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Takeovers Panel  
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Dear Ms Fawcett

### **Class Exemptions for Buybacks**

The Society's Commercial and Business Law Committee (the Committee) welcomes the opportunity to comment on the discussion document referred to above.

1. The Panel has identified a number of problems with the current Class Exemptions. The Committee does not share all of the Panel's concerns.
2. *Issue 1: Changes in ownership of exempted corporates*  
The proposed exemption does not address issue 1 raised in the paper. If a shareholder in a Code company has over 20% of the voting rights of that company and it is then taken over by another entity, that other entity must comply with the Code in respect of that acquisition. This should not affect the company, which can rely on the class exemption.
3. *Issue 2: Shareholder approval given under "point in time" disclosure*  
It is inappropriate to require the Code company to publish information continually in order for a shareholder to rely on an exemption. This would permit the Code company to cause the shareholder to breach the exemption by the Code company's inaction.

There is little concern about the issue (in the Committee's experience). Any such approval would be like any other shareholder approval (e.g. to issue shares or to enter into a major transaction). These matters can be approved now for subsequent action. Shares traded on the secondary market are priced so that people are aware of this information. The right to rely on the exemption by having received prior shareholder approval should be treated the in the same way as any other such resolutions.

4. *Issue 3: Basis for calculating disclosures not defined*  
It is appropriate that the Code company should select the date, because it must ensure that its shareholders are informed sufficiently to make an informed decision. There does not seem to be any problem in practice.
5. *Issue 4: Wording of clause 4(2)(a) unclear*  
The Committee does not agree that the wording of clause 4(2)(a) is unclear. It is incorrect for an adviser to suggest that the transaction, rather than the increased shareholding, needs approval.

6. *Issue 5: Uncertainty over whether multiple resolutions permitted*  
The Panel has given its view on this matter, which clarifies any uncertainty.
7. *Issue 6: Incomplete disclosure of maximum voting control of exempted person*  
The relevance of this information is unclear. If it is relevant, a Code company would disclose it under the Board's duty to shareholders to provide sufficient information for them to make an informed decision when voting on the resolution.
8. The Committee recommends that the Panel address the following two issues:
- (a) The Panel's early decision concerning TrustPower Limited appears to be based on a belief that, because major shareholders had potentially agreed how they would participate in a buyback, they would vote differently on the resolution to approve the buyback if the resolution was put after the offer rather than before it. The Committee does not agree with that reasoning. Those shareholders would remain "associates" throughout.
- The decision of the Panel has led to resolutions being based on assumption rather than on fact, because prior approval of shareholders must be sought, rather than their approval of a conditional buyback once the facts are known.
- No change to the Code is required to remedy this. The Panel need only reconsider its position on this matter to give certainty and remove anomalies identified in its paper.
- (b) It is unclear why the Code permits Code companies to be reimbursed costs for some matters, but not for calling shareholder meetings or obtaining an independent adviser's report for putting resolutions under rule 7(c) or 7(d). This is left to the shareholder proposal provisions of the Companies Act 1993 and the provisions concerning requisitioning meetings. The Code should be amended to specify a time period for when a requisitioning meeting must be held.

If you have any queries regarding this submission please contact Diana Brown, Committee Secretary, in the first instance, on 04 463 2967 or email [diana.brown@lawsociety.org.nz](mailto:diana.brown@lawsociety.org.nz).

Yours sincerely



John Horner  
**Convener, Commercial and Business Law Committee**