

Changes to the Takeovers Code in Response to Covid-19

Aaron Crampton

CHANGES TO THE TAKEOVERS CODE

The Takeovers Panel has just issued a Media Release announcing some temporary changes to the Takeovers Code (Code) to help mitigate the effects of COVID-19 on raising capital in New Zealand.

Another recent and noteworthy change to the Code has been the exclusion of small lower value unlisted companies from the ambit of the Code.

We have provided a brief introduction to the Code and then commented on each of these developments.

The Takeovers Code

The Code imposes a compliance regime that affects any shareholding of 20% or more in a Code company.

Up until the start of this year, a Code company was any New Zealand-registered company that is listed on the NZX or has 50 or more shareholders and 50 or more share parcels. This has now changed as described further on in this article.

The "fundamental rule" in the Code prevents the following (unless in accordance with the Code):

- a person (including their associates) from becoming the holder or controller of 20% or more of the voting rights in a Code company; or
- any shareholder (including their associates) that holds more than 20%, increasing that shareholding.

One of the main objectives of the Code is to protect shareholders in a Code company. It does this by ensuring the shareholders are given accurate information about the terms and fairness of any proposed takeover offer and the impact of that offer on their shareholding.

Temporary exemptions from the Takeovers Code to address COVID-19 impact

The Takeovers Panel has approved some temporary exemptions to help make it easier for shareholders to provide additional capital to Code companies while New Zealand is dealing with COVID-19.

The Takeovers Panel is publishing these exemptions before they are formalised so the market can plan accordingly. It is expected that the exemptions will come into force shortly.

The exemptions are temporary and will only apply to capital raisings carried out on or before 31 October 2020 (although the Takeovers Panel has signalled that this date may be extended).

The exemptions have been described in the following Media Release: [Media Release Summary of temporary class exemptions to address COVID 19 Impact 28 March 2020.](#)

The exemptions will only apply to the issue of new voting securities (e.g. new voting shares) in a Code company. They will not apply to the sale and purchase of existing voting securities. This is consistent with the rationale of promoting capital raising as opposed to private transactions between buyers and sellers of shares.

The changes are briefly summarised below:

Exemption for increases of up to 10%: The main headline change is that any person will be able to increase their voting control of a Code company by up to 10% despite the 20% fundamental rule in the Code. For example, as described in the Media Release, that will mean that a shareholder with a control percentage of 15% will be able to increase to (and retain) a control percentage of 30% (5% before encountering any Code issues and a further 10% under the exemptions). This is a significant change to a core part of the Code.

The rest of the changes are consistent with this key change.

Reduction of control requirement – does not apply to the first additional 10%: Takeovers Code (Class Exemptions) Notice (No 2) 2001 dealt with (among other things) what happens if:

- a shareholder increases its level of voting power above 20% in a Code company as a result of a buyback by a company of its own shares; or
- a shareholder increases its control percentage as a result of an offer of voting securities made pro rata to all holders of a class of voting securities.

In those situations, the increase was permitted but only on the basis that the shareholder was restricted from exercising its voting rights attached to the excess and the shareholder eliminated the excess within a certain time period.

Under the proposed new exemption, the shareholder will be entitled to keep a 10% control percentage which may be retained in addition to what may be acquired under the Code. If the excess is greater than 10%, then the excess control percentage must be reduced within 24 months and the voting rights can not be exercised.

Exemption for professional underwriters: Underwriting is an established feature of capital market activity in New Zealand. Professional underwriters agree (for a fee) to underwrite an offer of securities by a company so that the company has certainty that they will achieve a certain level of capital raise. The professional underwriter will then syndicate those securities to other investors. Professional underwriters already benefit from certain exemptions under the Takeovers Code (Professional Underwriters) Exemption Notice 2004 but must meet certain criteria.

Under the new exemptions, those criteria will be softened so that professional underwriters will be able to rely on the existing exemption if they and their associates hold or control 20% or less of the voting rights in the Code company (as opposed to the usual 5%). Professional underwriters will also be allowed 24 months to reduce their control percentage (as opposed to the usual 6 months).

Exemption for shareholder underwriters: Shareholders will now be able to act as underwriters (as described above) along the same lines as set out in

the Takeovers Code (Professional Underwriters) Exemption Notice 2004. The new exemption will:

- allow shareholders to retain (and exercise voting rights in respect of) at least some of voting control that they acquire through an underwrite consistent with the exemption described above; and
- provide that voting control over the 10% aggregate cap must be reduced within 24 months.

Further detail on the changes will be available once the formal exemption notice is finalised.

Although, the changes will temporarily relax some of the requirements of the Code, it remains to be seen what the market uptake will be like in the current COVID-19 dominated economic climate.

Takeovers Code now excludes small code companies

As mentioned above, until recently a Code company was any New Zealand-registered company that is listed on the NZX or has 50 or more shareholders and 50 or more share parcels.

That definition has created disproportionate compliance costs for small unlisted companies with more than 50 shareholders and more than 50 share parcels. Some of those companies will likely have become Code companies over time without realising it, resulting in breaches of the Code.

The compliance regime for lower value companies was arguably unnecessary given the Code was primarily intended to deal with takeover offers relating to larger high value companies.

In some cases companies have been forced to take creative measures to artificially keep their number of shareholders below the magic number of 50 (e.g. pooling multiple shareholders into a special purpose shareholder company or implementing a trustee arrangement). But even dealing with a restructure like that could be a costly exercise.

From 13 January 2020, the Takeovers Code no longer applies to small, unlisted companies, even if they have more than 50 shareholders and 50 share parcels.

A small company is defined as being an unlisted company that together with its subsidiaries has:

- total assets of less than \$30 million, and
- total revenue of less than \$15 million.

This is measured, in each case, at the end of the company's most recent accounting period.

Companies will still need to be careful if they have more than 50 shareholders and 50 share parcels and they are getting close to those asset and revenue thresholds.

This was a very welcome development. It will mean that many companies previously caught by the Code will have one less compliance issue to think about when restructuring shareholdings or raising capital.

Further Advice

At Gallaway Cook Allan we have an experienced commercial team that can successfully guide you through capital raising transactions. Please feel free to contact Aaron Crampton at aaron.crampton@gallawaycookallan.co.nz or 022 639 2294 if you would like us to assist.

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