



12 October 2009

Takeovers Panel
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The Society's Commercial and Business Law Committee (the Committee) welcomes the opportunity to comment on the consultation paper issued by the Takeovers Panel "Partial Offers".

1. Issue 1: Treatment of nominee and custodial holdings for scaling purposes

1.1 The preferred option is supported as it is consistent with other exemptions, as noted by the Panel, and seeks to achieve a fair result. The purposive interpretation is not supported as it will potentially result in the same word ("offeree") being given different meanings in different parts of the Code. Further, it would lead to uncertainty in applying the Code as each provision must then be given its "purposive intention" rather than applying the words written. The purposive approach should only be adopted when the position is unclear - that is not the case here. The issue was not contemplated by the draftsman, with the offeree being the registered shareholder.

2. Issue 2: Misstatements of the specified percentage

2.1 The preferred option is supported.

2.2 The Panel may wish to consider the situation where a sister company or parent company to the offeror holds shares in the target company. In that situation the offeror does not hold nor control the shares held by such a related company, so the shares held are counted in determining the specified percentage. This can cause some confusion to offerees, the target company and commentators..

3. Issue 3: Identity of the offerees for the purposes of voting under rule 10(1)(b)

3.1 The Panel is not correct in their view that all shareholders who acquire shares in the target company after the record date are "offerees". This would only be the case if the offer is made to such persons. If not, they neither fall within Rule 43 (as 43(2) is permissive) and there is no obligation to extend the offer to such persons - it does not deem such persons to have had the offer made to them - nor does Rule 3(1) apply. Accordingly, an offeror could elect to only make the offer to shareholders on the register at the record date. That would be unusual as it may compromise the success of the offer, but it would prevent transferees who were not on the share register at the record date voting on the approval.

3.2 The preferred option is supported, subject to the Panel noting the point in paragraph 3.1 above. That is, the eligible voter must be an offeree to be able to vote (as required by Rule 10(1)(b)), not simply a shareholder.

3.3 There are merits in favour of each of option 2a and 2b. Ultimately option 2b is preferred because, if an offeree has elected to dispose of their shareholding then it would appear that they have made their election and should not have the right to vote instead of the purchaser of the shares sold. It is the purchaser who has the interest in the on-going governance of the target company. The transferor has already voted with their feet. If the transferor does not sell all of their shares, the transferee and transferor can both vote (assuming the offer is extended to the transferee), as the number of shares held is taken into account in the voting process (Rule 10(1)(b)(iii)).

4. Issue 4: Dilution of offeror's shareholding during offer period

4.1 The preferred option is supported, however in paragraph 158 the Panel refers to the issue arising from "an obligation of the target company which preceded the notification". This qualification is unnecessary. If the target company made any non-pro rata share issue, and this was permitted under Rule 39, this would still have the effect of defeating the offer. It would be unreasonable that the offer is defeated on this ground, for the reasons the Panel notes. It should be irrelevant if the obligation preceded the notification.

5. Issue 5: Extending the offer period of partial offers

5.1 It is difficult to see how the fact scenario envisaged by the Panel can ever arise as the offer must be conditional upon obtaining the approval under Rule 10(1)(b), which is only satisfied after the offer has closed.

6. Issue 6: Votes cast by the offeror and its associates

6.1 The preferred option is supported. Potentially, if the offeror had no associates and the offeror did vote (which, as the Panel notes, is not prohibited by Rule 10) there is no breach of Rule 64 by the offeror. The breach of Rule 64 arises by the target company in counting such vote. The target company can identify the vote of the offeror and should exclude it. The position is different when associates vote because the target company may not be in a position to know who the associates are, and cannot therefore exclude them. Votes by associates are therefore likely to breach Rule 64.

If you have any queries regarding this submission, please contact Diana Brown, the Committee Secretary, by phone 04 463 2967 or email diana.brown@lawsociety.org.nz.

Yours sincerely



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