

**BEFORE THE TAKEOVERS PANEL**

**IN THE MATTER OF** the Takeovers Act 1993 and the Takeovers Code

**AND**

**IN THE MATTER OF** a meeting under section 32 of the Takeovers Act 1993 concerning New Image Group Limited (previously New Image Trustee Limited) and New Image Holdings Limited (previously New Image Group Limited)

**MEETING** 3-4 December 2020 at Auckland

**MEMBERS** R Coupe (Chair)  
C Blanchard  
S Horner  
T Pigou  
M Stearne

**APPEARANCES** J Cooper QC as counsel assisting the Panel  
  
Dr D Cooper and S Grey as counsel for New Image Group Limited, New Image Holdings Limited and G Clegg

**IN ATTENDANCE** G Clegg representing New Image Group Limited and New Image Holdings Limited

A Hudson, Chief Executive of the Panel, M Cunliffe, General Counsel of the Panel, L Delli Cicchi and A Wijewickrama, members of the Panel Executive

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**Determination and Statement of Reasons**

**15 February 2021**

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## **Determination and Statement of Reasons**

1. On 7 August 2020 the Takeovers Panel (**Panel**) gave notice of a meeting to be held under section 32 of the Takeovers Act 1993 (**Act**) in relation to potential breaches of the Takeovers Code (**Code**) by New Image Trustee Limited (now New Image Group Limited) (**NTL**) and New Image Group Limited (now New Image Holdings Limited) (**NEW**) relating to NTL's 2013 takeover offer for NEW (**Offer**).
2. The meeting was held on 3-4 December 2020 at Auckland before a division of the Panel, assisted by Jenny Cooper QC.
3. NTL and NEW were represented at the meeting by one of their directors, Graeme Clegg, and by their legal counsel, David Cooper and Sue Grey.
4. The meeting heard evidence from witnesses and received written and oral submissions from counsel on behalf of NTL and NEW. The Panel reserved its decision. All persons giving evidence at the meeting did so under oath. The witnesses were excluded from the meeting room until they had given evidence, with the exception of Mr Clegg, who attended throughout the hearing as the representative of NTL and NEW. A transcript of the proceedings was taken and was subsequently distributed to the parties to the hearing.
5. The Panel now gives its determination and the reasons for its decision.

## **Determination**

6. The Panel has determined under section 32(3)(b) of the Act that it is not satisfied that NEW or NTL acted in compliance with the Code in relation to the Offer.

7. In relation to the four potential breaches of the Code identified in the notice of meeting, the Panel is not satisfied that:
- a) NTL complied with Rule 20 of the Code by making a selective offer, as part of the Offer, to certain NEW shareholders to obtain shares in NTL instead of cash;
  - b) NTL complied with Rule 20 of the Code by offering different terms and/or providing different consideration to an individual NEW shareholder by not paying him on the same date as other shareholders, and by paying him in instalments and in a different amount to other shareholders;
  - c) NTL complied with Rule 44(1)(d)(i) of the Code by not providing the disclosures required by clause 6(1)(c) of Schedule 1 to the Code in respect of certain persons who were acting jointly or in concert with NTL at the time of the Offer; and
  - d) NEW complied with Rule 46(a)<sup>1</sup> of the Code by not providing the disclosures required by clause 5(1)(a) of Schedule 2 of the Code in respect of certain persons who were associated with a director of NEW at the time of the Offer.
8. In light of its determination, the Panel has a discretion to require NEW and NTL to pay a fee and costs in accordance with clauses 5(1)(b) and (c) of the Takeovers Regulations 2000. The Panel intends to exercise this discretion. It directs the Panel Executive to prepare a fee calculation and schedule of costs. Once this is available, the Panel will provide it to NEW and NTL, who will have the opportunity to make submissions before a final costs order is made.

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<sup>1</sup> Rule 46(a) under the Takeovers Code Approval Order 2000 as at 31 August 2012 (the equivalent rule under the current Code is Rule 46(1)(a)).

## Statement of reasons for decision of Takeovers Panel

### Background

9. At the time of the Offer, NEW was listed on the NZX and was engaged in the development, manufacture and distribution of health and nutritional products through a multi-level marketing network of distributors in 11 countries. Its most significant operations were in Malaysia and Taiwan.
10. Mr Clegg was the founder, Chairperson and Chief Executive Officer of NEW. At the time of the Offer, Mr Clegg was also the sole director and shareholder of NTL, which held a 6.37% shareholding in NEW. According to NTL's Offer Document dated 1 February 2013 (**Offer Document**) Mr Clegg held or controlled 64.72% of NEW's shares, including the shares held by NTL. However, as discussed further below, this figure excluded certain shares held or controlled by Mr Clegg as well as shares held or controlled by Mr Clegg and persons who were acting jointly or in concert with him at the time of the Offer. When aggregated, the total percentage under the control of Mr Clegg and the persons acting jointly or in concert with him was 76.08%.
11. Alan Stewart was also a director of NEW at the time of the Offer. Mr Stewart provided accounting services to NEW, NTL and Mr Clegg through his business, Stewart Consulting Limited (**SCL**). Prior to the Offer, Mr Stewart held 0.47% of NEW's shares. Mr Stewart became a director of NTL the day after NTL completed its acquisition of NEW and continues to be a director of both New and NTL, alongside Mr Clegg.
12. Chua Nam-Hoat was the Vice-President of NEW's Asia operations and also a director of NEW. Prior to the Offer, Mr Chua held 2.94% of NEW's shares.
13. In addition to Mr Clegg, Mr Stewart and Mr Chua, NEW had two independent directors, Max Parkin and Nigel Sinclair.

14. On 17 January 2013 NTL issued a takeover notice stating its intention to make a takeover offer in relation to NEW. It subsequently issued a full takeover offer for NEW in an Offer Document dated 1 February 2013. The Offer was at the price of \$0.26 cash per ordinary share and was conditional on a minimum acceptance level of 90% (although this condition could be waived).
15. NEW issued a Target Company Statement to shareholders on 18 February 2013 (**Target Company Statement**). The independent adviser's report by Simmons Corporate Finance Limited gave a valuation range for NEW equivalent to \$0.35 to \$0.42 per share. The independent directors of NEW advised shareholders not to accept the Offer.
16. On or around 14 March 2013 Mr Clegg sent an email to 23 shareholders in NEW. The email set out Mr Clegg's views on the advantages of privatising NEW and stated:

“If you would like to join me in my company that is making the takeover and to support my ongoing strategy I would be very pleased to have you join me as a shareholder. To do so you would complete the attached commitment form which authorises your share proceeds to go into a trust account to be held pending the transfer to you of shares in New Image Trustee Ltd where you will have the same percentage holding as you currently have in New Image Group Ltd. There will be no restriction in the future on selling these shares in the privatisation phase or at the future relisting and I would assist with any trading in those shares which could be even easier than for public company shares. I would guarantee a value of no less than the equivalent of 26 cents per share. Please return to me the signed form as soon as you can.”
17. The email instructed shareholders who wished to invest in NTL and who had not yet accepted the Offer to put the name and account details of SCL's trust account on their acceptance forms “so that on a successful conclusion of the takeover the funds can be immediately transferred to pay for your shares in

New Image Trustee Ltd.” Alternatively, for those who had already accepted the Offer, it requested that they sign a new acceptance form with the SCL bank details and send it to Mr Clegg to pass onto the registry service provider, Link Market Services Limited ([Link](#)).

18. The form attached to Mr Clegg’s email was a commitment letter to be signed by the shareholder. This stated, in part: “I agree to the payment for my shares to be paid to Stewart Consulting Ltd Trust Account... to be applied against purchase of shares in New Image Trustee Ltd at the same percentage as I held in New Image Group Ltd”.
19. Around the same time the 14 March 2013 email was sent (the **Selective Offer**), Mr Clegg was in Taiwan for a convention of NEW distributors. In his evidence he told the Panel that he took copies of the same commitment letter that was attached to his 14 March 2013 email with him to Taiwan, along with a number of Offer acceptance forms which he had already completed with the names and shareholding details for certain Taiwanese distributors who had shares in NEW. At some stage these acceptance forms were also stamped with the details of SCL’s Trust Account as the account to which payment under the Offer was to be made.
20. Mr Clegg said that he took these forms with him to Taiwan at the request of Bruce Huang, NEW’s manager in Taiwan. Mr Clegg said that Mr Huang was concerned that some of the Taiwanese distributors who had been given shares in NEW as a loyalty incentive would not stay with the business unless they were offered continued share ownership following completion of the Offer.
21. On 18 March 2013 Buddle Findlay, acting on behalf of the independent directors of NEW, informed the Panel of Mr Clegg’s 14 March 2013 email to selected shareholders offering them the option to receive NTL shares as consideration for their NEW shares instead of cash.

22. After raising the issue with NTL and receiving information and submissions on its behalf from its solicitors, Kensington Swan, the Panel formed the view that there was an appreciable possibility that the Selective Offer set out in the 14 March 2013 email breached Rule 20 of the Code. However, the Panel decided not to convene a section 32 meeting if NTL provided and complied with an enforceable undertaking to withdraw the Selective Offer, and to declare invalid all acceptances given on the basis of the Selective Offer, and to also make an announcement to the NZX that NTL was subject to this undertaking and explaining the circumstances that gave rise to the undertaking.
23. An undertaking in these terms was duly provided by Kensington Swan on behalf of NTL on 21 March 2013. On 22-23 March 2013 Mr Clegg sent emails to the 23 shareholders who had received his email of 14 March 2013 stating that the offer was withdrawn. He accepted in his evidence to the Panel that he did not send this email to the Taiwanese shareholders as he did not have their email addresses. It is possible that Mr Huang may have passed the news of the offer's withdrawal onto them but no evidence of this has been provided.
24. NTL also made an announcement to NZX on 22 March 2013 regarding the undertaking and confirming that it had contacted the recipients of the selective offer and withdrawn the opportunity.
25. Following the withdrawal of the Selective Offer, according to Mr Clegg, a number of NEW shareholders chased him for updates about the Offer and some of them chose to sign and send back the commitment letters which he had sent them with the email of 14 March 2013. In Mr Clegg's words: "That was the document they chose to send in to confirm what they wanted to do. I didn't tell them to use that document. They could have notified me any way they liked, and then I would have said to them that you've got to put it in Alan Stewart's trust account."

26. On 1 May 2013 NTL advised that it held or controlled 80% of shares and declared the Offer unconditional (having waived the 90% minimum acceptance condition). On the same date the independent directors revised their recommendation to shareholders and recommended acceptance of the Offer.
27. NTL issued a notice of dominant ownership on 6 May 2013.
28. On 7 May 2013 Mr Stewart gave an undertaking to ANZ to pay the funds received from Link into the trust account for SCL (**SCL Trust Account**) to an account nominated by ANZ. He also sent to ANZ a number of signed commitment letters from NEW shareholders confirming that they wished the payment for their shares to be paid to the SCL Trust Account and to be applied against purchase of shares in NTL. These commitment letters were signed and dated on various dates between 11 March 2013 and 23 April 2013. Mr Stewart confirmed that these letters were provided to ANZ as evidence that those shareholders would be investing the proceeds they received under the Offer directly into NTL.
29. On 9 May 2013 NTL drew down the sums of \$6,600,000 and \$1,328,539.94 from its ANZ facilities to transfer to Link to fund the Offer. Link then transferred \$6,012,675 to the SCL Trust Account as consideration for the NEW shares of 23 shareholders. The following day, SCL made a payment of \$5,650,393.58 to ANZ in partial repayment of NTL's overdraft facility.
30. In their evidence to the Panel, Mr Clegg and Mr Stewart accepted, and Mr Grigg of ANZ confirmed, that the funding arrangements for the Offer relied on this circular flow of funds.
31. On 4 June 2013 NTL completed a compulsory acquisition process to acquire the remaining shares in NEW.



32. After completion of the Offer, 22 former shareholders of NEW received NTL shares in the same or similar percentages as they had held in NEW. These shareholders included 10 of the recipients of the 14 March 2013 email offer, an additional 7 shareholders from the group in Taiwan for whom Mr Clegg had provided completed acceptance forms when he visited Taiwan in early March, and 5 additional shareholders.

### **Complaint and investigation by Panel Executive**

33. On 26 June 2019 the Panel received a complaint alleging a number of breaches of the Code and Act in relation to the Offer. The alleged breaches included:
- a) the Offer Document understating Mr Clegg's level of control of NEW by failing to disclose that two NEW shareholders, Sanny Prawiro and Chew Chye Tay, held their shares as nominees for Mr Clegg;
  - b) failure to pay consideration to Mr Chua for his shares as required under the Offer by making payment late and in instalments; and
  - c) continuation of the Selective Offer to some NEW shareholders to acquire shares in NTL after NTL gave the undertaking to the Panel to withdraw it.
34. The Panel through its Executive commenced an investigation into the allegations made in the complaint. In the course of its investigation the Panel sought and obtained documents and information on a voluntary basis from Mr Clegg, Mr Stewart, the other directors of NEW at the time of the Offer, certain shareholders of NEW at the time of the Offer, and the alleged nominees of Mr Clegg, Mr Prawiro and Mr Tay.
35. The Panel also obtained documents under section 31A of the Act from Link, ANZ, and SCL, as well as obtaining publicly available documents from NZX and the Companies Office and referring to its own records in respect of the Offer.

36. The Panel Executive issued its Investigation Report on 31 July 2020. This reported that there was sufficient evidence of possible breaches of the Code for the Panel to conclude that that threshold to call a meeting under section 32 of the Act had been met.
37. The Investigation Report also noted the possibility that NTL may not have complied with the undertaking it gave to the Panel on 21 March 2013. However, it recommended that the Panel not consider that matter at this stage as a breach of undertaking falls under section 31T of the Act rather than under the Code. As such, the Panel does not have jurisdiction to consider that issue at a section 32 meeting. Accordingly, that issue is not directly addressed by this determination.
38. On the basis of the findings and recommendations of the Investigation Report, the Panel issued a notice of meeting under section 32 of the Act on 7 August 2020.

#### **Initial call of section 32 meeting**

39. The first call of the section 32 meeting was held on 13 August 2020 to address procedural and administrative matters. The meeting was then adjourned to 6-7 October to allow the parties time to prepare for the substantive hearing.
40. On 11 September 2020 NEW, Mr Clegg, and Mr Stewart, through Ms Grey, sent a letter to the Panel challenging its jurisdiction to commence a section 32 inquiry in relation to the 2013 takeover, due to the passage of time. The Panel responded by letter on 16 September 2020 rejecting the arguments raised. While section 32 meetings often occur in the context of a live transaction and take place on very short notice, the public interest in enforcement of the Code may still arise after a transaction has been completed, and even after some considerable time has passed, as in this case. While the circumstances of each case need to be considered, if there was a general rule that historic issues should not be investigated or enforced, even where the limitation period for some enforcement options has not yet expired

(as in this case), this could leave serious wrongs unremedied and would create an incentive for concealment. The Panel considers that, having regard to all the circumstances of the case, it was appropriate to hold a section 32 meeting, despite the passage of time since the Offer.

41. The substantive hearing was later re-scheduled to 3-4 December 2020 at the request of NTL and NEW.

#### **Evidence heard at the section 32 meeting**

42. At the substantive hearing on 3-4 December 2020 the Panel heard evidence on oath from Joella Harris, an Investigation Manager with the Financial Markets Authority who was seconded to provide expert assistance to the Panel Executive in her capacity as a forensic accountant, and, under summons, from Philip Grigg of ANZ Bank (**ANZ**), Mr Stewart, Mr Chua and Mr Clegg.
43. The witnesses were examined by Ms Cooper with supplementary questions from members of the Panel. In accordance with the inquisitorial nature of the proceedings there was no cross-examination. However, counsel for NTL and NEW and members of the Panel Executive were given the opportunity to request the Panel to put additional questions to the witnesses and did so in relation to several of the witnesses.
44. Following the hearing the Panel sought further information from Link. Link responded to this request on 15 December 2020. The new information from Link was provided to NTL and NEW on 12 January 2021 and they were given until 28 January 2021 to comment on the new information if they wished to do so. Counsel for NTL and NEW provided their comments on the new information on 27 January 2021 and the Panel has taken them into account in reaching its decision.

#### **Submissions by counsel for NEW and NTL**

45. The primary focus of the submissions made by Dr Cooper as counsel for NEW and NTL was on Rule 20, which provides that an offer must be made on the

same terms and provide the same consideration for all securities in the same class.

46. Dr Cooper correctly noted that collateral arrangements to a takeover offer, that is, agreements or arrangements between an offeror and one or more target company equity security holders outside the formal offering documentation, are not prohibited per se. As noted at paragraph 1.3 of the Panel's *Guidance on Rule 20 and Collateral Arrangements* dated 1 August 2013 (**Guidance**), there may be legitimate commercial justifications for collateral arrangements. However, if the effect of the collateral arrangements is to provide terms or consideration to a target company shareholder under a takeover offer which differ from those offered to other shareholders those arrangements will breach Rule 20.
47. The presence or absence of an independent commercial rationale for a collateral arrangement (such as the incentivisation of key managers) is therefore highly relevant to determining whether the arrangement in question has the prohibited effect but does not provide a complete answer to the question of whether there has been a breach of Rule 20.
48. With reference to the Panel's previous decisions in *HT Media*, *Mr Chips* and *Lowe Corporation*, Dr Cooper submitted that a collateral arrangement will only breach Rule 20 where it:
  - a) is entered into before acceptance of the takeover offer by the relevant shareholder or shareholders; and
  - b) channels additional consideration to the relevant shareholder(s); and
  - c) acts as an inducement to the relevant shareholder(s) to accept the takeover offer.
49. The Panel does not accept those submissions. These factors may be indicative of whether a particular collateral arrangement is in breach of Rule 20, but they are not determinative. As noted in the Guidance, compliance with Rule 20 is

a substance over form test. The Panel may look behind the collateral arrangement to see whether, in substance, it is part of the offer. In doing so it must assess the circumstances of the collateral arrangement as a whole to determine whether it has the prohibited effect of providing different terms or consideration to a shareholder to those offered to other shareholders. This approach is consistent with the previous Panel decisions relied on by NEW and NTL which demonstrate the need for each case to be considered on its particular facts.

50. With regard to timing of the collateral arrangement, Rule 20 is concerned with ensuring not only that the terms of the offer to all shareholders are the same, but also that the same consideration is provided for all securities. Accordingly, a change in the terms of the offer or the consideration to be provided to a shareholder that occurs after that shareholder has accepted the offer is capable of constituting a breach of Rule 20. This reflects the fact that the objectives of the Code include fairness and equal treatment of shareholders. These objectives may be undermined by selective arrangements whether they are entered into before or after the acceptance of an offer by a shareholder or group of shareholders.
51. With regard to the issue of consideration, the Panel does not accept that a breach of Rule 20 can only occur where an arrangement provides additional consideration to a shareholder. Rule 20 prohibits different consideration of the same value being offered to certain shareholders as part of an offer (for example, cash for scrip offers, which require an exemption). Likewise, a collateral arrangement that has the effect of providing different, but not additional, consideration to certain shareholders is not exempt from Rule 20.
52. In support of the argument that a collateral agreement can only breach Rule 20 if it induces acceptance of the offer by the shareholder, Dr Cooper sought to rely on section 623 of the Australian Corporations Law and related authorities. That section prohibits collateral benefits being offered to a

person during an offer period if they are likely to induce the person to accept the offer and the benefit is not offered to all security holders in the same class.

53. However, section 623 must be read in the context of Chapter 6 of the Corporations Law as a whole. This is evident in the guidance from the Australian Takeovers Panel. In its *Guidance Note 21: Collateral Benefits*, the Australian Takeovers Panel states that, when assessing whether a collateral benefit gives rise to unacceptable circumstances, the question of whether it contravenes section 623 or not is one of a range of factors which are relevant and is not essential to a declaration.
54. The Panel also notes that there are differences between the Australian and New Zealand regulatory frameworks, and that neither the Act nor the Code contain a directly comparable provision to section 623. For these reasons the Panel does not find section 623 or the related authorities of assistance.

**Issue One: did NTL act in compliance with Rule 20 of the Code having regard to the allegation that it made a selective offer to certain NEW shareholders as part of the Offer to obtain shares in NTL?**

55. As discussed above, on 14 March 2013 NTL made an offer by way of email from Mr Clegg to certain shareholders to acquire shares in NTL. NTL made the same or a similar offer to additional shareholders in Taiwan on or around 12-13 March 2013 when Mr Clegg visited Taiwan.
56. These offers were made during and as part of the Offer, as indicated by the fact that the recipients were asked to complete their acceptance forms for the Offer to direct payment for their shares to the SCL Trust Account. The recipients of the Selective Offer in Taiwan were given acceptance forms to sign that were already partially completed and stamped with the SCL Trust Account details.
57. The Selective Offer included different consideration to that offered to other shareholders under the Offer, namely, shares in NTL instead of cash. Mr Clegg

also personally offered to assist with future trading in the shares and guaranteed the value of the NTL shares at the Offer price of 26 cents.

58. Mr Clegg sent further emails to the recipients of the 14 March 2013 email on 22-23 March 2013 withdrawing the Selective Offer (as noted above, Mr Clegg did not directly contact the Taiwanese shareholders who received the Selective Offer via Mr Huang). But despite notice of withdrawal of the Selective Offer, it appears that the Selective Offer was subsequently re-extended, whether explicitly or by implication, to some of the original recipients as well as to some additional shareholders who had not received the 14 March 2013 email.
59. Mr Clegg told the Panel that he acted in accordance with advice from Kensington Swan and the Panel and that his understanding was, once the Offer was completed, NTL was free to issue shares to the continuing shareholders. NTL provided the Panel with an email from Kensington Swan to Mr Stewart and Mr Clegg dated 22 March 2013 advising that the Panel had reviewed the draft letter to shareholders withdrawing the Selective Offer and had not objected to its inclusion of a statement affirming that Mr Clegg would explore opportunities for the shareholders to come on board following completion of the Offer. The withdrawal letter stated: "At the same time I continue to recognise how important it is that the people such as yourself who make the business succeed need to have a sense of alignment and involvement and once I have completed the Offer I will be exploring how this can best be done."
60. However, that statement, and Kensington Swan's email to Mr Stewart and Mr Clegg, clearly refers to further steps being taken *after* the Offer was completed. There is nothing in the communications between NTL, Kensington Swan, and the Panel which provided any basis for Mr Clegg to believe that he was free to continue to make arrangements with shareholders *before* the Offer was completed. Nevertheless, this is clearly what occurred.

61. The fact that NTL continued to make arrangements with shareholders before completion of the Offer on the same terms as the 14 March 2013 email is evidenced by the following:
- a) Commitment letters in the same terms as those sent out with the 14 March 2013 email continued to be received and relied on by NTL after Mr Clegg sent the withdrawal email;
  - b) On 20 April 2013 Jacqueline Birch and Jennie Cowan jointly signed a commitment letter to invest in NTL in similar terms to the letters sent out with the initial Selective Offer of 14 March 2013 (the letter omitted the sentence agreeing to payment to be made to the SCL Trust Account);
  - c) On 23 April 2013 Leslie and Diane Adrian signed a commitment letter to invest in NTL in identical terms to the letter signed by Jacqueline Birch and Jennie Cowan;
  - d) The proceeds from the sale of the reinvesting shareholders' shares in the Offer were paid by Link to the SCL Trust Account where they were treated as funds belonging to NTL and used to fund the Offer;
  - e) It was accepted by Mr Stewart and Mr Clegg that the reinvesting shareholders had directed their payments from Link to the SCL Trust Account because they wished to invest in NTL on the terms set out in the Selective Offer; and
  - f) What in fact occurred was in accordance with the terms of the Selective Offer – the reinvesting shareholders received shares in NTL corresponding to their shares in NEW. It appears that Mr Clegg also honoured his initial commitment to assist with trading and to guarantee the value of the shares at 26 cents in relation to at least two investors who later sold their shares in NTL to Mr Clegg (David Marsh and Murray Crawford).



62. In addition, the original acceptance forms signed by the Selective Offer recipients directing payment for their NEW shares to the SCL Trust Account were still used and relied on by Link and the commitment letters signed by them before the Selective Offer was withdrawn were still used and relied on by NTL, including by Mr Stewart, acting on behalf of NTL, sending some of the commitment letters to ANZ as evidence that the funds paid by Link as consideration for those shareholders' shares in NEW would be available to repay NTL's overdraft facility. It is further demonstrated by the fact that the relevant shareholders ultimately received shares in NTL in accordance with the terms of the Selective Offer.
63. The Panel is unable to form a view on the evidence on whether the value of the consideration offered under the Selective Offer was higher than the value offered to other shareholders. This is partly a consequence of the fact the Selective Offer was not made before the Offer and was not disclosed in the Offer Document, and was consequently not included in the independent advisor's Rule 21 report, as would normally be the case with an executive share scheme, for example. However, as discussed above, the Panel does not accept that additional consideration is a necessary pre-requisite for a collateral agreement to be in breach of Rule 20.
64. Further, irrespective of any difference in value, the evidence from Mr Stewart and Mr Clegg suggested that many of the NEW shareholders who reinvested in NTL wanted to stay as shareholders in the business. Therefore, the Panel considers that the opportunity to remain a shareholder in the ongoing business may have been an inducement to some shareholders to accept the Offer.
65. In addition, while it appears that most of the recipients of the Selective Offer had some role in NEW's extensive distribution network, the selection of recipients appears to have been somewhat ad hoc and based on personal relationships and who was considered likely to want to invest, rather than being related to the commercial importance of the individuals to the ongoing

business. For example, there did not appear to be any commercial justification for the Selective Offer to be made to Jennie Cowan, Mr Clegg's PA, or Jacqueline Birch, who was Ms Cowan's sister and whose only commercial connection with NEW was as a caterer to some events.

66. The fact that some of the later recipients of the Selective Offer did not receive the initial 14 March 2013 email, and that some recipients of the 14 March 2013 email were not given a further opportunity to reinvest after that email offer was withdrawn, and that the Selective Offers were not made before the Offer and were not disclosed to other shareholders, also suggest that the selection of the recipients was not based solely on commercial reasons relating to the ongoing business.
67. As already stated, the Panel does not accept the argument by counsel for NTL that a collateral agreement cannot be in breach of Rule 20 where the offer to enter into the collateral agreement is made after the relevant shareholder has accepted the Offer. But in any case, while not all of the dates are clear from the documents, it appears that many of the reinvesting shareholders agreed to invest in NTL before or at the same time as accepting the Offer.
68. Further, as discussed above, the evidence suggests that the Selective Offers were necessary to the funding structure of the Offer. Even if the Offer could have been funded in some other way, the path that NTL chose to pursue to fund the Offer relied on the circular flow of funds from NTL to Link and back to NTL, via SCL's Trust Account. Accordingly, it appears that the purpose of the Selective Offer was at least partly, if not predominantly, to channel different consideration to some shareholders in order to facilitate the funding of the Offer, irrespective of any independent commercial purpose.
69. Having regard to all the circumstances, the Panel considers that the Selective Offer had the effect of providing terms and consideration to the recipients which differed from those offered to other shareholders. Accordingly, the

Panel is not satisfied that NTL complied with Rule 20 in relation to the Selective Offer.

**Issue Two: did NTL act in compliance with Rule 20 of the Code having regard to the allegation that it entered into an agreement to pay a shareholder on a different date to other NEW shareholders?**

70. The last date on which Mr Chua should have been paid for his shares in NEW under the terms of the Offer was 5 July 2013, being 7 days after the extended closing date and the latest of the three alternative dates specified in the Offer for payment to be made by. (For completeness, the Panel notes that, under Rule 33 of the Code, the date for payment specified in the Offer document should have been based on the original closing date, in which case the last date for payment would have been 8 May 2013.) However, Mr Chua was part-paid for his NEW shares in multiple payments on 17 May and 7 June 2013, with the sum of \$250,000 left outstanding. The remaining sum was unpaid until 30 June 2014, when Mr Chua was paid \$262,485 (apparently incorporating a sum by way of 5% interest).
71. While Mr Chua and Mr Clegg both denied that there was any agreement for Mr Chua to be paid later than other shareholders, there was no clear explanation of why the late payment occurred.
72. The documents show that it was anticipated by NTL in the period where funding from ANZ was being finalised that Mr Chua would be paid later than other shareholders. This is evidenced by references to deferred payment of Mr Chua in documents provided to ANZ by Mr Stewart on behalf of NTL regarding the Offer funding requirements and in emails between ANZ and NTL during the course of the Offer.
73. Mr Chua's acceptance form for the Offer dated 29 April 2013 requested payment to his own ANZ bank account. However, on 7 May 2013 Kensington Swan directed Link not to make payment to Mr Chua on the grounds Mr Clegg would arrange payment directly. Link has confirmed that, on the basis of

those instructions, it did not receive or make any payment in respect of Mr Chua's shares.

74. On 14 May 2013 Mr Chua appears to have signed a form to Link saying that payment had been arranged directly with Mr Clegg. Mr Chua said he had no recollection of this form.
75. Whether there was a separate agreement with Mr Chua or not, in the Panel's view, the fact that he was not paid on time and was paid an additional amount by way of interest means that he did not receive the same consideration under the Offer as other shareholders.
76. Counsel for NTL submitted that failure to pay Mr Chua on time and payment of a different amount was simply a contractual matter between NTL and Mr Chua. The Panel does not accept this submission. Rule 20 requires that an offer must be made on the same terms and provide the same consideration for all securities, consistent with the objective of ensuring that the holders of financial products in a takeover are treated fairly. That did not occur in respect of Mr Chua. Accordingly, the Panel is not satisfied that NTL complied with Rule 20 in this regard.

**Issue Three: did NTL act in compliance with Rule 44(1)(d)(i) having regard to the disclosures required by clause 6(1)(c) of Schedule 1 to the Code in respect of persons acting jointly or in concert with NTL at the time of the Offer?**

77. Mr Clegg accepted that he controlled the shares in NEW held by Sanny Prawiro and Chew-Chye Tay and counsel for NTL did not make any submission to the contrary.
78. It is clear from the documentary evidence that Mr Stewart was closely involved in planning and executing the Offer. Mr Clegg and Mr Stewart accepted that they were both closely involved in the Offer and that they shared a common purpose throughout the Offer of ensuring its success. It was assumed by both of them that Mr Stewart would accept the Offer,

including the Selective Offer to acquire shares in NTL, and that he would become a director of NTL following completion of the Offer. The Panel therefore finds that Mr Stewart was acting jointly or in concert with Mr Clegg and NTL in relation to the Offer. Again, counsel for NTL did not make any submission to the contrary.

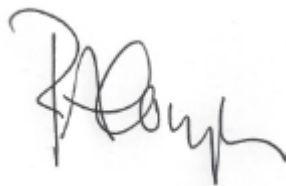
79. The Offer Document did not disclose the fact that Mr Clegg controlled the shares in NEW held by Sanny Prawiro and Chew-Chye Tay or that Mr Clegg/NTL and Mr Stewart were acting jointly or in concert, nor was this disclosed in any accompanying documents. Accordingly, the Panel is not satisfied that NTL complied with Rule 44(1)(d)(i) in this regard.

**Issue Four: did NEW act in compliance with Rule 46(a) of the Code by providing the disclosure required by clause 5(1)(a) of Schedule 2 in respect of persons associated with a director of NEW at the time of the Offer?**

80. As stated above, Mr Clegg accepted that he controlled the shares in NEW held by Sanny Prawiro and Chew-Chye Tay and no submission was made to the contrary.
81. The Target Company Statement did not disclose that Mr Clegg controlled the shares in NEW held by Sanny Prawiro and Chew-Chye Tay, nor was this disclosed in any accompanying documents. Accordingly, the Panel is not satisfied that NEW complied with Rule 46(a) in this regard.

Dated: 15 February 2021

Signed for and on behalf of  
the Panel by the Chairman:



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**R Coupe**