

December 2017

Number

45

ISSN 1175-5040

Code Word



TAKEOVERS PANEL

- IN THIS ISSUE
- > Failure to comply with an exemption condition
 - > Removal of certification requirements in Scheme document
 - > Appointments and departures
 - > Christmas closedown

Failure to comply with an exemption condition

Where an exemption from the Code relates to ongoing increases of voting control over a period of time, the exemption may contain ongoing disclosure conditions that must be fulfilled throughout the duration of the increase period.

Section 2(2) of the Takeovers Act 1993 provides that a contravention of a term or condition of an exemption from the Code is a contravention of the Code. This means that a Code company's failure to comply with any ongoing disclosure condition results in the Code company breaching the Code.

In addition, any person who has relied on the exemption to increase their voting control in the Code company, may also be in breach of the Code. This includes any increases of voting control made in reliance on the exemption *prior to the breach*.

An example of ongoing disclosure conditions

The Takeovers Code (Class Exemptions) Notice No 2 (2001) provides an exemption from rule 6(1) of the Code for every person who increases their voting control as a result of a Code company's acquisition of its own voting securities (the "Buybacks Exemption"). Clause 4(2) provides that the Buybacks Exemption is subject to the conditions in Schedule 1 of the Class Exemptions Notice.

Clause 7 of Schedule 1 of the Class Exemptions Notice states that if the buyback takes place over a period of more than 12 months, every annual report of the company issued during the buyback must include disclosures such as a summary of the terms of the buyback, a statement as to the number of voting securities acquired by the company under the buyback, the number of voting securities that are held or controlled by the person who is increasing their voting control under the exemption ("person P"), and the percentage of all voting securities on issue that that number represents, etc.

Clause 8(3) of Schedule 1 provides that if the buyback takes place over a period of more than 12 months and the company has a website, then during the buyback period and up to the issue of the first annual report after the end of the buyback, the company must:

"announce on its website any aggregate increase of 1% or more in the voting securities held or controlled by person P since the date of the last disclosure 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 or controlled by person P; and maintain every such announcement on its website in a prominent position".

Failure to comply with an exemption condition is a breach of the Code

If a Code company conducting a buyback does not comply with the annual report or website ongoing disclosure conditions, the Code company will breach the Code.

Further, when an exemption condition is breached, the exemption ceases to apply and can no longer be relied upon by any person P. All increases in voting control by person P purported to be made in reliance on the exemption both before and after condition breach would result in a breach of rule 6(1) of the Code.

This is clear from the words of the Buybacks Exemption. For example, clause 8(3)(a) of the Buybacks Exemption states that *during the buyback period*, any aggregate increase of 1% or more must be announced on the company's website. If any increase at any time during the buyback period is not announced on the website, the condition as a whole has not been fulfilled. As such, the Buybacks Exemption can no longer be relied on by person P at all, and any past increases by person P made in reliance on the Buybacks Exemption become breaches of rule 6(1) of the Code.

Even if person P decides to stop increasing under a buyback, but the buyback period under the exemption continues, clause 7 requires the company to continue to make the annual report disclosures, whether or not any increases took place in that year.

There are several other ongoing conditions that are required to be met during the buyback period, and in the Code itself, ongoing allotments under rule 16 and rule 19B have similar requirements, and consequences for failure to meet them, as discussed above.

Remedies

As with any breach of the Code, the Panel will take into account all relevant facts when deciding on an appropriate remedy for a breach of an exemption condition or the Code, including where a person breaches the Code as a result of the actions (or inaction) of a third party. The Panel executive is available to discuss any issues that may arise out of such a breach.

Removal of certification requirements in Scheme documents

The Panel's Guidance Note on Schemes of Arrangement states that the standard of disclosure required by the Panel in a scheme of arrangement will be equivalent to the standard that would be required by the Code in a Code-regulated transaction. This means that the relevant disclosures required by Schedules 1 and 2 of the Code and rule 15 or rule 16 of the Code need to be made as set out in the Code, or modified to better match the proposed scheme.

Under the Code, the particulars in Schedule 1 are disclosures required from the offeror in the offer document, and the particulars in Schedule 2 are disclosures required from the target company in the target company statement. Directors and senior officers of the offeror and the target company certify their respective disclosures.

In a scheme of arrangement, directors and senior officers of the offeror and the target company understandably wish to certify the accuracy of only the information supplied by or confirmed by their company. In order to limit the extent of the disclosure that is certified by the 'offeror' and the 'target company' respectively, scheme documents invariably include the Schedules 1 and 2 equivalent disclosures in separate appendices to the scheme booklet.

The unavoidable consequence of this is that some information set out in the appendices will also be included in the body of the scheme booklet in order to give the full picture of the proposed scheme. This results in repetition of information in the scheme documentation.

Rule 64 applies to scheme documents until the exclusion in section 236B of the Companies Act 1993 applies – that is, once the Court has made final orders approving that a scheme is binding on an applicant company and its shareholders. In addition, scheme documents are submitted to the Court for approval to be put to shareholders in accordance with section 236A of the Companies Act. The Court process ensures that an applicant takes responsibility for the accuracy of scheme documents and any other evidence put before the Court.

The Panel considers that the certification is superfluous and causes unnecessary repetition in scheme documents. To encourage clear and concise Code disclosures, the Panel will no longer require certification in a scheme document by the 'offeror' and 'target company', akin to Schedules 1 and 2 of the Code.

Appointments and departures

The Panel recently announced the appointment of Andrew Hudson to the position of Chief Executive of the Panel, effective from 26 October 2017.

Mr Hudson was the Panel's General Counsel. Prior to joining the Panel in 2011, Mr Hudson was a corporate lawyer in private practice.

Panel Chair, Andy Coupe said, "The Panel is delighted that, following a comprehensive search, and with competition from strong candidates, Andrew was identified as the best candidate for the position. Andrew is highly experienced and respected by market practitioners, and I am confident that his appointment will be well received in the market."

Mr Coupe paid tribute to the Panel's outgoing Chief Executive, Margaret Bearsley, who has taken up a new role. "On behalf of the Panel, I would like to thank Margaret for her leadership, energy and drive during her six years at the helm. Margaret was an outstanding Chief Executive and has played a key role with the Panel for many years. Margaret leaves the Panel in great shape and goes with our thanks and best wishes."

Christmas closedown

The Takeovers Panel offices will be closed from 22 December 2017, and will reopen on 8 January 2018. While the office is closed, the Panel's senior executive staff will be monitoring their emails and may be contacted on the phone numbers listed on the Panel's website.



HOW TO CONTACT US

Takeovers Panel
Level 3, Solnet House
70 The Terrace
Wellington
Phone: 64 4 815 8420
Fax: 64 4 815 8459
Email: takeovers.panel@takeovers.govt.nz
Website: www.takeovers.govt.nz

You can subscribe to receive Code Word on our website.

DISCLAIMER

Code Word is produced for general information only. The Takeovers Panel does not assume any responsibility for giving legal or other professional advice and disclaims any liability arising from the use of the information. If you require legal or other expert advice you should seek assistance from a professional adviser.



TAKEOVERS PANEL