TECHNICAL AMENDMENTS TO THE TAKEOVERS CODE

RECOMMENDATIONS TO THE MINISTER OF COMMERCE FROM THE TAKEOVERS PANEL

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20 August 2012

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INTRODUCTION

1. The Takeovers Panel (the "Panel") has the function, among other things, of keeping under review the law relating to takeovers of Code companies and recommending to the Minister of Commerce (the "Minister") any changes to that law that the Panel considers necessary.[1]

2. The Takeovers Code (the "Code") came into force on 1 July 2001. The Panel has administered the Code since then and from time to time becomes aware, through its interaction with the market, of problems, often of a minor technical drafting nature, which leave the Code less efficient and effective than it could be. This is the third time that the Panel has made recommendations to the Minister on changes to the Code.

3. The Panel has undertaken the current review in four stages, with each stage focusing on a specific set of proposals. At each stage, the Panel has published a discussion document and sought the views of the public on the Panel's proposals for law reform.

4. The stages of public consultation consisted of the following:

   (a) The first paper, in August 2009, related to the Code's regulation of partial takeover offers;

   (b) The second paper, in June 2010, covered a range of issues identified in Parts One to Five of the Code;

   (c) The third paper, in December 2010, related to hostile takeover offers; and

   (d) In July 2011, the fourth paper covered the issues that had been identified in Parts Six to Eight, and the Schedules, of the Code.

5. The proposals are of principal interest to practitioners actively involved in the takeovers market and, accordingly, the Panel received submissions on each of the discussion documents from the major corporate law firms in New Zealand, investment banks, and the New Zealand Law Society.

6. This Paper outlines the Panel's original proposals and comments on submissions received on those proposals before detailing the Panel's final recommendations. Most of the proposals relate to amendments to the Code and may be implemented by regulations made by way of an Order-in-Council. However, a small number of the proposals would require amendments to the Takeovers Act 1993.

7. Because of the nature of the review (technical as opposed to a review from first principles) these Recommendations include detailed drafting suggestions for each proposed amendment so that their precise nature is clear. However, the Panel is, of course, aware that the Parliamentary Counsel Office is the body ultimately responsible for drafting the amendments to the Code and, accordingly, the final form of the amendments may differ from those shown in these Recommendations.

8. The Paper is divided schematically to correspond to the various stages of the public consultation process. That is:

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[1] Takeovers Act 1993, section 8(1)(a).

(a) Section One of the Paper relates to the partial offers regime;

(b) Section Two relates to Parts One to Five of the Code;

(c) Section Three relates to hostile takeovers; and

(d) Section Four relates to Parts Six to Eight, and the Schedules, of the Code.

Regulatory impact

9. The Panel is committed to having the Code work well. To this end, the Panel has undertaken a ‘low policy content’ review of the Code, and is proposing a number of amendments, mostly to address technical anomalies. The review does not extend to the fundamental policy underlying the Code.

Compliance costs

10. The public consultation undertaken by the Panel indicated that the proposed amendments would only result in a marginal increase in compliance costs for market participants. The Panel believes that the benefits of the proposed amendments will exceed any increases in compliance costs.

Recommendation

11. The Panel recommends, under section 8(1)(a) of the Takeovers Act 1993, to the Minister of Commerce that the Code be amended as proposed in this Paper.

David Oliver Jones
Chairman
Takeovers Panel
20 August 2012

SECTION ONE: PARTIAL OFFERS

Overview

12. A partial offer under the Code enables a person to become the holder or controller of 20% or more, but less than 100%, of the voting rights in a Code company,[2] by way of an offer to all shareholders.

13. A partial offer is subject to some rules in the Code which specifically relate to the nature of partial offers, but in all other respects is subject to the same rules as a full takeover offer for 100% of the equity securities of the target company.

14. Partial takeovers occur relatively infrequently in the New Zealand market, comprising about 10% of all offers made under the Code. By August 2011, 16 partial offers had been made since the introduction of the Code in 2001. In contrast, 91 full offers had been undertaken.

15. In mid-2009, the Panel carried out a review of the Code's partial offers regime. The review identified a number of issues which the Panel wished to address by way of amendments to the Code (some of which were identified after the public consultation process, as indicated in the discussion below). These issues were:

    (a) A number of examples where the 'specified percentage' of voting securities being sought by the offeror under the partial offer is misstated or incorrectly calculated in the offer documentation.

    (b) The bias in the wording of "approval document" in rule 10(1)(b)(ii) of the Code.

    (c) The outcome of any voting by the offerees on whether to approve an offeror making a partial offer that results in the offeror having voting control in the target company of 50% or less is unknown at the time that the offer closes.

    (d) Identifying which persons are eligible to vote on the making of a partial offer if voting securities in the target company are traded during the offer period.

    (e) The ambiguity regarding how to state the percentage of voting securities being sought under the offer, in respect of which the approval of offerees is required under rule 10.

    (f) The percentage of voting rights already held or controlled by the offeror being diluted during the course of the offer period.

    (g) Votes being cast by the offeror or its associates under the rule 10 voting process.

    (h) The potential distortion effect in the scaling of acceptances of an offer where

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[2] Code company means a company that –

(a) is a party to a listing agreement with a registered exchange and has securities that confer voting rights quoted on the registered exchange's market; or

(b) was within paragraph (a) at any time during the period of 12 months before a date or the occurrence of an event referred to in this Code; or

(c) has 50 or more shareholders [and 50 or more share parcels](once the Regulatory Reform Bill is passed).

shares in the target company are held by nominees or custodians on behalf of multiple 'upstream' beneficial owners.

16. The Panel conducted public consultation between 28 August 2009 and 9 October 2009 (the "First Consultation Paper"). The Panel received seven submissions, from a number of major commercial law firms, the New Zealand Law Society, a share registry, and professional financial intermediary firms. As a whole, the public submissions supported the Panel's proposed amendments to the Code.

17. The Panel's recommendations are described under the following four broad topics:

    (a) *The specified percentage* ((a), above);

    (b) *The voting procedure under rule 10(1)(b)* ((b) to (e) and (g), above);

    (c) *Dilution of the offeree's voting control* ((f), above); and

    (d) *Acceptances by custodians* ((h), above).

The specified percentage

The Problem

18. A partial offer under the Code must be made for a "specified percentage" of target company voting securities not already held or controlled by the offeror (rule 9).

19. In about half of partial offers the specified percentage is misstated or is calculated incorrectly by the offeror in its takeover notice documentation.[3]

20. The Panel has a practice of allowing the offeror to correct a wrongly stated specified percentage by including the corrected percentage in its formal offer document that is sent to shareholders, but only if:

    (a) The target company directors consent to the offer document that is sent to shareholders being different from the draft offer document attached to the takeover notice, to the extent that the specified percentage is correctly stated in the offer document; and

    (b) Promptly after such consent being received, the offeror makes a market announcement explaining the error in the draft offer document that accompanied its notice of intention to make an offer.

21. The problem is that this practice does not prevent a misstatement from occurring in the first place. Additionally, the practice only works in a 'friendly' takeover. In a hostile takeover, the target company directors may not consent to an alteration of the offer

[3] Before a person can make a takeover offer, they have to have given a notice of intention to make a takeover offer that contains the proposed terms and conditions of the proposed offer (a "takeover notice"). This is one of the Code's fundamental features; a 'notice and pause' regime which applies the principle that steps in a takeover are paced, and that shareholders and the prospective target company have adequate time to consider a takeover offer.

document. In that case, the offeror would need to re-issue the takeover notice and begin the takeover process again.

22. Because the Code does not require the numbers and percentages for the calculation of the specified percentage to be set out in the offer document, it may lead to misstatements of the specified percentage by the offeror and there is also a lack of transparency about how the percentage was calculated.

The Solution

23. The Panel's preferred option is to amend the rules to set out an example calculation of the specified percentage for a partial offer, within the Code itself. In addition, the offer document should contain details about the calculation of the specified percentage.

Recommendations

24. The Panel recommends that the Code be amended to include the following example in rule 9 of the Code:

Example calculation of specified percentage

$$\frac{\textit{Number of total voting rights sought by offeror}}{\textit{Number of total voting rights not already held or controlled by offeror}} \times 100 = \textit{the specified percentage}$$

25. The Panel recommends that Schedule 1 of the Code, which prescribes the information to be contained in, or accompany, the takeover notice and offer document, include the following provision:

5A Partial offers

If the offer is a partial offer, a statement of the particulars of the voting securities sought to be acquired by the offeror under the offer, including:

(a) The total number of voting securities that the offeror would hold or control in the target company after successful completion of the offer; and

(b) The percentage of all voting securities that the number under sub-clause (a) represents; and

(c) The number of voting securities that the offeror would hold or control in the target company if the offeror receives acceptances in respect of the minimum percentage of acceptances required as a condition of the offer under rule 23 of the Code; and

(d) The percentage of all voting securities that the number under sub-clause (c) represents; and

(e) The number of voting securities that the offeror already holds or controls in the target company; and

(f) The percentage of all voting securities that the number under sub-clause (e) represents; and

(g) The number of voting securities that the offeror must acquire under its offer to obtain the number specified under sub-clause (a); and

(h) The number of voting securities that the offeror must acquire under its offer to obtain the number specified under sub-clause (a) expressed as a percentage of the total voting rights not already held or controlled by the offeror (note: this is the "specified percentage" for the purposes of rule 9 of the Code).

(i) A statement of the assumptions on which the particulars above are based.

Comment

26. The recommendations address the misunderstandings that so frequently occur about how to calculate the specified percentage for a partial offer.

27. The amendment to include an example in the Code on how to calculate the specified percentage was the Panel's preferred option in the First Consultation Paper. All of the submissions which commented on the issue (five out of seven) supported the Panel's preferred option.

28. The recommended amendments to Schedule 1 of the Code would ensure that target company shareholders have clear and accurate information about how many voting rights the offeror is seeking under the offer and the precise ownership position that the offeror will be in if the offer is successful. Because of the implications of the specified percentage on scaling, it is useful for offerees to clearly understand how that percentage for the offer was calculated. In addition, the information parallels the particulars which must be provided to shareholders for other types of transactions that are regulated by the Code.

29. The proposed amendment to Schedule 1 was not included in the consultation. However, the additional requirements would not add to an offeror's compliance costs or to the administrative burden of making a partial offer. The information must already be known to the offeror in order to be able to state the "specified percentage", a requirement already existing in the Code. The only change would be that the information must now be explicitly stated in the offer documentation that is sent to shareholders.

Voting procedure

30. If a partial offer would result in the offeror holding or controlling 50% or less of the total voting rights in the target company, the offer must be conditional on the offer being approved by the offerees. Rule 10(1)(b) of the Code prescribes the voting procedure. Voting is carried out during the offer period. In order for the offer to succeed, the offeror must obtain approval of the offerees under the procedure prescribed by rule 10(1)(b), as well as obtaining acceptances under the offer for the percentage of voting securities sought.

31. The Panel is making five recommendations in respect of the voting procedure prescribed in rule 10(1)(b) of the Code. The proposed drafting for the amendments is set out below, in totality, at paragraph 68. The problems, the Panel's proposed solution, and a description of the public consultation process, in respect of each of the recommendations are set out below.

A. Bias in the wording of "approval document" in rule 10(1)(b)(ii) of the Code

The Problem

32. Rule 10(1)(b)(ii) of the Code states that the offer must be accompanied by a separate "approval document" providing for the offeree to approve or object to the offeror making an offer for 50% or less of the voting rights in the target company.

33. The Panel's concern is that the use of the wording "approval document" in the Code can give the impression that an offeree need only vote (by completing and sending in the form) if that offeree approves of the offer. In other words, an offeree who objects to the offer may believe that not sending in a completed approval form is tantamount to objecting to the offer. This is not the case. Approval is obtained if the offerees "so approving hold more voting rights in the target company than are held by the offerees so objecting" (rule 10(1)(b)(iii)).

34. The Panel has received complaints to this effect during hostile partial takeovers. The Panel has also received enquiries from shareholders confused about whether they need to vote if they object to the offer being made.

35. The Panel considers that there may be an inherent bias in the voting process caused by the use of the words "approval document". The Panel would prefer that neutral wording was used for the voting document.

The Solution

36. The Panel's preferred solution is to replace the words "approval document" with the words "voting document". This would require an amendment to rule 10 of the Code.

Comment

37. The proposed amendment was not included in the consultation process. However, practitioners and target companies have voiced their concerns about the biased wording of "approval document" to the Panel. The Panel considers the change to be both necessary and uncontroversial. The proposed amendment would not create any new compliance costs or burdens for offerors making a partial offer. The benefit of the proposed amendment is that it will ensure that offerees who wish to object to a partial offer are more aware of the need to actively participate in the voting process.

B. Outcome of offerees' voting unknown at close of offer period

The Problem

38. Under rule 10(1)(b)(v), an approval or objection, for the purposes of the offerees' voting process, is only valid if the completed approval document (or "voting document", if the recommendation above is adopted) is received by the target company or its agent before the end of the offer period. In practice, this means that the voting period under rule 10(1)(b) closes at the same time as the offer period.

39. The problem is that the *result* of the voting by the offerees may not be known until after the close of the offer period. Accordingly, an offeree must make its decision as to

whether to accept the offer without knowing whether the making of the offer has been approved by the offerees and, therefore, whether the offer can actually be completed, regardless of whether sufficient acceptances are received to meet the offeror's specified percentage. The Panel considers that this outcome results in an uninformed market during the offer period.

40. In this situation, shareholders may not always understand that they must make two decisions:

   (a) how to vote on the question of whether the offer (for 50% or less of the voting rights in the target company), effectively, can be made; and

   (b) whether or not to accept the offer in respect of some or all of their shares.

<u>The Solution</u>

41. The Panel would prefer that the period for voting closes in advance of the close of the offer period. This would ensure that the outcome of the vote was known while an offeree still has the opportunity to consider whether to accept or decline the offer. The Panel is mindful that a sufficient time period (at least seven days) should run between the close of the voting and the close of the offer period to ensure that offerees still have time to weigh up whether to accept the offer (assuming that the votes that have been cast approving of the offer are sufficient for the offer to be made).

<u>Comment</u>

42. The Panel's proposed amendment was not covered in the First Consultation Paper. However, it is an issue that practitioners have raised with the Panel.

43. The Panel considers that the proposed amendment would ensure that there is an informed and efficient market during the course of a partial offer. The proposed amendment would provide more certainty both for offerors and offerees. An offeror would know in advance of the close of an offer whether there is any prospect of the offer's success. It would provide greater certainty for offerees in dealing with their securities if they know an outcome of a vote before they decide whether to accept an offer. The proposed amendment may also reduce the likelihood of offerees being confused about the voting process and the acceptance process.

C. Identifying eligible voters

<u>The Problem</u>

44. If a successful offer would result in the offeror holding 50% or less of the total voting rights in a target company, the offer must be conditional on the offer being approved by the "offerees" in accordance with rule 10(1)(b) of the Code. For the purposes of this vote, there is no shareholder meeting. Votes can be cast at any time during the voting period.

45. If voting securities in a target company are traded during the course of the voting period for a partial offer, it is not clear who, out of the transferor or the transferee (or both), is (or are) entitled to vote. On a strict reading of the Code, it appears that both the

transferor and the transferee would be entitled to vote in respect of the *same* parcel of shares, because both persons satisfy the Code's definitions of "offeree".

46. In relation to the partial offers for Auckland International Airport Limited ("AIAL") and Rubicon Limited ("Rubicon"), in order to provide a way forward for the parties, the Panel expressed its view that only those persons who are the registered holders of target company voting securities *as at the record date of the offer* should be entitled to vote.[4] The Panel took this view because it was consistent with the default provisions for shareholder meetings under the Companies Act 1993. The Panel's view provided the most transparent process possible, under the current wording of the Code, for ensuring that there could be no double voting of shares that were traded during the offer period.

47. However, the problem with this approach is that any persons who acquire voting securities in the target company during the voting period for the offer, and who retain any of those securities after completion of the offer, do not have an opportunity to approve of or object to a change of control of the company. Rather, the persons who dispose of their securities are the ones who may vote, despite the fact that they may no longer have an interest in the target company.

<u>The Solution</u>

48. The Panel's preferred option is to amend the Code to provide certainty as to which persons are entitled to vote. In the First Consultation Paper, two alternative proposals were suggested, on which submissions were sought:

    (a) Only those persons who are registered holders of target company voting securities *as at the record date of the offer* are entitled to vote ("Option A"); or

    (b) Only those persons who are registered holders of target company voting securities *as at the close of the offer period* (or as at the close of the voting period, as recommended above) are entitled to vote ("Option B").

49. The Panel's preferred option is Option B.

<u>Comment</u>

50. All the submissions on the First Consultation Paper which commented on this issue (six out of seven) supported Option B.

51. The Panel's proposed amendment to the Code ensures that those shareholders who have an ongoing interest in the target company following completion of a partial offer have the opportunity to approve or object to the offer being made.

52. A potential downside with Option B is the administrative burden for the target company in determining whether votes have been validly cast or not. This burden would be more onerous for small unlisted target companies which, unlike larger companies, may not use

[4] The record date, for the purposes of a takeover offer, is the date, which must not be more than 10 days before the date of an offer, that is used to determine various entitlements in relation to the offer. For instance, an offeree is a person who holds securities in the target company on the record date (although an offeror may also send the offer document to a person who acquires securities after the record date, and then such a person is also defined as being an offeree).

a professional share registrar whose automated systems can easily track changes in shareholders and voting decisions. However, as the Code allows target companies to recover their reasonably-incurred takeover costs from the offeror, a small target company could make use of the services of a professional registry for the purposes of the offer.

53. The Panel's recommendation represents a departure from the Panel's practice adopted for the partial offers for AIAL and Rubicon. However, the Panel considers that the proposed amendment is appropriate because, in principle, those persons who have an ongoing interest in a target company should be those who have an opportunity to approve of or object to a change in control that is brought about by a potential offer. The Panel's previous practice had the benefit of being simple and transparent; however the Panel considers that the principled basis for the proposed amendment outweighs any administrative burdens on target companies.

54. Another matter to consider with Option B is its potential effect on the information released to the market during the course of a partial offer. The Panel's experience has been that target companies (and offerors) issue regular updates to the market on the progress of voting under rule 10(1)(b). One submitter noted that Option B may raise administrative issues regarding the target company's ability to provide regular and accurate updates to the market on the progress of voting. If Option B is enacted, it will not be clear until after the close of the voting period whether votes that have been cast are valid or not (i.e., because persons may have voted but since disposed of their shares in the target company). Accordingly, to ensure that the market is not misinformed, any announcement in respect of the progress of voting should contain a suitable proviso that the final figures may differ from those in the announcement.

D. Ambiguity regarding stating of the percentage that is subject to the approval of offerees under rule 10

<u>The Problem</u>

55. As discussed above, if a successful partial offer would result in the offeror holding or controlling 50% or less of the total voting rights in a Code company, the offer must be conditional on the approval of the offerees being obtained in accordance with rule 10(1)(b) of the Code. Rule 10(1)(b)(ii) states that the offer must be accompanied by a separate approval (voting) document providing for the offeree to approve or object to the offeror "making an offer for 50% or less" of the voting rights in the target company.

56. It could be argued, on a plain reading of rule 10(1)(b)(ii), that the rule does not require the voting form to state an exact percentage to be approved by the offerees (i.e., the voting form could say, "Do you approve or object to the offeror making an offer for 50% or less of the voting rights in the target company?").

57. In practice, this does not occur because of the effect of rule 23 of the Code, which provides that an offer made under the Code must be conditional on the offeror receiving a minimum level of acceptances. In the case of a partial offer which would result in the offeror holding or controlling 50% or less of the total voting rights in the target company, the rule 23 minimum percentage of acceptances is the percentage approved under rule 10(1)(b). Accordingly, the voting document must state an exact percentage, otherwise it would be impossible to work out the minimum level of acceptances for the

purposes of rule 23. The percentage which the offerees must be asked to approve is the total percentage of voting rights in the target company that the offeror will hold or control if its partial offer is successful.

58. The problem is that confusion and uncertainty may arise in relation to the correct application of rules 10(1)(b) and 23 of the Code due to their current wording.

The Solution

59. The Panel proposes that rule 10(1)(b)(ii) of the Code be amended to make it clear that the offer must be accompanied by a separate voting document providing for the offeree to approve or object to the offeror making an offer that would confer on the offeror the percentage of voting rights specified in the offer document as the total percentage of voting rights that the offeror would hold or control in the target company after successful completion of the partial offer.

Comment

60. The First Consultation Paper did not include this problem. The Panel considers that it is essentially a drafting issue. The proposed amendment would not add to the compliance costs or administrative burden of making a partial offer. The proposed amendment would make the rules easier to understand.

E. Voting by the offeror and its associates

The Problem

61. If a successful partial offer would result in the offeror holding or controlling 50% or less of the total voting rights in a Code company, the offer must be conditional on the approval of the offerees being obtained in accordance with rule 10(1)(b) of the Code. Rule 10(1)(b)(iv) provides that, for the purposes of the approval voting procedure, the voting rights held by the offeror and its associates must be disregarded. Rule 64 of the Code prohibits conduct that is, or is likely to be, misleading or deceptive in relation to a takeover.

62. The Panel considers that rule 10(1)(b)(iv), in conjunction with rule 64, amounts to an effective prohibition on any voting by the offeror and its associates. This was the Panel's decision in its determination following a meeting under section 32 of the Takeovers Act in relation to the partial offer by Knott Partners LP and associated investment funds for shares in Rubicon.[5]

63. The problem, however, is that there may be a lack of clarity regarding the effective prohibition in rule 10(1)(b)(iv) of the Code, because, on its face, rule 10(1)(b)(iv) appears to anticipate the possibility that an offeror or its associates can vote (even though to do so is of no benefit to the offeror because any such votes must be disregarded).

The Solution

[5] Takeovers Panel, *Determination – Rubicon Limited* (6 July 2009) <http://www.takeovers.govt.nz/decisions/2009/determination-rubicon.htm>

64. The Panel's preferred option in the Consultation Paper was an amendment to rule 10(1)(b)(iv) of the Code to make it consistent with rule 17. Rule 17 provides a clear prohibition on voting in respect of other Code-regulated transactions.

Comment

65. The recommendation is for the incorporation into the Code of the Panel's preferred option from the First Consultation Paper. Six submissions commented on and supported the Panel's preferred option.

66. The Panel's proposed amendment would ensure that the Panel's ruling on the interpretation of rule 10(1)(b)(iv) is directly expressed in the Code.

67. This would remove the risk of any uncertainty in regards to the correct application of rule 10(1)(b)(iv). The recommended amendment would bring the prohibition on voting by the offeror and its associates for a partial offer into line with the similar prohibition for other Code-regulated transactions that is contained in rule 17 of the Code.

Panel's Recommendations in respect of the voting procedure in rule 10 of the Code

68. The Panel recommends that rule 10 of the Code be amended as follows (deletions to the current wording of the Code are indicated with a strike-through line and the proposed amendments are shown in underlining):

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

(1) If, on the date of a partial offer, the offeror does not hold or control more than 50% of the voting rights in the target company, the partial offer must be 1 only of the following:

(a) a partial offer for a specified percentage of the voting securities of each class not already held or controlled by the offeror that, when taken together with the voting securities already held or controlled by the offeror, confers more than 50% of the voting rights in the target company; or

(b) a partial offer for a specified percentage of the voting securities of each class not already held or controlled by the offeror that, when taken together with the voting securities already held or controlled by the offeror, confers 50% or less of the voting rights in the target company if approval is obtained in accordance with the following provisions:

(i) the takeover notice and the offer must include a statement that approval is sought under rule 10 of the Takeovers Code and that the offer is conditional on approval being obtained:

(ii) the offer must be accompanied by a separate ~~approval~~ voting document providing for the offeree to approve or object to the offeror making an offer ~~for 50% or less of the voting rights in the target company~~ that would confer on the offeror the percentage of voting rights specified in the offer as the total percentage of voting rights that the offeror would hold or control in the target company after successful completion of the partial offer:

(iii) approval under this rule is obtained if the offerees so approving hold more voting rights in the target company than are held by offerees so objecting:

(iiia) The persons who are registered holders of voting securities in the target company at the close of the voting period specified in the offer document are entitled to vote for the purposes of subparagraph (iii):

(iv) ~~for the purposes of subparagraph (iii), voting rights held by the offeror and its associates must be disregarded~~ The offeror and its associates must not vote on a resolution for the purposes of subparagraph (iii):

(v) for an approval or objection to be valid for the purposes of this rule the completed voting document must be received by the target company or its agent ~~before the end of the offer period~~ by the end of the voting period

(vi) The voting period for the purposes of this rule must be specified in the offer and

must commence with the date of the offer and close –

A. no later than seven days before the date first specified in the offer under rule 24(2) as the end of the offer period; and

B. at least 14 days after the date on which the offer document and the accompanying voting document are sent in accordance with rule 45.

(2) A target company, or its agent, that receives an approval or objection before the expiration of the offer period must, if requested by the offeror, send a copy of the approval or objection to the offeror within 2 days of its receipt.

Dilution of offeror's shareholding during offer period

The Problem

69. As discussed above, the specified percentage for a partial offer is the percentage of all the voting rights of the target company not already held or controlled by the offeror that the offeror wishes to acquire. The specified percentage is calculated by reference to the number of voting rights on issue as at the date of the offer and is thereafter fixed for the offer's duration.

70. A potential risk for an offeror who already holds or controls voting securities in the target company is that the percentage of voting securities which that holding or controlling represents could be diluted (for example, as a result of a non pro rata allotment of voting securities by the target company, for example, under an ongoing employee share purchase scheme). Conversely, an increase could occur (for example, as a result of a buyback of shares) before the end of the offer period. This could mean that even if the offeror receives acceptances that would have equated to the specified percentage at the time that percentage was set, the offeror may not receive sufficient acceptances to meet the stated specified percentage of the voting securities when calculated by the number of voting securities now on issue in the target company.

71. This problem can be managed, with careful drafting of the conditions of an offer, for a partial offer for more than 50% of the voting rights. However, because of the relationship between rule 10 (regarding voting) and rule 23 (regarding a minimum level of acceptances) it cannot be managed at all for a partial offer for 50% or less of the voting rights.

72. The problem does not arise for those offerors who do not hold or control voting securities in the target company prior to the offer. In this case, a change in the total number of voting securities on issue during the offer period will have no effect on the specified percentage for the purposes of the offer.

73. The minimum acceptance condition, which is required by rule 23 of the Code to be included in the offer document, for a partial offer which would confer on the offeror voting control of 50% or less, is fixed to the percentage approved by a vote of the offerees under rule 10. The percentage approved by the offerees under the rule 10 voting procedure is the sum of the percentage of voting rights already held or controlled by the offeror (as at the date of the offer) together with the specified percentage under the offer. Therefore, if the offeror's shareholding is diluted during the offer period, it will be impossible for the offeror to satisfy the minimum acceptance condition in rule 23, even if the offeror receives acceptances for voting securities equal in number to the number under the specified percentage when it was calculated as at the offer date.

74. The problem has arisen once, in relation to the partial offer by Canada Pension Plan Investment Board for AIAL (partial offers for less than 50% are quite rare). The Panel granted an exemption in that case which enabled the offer to proceed notwithstanding a dilution in the number of voting rights held or controlled by the offeror.

The Solution

75. The problem would not occur if the specified percentage could be reset at the end of the offer period to account for any change in the percentage of voting securities held or controlled by the offeror.

Recommendation

76. The Panel recommends that a provision like the following be incorporated into rule 9 of the Code (the proposed amendments are shown in underlining):

9 Partial offer

(1) An offer may be made under this code for less than all the voting securities of a target company.

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

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

(4) If there is more than 1 class of voting securities of the target company, a partial offer must be made for a specified percentage of the voting securities of each class not already held or controlled by the offeror, and such specified percentage must be the same percentage in respect of each class.

(5) The consideration and terms offered for each class of voting securities of the target company must be fair and reasonable as between the classes of voting securities.

*(6) If the percentage of voting securities already held or controlled by the offeror (**current percentage**) is increased or decreased between the date that a notice is sent under rule 41 and the end of the offer period, the specified percentage is deemed to change in proportion to the change in the current percentage.*

Comment

77. The Panel's recommendation differs slightly from the preferred option stated in the First Consultation Paper. The preferred option focused solely on the problem that could arise for an offeror who already held or controlled voting securities in the target company and made an offer that would result in it holding or controlling 50% or less. However, the problem is broader than that and relates to all partial offers where the offeror already holds or controls voting securities. Accordingly, the Panel's recommendation focuses on resolving the broader problem.

78. The submissions received on the First Consultation Paper were supportive of the Panel's proposed amendment to the Code.

Scaling of acceptances by custodian shareholders

The Problem

79. If a partial offer is accepted in respect of more securities than those sought by the offeror, the scaling provisions in rules 12 and 13 of the Code determine the number of

voting securities that the offeror must take up from those “offerees” who have accepted the offer in excess of the specified percentage. Offerees are, essentially, the persons who *hold* the voting securities under the offer.

80. The scaling calculation can result in significant distortions if there are underlying beneficial owners of voting securities under the offer and the acceptances of the underlying beneficial owners are aggregated at the registered-holder level (i.e., where a “custodian” holds the securities on behalf of the underlying owners).[6] The scaling procedure in rules 12 and 13 of the Code result in a different outcome, under this scenario, than it would if the underlying owners’ acceptances were scaled as if those owners were directly the registered holders of the securities.

81. Under the former scenario, if any of the underlying owners accept the offer in respect of *less than* the specified percentage of their securities, underlying owners who accept in respect of *more than* the specified percentage will have a greater proportion of their securities taken up by the offeror. Although the outcome under the former scenario is inequitable to other shareholders, the wording of rules 12 and 13 of the Code appears to require the scaling to be calculated at the holder level of ownership.

The Solution

82. The distortion would not occur if the offeror was permitted to “look through” the holding of a nominee or custodian and was required to treat, for scaling purposes, the acceptances of the underlying owners as if those owners were the registered shareholders.

83. In the Consultation Paper, the Panel’s preferred option for addressing this problem was an amendment to the Code. The amendment would provide that, for the purposes of scaling, the offeror must look through the holding of a custodian and treat the underlying beneficial owners of the relevant securities as if those owners hold securities directly in the target company.

84. The Panel also favoured granting a class exemption from rules 12 and 13 of the Code which, in effect, would provide for a look through procedure on similar terms to the proposed amendment to the Code. The class exemption would act as an interim measure until the formal regulatory process for the amendment was completed. However, the class exemption would be a ‘weak’ solution, as an offeror could choose not to rely on it. Accordingly, it would only be where an offeror wished to ensure an appropriate outcome from scaling that it would rely on the class exemption. The class exemption was granted by the Panel on 4 August 2011. At the time of writing, there have been no partial offers since the date of the granting of the exemption.

Recommendation

85. The Panel recommends that the following requirements are incorporated as a new rule into the scaling rules in the Code:

11A Custodians

(1) Any offeree who holds voting securities in the target company as a custodian must provide, no

[6] A custodian may be a financial intermediary such as a trustee corporation or nominee company, or a simple trust that holds securities on behalf of multiple beneficiaries

later than the close of the last day of the offer period, a certificate that complies with subclause (2) to:

(a) the offeror; and

(b) the person who administers the target company's share register.

(2) A certificate provided under subclause (1) must:

(a) state the date of the certificate; and

(b) include a statement that the offeree holds voting securities as a custodian on behalf of relevant clients; and

(c) state the total number and class of voting securities that are held by the offeree on behalf of relevant clients; and

(d) state the number of relevant clients on whose behalf the offeree holds those voting securities; and

(e) identify as **Pool A***:*

(i) the number of relevant clients who have not accepted any voting securities under the offer, along with the number and class of voting securities held by the custodian on behalf of each such relevant client; and

(ii) the number of relevant clients who have accepted the offer for the specified percentage, or any smaller percentage, of voting securities that are held by the custodian on behalf of each such relevant client, along with the number and class of voting securities that are held by the custodian on behalf of each such relevant client and to which the acceptance relates; and

(f) identify as **Pool B** *the number of relevant clients who have accepted the offer in relation to more than the specified percentage of voting securities that are held by the custodian on behalf of each such relevant client, along with the number and class of voting securities that are held by the custodian on behalf of each such relevant client and to which that acceptance relates; and*

(g) state the total number of voting securities and acceptance in each of Pool A and Pool B.

(3) An offeror who receives a certificate that complies with subclause (2) must:

(a) in relation to Pool A, take up all the voting securities accepted; and

(b) in relation to Pool B, take up all the voting securities accepted, as if each relevant client in pool B were an offeree, in accordance with rule 12 and 13 of the Code.

(4) Subclause (3) does not require an offeror to take up voting securities directly from a relevant client, but the offeror must instead take up the voting securities from the custodian that provided the certificate.

(5) If the offeror receives an acceptance form from a custodian that is not accompanied by a certificate under clause (2), the acceptance is invalid.

(6) For the purposes of this rule:

custodian *means an offeree under a partial offer that is:*

(a) a trustee corporation or nominee company that holds voting securities by reason of acting, directly or indirectly, on behalf of a client in the ordinary course of the trustee corporation's or nominee company's business; or

(b) a person who holds voting securities as the bare trustee of a trust to which the voting securities are subject

relevant client *means a client of a custodian on whose behalf, directly or indirectly, and through whatever arrangements, the custodian holds voting securities*

voting security *means a voting security in the target company.*

Comment

86. The Panel's recommendation is that the Panel's preferred option from the First Consultation Paper be incorporated into the Code. All of the submissions commented on the issue and all supported the Panel's preferred option.

87. In order to effect a "look through" of holdings in the target company, the proposed amendment includes a certification procedure for persons who act as a custodian. The intention of the procedure is that a custodian must provide the offeror with sufficient information to ensure that the scaling of acceptances is accurate and fair.

88. The terms of the proposed amendment are drawn from the class exemption that was granted by the Panel on 4 August 2011 as an interim measure, in clause 26 of the *Takeovers Code (Class Exemptions) Notice (No.2) 2001*. The terms of the exemption were developed by the Panel with the close involvement of custodians and share registries. However, compliance with the class exemption is voluntary and, accordingly, it does not resolve the problem because an offeror could scale the acceptances of a partial offer in accordance with the rules of the Code as they currently stand. Therefore, without an amendment to the Code the problem will remain.

89. The Panel's proposed amendment includes an incentive designed to ensure compliance. If an offeror receives an acceptance relating to beneficial owners, without an accompanying certificate from a custodian, that acceptance is invalid. This places an onus on the custodian to supply the required certificate; otherwise the custodian's clients will not receive any benefits accruing as a result of the offer. There is a corresponding incentive on the offeror to ensure that all acceptances it receives are valid and effective. It is in the offeror's best interests to receive as many acceptances into an offer as possible, to ensure the offer's success.

SECTION TWO: PARTS ONE TO FIVE OF THE CODE

Introduction

90. Part 1 of the Code covers preliminary matters, such as definitions and anti-avoidance provisions. Part 2 contains the Code's fundamental rule and its exceptions. Part 3 prescribes the rules for the exceptions to the fundamental rule, such as the basic requirements for a takeover offer, and for acquisitions and allotments that must be approved by the shareholders of a Code company. Part 4 sets out in detail various rules which regulate offers made under the Code. Finally, Part 5 relates to dealings in securities in a target company by an offeror during an offer period, and defensive tactics by the target company.

91. The Panel undertook public consultation on these problems in June and July 2010 (the "Second Consultation Paper"). Submissions were made by four prominent law firms who specialise in corporate and takeovers law, and by the New Zealand Law Society's Commercial & Business Law Committee.

92. The issues with Parts 1 to 5 of the Code identified by the Panel are summarised below:

    (a) Rule 3(1) defines a number of terms used in the Code in a manner that creates an anomaly with respect to the application of rule 7(c) and (d) of the Code;

    (b) Rules 15(a) and 16(a) do not require disclosure of the identity of the person whose <u>control</u> is increasing in a Code company;

    (c) Rule 16(b) is inflexible, and is, accordingly, the subject of many of the exemptions granted by the Panel;

    (d) Rule 35 prevents an offeror (or certain associates of the offeror) from accepting its own offer, and, thereby, has been the subject of a number of exemptions.

Definitions in the Code

The Problem

93. Rule 7(c) and (d) of the Code allows a person to increase their voting control in a Code company by way of, respectively, an acquisition or an allotment of *"voting securities in a code company or in any other body corporate"*, if the increase is approved by the shareholders of the Code company.

94. The way that the Code defines *"voting securities"* could mean that they must be issued only by companies registered under the Companies Act 1993 (i.e., a company registered in New Zealand).[7] In other words, a voting security issued by any other form of body corporate could be argued to not be a *"voting security"* for the purposes of the Code.

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[7] Under rule 3(1) of the Code:
*"**voting security** means <u>an equity security</u> that confers a <u>voting right</u>…*
***equity security** means…any interest in or right to a share in, or in the share capital of, <u>a company</u> (whether carrying voting rights or not…*

95. This anomaly may arguably cause problems with the application of the Code. For example, where an acquisition or allotment that triggers the fundamental rule is of securities in an entity which is "upstream" from a Code company, and that entity is not a company registered under the Companies Act, the approval of the shareholders of the Code company affected could not, on a strict application of all the relevant defined terms included in the Code, be obtained under rule 7(c) or (d).

96. However, for the words in rule 7(c) and (d) *"in any other body corporate"* to have any meaning, the rule must have been intended to cover changes of control of any entities that hold voting securities in Code companies, not only of companies registered under the Companies Act. The Panel takes this to be so and enforces the Code on that basis.

The Solution

97. The Panel's preferred option is to include all bodies corporate in the definitions relied on by rule 7(c) and (d), not only companies that are registered in New Zealand under the Companies Act.

Recommendation

98. The Panel recommends that the following amendments (shown in underlining) be made to the interpretation section of the Code:

> ***3 Interpretation***
> *(1) In this code, unless the context otherwise requires:*
> *…*
> ***equity security*** *means – (a) any interest in or right to a share in, or in the share capital of, a company, <u>or of any other body corporate</u> (whether carrying voting rights or not)…*
> *…*
> ***voting right*** *means a currently exercisable right to cast a vote at meetings of shareholders of a company, <u>or the security holders of any other body corporate</u>…*

Comment

99. The proposed amendment would remove the potential anomaly that arises from the definitions that underpin the term *"voting securities"*, as used in rule 7(c) and (d). This would remove inconsistencies in the wording of the Code and reduce potential confusion for investors in Code companies. The Panel does not expect the proposed amendment to have any costs associated with it. It merely resolves a technical difficulty with the wording of the Code itself.

100. All submissions received on the Second Consultation Paper supported this amendment to the Code.

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voting right *means a currently exercisable right to cast a vote at meetings of shareholders of <u>a company</u>…"*
"Company" is defined by rule 3(1) as having the same meaning as in s 2(1) of the Companies Act, which provides that a "company" means a company registered under Part 2 of the Companies Act (i.e. a company registered in New Zealand).

Identity of upstream acquirer or allottee of voting securities

The Problem

101. Rule 7(c) of the Code provides an exception to the prohibition in the fundamental rule against increases in voting control, enabling persons to become the holder or controller of an increased percentage of voting rights in a Code company by way of an acquisition of shares that has been approved by an ordinary resolution of the company. Rule 7(d) provides a corresponding exception in cases of allotments of new shares.

102. Rule 15 of the Code prescribes the information which must accompany the notice of meeting sent to the shareholders of the Code company, together with the proposed resolution, for the purposes of rule 7(c). This must include "*the identity of the persons acquiring and disposing of the voting securities*" (rule 15(a)). Rule 16 prescribes the information required for the purposes of shareholder approval under rule 7(d). This must include "*the identity of the allottee*" (rule 16(a)).

103. It is a common arrangement in New Zealand for voting securities in a Code company to be held by a custodian or nominee, with the control of those securities resting with the beneficial owner. It is arguable that a notice of meeting would comply with rule 15(a), in respect of an acquisition of securities, or rule 16(a), in respect of an allotment, if only the identity of the custodian or nominee (i.e., strictly speaking, the "acquirer" or "allottee") was disclosed in the notice of meeting. Under a strict interpretation, the identity of the controller would not need to be disclosed. This may lead to investors being uninformed about the identity of a person who is increasing their voting control in the company.

104. Also, rules 15 and 16 of the Code do not expressly stipulate the obligation of the Code company to ensure that the notice of meeting contains the information required under those rules. However, company law mandates this obligation, and the Panel enforces the Code on this basis. With the opportunity of the present review of the Code, this minor issue can be resolved.

The Solution

105. The Panel's preferred option is to ensure that the controller of voting rights is always disclosed in the notice of meeting, and to remove any doubt that the Code company must ensure that a notice of meeting includes the information required by rules 15 and 16.

Recommendation

106. The Panel recommends that the following amendments (shown in underlining) be made to rules 15 and 16 of the Code:

> ***15 Notice of meeting: acquisition of voting securities***
> *The notice of meeting containing the proposed resolution in respect of an acquisition of voting securities referred to in rule 7(c) must contain, or be accompanied by, –*
> *(a) the identity of the persons acquiring <u>(and, as the case may be, the identity of any person who is increasing their control in the Code company as a result of the acquisition)</u> and disposing of the voting securities; and*
> *…*
> ***16 Notice of meeting: allotment of voting securities***
> *The notice of meeting containing the proposed resolution in respect of an allotment of voting securities referred to in rule 7(d) must contain, or be accompanied by, –*

(a) the identity of the allottee <u>(and, as the case may be, the identity of any person who is increasing their control in the Code company as a result of the allotment)</u>; and

16B Obligations for notice of meeting
<u>The Code company has the obligation of including all of the information required by rule 15 or rule 16, as the case may be, in or with the notice of meeting</u>

Comment

107. The proposed amendments would ensure that the Code company's disclosure obligations are clear when it issues a notice of meeting to shareholders in respect of an ordinary resolution to approve a person increasing its voting control by way of an acquisition or allotment of voting securities. The notice would have to include the particulars in rule 15 (acquisitions) or rule 16 (allotments), including the identity of the persons who will control the relevant voting securities.

108. All submissions received on the Second Consultation Paper supported this amendment to the Code.

Inflexibility of notice of meeting requirements for allotments of voting securities

The Problem

109. Rule 16(b) of the Code provides that particulars of the voting securities to be allotted to a person (including the exact number to be allotted and the percentage of the total securities on issue that that number represents, among other things) must be included with the notice of meeting which contains a proposed resolution for shareholder approval of the allotment, under rule 7(d).

110. The characteristics of some transactions which are subject to rule 7(d) of the Code mean that it is impossible for the Code company to specify the exact numbers and percentages required to be disclosed under rule 16(b). The information may be dependent on a number of factors outside of the company's control. Accordingly, in the absence of an exemption from rules 16(b) and 7(d) (to the extent that rule 7(d) requires compliance with rule 16(b)), the allottee and the Code company will be unable to comply with the Code.

111. Examples of such circumstances include:

(a) underwriters of share issues may not know how many shares they will subscribe for under an allotment, as it is dependent upon whether, and to what degree, others subscribe;

(b) subscribers to rights to acquire shares under a rights issue may not know what percentage of voting rights in the Code company they will hold as a result of the allotment, as it is dependent upon whether, and to what degree, others subscribe;

(c) persons exercising rights to convert convertible securities into voting securities may not know the total voting rights that will be on issue at the time of their conversion and allotment, because there will be a (possibly unknown) number of other holders of the convertible securities who may or may not also exercise their conversion rights.

112. The Panel has granted a class exemption which covers the three scenarios above, but a class exemption can not change the law for all circumstances.

113. The class exemption is subject to conditions which effectively modify the disclosure requirements in rule 16(b) so that, rather than expressing the exact numbers and percentages that may be held or controlled by the allottee, the notice of meeting must state the *potential maximum* numbers and percentages.

114. Also, to ensure that the shareholders of the Code company have the necessary information to make a fully informed decision on whether to approve the increases in voting control, the transaction needs to be fully described, and the assumptions on which the calculations of potential maximum numbers / percentages are based also need to be set out with the notice of meeting information. For allotments that will occur over a period of more than 12 months, on-going disclosures about the control position of the exempted allottee must be made in the company's annual report and on its website (if it has one).

115. The Panel carried out public consultation on the need for the class exemption, in August 2009. Submitters expressed a concern that the class exemption would not cover every situation where exact numbers and percentages could not be stated in the notice of meeting. All submitters acknowledged that a class exemption would be useful as an interim measure, but that the Code should be amended to resolve the problem for all circumstances where the exact numbers/percentages cannot be given.

The Solution

116. The Panel's preferred option is to address the cause of the demand for exemptions from rule 16(b) of the Code. This would involve the requisite disclosure information (mirroring the requirements currently in the class exemption) becoming a new Schedule to the Code. A new provision would be inserted into the Code, which provides that, if a Code company cannot comply with rule 16(b), the notice of meeting must contain, or be accompanied by, the information required by the new Schedule.

Recommendation

117. The Panel recommends that the following provisions be inserted into rule 16 of the Code and as a new Schedule to the Code, respectively:

16 Notice of meeting: allotment of voting securities
(2) If the particulars under rule 16(1)(b) cannot be stated, Schedule 4 applies.

Schedule 4
Notice of meeting under rule 7(d): statement of maximum numbers and percentages
1 Contents of notice of meeting
If the particulars of the voting securities to be allotted cannot be stated in accordance with rule 16(1)(b), the notice of meeting must contain or be accompanied by:
(a) the maximum number of voting securities that could be allotted (the **approved maximum number***) to the person named under rule 16(a) in the notice of meeting (the* **allottee***); and*
(b) the percentage of the aggregate of all existing voting securities and all voting securities that could be allotted that that number represents; and
(c) the potential maximum percentage(the **approved maximum percentage***) of all voting securities*

that could be held or controlled by the allottee after completion of the allotment or allotments; and

(d) the potential maximum percentage of all voting securities that could be held or controlled by the allottee and the allottee's associates, excluding those (if any) of the allottee's associates who are named under rule 16(a) in the notice of meeting (the ***excluded associates****); and*

(e) the potential maximum percentage of all voting securities that could be held or control by the allottee and the allottee's associates after completion of the allotment or allotments; and

(f) the assumptions that are reasonably necessary to ensure that shareholders in the Code company are provided with the material information required for them to be able to determine whether to approve the resolution and on which the particulars referred to in this clause are based.

(g) the date used to determine the information referred to in this clause (the ***calculation date****).*

2 Assumptions

The assumptions for the purposes of clause 1(f) must include:

(a) that the number of voting securities is the number of voting securities on issue on the calculation date; and

(b) that there is no change in the total number of voting securities on issue between the calculation date and the end of the allotment period, other than as a result of the transaction for the purposes of the notice of meeting (the ***relevant transaction****); and;*

(c) that, in relation to clause 1(a) to (c), the allottee is allotted the approved maximum number under the relevant transaction; and

(d) that, in relation to clause 1(d), the allottee and each of the allottee's associates (except for the excluded associates) are allotted the maximum number of voting securities under the relevant transaction; and

(e) that, in relation to clause 1(e), the allottee and each of the allottee's associates are allotted the maximum number of voting securities under the relevant transaction.

3 Restriction on increase above approved maximum percentage

Until the end of the allotment period the allottee must not hold or control a percentage of voting securities that exceeds the approved maximum percentage, except as a result of an other-means increase that complies with clause 6.

4 Annual report disclosures for ongoing allotments

If allotments under the relevant transaction occur over a period of more than 12 months, every annual report of the Code company issued during the allotment period, and the first annual report issued after the end of the allotment period, must include in a prominent position:

(a) a summary of the terms of the relevant transaction as approved at the meeting at which approval for the allotment of voting securities under the transaction was given; and

(b) a statement, as at the end of the financial year to which the report relates, of—

(i) the number of voting securities allotted to the allottee under the relevant transaction; and

(ii) the number of voting securities on issue that are held or controlled by the allottee, and the percentage of all voting securities on issue that that number represents; and

(iii) the percentage of all voting securities on issue that are held or controlled, in aggregate, by the allottee and the allottee's associates; and

(iv) the maximum percentage of all voting securities that could be held or controlled by the allottee on completion of all the allotments; and

(v) The maximum percentage of all voting securities on issue that could be held or controlled by the allottee and the allottee's associates on completion of all the allotments.

(c) the assumptions on which the particulars referred to in paragraph (b) are based.

5 Internet site disclosures for ongoing allotments

(1) This clause applies if:

(a) the allotments under the relevant transaction occur over a period of more than 12 months; and

(b) the Code company has an internet site.

(2) Following the issue of the first annual report during the allotment period and up to the issue of the first annual report after the end of the allotment period, the Code company must disclose on its Internet site the information required under clause 4 to be disclosed in an annual report.

(3) During the allotment period and up to the issue of the first annual report after the end of the allotment period, the Code company must—

(a) announce on its internet site any aggregate increase of 1% or more in the voting securities held or controlled by the allottee since the date of the last disclosure under this

paragraph or, where no prior disclosure has been made, since the date of the first aggregate increase of 1% or more in the voting securities held by the allottee; and

(b) maintain every such announcement on its Internet site in a prominent position.

(4) The announcement referred to in clause 5(a) must be made as soon as the Company is aware, or ought to be aware, that the relevant increase has occurred.

6 Other-means increases

*(1) During the allotment period, the allottee must not increase its voting control in the Code company by a means other than an allotment under the relevant transaction (**an other-means increase**), except by—*

(a) an acquisition of voting securities approved in accordance with rule 7(c) of the Code; or

(b) an allotment of voting securities approved in accordance with rule 7(d) of the Code; or

(c) another exemption granted by the Panel.

(2) If approval of the Code company's shareholders is required under clause 1(a) or (b), the notice of meeting containing the resolution in respect of the other-means increase must contain or be accompanied by:

(a) a summary of the terms of the relevant transaction as approved at the meeting at which approval for the allotment of voting securities to the allottee was given for the purposes of rule 16 and clause 1; and

(b) a statement as at the date of the notice of meeting containing the resolution to approve the other-means increase, of:

(i) the particulars required under clause 4(b) to be disclosed in an annual report; and

(ii) the maximum percentage of all voting securities on issue that could be held or controlled by the allottee after the other-means increase and completion of the relevant transaction which could yet be made under that transaction; and

(iii) the maximum percentage of all voting securities on issue that could be held or controlled by the allottee and the allottee's associates, after the other-means increase and completion of the relevant transaction which could yet be made under that transaction.

(c) a statement of the assumptions on which the particulars referred to in paragraph (b) are based.

(3) If an other-means increase is approved by shareholders in accordance with this clause, the reference in clause 1 to the approved maximum percentage must be taken to be a reference to the approved maximum percentage adjusted to take account of the other-means increase.

7 Change of control of the allottee

(1) During the allotment period, there must be no change of control of the allottee that results in another person becoming the holder or controller of an increased percentage of voting rights in the Code company unless the change of control of the allottee:

(a) is by an acquisition of voting securities in the allottee approved by an ordinary resolution of the Code company in accordance with rule 7(c); or

(b) is by an allotment of voting securities in the allottee approved by an ordinary resolution of the Code Company in accordance with rule 7(d); or

(c) is permitted under an exemption granted by the Panel.

(2) If approval of the Code company's shareholders is required under paragraph (a) or (b), the notice of meeting containing the resolution to approve the change of control must contain or be accompanied by:

(a) a summary of the terms of the relevant transaction as approved at the meeting at which approval for the allotment of voting securities to the allottee under the relevant transaction was given; and

(b) a statement, as at the date of the notice of meeting containing the resolution to approve the change of control, of the numbers and percentages referred to in clause 4(b)

(c) a statement of the assumptions on which the particulars referred to in paragraph (b) are based.

Comment

118. This recommendation was the Panel's preferred option in the Second Consultation Paper. It has a significant advantage over the status quo (i.e., the class exemption) because of its general effect. The amendment would result in all transactions that would

currently require an exemption from rule 16(b) of the Code instead being directly subject to the subject provisions of the Code itself. The disclosure requirements would effectively be the same as those currently required under the conditions of the class exemption, so the proposal does not increase compliance costs for the market (because the market is very familiar with these requirements). To the extent that a proposed transaction would have required an individual exemption from the Code, the amendment would reduce compliance costs.

119. All submissions received on the Second Consultation Paper supported this amendment to the Code. Several submitters expressed an interest in commenting on the proposed wording of the disclosure requirements in the new Schedule. The class exemption has been operating for more than one year and has been relied upon by market participants some five or more times.

120. The wording of the proposed amendment is drawn from the class exemption from rule 16(b). The Panel appreciates that the proposed amendment is quite lengthy and prescriptive. This reflects the Panel's concern that allotments that occur over a period of years involve different considerations for shareholders than simple one-off allotments (where the requirements of rule 16(b) are readily satisfied). The nature of both the Code company and the allottee can change significantly over the years of the allotment period. Accordingly, prior to the granting of the class exemption, the Panel developed a set of standard conditions to meet its concerns that fulsome disclosures be made to shareholders for these complex types of transactions. The class exemption contains those standard conditions. These conditions were designed to avoid abuses of the terms of the exemption and to ensure that accurate and comprehensive information was provided to the shareholders of the Code company in the notice of meeting. The Panel believes that this same standard should apply under the proposed amendment to the Code.

Acceptances by the offeror

The Problem

121. Rule 35 of the Code provides that during the offer period neither the offeror nor any person acting jointly or in concert with the offeror may dispose of any equity securities in the target company other than to an offeror under another offer that is made under the Code.

122. The purpose of rule 35 of the Code is to prevent an offeror, or any person who is acting jointly or in concert with the offeror, from taking steps to defeat the offer by way of disposing of securities it holds in the target company (the offeror could achieve this if it reduced its holding to such a level that it could not satisfy the minimum acceptance condition in its offer).

123. A problem with rule 35 typically arises where the offeror, who already holds or controls voting rights in the target company, wishes to use a special purpose vehicle or a related person to make an offer under the Code. Rule 35 prohibits an offeror from "selling in" its voting securities into its own offer. There may also be other persons who hold or control voting rights in the target company and wish to accept into an offeror's offer, but for various reasons may be considered to be acting jointly or in concert with the offeror. In this case, those persons are prohibited by rule 35 from accepting the offer.

124. There have been seven instances to date where offerors have encountered this problem. This has led to the Panel granting exemptions from rule 35 for each of these transactions. The usual condition to such an exemption is that the offeror, or any other person acting jointly or in concert with the offeror, does not dispose of any equity securities in the Code company other than into the offeror's relevant offer or any other offer made by a third party in accordance with the Code. In short, the exemptions from rule 35 of the Code have been sought and granted because of a drafting anomaly.

The Solution

125. The Panel's preferred option is to allow an offeror, or any person acting jointly or in concert with that offeror, to accept the offeror's offer.

Recommendation

126. The Panel recommends that rule 35 of the Code be amended along the lines adopted in the exemptions that have been granted. This could be achieved by the addition of the underlined words into rule 35, as follows:

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

Comment

127. The proposed amendment would mean that the Panel would no longer need to grant exemptions from rule 35. This would reduce compliance costs for market participants, thereby contributing to a more efficient Code and a more effective capital market.

128. All submissions received on the Second Consultation Paper supported this amendment to the Code.

SECTION THREE: HOSTILE OFFERS

Introduction

129. In December 2010 and January 2011, the Panel consulted with the public on some issues identified with the Code's regulation of hostile takeover offers (i.e., takeover offers that are resisted by the board of the target company) (the "Third Consultation Paper"). The issues related to:

    (a) Whether rule 25(1) of the Code, which governs the conditions that the offeror may include in an offer, is out-of-balance with rule 38, which relates to defensive tactics engaged in by the target company to frustrate a takeover offer or to deny the shareholders of the target company an opportunity to consider the merits of a takeover offer;

    (b) The problem encountered by target companies in resolving disputes with offerors over the reimbursement of the target company's expenses incurred in relation to a takeover offer; and

    (c) A matter relating to the definition of "Code company".

130. The Panel set out in the consultation paper its preferred options for addressing these issues.

131. The Panel received six submissions on the consultation papers. Submissions came from several of the major corporate law firms in New Zealand, one of New Zealand's largest listed companies, the New Zealand Law Society, and the NZX.

132. Each of the three issues is described below and a recommendation is made in each case that the Code or the Takeovers Act 1993 be amended.

Offer conditions and defensive tactics

The Problem

133. Rule 38(1) of the Code prohibits the directors of a target company, once the company has received a takeover notice or has reason to believe that a bona fide offer is imminent, from taking or permitting any action, in relation to the affairs of the company, that could effectively result in:

    (a) a takeover offer being frustrated; or

    (b) the shareholders in the target company being denied an opportunity to decide on the merits of a takeover offer.

134. Rule 39 of the Code prescribes exceptions to the prohibition in rule 38(1). The rule states that what would otherwise be prohibited is allowed if one of the provisos set out in rule 39 applies. The provisos are:

(a) the shareholders of the target company have approved of the action by passing an ordinary resolution; or

(b) the action is taken as a result of a contractual obligation, or the implementation of proposals, of the target company, and that obligation was entered into, or the proposals were approved by the directors, prior to the issuing of a takeover notice by the offeror or to the target company becoming aware that a takeover offer was imminent; or

(c) if neither of the above provisos applies, the action is permitted if it is taken for reasons unrelated to the offer, but with the prior approval of the Panel.

135. The purpose of rule 38(1) is to prevent the directors of a target company from taking steps to improperly resist a takeover offer for the company. The rule captures conduct by the target company directors that *could effectively* defeat a takeover offer. This is a broad expression and focuses on the potential outcome of the action taken, regardless of the directors' intentions.

136. Under rule 38(1), the conduct does not need to *actually* lead to the offer failing or not proceeding. It can also catch conduct that is not intended by the directors of the target company to be defensive. Yet, as the rules are currently drafted, the directors of the target company must either seek relief under one of the provisos in rule 39, when, in principle, they should not have to, or risk breaching the Code.

137. The risk is particularly acute in relation to the triggering of "defeating" conditions in an offer. Under the Code, an offeror has a broad discretion to include any conditions it wishes in its offer, subject to the proviso that the conditions do not depend on the judgement, and are not within the power, of the offeror, or the offeror's associates.[8] The conditions in an offer document describe the circumstances in which the offeror is entitled to allow its offer to lapse or not proceed (although conditions may be expressed as being waivable and, in that case, the offeror can waive its right to rely on the condition). This flexibility is particularly important to offerors in light of rule 26 of the Code, which provides that, once it has commenced, a takeover offer may only be withdrawn by the offeror with the consent of the Panel.

138. There may be circumstances where it would be unreasonable for a bidder to invoke or rely on a defeating condition in an offer, or a condition could be triggered by an event which was not of material significance to the offeror in the context of the offer. Regardless of the materiality or reasonableness, currently the offeror may invoke or rely on its condition and allow its offer to lapse, thereby ending the takeover. For example, an offer could include a condition that during the pre-offer and offer periods the target company cannot enter into any transaction (such as the sale or purchase of an asset) above a prescribed value. This value could be low in relation to the business activities of the target company. It is conceivable that the target company could enter into a relatively minor transaction during the pre-offer or offer period of a takeover and, in doing so, give rise to a right for the offeror to invoke or rely on a defeating condition.

139. A Guidance Note issued by the Panel in May 2006 has mitigated the problem somewhat.[9] The Guidance Note comments on the possibility that a condition could be

[8] Rule 25(1) of the Code.
[9] Guidance Note – Restrictive Conditions (May 2006).

so restrictive that it prevents the target company from carrying out activities that are part of its ordinary business. In the Panel's view, it would be almost inevitable that a target company would trigger a condition such as this, meaning that the condition was effectively within the judgement or control of the offeror. The Guidance Note has encouraged the market practice of offerors including, in restrictive conditions in an offer, a proviso that the target company may carry out its ordinary business during the period of the takeover offer.

140. A Guidance Note, however, can only encourage a practice in the market. The limits of the proviso in rule 25(1) have not been formally tested. The broad flexibility available to offerors under the Code for the inclusion of defeating conditions can create uncertainty regarding whether an offer will lapse.

141. Moreover, any action taken or permitted by the directors of the target company which could trigger a defeating condition is an action that *could effectively* result in the shareholders not having an opportunity to consider the merits of the takeover offer. Accordingly, when coupled with the rigidity of the prohibition against defensive tactics by a target company, the wide discretion for offerors to invoke or rely on defeating conditions puts the directors of the target company in a difficult position during the pre-offer and the offer period, as the target company and its directors run the risk of triggering a defeating condition in the offer. While this risk can usually be managed in a 'friendly' takeover situation, it can be very difficult in a hostile takeover.

142. As noted above, rule 39 of the Code provides mechanisms for the target company to carry out an action that would otherwise be prohibited by rule 38(1). The most significant problem is that even if the directors are able to rely on a proviso in rule 39, the offeror may still invoke a triggered defeating condition and allow the offer to lapse. The provisos in rule 39 only protect the directors of the target company from otherwise being in breach of rule 38 of the Code – the provisos do not ensure that a takeover will continue.

The Solution

143. The Panel's preferred option for addressing the problem is to have the Code amended, to the effect that:

(a) An offeror cannot rely on a condition of an offer that seeks to restrict the target company from undertaking activities in the ordinary course of its business during the offer period; and

(b) An offeror cannot rely on a condition of an offer unreasonably.

Recommendation

144. The Panel recommends that rules to the following effect be inserted into the Code:

25 Conditions

(1A) An offeror must not invoke or rely on a condition of the offer which purports to restrict the target company from carrying out activities in the ordinary course of its business during the period that begins with the sending of a notice under rule 41 of the Code and ends on the date specified by the offeror under rule 25(2).

(1B) An offeror must not unreasonably invoke or rely on any condition in an offer made under this Code.

Schedule 1 Information that must be contained in, or must accompany, takeover notice and offer document

5A A statement that no condition of the offer can be unreasonably invoked or relied on by the offeror

Comment

145. The proposed rule changes place reasonable and fair limits on the ability of an offeror to invoke a defeating condition.

146. Firstly, the proposed amendments would codify the current market practice that the Panel has encouraged by its Guidance Note on restrictive offer conditions. In other words, an offeror would breach the Code if it sought to rely on a condition in its offer that purported to restrict the target company from carrying out its ordinary business activities during the offer, and pre-offer, period.

147. Secondly, an offeror would be prohibited from unreasonably invoking or relying on a condition in an offer so as to cause an offer to lapse or to not proceed. For example, it would be unlikely that an offeror could rely on a minor and commercially insignificant event to justify invoking or relying on a condition in the offer.

148. Accordingly, the amendments to the Code being recommended by the Panel would remedy the problem by:

(a) removing the risk that an offer could lapse or not proceed on the grounds of the triggering of a defeating condition that would prevent the target from carrying out its ordinary business while the takeover was underway, or where reliance on that condition by the offeror would, in the circumstances, be unreasonable; and thereby

(b) relieving the directors of the target company of potential non-compliance with rule 38(1) of the Code in respect of actions that were not genuinely defensive tactics.

149. The Panel's recommendation would also bring greater consistency between the regulatory regimes of New Zealand and Australia. Accordingly, the New Zealand Panel and market practitioners would be able to draw upon the experience and jurisprudence in that jurisdiction. This should alleviate concerns about the application of the proposal in practice.

150. Moreover, the preferred option is not a radical change from the status quo. It serves to introduce more clarity and fairness into the Code and should not require significant changes to market practice. It seeks only to remove the risk of an offer being aborted unreasonably or on some insignificant or immaterial ground, and to balance the defensive tactics rules to which a target company is subject with a more controlled approach to the offeror's ability to let the offer lapse.

Consultation

151. The Panel undertook two rounds of consultation on its preferred option.

152. In June 2010, the Panel issued a consultation document in respect of a number of issues with Parts One to Five of the Code. Amongst these issues, the Panel identified the problem with rule 38(1) of the Code being out-of-balance with rule 25.

153. The Panel's preferred option to address this problem was to amend the Code to prevent an offeror from invoking any condition (and so causing the offer to lapse or not proceed), unless the circumstances that gave rise to the offeror's right of invocation could reasonably be considered to be of material significance to the offeror in the context of the offer.

154. The submissions received by the Panel on this consultation paper expressed a divergence of opinions on the Panel's preferred option but, generally, consultees raised concerns that the proposed amendment would create a very high threshold for an offeror to overcome before it could invoke a condition of the offer, and that the threshold was vague and uncertain.

155. In light of the concerns expressed, in December 2010, the Panel issued another discussion paper that refined the preferred option. The refined preferred option provided:

(a) that the offer could not contain a restrictive condition; and

(b) the offeror could not unreasonably invoke or rely on a condition.

156. The recommended amendments to the Code would enable the Panel to consider, if an offeror purported to rely on or invoke a condition of its offer, whether the condition did, indeed, restrict the target company's ordinary course of business; or whether the offeror was relying on the condition unreasonably.

157. The submissions were all supportive of the Panel's refined preferred option, but several of the submitters pointed out a potential difficulty with the Panel's proposal that an offer not *contain* a restrictive condition. It was submitted that an amendment to this effect could result in the Panel vetting draft conditions for compliance with the Code. This would be almost impossible to ascertain *ex ante* because whether a condition was restrictive would depend on the particular facts and circumstances of the target company. The submitters suggested that the amendment could be better expressed by providing that an offeror could not *rely* on a restrictive condition. The Panel has addressed these submissions in its recommendation.

158. A major law firm submitted that the Takeovers Act does not give the Panel (or the Court) the power to order an offeror to continue a takeover offer in the event that the offeror unreasonably invokes or relies upon a condition. The Panel agrees with this submission. Accordingly, the proposed amendments to the Code include a provision that the offer document includes, as part of the terms of the offer, a statement that the offeror can not unreasonably invoke or rely upon a condition in the offer.

Target companies' reimbursement of takeover expenses

The Problem

159. Rule 49 of the Code enables target companies to recover from the offeror, as "a debt due", their properly incurred takeover-related expenses.

160. The policy of rule 49 is to discourage vexatious or ill-conceived bids, due to the adverse impact that a takeover can have on a Code company's business operations and board activities. The rule also encourages bidders to 'play by the rules', because one of the expenses that a target company can properly incur, in ensuring that shareholders have all the information they need to consider whether to accept or reject the offer, is the countering of 'propaganda' by a bidder.[10]

161. On 12 October 2010, judgment was given on a judicial review of the Panel, instigated by Marlborough Lines Limited ("Marlborough"), that was heard in the High Court in Wellington on 9 – 11 August 2010 ("the *Marlborough Lines* case").[11] The second defendant in the proceedings was Horizon Energy Distribution Limited ("Horizon"), the target company for which Marlborough had made a takeover offer late in 2009. The takeover failed.

162. One of the matters in respect of which Marlborough had sought judicial review was a decision by the Panel to hold a meeting under section 32 of the Takeovers Act 1993,[12] on the request of Horizon, to consider whether Marlborough had breached rule 49(2) of the Code in failing to pay the sum claimed by Horizon for costs incurred in relation to the failed takeover. Marlborough claimed that the Panel does not have jurisdiction to determine matters relating to rule 49(2). The Court upheld that claim.

163. The judgment given by MacKenzie J acknowledges the potentially powerful policy argument that the Panel's specialist expertise in determining takeovers matters makes it the most suitable body to determine rule 49 expenses. However, MacKenzie J held, on a consideration of principles of statutory interpretation, that the policy argument could not overcome the statutory indications that the Panel lacks the jurisdiction to make such determinations.[13] Broadly speaking, the Court found that the "debt due" process was amenable to determination by a Court (which would be able to enforce payment of the debt that was found to be owing). The process and remedies currently available under the Takeovers Act do not support a role for the Panel in making determinations of these disputes.

164. As a result of the High Court decision, the takeovers market is now left without the mechanism of the Panel's specialist expertise to determine the expenses properly incurred by a target company that must be reimbursed by an offeror.

The Solution

165. The Panel's solution to this problem is to move rule 49 out of the Code and into the Takeovers Act, and to include a specific procedure for the consideration of these reimbursement disputes. Thus, the Takeovers Act would be amended to clearly make the Panel the primary adjudicator of target company reimbursement claims. The new provisions would set out the procedures (either a 'hearing' with the Panel as adjudicator, or a decision 'on the papers' by the Panel, with the prior consent of all the parties). The

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[10] *Canterbury Frozen Meat Company Ltd* v *Waitaki Farmers' Freezing Company Ltd* [1972] NZLR 806; *Code Word Number 24*.
[11] *Marlborough Lines Limited v Takeovers Panel & Ors* (CIV-2010-485-1150), MacKenzie J.
[12] Section 32 provides the Panel with the power to hold a hearing to determine whether a person has breached the Takeovers Code.
[13] *Marlborough Lines*, Paragraph [88].

High Court would have a backup role of enforcing Panel determinations of target company reimbursement claims.

Recommendation

166. The Panel recommends that rule 49 be removed from the Code and that the Takeovers Act be amended to include provisions to the following effect (the proposed new section 31Y replicates rule 49 of the Code, but it removes the words "as a debt due"):

Target company reimbursement claims

31Y Reimbursement of directors and target company

(1) Despite anything in the constitution of the target company, each director of the target company is entitled to have refunded to the director by the target company any expenses properly incurred by the director on behalf, and in the interests, of holders of equity securities of the target company in relation to an offer or a takeover notice that is made or given under the takeovers code.

(2) The target company may recover from the offeror any expenses properly incurred by the target company in relation to an offer or a takeover notice, whether as a result of refunds made under subsection (1) or otherwise.

31Z Panel to determine target company reimbursement claims

(1) The target company may make an application to the Panel in accordance with this section if the offeror fails, within a reasonable time, to reimburse in full the expenses claimed by the target company under section 31Y.

(2) The Panel must hold a meeting to consider any application it receives for the reimbursement of the expenses referred to in section 31Y, after giving the target company and the offeror such written notice of the meeting as the Panel considers appropriate in the circumstances.

(3) Following the meeting, the Panel may determine the expenses that have been properly incurred by the target company in relation to an offer or a takeover notice, whether as a result of refunds made under section 31Y(1) or otherwise.

(4) If the Panel makes a determination under subsection (3), the Panel may make an order directing the offeror to pay to the target company the amount determined by the Panel.

(5) An order made under subsection (4) may be made on terms and conditions that the Panel thinks fit.

(6) If the Panel makes an order under subsection (4), the Panel—

(a) must immediately give written notice to the person to whom the order is directed of the terms and conditions of the order; and

(b) may also give notice to any other person of those matters.

(7) The Panel may vary the order in the same way as it may be made under this section.

(8) The Panel may revoke the order or suspend the order on the terms and conditions it thinks fit.

31ZA Determination on the papers

If the target company and the offeror give their prior written consent, the Panel may hold the meeting under section 31Z without either of the target company or the offeror being heard or represented at the meeting.

31ZB Enforcement of reimbursement orders

(1) If the Panel has made an order under section 31Z(4), the target company may apply to the Court for an order under subsection (3).

(2) The target company may apply to the Court for an order under subsection (3) on the later of—

(a) 14 days after the Panel gave notice under section 31Z(6) of the Panel's order; or

(b) the day after the date by which the Panel directed the offeror to pay the target company.

(3) The Court may make any of the following orders if it is satisfied that the offeror has not complied with a term of the Panel's order:

(a) an order directing the offeror to comply with that term;

(b) any order that the Court thinks appropriate directing the offeror to compensate the target company or any other person who has suffered loss, injury or damage as a result of the failure to comply with the term of the Panel's order;

(c) an order for any consequential relief that the Court thinks appropriate.

167. For the purposes of the new sections of the Act, the "offeror" would have to be defined in such a way as to ensure that liability by the offeror could not be avoided by

disestablishing the offer entity. Accordingly, the Panel recommends that the "offeror" includes "*any person acting or who acted jointly or in concert with the offeror*."

Comment

168. Amongst the submissions received on this issue was a submission from a major law firm which did not support the preferred option. That submitter argued that the most appropriate body to determine disputes under rule 49 is the High Court. The main basis for the submission was the view that the Court's procedures (e.g., the discovery process) facilitate the fair resolution of disputes of costs.

169. The Panel considered the arguments in this submission. The High Court in the Marlborough Lines case, and all of the other submitters, recognised the benefits of the Panel, as a specialist body with expert knowledge in takeovers law and practice, adjudicating on disputes over the reimbursements of costs. The High Court is unlikely to have such expertise. Moreover, the Panel is more likely to be cost effective and timely in considering disputes than the High Court. The Panel's recommendation, if accepted and implemented into law, would give the Panel the powers and procedures it would need to fairly resolve a dispute. Accordingly, the Panel considers that its proposal offers the best solution to the problem.

170. The five other submissions all supported the Panel's preferred option, with some minor suggestions for improving it which the Panel has adopted in the recommendation above. These related to:

   (a) Whether the Panel should have a discretion to determine a costs dispute when it receives an application for such a determination. The submitters commented that there were no foreseeable circumstances where the Panel would or should decline to consider the dispute. The recommendation, above, has removed the Panel's formerly proposed discretion, so that the Panel must make a determination;

   (b) The proposed definition of "offeror" for the new provisions had included a reference to any person acting or who had acted "on behalf of" the offeror. Several submitters argued that the proposed wording would likely catch legal and other professional advisers to the target company and that that would be inappropriate. The recommendation, above, has removed the reference to persons acting "on behalf of" the offeror.

Definition of Code company

The Problem

171. A change was made to the definition of "code company" in 2006, which inadvertently reduced the coverage of the Code in relation to listed companies. According to both the Takeovers Act and the Code (as amended in 2006, as shown below by underlining), a company is a Code company if it:

   (a) is a party to a listing agreement with a registered exchange <u>and has securities that confer voting rights quoted on the registered exchange's market</u>; or

(b) was within paragraph (a) at any time during a 12 month period prior to its involvement in a Code transaction or event; or

(c) has 50 or more shareholders.[14]

172. Entering into a Listing Agreement with NZX Limited precedes the undertaking of an initial public offering ("IPO") which, if successful, will result in many new shareholders entering the ownership of the company.

173. Prior to 2006, a company became a Code company at the time it entered into a Listing Agreement with NZX. Accordingly, the Code had to be complied with or, more usually, an exemption from compliance with the Code relied upon, in relation to an IPO itself if, as is sometimes the case, a shareholder proposed to take up a holding in the company, under the IPO, that would trigger the fundamental rule of the Code. The terms of the exemption would include that the offer documents clearly showed the potential control percentages of the person or persons, together with their associates, who would trigger the Code's 20% threshold as a result of the IPO.

174. However, in 2006 the definition of Code company was amended for the purposes of ensuring that debt-listed-only companies would not be caught by the Code.[15] Accordingly, the definition of Code company was changed, by adding the underlined words shown above.

175. At the same time, a new definition of "*quoted*" was also included in the Act, as follows:

> ***quoted****, in relation to securities of a person, means securities of the person that are approved for trading on a registered exchange's market…*

176. This new definition was intended to retain the timing at which a company became a Code company in advance of an IPO. It was thought that the words "*approved for trading*" in the definition linked the quotation of the securities to the timing of the entering into of the Listing Agreement.

177. Unfortunately, it has now become apparent that the 2006 amendments had the unintended consequence of altering the timing at which an equity-listed company becomes a Code company. Consequently, it appears now that the Code need not be complied with until *after* the IPO (assuming that any allotments to major shareholders are made before there are 50 shareholders on the share register).

The Solution

178. The Panel's proposed solution to this problem is to change the relevant definition in the Takeovers Act to ensure that a Code company includes a company *that has made an application* to a registered exchange for its securities to be quoted on the exchange's market.

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[14] The '50 or more shareholders' part of the definition is to be amended to '50 or more shareholders and 50 or more share parcels' under the *Regulatory Reform Bill* which was introduced into the House in December 2010.
[15] Takeovers Amendment Act 2006. This was done because the Code is concerned with voting rights, but debt securities do not confer voting rights (as defined by the Code). As a result, the Panel was having to grant exemptions to remove such companies from the Code's ambit. It was thought more appropriate that the definitions be changed so that the Takeovers Act itself removed these companies.

Recommendation

179. The Panel recommends that the definition of "quoted" in section 2(1) of the Act be amended as follows (shown in underlining):

> ***quoted****, in relation to securities of a person, means securities of the person that are approved, <u>or in respect of which an application for approval has been made</u>, for trading on a registered exchange's market…*

Comment

180. Amending the Act as recommended by the Panel would restore the timing of becoming a Code company to the position it was in before the 2006 amendments to the Act inadvertently changed that position. The benefit of restoring the timing for becoming a Code company as a result of an IPO is that it would restore the Panel's jurisdiction to monitor and enforce clear disclosures about the potential ownership structure of the company if a shareholder, together with any associated shareholders, triggers the Code's 20% threshold as a result of subscribing under the IPO.

181. Three out of the four submissions received on this issue, including from the NZX, supported the Panel's preferred option.

182. One submitter, a corporate law firm, did not support the Panel's preferred option. The submitter argued that the proposed new definition of "quoted" would catch a listed company that had applied to have voting securities quoted on the exchange, but, for good reason, did not proceed with the approved quotation. Accordingly, the proposed definition would impose an additional, and unnecessary, compliance burden on such a company. Secondly, the submitter suggested that there are already a number of agencies (the Companies Office, the NZX, the Securities Commission (as it then was), and, arguably, the Commerce Commission) that have a role in monitoring the disclosure made by a party who is pursuing a public listing of securities, so there is enough regulatory oversight without the further involvement of the Panel.

183. The Panel has considered this submission. The Panel's recommendation, if implemented, would, in effect, restore the timing at which a listed company became a Code company to the status quo prior to the 2006 amendment. The first issue identified by the submitter is presumably a possibility, but the Panel is not aware of it ever having arisen during the five years of the Code's existence before the 2006 amendment was made. In any event, it is a matter which the Panel considers could be adequately resolved by the Panel exercising its exemption power under the Act. In relation to the issue of multiple regulators, the Panel's oversight role is primarily concerned with voting control in Code companies. The other regulators have different purviews, and the Panel's jurisdiction is largely contiguous to, not overlapping of, those of the other regulators.

SECTION FOUR: PARTS SIX TO EIGHT AND THE SCHEDULES OF THE CODE

Introduction

184. In July 2011, the Panel issued a public consultation document on further technical issues with the Takeovers Code (the "Fourth Consultation Paper"). The paper was the fourth in a series of consultation papers that the Panel has published on technical issues with the Code.

185. The Fourth Consultation Paper covered three substantive issues:

  (a) the lack of information about the status of defeating conditions during the offer period;

  (b) the lack of specificity of the offeror's statement of its intentions for the target company; and

  (c) follow-on offers.[16]

186. The Fourth Consultation Paper also identified seven drafting anomalies and inconsistencies in the Code which require remedying, but would not result in any substantive changes to the Code.

187. The Panel received eight submissions on the Fourth Consultation Paper. Submissions were made by most of the major corporate law firms in New Zealand, together with the New Zealand Law Society and a major financial advisory firm.

188. The Panel's recommendations in respect of the issues in the Fourth Consultation Paper are set out below.

Status of defeating conditions during the offer period

The Problem

189. If the offeror makes its offer subject to conditions, it must specify a date by which the offer is to become unconditional.[17] The specified date is subject to prescribed time limits. It must be no more than 14 days after the end of the offer period or, in cases where the transaction requires statutory approval (e.g., under the Overseas Investment Act 2005), 30 days after the end of the offer period.[18] If the offer does not become unconditional by the specified date, the offer will lapse.[19]

190. The offeror is under no obligation in the Code to provide on-going information to offerees or the market on the status or the fulfillment of conditions before the specified

[16] As a result of the consultation process, the Panel has not proposed any changes to the Code in respect of follow-on offers, and that issue is not mentioned any further in these recommendations.
[17] Rule 25(2) of the Code.
[18] Rule 25(3) of the Code. There are provisions in the Code to deal with changing the specified date for declaring the offer unconditional in the event that the offeror extends the offer period (see rule 25(3) and rule 27(e)).
[19] Rule 25(4) of the Code.

date for declaring the offer unconditional.[20] Accordingly, during the offer period, and up to 30 days after the close of the offer period, the offerees and the target company may not know whether the offer will succeed.

191. A condition that relates to the minimum level of acceptances of the offer is a key condition of the offer from the perspective of the offerees, the target company, and the market generally.[21]

192. The Panel considers that it is a significant event in the course of a takeover offer for the offeror to obtain a sufficient level of acceptances to satisfy the minimum acceptance condition, or, similarly, if the offeror elects to waive a minimum acceptance condition. It may alter the views of the directors of the target company and of the offerees as to the merits of accepting the offer. In the Panel's experience, such an event can occur even at the "last minute" of the offer period, which leaves the offerees with very little time to consider the effect of the change in circumstances.

193. It is not possible to quantify the magnitude of any problem associated with a lack of information about the status of the offer conditions. It is likely that the costs are not great, but a lack of information creates uncertainty, and uncertainty has a negative impact on the market.

The Solution

194. The Panel's preferred option is to amend the Code so that it provides:

(a) an automatic extension of the offer period if any minimum acceptance condition is satisfied or waived in the final week of the offer period; and

(b) a requirement for the offeror to give notice of the status of defeating conditions, at least a week before the close of the offer period. The notice would be sent to the target company, the Panel, and to the stock exchange (if the target company was listed).

Recommendation

195. The Panel recommends that the Code be amended by adding new rules, to the following effect:

24C Automatic extension if the offeror satisfies or waives minimum acceptance condition in final week

(1) This rule applies if:

(a) the offer is subject to anyminimum acceptance conditions; and

(b) any such condition is satisfied or waived in the period that is 7 days before the end of the offer period.

(2) If subclause (1) applies, the offer period is extended for 14 days from the day on which a

[20] Under rule 49A of the Code, the offeror must notify the Panel and the target company each time the acceptances received increase by 1% or more. To some extent, this disclosure process informs the market of the status of any minimum acceptance condition in the offer.

[21] Under rule 23(1) of the Code, an offer made for more than 50% of the voting rights in the target company, must be subject to a condition that the offeror receives sufficient acceptances in respect of more than 50% of the voting rights. In addition, an offer may include a condition that the offeror receives acceptances to take it to having a higher ownership level, e.g., more than 90% of the voting rights. Such a condition could be expressed as being waivable by the offeror.

condition referred to in subclause (1) is satisfied or waived.

(3) If the offer period is extended under subclause (2), the offeror must, immediately, send a written notice that the minimum acceptance condition has been fulfilled and of the extension to:

(a) every offeree who has not already accepted the offer or has accepted the offer in part; and

(b) the target company; and

(c) the Panel; and

(d) the registered exchange (if listed).

(4) In this rule, a minimum acceptance condition means a term of the offer which provides that the offer is conditional on the offeror receiving acceptances in respect of voting securities that, when taken together with voting securities already held or controlled by the offeror, confers equal to or more than a percentage level or number of voting securities specified by the offeror and which complies with rule 23.

49B Notice requirements in respect of conditions

(1) The offeror must give notice to the target company, the Panel, and, if the target company is a listed company, the registered exchange, at least 7 days, but no more than 14 days, before the end of the offer period, of the following:

(a) that the offer is, and remains, subject to conditions as specified in the offer document;

(b) whether, to the best knowledge and belief of the offeror, after making proper enquiry, any (and, if so, which) conditions have been fulfilled or satisfied at the date of the notice;

(c) whether the offeror has the right to waive any of the conditions to which the offer remains subject as at the date of the notice and, if so, which conditions; and

(d) the percentage of voting rights in the target company in respect of which the offeror has received acceptances as at the date of the notice together with the percentage of voting rights already held or controlled by the offeror (if any).

(2) Subclause (1) does not apply if, at the date that the notice would be given, the offer is not subject to any conditions.

(3) If the offer period is extended after a notice has been given under subclause (1), a new notice must be given in accordance with subclause (1).

Comment

196. The proposed automatic extension of the offer period, if a minimum acceptance condition is satisfied or waived in the final week of the offer period, addresses the problem of “last minute” satisfaction of the minimum acceptance condition. It is appropriate that a reasonable period of time is made available for offerees to consider the effect of this change when deciding whether to accept or reject the offer. The additional time period, in the Panel’s view, would be particularly valuable to retail shareholders because they may need more time to consider the information than, say, a large financial institution.

197. The new notice requirements in the proposed amendment directly address the problem that the offerees, the target company and the market may not know the extent to which the offer is still subject to conditions while the offer is still open and able to be accepted. The offeror would also have to state whether any of the conditions to the offer that remain unfulfilled or untriggered as at the date of the notice are waivable. This would ensure that complete information is available about the progress of the offer.

Consultation

198. All submitters endorsed the Panel’s proposal for the automatic extension of the offer period if a minimum acceptance condition is satisfied or waived in the final week of the offer. A number of comments were made that the proposal would reduce uncertainty and enable offerees to make an informed decision whether or not to accept the offer.

199. The submitters, generally, did not think that the proposal would cause problems for offerors. Some submitters suggested that the proposal be slightly redrafted to require the offeror to send notice of the extension *"as soon as practicable"*, whereas the Fourth Consultation Paper had proposed that the notice be sent *"immediately"*. The Panel is satisfied that term *"immediately"* is appropriate, is interpreted by the context in which it operates, and is consistent with other notice rules in the Code.

200. A minority of the submitters believed that a seven day extension would be the right amount of time for the extension period. However, the Panel, together with the majority of the submitters, considers that a 14 day extension period is appropriate.

201. The Panel also asked submitters if the automatic extension provision should extend to takeover offers which are subject to non-waivable 90% minimum acceptance conditions. Such an offer will only succeed if the offeror receives enough acceptances (90% or more of the voting rights) that the Code's compulsory acquisition procedure can be invoked. Seven out of the eight submitters supported this idea (the eighth submitter had no comments).

202. The submitters were broadly supportive of the Panel's proposal in respect of the offeror being required to give notice of the status of the conditions before the end of the offer period. Some submitters noted that the extent of the problem has already been mitigated since the introduction of rule 49A into the Code in 2007 (this rule requires the offeror to notify the target company and the Panel whenever the level of acceptances for an offer increases by more than 1%). However, those submitters did not object to the Panel's proposal. Other submitters commented favourably that the proposal would lead to greater harmony with Australian legislation and practice.

203. The Panel also sought comments on whether the New Zealand Code should be aligned more closely to the Australian regulations, which, broadly speaking, result in the offeror being unable to waive any conditions in the final week of the offer period. The effect of the Australian legislation is that, except for certain prescribed circumstances, the offer will be declared unconditional before the final week of the offer period. There was no support for a change of this nature being introduced in New Zealand because it significantly increases the offeror's risks.

Statements by the offeror of its intentions for the Code company

The Problem

204. Clause 14(1) of Schedule 1 of the Code requires the offeror to include in the offer document a statement of *"the general nature of any material changes likely to be made by the offeror in respect of the business activities of the target company and its subsidiaries."* The offeror does not have to provide this statement if the offer is subject to a non-waivable condition that the offeror receives acceptances in respect of 90% or more of the voting rights in the Code company.[22]

205. The Panel is concerned with the quality of disclosures made by offerors under clause 14(1) which can leave offerees lacking important information about the offeror's intentions for the target company when considering whether to accept or reject the offer.

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[22] Clause 14(2), Schedule 1 of the Code.

This is particularly acute in partial offers which necessarily result in some or all of the offerees remaining as shareholders of the target company. They have a direct interest in knowing the extent to which the offeror will add value to the company (and, therefore, to their investment).

206. An offeror making an offer for a New Zealand Code company is not required to make statements in respect of its intentions for the target company as extensively as those required in the UK and Australia.

The Solution

207. The Panel's preferred option is to amend the Code so that it requires the offeror to make better disclosure of its intentions in respect of the target company. To this end, the offeror should be required to disclose its intentions regarding the material changes to the business activities, assets, or capital structure of the target company, and also to explicitly affirm that the information provided is consistent with information given to other regulators (such as the Overseas Investment Office or the Commerce Commission). If the offeror has no such intentions, it should make a statement to that effect.

Recommendation

208. The Panel recommends that the current clause 14(1) of Schedule 1 of the Code be replaced with a provision that the takeover notice and offer document must contain, or be accompanied by, the following information:

14 Intentions regarding changes in target company

(1) A statement of the offeror's intentions regarding making any material changes to:
- *(a) the business activities of the target company or its subsidiaries;*
- *(b) the material assets of the target company or its subsidiaries;*
- *(c) the capital structure of the target company, including as to the target company's dividend policy, and the raising of capital, and the taking on of debt.*

(2) Any other information about the likelihood of changes to the target company or its subsidiaries that could reasonably be expected to be material to the making of a decision by an offeree to accept or reject the offer.

(3) If the offeror has no intentions in respect of the matters in subclauses (1) and (2), the offer document must include a statement to that effect.

(4) A statement that the statement made under this clause is consistent with the information, if any, that has been given by the offeror to any regulatory body (in New Zealand or in an overseas jurisdiction) in relation to the offer.

Comment

209. The Panel usually considers a clause 14(1) intentions statement to be a "last and final statement". The Panel considers that any action by a party which is inconsistent with a last and final statement that that party has made risks breaching rule 64 of the Code. Rule 64 prohibits any person from engaging in conduct that is misleading or deceptive. This rule gives offerees confidence that the offeror will stand behind the intentions statement it made in the offer document.

210. The Panel understands the inevitable tension between the interests of the offeror in protecting commercially sensitive information and the interests of the offerees in disclosure of the offeror's plans. The offeror may have limited information about the business of the target company at the time that it makes the offer and has to make its

intentions statement. The Panel also understands that general business and economic conditions can change and that, accordingly, the offeror's intentions for the target company may have to be adjusted in light of new events after completion of the takeover. However, in order to ensure that the clause 14 intentions statement remains accurate under these circumstances, offerors need to be careful to not overstate their intentions.

211. The Panel recognises that, given the implications of rule 64 of the Code for clause 14 intentions statements, there is a risk that statements made by offerors may be heavily qualified or lack substance. In the Panel's experience, this is a problem with the current clause 14 of the Schedule 1 of the Code, and it is also a difficulty encountered in Australia and the United Kingdom. Nevertheless, the proposed amendment would ensure that offerors are to provide detailed and useful information to offerees in the offer document, even though they may qualify the statements.

212. An offeror may have to provide information regarding its intentions in respect of the target company to other regulators, such as the Commerce Commission or the Overseas Investment Office. The Panel's proposal provides that the offeror must state in the offer document that its disclosed intentions are consistent with the information given to another regulatory authority. This requirement provides a reminder to offerors, and reassurance to offerees, that the regulatory requirements across jurisdictions are being followed consistently.

Consultation

213. This proposal generated the most comments from submitters. The Panel explicitly sought the views of the market on what level of disclosure the market considers would be appropriate for New Zealand.

214. Six out of eight submitters agreed with the Panel that, under the current rules, the level of disclosure is not helpful for offerees. However, two submitters did not consider that there was a problem with the status quo, and, accordingly, did not support the Panel's proposed amendment to the Code.

215. The proposal in the Fourth Consultation Paper proposed that the statement address:

(a) The offeror's strategic expectations regarding the future business activities of the target company;

(b) any material changes likely to be made by the offeror in respect of the business activities of the target company;

(c) its expectations regarding the future ownership or use of the assets of the target company;

(d) any material changes likely to be made to the capital structure of the target company, including as to the target company's dividend policy, and the raising of capital or the taking on of debt; and

(e) any other information about the likelihood of changes to the target company or its subsidiaries that could reasonably be expected to be material to the making of a decision by the offerees to accept or reject the offer.

216. Six of the eight submitters expressed concerns about how the Panel would enforce clause 14(1) statements under rule 64 of the Code. The submitters commented that an offeror's intentions may change in light of economic and business circumstances. Similarly, an offeror may only have access to limited information about the state of the target company's business prior to the takeover offer (this will depend on the extent to which the offeror has access to information only through the target company's public disclosures or whether it has been able to undertake a due diligence process). The concerns related to the circumstances in which the offeror could legitimately depart from its stated intentions without breaching rule 64 of the Code. Several submitters asked for the Panel to provide guidance on this issue.

217. The proposed statement also requires the offeror to disclose its intentions regarding making material changes to the material assets of the target company. This information, together with the disclosures regarding material changes to the target company's business activities, is likely to be relevant to the offerees, the independent adviser, and the board of the target company. No specific objections were raised by the submitters to a requirement that the offeror disclose this information.

218. Some submitters argued that given that the offeror is taking a risk in making an offer, it should not be required to give its reasons for doing so. The Panel's view, however, is that shareholders' and other parties' interests in knowing a bidder's intentions outweigh the offeror's interest in keeping the information to itself.

219. Only one of the submitters, responding to a question in the Fourth Consultation Paper about whether the statement should include the offeror's intentions regarding continuation of employment of the general staff of the target company, agreed that it should. The Panel accepts the majority view that such information would not be relevant to offerees and, accordingly, does not propose that intentions regarding employment be required to be disclosed by the offeror.

220. Only one submitter supported including any requirement that the offeror disclose its long term commercial justification for the offer. Several submitters suggested that such a requirement would be harmful to offerors, who would potentially be required to disclose commercially sensitive information, and that this level of disclosure was inappropriate. Accordingly, the Panel does not propose that an offeror be required to make this disclosure.

221. After weighing up the comments of the submitters, the Panel now proposes that the intentions statement should remain focused on the business activities of the target company. The Panel considers this to be the appropriate level of disclosure because it accepts that offerors may be unable, or unwilling, to commit themselves to the depth of disclosure regarding their intentions that the original proposal would have required.

Sending and delivering consideration

The Problem

222. There are a number of references in the Code to the offeror "sending" or "delivering" the consideration for the offer.[23]

223. If the consideration is, or includes, securities ("scrip"), it may be impossible for the offeror to literally "send" or "deliver" it, as the case may be. Transactions in securities normally occur though an electronic transfer system. An allotment occurs when the relevant shares are entered on the company's share register against the name or names of the allottee(s) or transferee(s). The entry on the company's share register is prima facie evidence that legal title to the shares vests in the named person.[24] Even before the advent of electronic trading systems, shares were not themselves sent or delivered to allottees or transferees. Only evidence of the allotment or transfer is sent or delivered (in the case of electronic transfers, by way of share statements, and in the case of non-electronic trading, by way of share certificates).

224. Accordingly, the best that an offeror can do to "send" or "deliver" scrip consideration, as the Code requires, is to provide evidence that the appropriate electronic (or non-electronic) transactions have occurred.

225. The magnitude of this problem is small, in that the majority of offers made under the Code are for cash consideration only. However, the concern is that the words used in the Code, "send" or "deliver" may not accurately reflect what occurs when shares are transferred or allotted and may lead to the offeror being uncertain about what its obligations under the Code in practice require it to do.

The Solution

226. The Panel considers that the problem would be resolved by clarifying in the Code that, in cases of non-deliverable forms of consideration, any requirement to send the consideration may be satisfied by sending evidence of the satisfaction of consideration.

Recommendation

227. The Panel recommends that the following rules be amended (deletions to the current wording of the Code are indicated with a strike-through line and the proposed amendments are shown in underlining):

33 Offer to specify date for satisfaction of consideration

(1) The offer must specify a date by which the consideration for the offer, in the case of cash or other deliverable consideration, or, in the case of non-deliverable consideration, evidence of satisfaction of the consideration, must be provided ~~be sent~~ to the persons whose securities are taken up under the offer.

34 Withdrawal of acceptance for non-payment of consideration

(1) If the consideration or, in cases of non-deliverable consideration, evidence of satisfaction of the consideration, is not provided ~~not sent~~ within the period specified in the offer to any person

[23] Rules 33(1), 34, 60, and 61.

[24] Companies Act 1993, section 89.

whose securities are taken up under the offer, the person may withdraw acceptance of the offer-

(a) by notice in writing to the offeror; but only

(b) after the expiration of 7 days' written notice to the offeror of the person's intention to do so.

60 Payment of consideration to outstanding security holder

(1) If an outstanding security holder returns to the dominant owner the documents referred to in rule 59, the dominant owner must, within 7 days after the dominant owner receives those documents, provide to ~~send to~~ the outstanding security holder –

(a) the consideration or, in cases of non-deliverable forms of consideration, evidence of satisfaction of the consideration, specified in the acquisition notice; or

(b) if rule 56A applies, the consideration or, in cases of non-deliverable forms of consideration, evidence of satisfaction of the consideration, that is payable under that rule.

61 Delivery of consideration to Code company

(1) If an outstanding security holder does not return to the dominant owner the documents referred to in rule 59, then, in the case of a compulsory sale, the dominant owner must, within 7 days after the expiration of the 21-day period referred to in rule 59 –

(a) deliver to the Code company –

(i) the consideration or, in cases of non-deliverable forms of consideration, evidence of satisfaction of the consideration, specified in the acquisition notice; or

(ii) if rule 56A applies, the consideration or, in cases of non-deliverable forms of consideration, evidence of satisfaction of the consideration, that is payable under that rule; and

(aa) if the consideration is, or includes, securities:

(i) allot the securities to the outstanding security holder in accordance with paragraph (a)(i) or (ii) (whichever applies); and

(ii) enter, or procure the entry of, the outstanding security holder's name on the relevant securities register as the holder of the securities and the issue of a statement to that person at his, her, or its last known address confirming the registration of that person as the holder of the securities; and

(iii) deliver to the Code company a copy of the statement referred to in sub-paragraph (ii).

(b) send to the Code company an instrument of transfer for those outstanding securities, executed on behalf of the outstanding security holder by the dominant owner or its agent.

Comment

228. The proposed amendments would clarify the offeror's obligations under the Code if the consideration is non-deliverable. In practice, the proposed amendment will apply to scrip offers. It will be clear to the offeror that, if it cannot physically send the consideration itself, it can send evidence that the consideration has been satisfied (e.g., in the case of scrip offers, evidence that securities have been allotted to the particular offeree).

Consultation

229. Seven out of the eight submitters commented on this issue. Six submitters agreed with the Panel that there is a drafting anomaly in rules 33(1), 34, 60, and 61 of the Code. One submitter argued that the meaning of the rules was already clear and, accordingly, there was no problem in practice.

230. Five submitters supported the Panel's preferred option for addressing the problem. However, two of those submitters queried the Panel's proposed wording in the amendment. The preferred option in the Fourth Consultation Paper proposed that

offerors "provide" the consideration, rather than "send" or "deliver". One submitter in particular argued that this proposed wording might have unintended consequences. It could mean that the offeror's obligation was only satisfied at the time that the offeree actually receives the consideration, rather than when the offeror sends it. This outcome was not the Panel's intention. Accordingly, the wording for the proposed amendment has been changed to clarify the offeror's obligation to *send* the consideration or evidence of satisfaction of the non-deliverable consideration.

231. The Panel also proposed that the regime under rule 61 for dealing with, what is effectively, unclaimed compulsory acquisition consideration should distinguish between cash consideration and scrip. In the case of cash, the Code company only needs to remain responsible for it until it can be dealt with under the Unclaimed Money Act 1971 (a period of six years). However, scrip does not fall within the Unclaimed Money Act. Accordingly, rather than leave the Code company responsible for it, the Panel is proposing an amendment to rule 61 so that the scrip is allotted to the outstanding security holder and evidence of that satisfaction of the consideration is sent to the Code company and to the outstanding security holder. Five of the eight submitters agreed with this proposal, two made no comment on it, and one supported the proposal but made some drafting suggestions.

Definitions of offeror and offeree

The Problem

232. Rule 3(1) of the Code defines an *offeror* and an *offeree* as follows:

> ***Offeree*** *means a person to whom an offer is made*
> ***Offeror*** *means a person who makes an offer*

233. Rule 43B of the Code states that the *offerees in respect of an offer* are:

> *...the persons shown as the holders of securities in the target company to which the offer relates on the securities register of the target company as at the record date.*

234. Rule 43B defines an "offeree" with greater precision than rule 3(1) as at a particular time. Rule 43B is only of relevance to the procedural provisions in Part Six of the Code (which relate to matters such as the practicalities of sending takeover notices, offer documents, and target company statements). These procedural provisions frequently refer to the "offerees".[25] For example, the rule 43B prescribes the timeframe in which the offeror must send the offer document to the "offerees". The inconsistency is the result of a drafting anomaly, and although it rarely causes confusion in practice, it is unhelpful to maintain something that is problematic that could be readily remedied.

235. Furthermore, the definitions of *offeror* and *offeree* in rule 3(1) do not make any reference to the takeover notice procedure in the Code. During the takeover notice period, it is more accurate to describe the offeror and the offerees only as "prospective" because no formal offer has yet been made. The Code, however, refers to certain things that the "offeror" must do during the takeover notice period (such as its obligation to give notice of the record date of the offer).[26] Accordingly, this inconsistency may also cause confusion.

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[25] For examples, rules 43A, 43B, 45, 46, and 48 of the Code.
[26] Rule 43A(1) of the Code.

236. The extent of the problem is small and unlikely to cause a great deal of difficulty in practice. However, the inconsistent drafting leaves the Code slightly confusing and this may undermine efficiency in the takeovers market.

237. In addition, rule 47(4) of the Code imposes a general obligation on the "offeror", and the target company, and their agents (e.g., legal advisers, employees, etc.), to provide to the Panel copies of all offer-related correspondence that is sent to the "offerees". Read literally, under the current definitions of *offeror* and *offeree* in rule 3(1), during the takeover notice period if correspondence is sent to the (prospective) offerees by the (prospective) offeror, the offeror would, arguably, not be required to provide a copy of that correspondence to the Panel. This is because the definitions in rule 3(1) apply only after the offer has been made.

238. The Panel requires copies of all communications and public statements so that it is kept fully informed of the takeover and is in a position to exercise its enforcement powers, if appropriate (for example, under rule 64 of the Code, which prohibits persons from engaging in misleading or deceptive behaviour in relation to any transaction that is or is likely to be regulated by the Code).

239. In practice, the Panel normally receives copies of all information during the takeover notice period (although, sometimes only after prompting by the Panel executive). However, there have been a number of instances where the Panel has become aware of important information that ought have been provided to it under rule 47(4), only by reviewing the news media or announcements on the stock market. This leaves a risk that important information may be overlooked, and this could hamper the Panel's enforcement role.

The Solution

240. The problem would be removed if the Code clearly defined "offerors" and "offerees" to include prospective offerors and offerees, and also if the obligations in the procedural provisions of the Code, that refer to "offerees", instead focused on the issue of determining to whom the various takeover documents and notifications must be sent.

Recommendation

241. The Panel recommends that the definitions in rule 3(1) of the Code be changed as follows (deletions to the current wording of the Code are indicated with a strike-through line and the proposed amendments are shown in underlining):

> ***3 Interpretation***
>
> *(1) In this Code, unless the context otherwise requires –*
>
> ***offeree*** *means a person to whom an offer is made <u>and includes a person who is a security holder in a target company has received a takeover notice</u> <u>that relates to those securities</u>*
>
> ***offeror*** *means a person who makes an offer<u>, and includes a prospective offeror who sends a takeover notice</u>*
>
> ***43 ~~Who are offerees~~ To whom should the offer be sent***
>
> *(1) ~~The offerees in respect of an offer are the persons~~ <u>The offer must be sent to the persons</u> shown <u>at the record date</u> as the holders of securities in the target company to which the offer relates on the securities register of the target company ~~as at the record date~~.*
>
> *(2) Nothing in subclause (1) prevents the offeror from sending the offer to persons who acquire securities in the target company to which the offer relates, after the record date.*

43A Record date

(1) The offeror must send to the target company a notice in writing that specifies the record date for the purposes of the offer.

(2) The record date must not be more than 10 days before the date of the offer.

(3) The notice referred to in subclause (1) must be sent no later than 2 days before the record date.

(4) Before the offeror has sent the offer ~~to the offerees~~ in accordance with rule 43, the offeror may change the record date to a later record date by giving a further notice or notices under subclause (1), and in that case subclauses (2) and (3) apply to that notice or those notices as well.

43B When offer must be sent

The offeror must send the offer ~~to the offerees~~ in accordance with rule 43 on a date that is—

(a) no later than 3 days after the date of the offer specified under rule 44(1)(c); and

(b) during the period beginning 14 days, and ending 30 days, after the takeover notice relating to the offer has been sent to the target company.

45 Despatch notice

(1) Immediately on sending the offer document ~~to the offerees~~ in accordance with rule 43, the offeror must—

(a) send to the target company—

(i) a notice in writing stating that the offer document has been sent ~~to the offerees~~ in accordance with rule 43; and

(ii) a copy of the offer document; and

(b) send to the registered exchange a copy of—

(i) the notice referred to in paragraph (a)(i); and

(ii) the offer document; and

(c) deliver to the Registrar of Companies for registration a copy of—

(i) the notice referred to in paragraph (a)(i); and

(ii) the offer document.

(2) Subclause (1)(b) applies only if the offeror's or the target company's voting securities are quoted on the registered exchange's securities market.

48 Notification of altered offer document

The offeror must notify the target company, as soon as practicable before it sends the offer document ~~to the offerees~~ in accordance with rule 43B, of all information to be included in the offer document that is altered from, or additional to, the information that was contained in, or accompanied, the takeover notice.

Comment

242. The proposed amendments would clarify to which persons the offeror must send the offer document.

243. Moreover, the prospective offeror would clearly be obliged to provide copies to the Panel, under rule 47 of the Code, of all statements and information that are published or sent to (prospective) offerees during the takeover notice period. This would assist the Panel with performing its enforcement functions and meet the policy objective of ensuring that the market for takeovers of Code companies is efficient and competitive.

Consultation

244. Seven out of the eight submitters commented on this issue and agreed with the Panel that the current drafting was a problem.

245. One of the submitters, a major corporate law firm, made a very good argument that the opportunity was present to clarify the other uses of the word “offeree” in the procedural provisions of the Code. The Panel agreed with this submission and this is reflected in the proposed amendment to the Code.

Redundant words in clause 14(2)(b) of Schedule 2

The Problem

246. An offer document must include a general statement about any material changes that the offeror is likely to make to the target company.[27] However, the offeror does not have to provide this statement if:[28]

(a) the offer is conditional on the offeror acquiring 90% or more of the voting rights (which would give the offeror dominant owner status and entitle it to invoke the compulsory acquisition provisions of the Code to acquire the remaining voting securities in the Code company); and

(b) the condition cannot be waived *or varied*.

247. The inclusion of the words “or varied” in clause 14(2)(b) is a drafting error. Rule 27 of the Code limits the kinds of variations that an offeror is permitted to make to the offer during the offer period; that is, the offeror may increase the consideration, add cash or a cash component to the consideration, extend the offer period (within prescribed limits), and, if so, extend the specified date by which the offer must become unconditional. No other variations to the offer are allowed. Accordingly, the redundant words are at odds with that the Code in fact permits, which may cause confusion.

The Solution

248. The error can be resolved by removing the unnecessary words “or varied from clause 14(2) of Schedule 1 of the Code.

Recommendation

249. The Panel recommends that the words *“or varied”* be removed from clause 14(2) of Schedule 1 of the Code.

Comment

250. This is an inconsequential change to the Code. It would remove any potential risk of confusion and solve the problem identified above.

Consultation

251. All submitters who commented on this issue (seven out of eight) agreed with the Panel’s proposed amendment.

[27] Clause 14(1), Schedule 1 of the Code.
[28] Clause 14(2), Schedule 1 of the Code.

Availability of annual reports

The Problem

252. Sections 209, 209A, and 209B of the Companies Act 1993 provide that a company may make available its annual report to shareholders by electronic means. If a shareholder requests a hard copy of the annual report, the company must send it. Otherwise, the company must make the annual report available by electronic means (such as by keeping it posted on its website). In the case of listed companies, the NZX requires the issuer to also make its annual reports available to shareholders by electronic means in accordance with the relevant provisions of the Companies Act.[29]

253. The provisions of the Companies Act that relate to electronically available reports were introduced in 2007 by the Companies Amendment Act (No. 2) 2006 but consequentially amending the Code was overlooked. As a result, there is an inconsistency between the Code and the Companies Act. Clause 18(1) of Schedule 2 of the Code provides that the target company statement must include a statement that the offeree is entitled to obtain from the target company a copy of the most recent annual report of the target company, and clause 18(2) requires that a copy of any half-yearly report be included with the target company statement.

254. Clause 18(6)(a) and (b) define the annual report in terms of its being required by the Listing Rules or the Companies Act to be "sent" by the target company, whereas the Companies Act permits annual reports to be made available on websites. Although a minor matter, the Code does not reflect the flexibility in the Companies Act for a target company providing its annual report by electronic means.

The Solution

255. The problem would be resolved by removing the words "send" and "sent" and replacing them with the words "make available" and "made available", in clause 18(6)(a) and (b) of Schedule 2 of the Code, for both annual reports and half-yearly reports, respectively. This wording captures the possibility that the target company may provide its annual report, in accordance with its obligations under the Companies Act, and, in the case of listed companies, the NZX Listing Rules, by electronic means.

Recommendation

256. The Panel recommends that clause 18(6) of Schedule 2 of the Code be amended as follows (deletions to the current wording of the Code are indicated with a strike-through line and the proposed amendments are shown in underlining):

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

[29] Rule 10.5.4, NZX Listing Rules.

(a) if any voting securities of the target company are quoted on the registered exchange's securities market, the half-yearly report and half-yearly financial statements (including the auditor's report on such financial statements, if any) that the issuer is required by the rules of the registered exchange to ~~send~~ make available to equity security holders of the issuer; or

(b) if paragraph (a) does not apply, any half-yearly report and half-yearly financial statements (including the auditor's report on those financial statements, if any) that have been ~~sent~~ made available to the shareholders of the target company

Comment

257. The proposed wording removes any ambiguity about annual reports and half-yearly in the Code and the inconsistency between the Code and the Companies Act and Listing Rules.

Consultation

258. All submitters who commented on this issue (seven out of eight) agreed that clause 18(6) of Schedule 2 needed to be updated. Those submitters all supported the Panel's proposed amendment.

Trading behind nominees

The Problem

259. Clause 6(1)(b)(ii)(A) and (B) of Schedule 2 of the Code requires the target company to disclose (to the best of its knowledge) all trading in the equity securities of the target company by persons holding or controlling 5% or more, in the six months prior to the date of the target company statement. The purpose of this provision is to inform the offerees and the market of any dealings in the target company's equity securities by the significant shareholders in the months leading up to the takeover.

260. In New Zealand, a substantial proportion of the equity securities in listed companies are traded through the NZClear settlement system.[30] Under this system, New Zealand Central Securities Depository Limited ("NZCSD"), a custodian owned and operated by the Reserve Bank of New Zealand, is the legal holder of securities on behalf of the members of the NZClear system (i.e., on behalf of the beneficial owners of the securities or agents of the beneficial owners), who are typically financial institutions. All transactions in respect of the particular securities between the members of NZClear are settled by way of account. The actual securities remain a holding of NZCSD.

261. It is likely, given its custodial function, that in respect of many listed Code companies in New Zealand, NZCSD will hold 5% or more of the class of equity security under offer. There may be other custodians in a similar position. The target company statement is required to disclose trading in the securities of the target company by those custodians. However, the custodians, as custodians, do not *control* the securities which they hold. Indeed, these individual beneficial owners of the securities (who are likely to be clients of the financial institutions who are members of the NZClear system)[31] who do control the shares may have a voting interest of less than 5%. Nevertheless, the trading

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[30] Reserve Bank of New Zealand *Overview of NZClear* (updated June 2010), available online at <http://www.rbnz.govt.nz>.

[31] It is also quite common to have 'layers' of nominees between the beneficial owners and the custodian who holds the securities.

information will have to be disclosed under clause 6 of Schedule 2. This information is unlikely to be of value to the offerees,[32] and, in the case of NZCSD, there could be large volumes of data that would have to be included.

The Solution

262. The problem would not occur if the Code was amended to include a proviso to the disclosure obligation in clause 6 of Schedule 2 of the Code to exclude disclosure of transactions in the target company's equity securities by professional custodians who do not themselves control the securities that are owned by beneficial owners of less than 5%.

Recommendation

263. The Panel recommends that clause 6(1)(b)(ii)(A) and (B) of Schedule 2 of the Code be amended to incorporate the underlined changes:

> ***6 Trading in target company equity securities***
>
> *(1) If any of the persons referred to in clause 5(1) [i.e., the target company's directors, senior officers, their associates, and those with 5% or more of the equity securities] has, during the 6-month period before the latest practicable date before the date of the target company statement, acquired or disposed of any equity securities of the target company,—*
>
> *(a) in respect of each such person, the total number and the designation of each class of the equity securities acquired or disposed of; and*
>
> *(b) in the case of a person referred to in—*
>
> *(i) clause 5(1)(a), the number of securities, the consideration per security, and the date of each transaction to which this subclause applies; or*
>
> *(ii) clause 5(1)(b)—*
>
> *(A) in the case of a single transaction in any week to which this subclause applies, the number of securities, the consideration per security, and the week of each transaction; and*
>
> *(B) in the case of multiple transactions in any week to which this subclause applies, the total number of securities acquired or disposed of in a week, in each class, and the weighted average consideration per security per class.*
>
> *(2) If no person referred to in clause 5(1) has, during the 6-month period referred to in subclause (1), acquired or disposed of equity securities of the target company, a statement to that effect.*
>
> *(3) If a person referred to in subclause (1) holds equity securities of any class of the target company as a professional custodian, the target company statement may omit information for the purposes of subclause (1) in respect of a beneficial owner of the equity securities held by the professional custodian in that class, and of the professional custodian, if that beneficial owner, or if that professional custodian (as the case may be), controls less than 5% of the total equity securities in that class in the target company.*
>
> *(4) For the purposes of subclause (3), a professional custodian means a person who, in its ordinary course of business, holds securities directly or indirectly on behalf of the beneficial owner of the securities, and who only acts on the direction of the beneficial owner of the securities.*

Comment

264. The proposed amendment would ensure that the target company statement would only contain share trading data in respect of the "true" substantial security holders, and not also data on the trading of beneficial owners with less than 5% who were the clients of custodian shareholders. The target company statement would still be required to disclose trading information in respect of any persons who controlled 5% or more of the equity

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[32] However, trading data in respect of any beneficial owner who controls 5% or more of the class of equity security under offer (which are held through a custodian) in the target company should be disclosed in the target company statement, because of the reference to "controlled" in clause 5(1) of Schedule 2.

securities in the target company, even if those persons' securities were held by a professional custodian.

Consultation

265. Seven of the eight submitters agreed that a target company statement should not have to disclose trading data in relation to custodians where the trades relate to clients who control less than 5% of the equity securities in the target company. Those submitters all supported the Panel's preferred option. Two submitters commented that the definition of "professional custodian" be qualified to relate to a custodian who only acts on the direction of the beneficial owner of the securities. The Panel agrees that this qualification would ensure that only 'true' custodians are exempt from the disclosure requirement and, accordingly, it has been incorporated into the proposed amendment.

Variation of offer if more complete information in respect of securities is available

The Problem

266. The offer must be on the same terms and conditions as those set out in draft form in the document that accompanies the takeover notice except for:[33]

(a) Any conditions that have been waived or satisfied;

(b) Any variations to which the directors of the target company have given their prior written approval;

(c) Any variation that extends the offer to an additional class or classes of security; and

(d) Any consequential amendments.

267. The target company must, no later than two days after it receives a takeover notice, provide the offeror with a "class notice" which contains sufficient information about each class of equity security (in the case of a full offer)[34] or voting security (in the case of a partial offer)[35] to enable:[36]

(a) The offeror to formulate an offer; and

(b) An independent adviser to provide a report (or amended report) which certifies that the offer is fair and reasonable as between the classes of securities.

268. Rule 44(3) of the Code enables the offeror to vary the offer from the draft that accompanied the takeover notice, to include in the offer an additional class or classes of security, without the offeror having to obtain the prior consent of the directors of the target company if the additional class(es) was defined in the class notice.[37]

[33] Rule 44(1) of the Code.
[34] A full offer must include, whether they carry voting rights or not, an offer for all classes of equity securities in the target company: rule 8(2) of the Code.
[35] A partial offer must be made to all holders of voting securities in the target company: rule 9(2) of the Code.
[36] Rule 42A of the Code.
[37] Rule 44(3) of the Code.

269. There is a situation that can occur where an offeror may have access to *incomplete* information in respect of a class or classes of security of the target company. This scenario could cause two problems for a prospective offeror:

(a) The offeror gives a takeover notice which includes the draft terms and conditions of an offer based on the incomplete information. If the offer is made for more than one class of security, the takeover notice would have to include an independent adviser's report which certifies that the offer is fair and reasonable as between the classes (based on the information available about those securities). In light of new information received by the offeror in the class notice from the target company, the offeror may vary the terms of its offer. The variation would require the prior written approval of the directors of the target company, because this situation falls outside of the terms of rule 43(3). The independent adviser's report may also (depending on the nature of the variation) be inaccurate. The offeror cannot obtain an amended report because that is only permitted in cases where the offer is being varied to include an *additional* class or classes of securities, so the offeror would have to start the takeover notice process over again.

(b) The offeror could withhold making an offer for the class or classes of security in respect of which only limited information exists (and once the offeror had obtained the class notice, it could vary its offer to include the additional class or classes of security). The problems with this approach are two-fold: Firstly, such an offer may breach the Code. A full offer must include all classes of equity securities in the target company or, in the case of a partial offer, all classes of voting securities. Secondly, the offeror could be misleading the market if it deliberately makes an offer for a class or classes of security with the intention of including another class or classes at a later date.

The Solution

270. The Panel's preferred option is to amend the Code to make rule 44(3) apply, not only to additional classes of securities, but also to new information about classes that were already known by the offeror.

Recommendation

271. The Panel recommends that rule 44(3) of the Code be amended to incorporate the underlined changes:

(3) The offer may be varied to extend the offer to an additional class or classes of security or <u>to amend the terms or conditions of the offer relating to a class or classes of security</u>, without the approval of the directors of the target company if –

(a) the class or classes were ~~not~~ included in the <u>class notice given under rule 42A but were either</u>:

<u>(i)</u> <u>not included in the</u> terms or conditions contained in or accompanying the takeover notice<u>; or</u>

<u>(ii)</u> <u>were included in the terms or conditions contained in or accompanying the takeover notice but those terms or conditions did not accurately or completely account for the information in the class notice given under rule 42A.</u>

(b) the offeror has sent a notice of the variation referred to in subclause (1)(b)(iii) to the target company not less than 7 days before the date of the offer; and

(c) the offeror has obtained a report or an amended report under rule 22 if any of rules 8(3) or 8(4) or 9(5) apply in relation to the offer as varied under subclause (1)(b)(iii); and

(d) the notice of variation referred to in paragraph (b) is accompanied by a report or an amended report (as the case may be) under rule 22.

Comment

272. The advantage of the proposed amendment is that it would enable the offeror to vary its offer, and obtain an amended report from an independent adviser on the fairness of the offer, in respect of any class or classes of securities in respect of which the offeror has obtained additional information as a result of the Code's class notice procedure. This should facilitate the making of takeover offers and decrease the potential compliance costs for offerors.

273. It is likely that the Panel could address these problems in practice by the exercise of its exemption power under section 45 of the Takeovers Act. Prospective offerors would apply for an exemption when they receive the class notice with the additional information. The Panel might grant it on conditions that replicated the current rules, except they would be redrafted in the exemption to expand the variations that may be made to the terms of the offer without the target company directors' prior approval. This would accommodate the new information that had come to light in the class notice from the target company. However, this would be cumbersome for the offeror and would result in the offeror effectively paying (in terms of time and money in the making of an application for an exemption) for a drafting lacuna in the Code. Accordingly, an amendment to the Code is preferable.

Consultation

274. Seven out of the eight submitters commented on the Panel's preferred option and indicated support for it.

Directors and the Limited Partnerships Act 2008

The Problem

275. The Limited Partnerships Act 2008 established a regime in New Zealand for a new kind of legal corporate entity called a limited partnership. A limited partnership consists of at least one general partner and at least one limited partner.[38] The general partner manages the limited partnership.[39] A limited partner is not responsible for management, but may make a capital contribution to the limited partnership.[40] Limited partnerships must be registered on the public register of limited partnerships.[41] Limited partnerships are somewhat similar to companies, but they are not companies.

276. The definition of "director" in the Code is prescriptive (it explicitly lists the various entities in respect of which a person is a director for the purposes of the Code), but it does not include limited partnerships. The definition in the Takeovers Act, on the other hand, is broadly stated and does not specify the kind of entity in respect of which a person is a director. It is not helpful to have two differently worded definitions.

[38] Limited Partnerships Act 2008, s 8.
[39] Ibid, s 19
[40] Ibid, s 20.
[41] Ibid, s 51.

277. When the Limited Partnerships Act was enacted, it provided for a number of consequential amendments to definitions of “director” in various pieces of legislation.[42] The Takeovers Act and Code were overlooked in these provisions. The Code prescribes obligations on directors (particularly in respect of disclosure) which may be relevant to limited partnerships. Given the increasing use of limited partnerships in takeovers transactions, to provide certainty and clarity for the parties to a takeover, the Act and Code should recognise the limited partnerships regime. At present, the Act and Code do not do this.

The Solution

278. An update of the definitions of “director” in both the Act and the Code to reflect the limited partnerships regime, and aligning the definitions in both the Code and the Act, would resolve the problem.

Recommendation

279. The Panel recommends that rule 3(1) of the Code be amended to incorporate the underlined changes:

> ***director***,—
> (a) *in relation to a company, means a person occupying the position of a director of the company, by whatever name called; and*
> (b) *in relation to a partnership (other than a special partnership <u>or limited partnership</u>), means a partner; and*
> (c) *in relation to a special partnership <u>or limited partnership</u>, means a general partner; and*
> (d) *in relation to a body corporate, or unincorporate, other than a company, partnership, ~~or~~ special partnership <u>or limited partnership</u>, means a person occupying a position in the body that is comparable with that of a director of a company; and*
> (e) *in relation to any other person, means that person; and*
> (f) *includes a person in accordance with whose directions or instructions a person referred to in paragraphs (a) to (d) may be required or is accustomed to act in respect of the exercise of duties or powers as, or comparable to those of, a director.*

280. The Panel also recommends an amendment to the Takeovers Act to remove the existing definition of “director” in section 2 of the Act and replace it with the definition of director (including the references to limited partnerships) used in the Code.

Comment

281. The preferred option would add certainty and clarity by including limited partnerships in the Code and the Act and by aligning the definitions so that they are the same in both pieces of legislation. The Panel has noted that limited partnerships are becoming an increasingly popular means for an offeror to carry out a takeover offer under the Code.

Consultation

282. Seven out of the eight submitters commented on this issue and agreed with the Panel that there is a problem with the definition of director in the Act and the Code, and that those definitions should reflect the enactment of the Limited Partnerships Act. Several

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[42] Ibid, s 121.

submitters noted that the popularity of limited partnerships as vehicles for takeover offers is increasing. All those submitters supported the Panel’s proposed amendments.