requirement could involve many pages of detailed information, all or most of which would be of very limited relevance to shareholders.

Compliance Costs

223. There should be an overall reduction in compliance costs because of the relaxation in the requirement to disclose details of every transaction by substantial security holders in the six months preceding the takeover.

224. The proposal to shift responsibility for disclosure of substantial security holder information from the offeror to the target company would result in the apparent shift in costs from the offeror to the target company. However these costs can be recovered from the offeror. As it is less burdensome for the target company to collate this information, the overall compliance costs of a takeover should be reduced. Respondents have indicated no increased compliance costs will result from the recommended changes.

Recommended change

225. The Panel recommends that clauses 6 and 7 of Schedule 1 be amended and clause 6 of Schedule 2 also be amended to:

(a) transfer the obligations to disclose details of share trading by substantial security holders of the target company from the offer document to the target company statement;

(b) allow the daily aggregation of trading information by the offeror and its related parties, and the weekly aggregation of trading information of non-related substantial security holders;

(c) clarify the method of disclosing non-shareholding by related parties and directors of related parties of the offeror.

Proposed replacement clause 6 of Schedule 1:

(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.

Proposed amended clause 7(1) of Schedule 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 per security for, and the date of, every transaction to which this subclause applies (or, in respect of any day on which any such person made more than one such acquisition or more than one such disposal of securities in a class, the total number of such securities acquired or disposed of on that day by that person and the weighted average consideration per security paid or received).

Proposed replacement clause 6 of Schedule 2:

(1) The number and designation of any equity securities of the target company:-

(a) 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 transaction;

(b) acquired or disposed of by each person referred to in clause 5(1)(b) during the 6-month period before the latest practicable date before the date of the target company company statement, including the consideration per security for, and the week of, each such transaction (or, in respect of any week in which any such person made more than one such acquisition or more than one such disposal of securities in a class, the total number of such securities acquired or disposed of in that week by that person and the weighted average consideration per security paid or received), to the knowledge of the target company.

(2) If no such equity securities were acquired or disposed of, a statement to that effect.

Q: Certificate in takeover notices and offer documents

Proposal

226. Clause 19 of Schedule 1 of the Code prescribes the form of certification to be given on each offer document by two directors and two senior executives of each offeror. However, the Code is unclear as to whether the takeover notice (which is also based on Schedule 1) should be similarly signed.

227. The Panel proposes the Code be amended to clarify 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.

Rationale for proposal

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

229. Currently, most takeover notices received by the Panel are not signed. The Panel believes takeover notices form an important part of the takeover process because the target company statements and the independent advisers' reports are prepared on the basis of the information in the notice and accordingly should be properly attested to.

Proposals in April 2003 discussion paper

230. The Panel in its discussion paper proposed that the Code be amended to require the takeover notice to be signed in the same manner as the offer document.

Comments of respondents

231. Most respondents agreed that the Code did not currently require takeover notices to be signed. Some respondents agreed that takeover notices should be certified in the same way as offer documents. Other respondents questioned the need for signed certificates in takeover notices. One respondent suggested that if certification is to be required, it should be less formal, with one director's signature, instead of the usual formality of two company directors' signatures and two signatures by management.

232. The Panel considered these comments. In the Panel's view the takeover notice is an important document which should be properly certified by persons specified in clause 19(2) of Schedule 1 in the same manner as the offer document. The Panel considers the present lack of clarity in the Code is simply the result of inadvertent error.

Compliance costs

233. The Panel's proposal could result in a modest increase in compliance costs to the extent that those who would be 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 is the case when the notice does not have to be signed.

Recommended change

234. The Panel recommends that the Code be amended to ensure that takeover notices are signed by specified persons in the same manner as offer documents. This involves replacing rule 41(1)(b) with a new rule of the same number, replacing rule 44(1)(d) with a new rule of the same number, and amending clause 19(1) of Schedule 1. See also section J of this report at paragraph 162 for earlier proposed changes to rule 44(1).

Proposed replacement rule 41(1)(b):

(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.

Proposed replacement rule 44(1)(d) (incorporating the changes recommended in section J)

(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) any document required to accompany the takeover notice under rule 41(4) that is required by the Securities Act 1978 or any other applicable law to accompany the offer of securities; and

(iv) a copy of the target company statement (if the target company statement has been given to the offeror under rule 46(a)); and

(v) 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."

Proposed replacement clause 19(1) of Schedule 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."

R: Material contracts

Proposal

235. Clause 13 of Schedule 2 currently requires disclosure of whether any director or senior officer of the target company or their associates has any interest in a material contract to which the offeror or a related party of the offeror is a party. Where there is an interest the nature and extent of such interest must be disclosed in the target company statement.

236. The Panel proposes to remove the requirement that contracts have to be "material" before being disclosed. This is to avoid difficulties in defining when a contract is "material" or otherwise for the purposes of disclosing any such contractual relationship.

237. The Panel further proposes to require the nature of relevant contracts to be disclosed along with their extent and monetary value (other than those contracts entered into in the normal course of business and on usual terms and conditions). It has not been clear whether the existing requirement to disclose the "extent" of each contract extends to disclosure of monetary amounts.

238. Clause 13 also requires disclosure of interests in material contracts with the offeror and its related parties in which substantial security holders of the target company have an interest. The Panel's proposed changes would also apply to contracts involving these parties.

Rationale for proposed changes

239. The Panel believes that the disclosure of any contractual relationships involving the directors and officers of the target company and the offeror and its related parties is important to target company shareholders. The Panel is concerned that the "materiality" qualification in clause 13 may be being used to justify non-disclosure of potentially important relationships.

240. The reason for the first proposed change is to ensure that there is meaningful and relevant disclosure to target company shareholders about interests target company directors and officers and their associates may have in contracts with the offeror and its related parties by removing any uncertainty created by the qualifying word "material." The second change makes clear that the monetary value of contracts should be disclosed unless these are contracts (including employment contracts) entered into in the normal course of business and on usual terms and conditions. This should ensure adequate disclosure of the details of any unusual contractual arrangements.

Proposals in April 2003 discussion paper

241. In its discussion paper, the Panel proposed that clause 13 of Schedule 2 be amended by:

(a) removing reference to the word "material"; and

(b) including a reference to requiring disclosure of the monetary value of contracts.

Comments of respondents

242. Many respondents were opposed to the Panel's proposals because of the potential to require disclosure of information concerning a large number of immaterial contracts.

243. Some respondents agreed the Panel's proposals would clarify the position in respect of "material" contracts and acknowledged that there are difficulties associated with the definition of "material." However, one respondent was of the opinion that the concept of "materiality" was well understood in legal circles. The respondent went on to observe that monetary value does not necessarily determine if a contract is material. Some respondents agreed with the Panel that the materiality requirement should be removed because of the importance of full disclosure of relationships between directors or officers of the target company and the offeror.

244. One respondent suggested that details of employment contracts should not be disclosed, if entered into in the ordinary course of the company's business. Another respondent suggested that the Panel's proposals go beyond the Companies Act obligations in relation to disclosure of contractual relations between the offeror and the target company.

245. The Panel responded to these concerns by adding the qualification that disclosure of details of a contractual interest would not be required where the contract was entered in the normal course of business and on usual terms and conditions.

246. The aim of the Panel is to require disclosure of information in line with the obligations required by the Companies Act's provisions on "interest."

Compliance costs

247. There are likely to be some increased compliance costs with this proposal because it brings the possibility of an enhanced 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 some of those details.

248. It is not possible to quantify the extent of any increased costs. These would be "due diligence" costs. They will ultimately be borne by the offeror. There could also be additional printing costs, if increased disclosures are required. 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.

249. In the Panel's view any extra costs are warranted by the increased disclosure of relevant but not necessarily material contracts.

Recommended change

250. The Panel proposes that all contracts to which the offeror or any related party is a party, and in which directors or senior officers of the target company or their associates have an interest, should be disclosed in the target company statement.

The nature of all such contracts would be disclosed, along with the extent and monetary value of any such contracts unless the contract is entered into in the normal course of business and on usual terms and conditions.

251. The proposed change would also apply to contracts the offeror and its related parties may have with substantial security holders of the target company.

Proposed new clause 13 of Schedule 2 :

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 of any such interest and (except in respect of any contract entered into in the ordinary course of business of the offeror or the related company and on usual terms and conditions) its extent and 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.

S: Unlisted Code companies

Proposal

252. The Panel proposes to require offerors who are making an offer for a Code company to periodically inform the target company, the Panel and the market as to the progress of a takeover in relation to the level of acceptances received. Disclosure is to be more limited for takeovers of unlisted companies.

Rationale for proposed changes

253. There is no Code rule which requires offerors who are making an offer for a 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. This is not a difficulty for a listed company because of the bidder's obligations to disclose each 1% change in its relevant interest in the target company's voting securities under the substantial security holder regulations.

254. It is currently impossible for the market (including prospective competing bidders), and the Panel, to follow an offer's progress where an unlisted company is the target. It is desirable that securities markets, including target companies and their shareholders, are kept well informed about levels of acceptances received.

255. However, the Panel acknowledges that shareholders opting to invest in unlisted companies are doing so on the basis that disclosure about those companies' affairs will be of less frequency and contain less information than that for a listed company.

Proposals in April 2003 discussion paper

256. The Panel proposed in its discussion paper to require offerors to provide notices to the Panel and to the relevant registered exchange in respect of each 1% of acceptances of an offer received where either the offeror or target company was a listed company. The Panel also proposed that offerors should give similar notification to the Panel and make news releases where both parties to a takeover are unlisted companies.

Comments of respondents

257. Although respondents acknowledged the desirability for disclosure of progress of a takeover, most respondents did not support notification through the news media of the level of acceptances of takeover offers for unlisted companies.

258. Some respondents questioned the need for the Code to require more disclosure, given that in general, the continuous disclosure regime is already in place and requires publication of similar information to that proposed by the Panel.

259. The Panel has noted and accepted the comments of respondents in relation to unlisted companies and newspaper notification.

Compliance costs

260. There should be only minimal increased compliance costs arising from the Panel's proposals.

Recommended change

261. The Panel recommends the addition of a new rule 47(5) (taking account of changes already proposed in section M of this report) to provide for disclosure of progress in a takeover each time the level of acceptances increases by 1% or more of the total voting rights in the target company. Notification would be required to the Panel and the target company and, where either company is listed, to the relevant registered exchange.

Proposed new rule 47(5): (See also section M at paragraph 193 for further changes to rule 47. This proposed amendment is prepared on the basis that the other changes proposed in section M are implemented.)

Each time the level of acceptances in respect of an offer increases by 1 % or more 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

(i) the target company; and

(ii) the Panel; and

(iii) 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 registered exchange.