



Takeovers Code (Facilitation of Capital Raising in Response to COVID-19) Exemption Notice 2020

Pursuant to section 45 of the Takeovers Act 1993, the Takeovers Panel, being satisfied of the matters set out in section 45(6) of that Act, gives the following notice.

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Notice**1 Title**

This notice is the Takeovers Code (Facilitation of Capital Raising in Response to COVID-19) Exemption Notice 2020.

2 Application

This notice applies to acts or omissions occurring on or after 10 April 2020.

3 Revocation

This notice is revoked on the close of 31 October 2022.

4 Interpretation

- (1) In this notice, unless the context otherwise requires,—

Act means the Takeovers Act 1993

aggregate control percentage means, in respect of a person, the aggregate control percentage of that person and that person's associates

aggregate increase cap has the meaning set out in clause 15(5)

allotment includes the issue of voting securities by a code company and the sale, transfer, or other disposal of treasury stock by a code company

beneficiary,—

- (a) in relation to a nominee company, means a person for whom the nominee company acts in the ordinary course of business as a nominee company; and
- (b) in relation to a bare trustee of a trust, means a beneficiary of the trust; and
- (c) in relation to a broker, means a person for whom the broker acts in the ordinary course of business as a broker

broker has the same meaning as in section 77A of the Financial Advisers Act 2008

class notice means the Takeovers Code (Class Exemptions) Notice (No 2) 2001

Code means the Takeovers Code under the Act

control percentage means the percentage of voting rights in a code company that a person holds or controls

control reduction requirement means a requirement in clause 15(1) or (3)

excluded overseas shareholders means, in respect of an offer, the 1 or more overseas shareholders—

- (a) to whom the offer is not made; or
- (b) who are prevented by the terms of the offer from accepting their pro rata share of the rights or voting securities offered

first increase date has the meaning set out in clause 15(5)

overseas shareholder means a shareholder whose last known address, as recorded in the code company's financial products register, is an address outside New Zealand

treasury stock means voting securities or securities that, but for the suspension of voting rights attached to them, would be voting securities issued by a code company and held by the code company.

- (2) For the purposes of calculating a person's control percentage or aggregate control percentage under this notice, any restrictions on the person's ability (or that of any associate of the person) to exercise voting rights under this notice or any other exemption notice issued by the Panel must be disregarded.
- (3) In this notice, a reference to a person increasing voting control is a reference to the person becoming the holder or controller of an increased percentage of the voting rights in a code company.
- (4) If, under the terms of the offer in respect of which a person increases their voting control in reliance on this notice, 1 or more persons are allotted voting securities up to 2 months earlier than other persons, references in this notice to a control percentage or percentages immediately before the increase in voting control must be read as references to a control percentage or percentages immediately before the first allotment is made under the offer.
- (5) Any term or expression that is defined in the Act, the Code, or the class notice and used, but not defined, in this notice has the same meaning as in the Act, the Code, or the class notice.

General increase exemption

5 General increase exemption

- (1) Every person who, on or before 31 October 2020, increases their voting control as a result of an allotment of voting securities is exempted from rule 6(1) of the Code in respect of that increase in voting control.
- (2) This clause applies—
 - (a) regardless of whether the person is a holder or controller of voting securities in the code company; and

- (b) regardless of whether the allotment is made under an offer of voting securities that is made pro rata to all holders of a class of voting securities in the code company.

6 Conditions of exemption in clause 5

- (1) The exemption in clause 5 is subject to the condition that, if the person's aggregate control percentage immediately before the increase in the person's voting control—
 - (a) is 20% or less, the person's aggregate control percentage resulting from the allotment does not exceed 30%; or
 - (b) is more than 20%, the person's aggregate control percentage resulting from the allotment does not exceed by more than 10% the person's aggregate control percentage immediately before the allotment.
- (2) *See also* the condition in clause 14.

Exemptions for allotments under pro rata offer or similar offers

7 Exemption for allotments under pro rata offer

- (1) This clause applies if a code company makes an allotment of voting securities under an offer of voting securities that is made pro rata to all holders of a class of voting securities in the code company.
- (2) Every person who, on or before 31 October 2020, increases their voting control as a result of the allotment is exempted from rule 6(1) of the Code in respect of that increase in voting control.

8 Exemption for allotments under offer with accelerated features but otherwise pro rata

- (1) This clause applies if a code company makes an allotment of voting securities under an offer of voting securities—
 - (a) that is made by a series of offers with accelerated features; but
 - (b) in all other respects, that is made pro rata to all holders of a class of voting securities in the code company.
- (2) Every person who, on or before 31 October 2020, increases their voting control as a result of the allotment is exempted from rule 6(1) of the Code in respect of that increase in voting control.
- (3) In this clause, **accelerated features** means 1 or more of the following is a feature of the offer that is made by the series of offers:
 - (a) it is made to 1 or more persons (**earlier recipients**) before it is made to other persons (**later recipients**):
 - (b) earlier recipients are given less time to accept the offer than is given to later recipients:

- (c) its terms provide for 1 or more earlier recipients to be allotted voting securities on a date or dates up to 2 months earlier than the date for allotment of all other securities under the offer:
- (d) under its terms, 1 or more (but not all) recipients may trade rights to be allotted the voting securities.

9 Exemption for allotments under certain offers with excluded overseas shareholders

- (1) This clause applies if a code company makes an allotment of voting securities under an offer that would be of the kind described in clause 7 or 8 except that—
 - (a) the offer is not made to 1 or more overseas shareholders; or
 - (b) the terms of the offer prevent 1 or more overseas shareholders from accepting their pro rata share of the rights or securities offered.
- (2) Every person who, on or before 31 October 2020, increases their voting control as a result of the allotment is exempted from rule 6(1) of the Code in respect of that increase in voting control.
- (3) However, the exemption in subclause (2) does not apply to an increase in voting control acquired as a result of the rights or voting securities sold by the NZX trading and advising firm or related company that is appointed as referred to in clause 11(1).
- (4) In this clause and clause 11,—
NZX trading and advising firm has the meaning set out in the NZX Participant Rules made by NZX Limited
rights means rights to acquire voting securities.

10 Conditions of exemptions in clauses 7 to 9

- (1) The exemptions in clauses 7 to 9 are subject to the condition that each person to whom the allotment of voting securities resulted in the increase, or part of the increase, in voting control (an **allottee**)—
 - (a) acquired no more than the allottee's pro rata share of the securities offered; or
 - (b) if this paragraph applies, acquired on behalf of a beneficiary no more than the beneficiary's pro rata share of the securities offered to the allottee.
- (2) Subclause (1)(b) applies if the allottee is a nominee company, bare trustee of a trust, or broker, acting for a beneficiary whose increase in voting control resulted in the allottee's increase (or part of the allottee's increase) in voting control.
- (3) Subclause (1) does not apply to the extent that the allottee relies on an exemption in clause 5 or 12 (or both) to acquire voting securities in excess of their pro rata entitlement.

- (4) *See also* the condition in clause 14.

11 Further condition of exemption in clause 9

- (1) The exemption in clause 9 is also subject to the condition that, if the offer is renounceable, the terms of the offer must include statements to the following effect:

- (a) that the code company—
- (i) has appointed an NZX trading and advising firm, or a related company of an NZX trading and advising firm, to sell the relevant rights or the voting securities to which the relevant rights relate (with those sales being made as soon as practicable and consistent with the terms of the offer); and
 - (ii) will ensure that each excluded overseas shareholder is paid that shareholder's pro rata share of the net proceeds of those sales; and
- (b) that, to the best of the code company's knowledge, the appointed NZX trading and advising firm or the related company (as relevant) is not being prosecuted for any offence.

- (2) In this clause,—

relevant rights means, in respect of an offer, the aggregate pro rata share of rights or voting securities that the excluded overseas shareholders—

- (a) would have been offered (in addition to, and not as a portion of, those rights or securities offered to the shareholders who received the offer) had the offer been of the kind described in clause 7 or 8; or
- (b) are prevented from accepting by the terms of the offer

renounceable means, in relation to a right or an offer of voting securities, a right or an offer of voting securities that is transferable (whether on or off-market) by the holder to another person (whether or not that person is an existing holder of any voting securities to which the right or offer relates).

Pro rata underwriter exemption

12 Pro rata underwriter exemption

- (1) This clause applies if a code company makes an allotment of voting securities under an offer of voting securities of the kind described in clause 7, 8, or 9.
- (2) Every person who, on or before 31 October 2020, increases their voting control as a result of the allotment is exempted from rule 6(1) of the Code in respect of that increase in voting control.

13 Conditions of exemption in clause 12

- (1) The exemption in clause 12 is subject to the conditions that—

- (a) the increase in voting control by the person (A) who relies on the exemption results from 1 or more of the following in connection with the offer of voting securities of the kind described in clause 7, 8, or 9:
 - (i) A acting as an underwriter under an underwriting contract;
 - (ii) A acting as a subunderwriter under a subunderwriting contract;
 - (iii) A being allocated voting securities under a shortfall bookbuild;
 - (iv) A acquiring voting securities under an over-acceptance facility; and
 - (b) under the offer referred to in paragraph (a), the voting securities—
 - (i) have been offered to, and not taken up by, existing holders of voting securities; or
 - (ii) were not offered to existing holders of voting securities who are excluded overseas shareholders.
- (2) *See also* the condition in clause 14.

General condition for exemptions in clauses 5, 7, 8, 9, and 12

14 General condition to comply with requirements in clauses 15 to 20

The exemptions in clauses 5, 7, 8, 9, and 12 are subject to the condition that all of the requirements in clauses 15 to 20 are complied with.

15 Requirement to decrease control percentage within 2 years

- (1) A person (A) who relies on 1 or more of the exemptions referred to in clause 14 must, before the close of the second anniversary of the first increase date (the **2-year date**), decrease their control percentage to the extent necessary to meet the applicable threshold as follows:
 - (a) if A's control percentage immediately before the first increase date was 20% or less, A's control percentage must be decreased to, or below,—
 - (i) 30%; or
 - (ii) a lesser amount that is required to comply with subclause (3);
 - (b) if A's control percentage immediately before the first increase date was more than 20%, A's control percentage must be decreased to, or below,—
 - (i) the percentage determined under subclause (2); or
 - (ii) a lesser amount that is required to comply with subclause (3).
- (2) The percentage under subclause (1)(b)(i) is the sum of the following:
 - (a) A's control percentage immediately before the first increase date; plus
 - (b) 10%; plus

- (c) an additional 5% if the sum of the amounts referred to in paragraphs (a) and (b) is more than 50% (the **creep allowance**).
- (3) A must do either or both of the following to the extent necessary to ensure that, before the close of the 2-year date, A's aggregate control percentage does not exceed A's aggregate control percentage immediately before the first increase date by more than the aggregate increase cap:
 - (a) decrease A's control percentage:
 - (b) ensure that A's associates decrease their control percentage.
- (4) Subclause (3) does not limit subclause (1).
- (5) In this notice,—

aggregate increase cap means,—

- (a) if A's aggregate control percentage immediately before the first increase date was 20% or less,—
 - (i) 10%; plus
 - (ii) the amount (if any) by which A's aggregate control percentage immediately before the first increase date was less than 20%; and
- (b) 10% if—
 - (i) A's aggregate control percentage immediately before the first increase date was more than 20%; and
 - (ii) paragraph (c) does not apply; and
- (c) 15% if—
 - (i) A's aggregate control percentage immediately before the first increase date was more than 20%; and
 - (ii) the creep allowance applies in relation to A or any of the persons who were A's associates as at the first increase date; and
 - (iii) only the person to which the creep allowance applies will retain the voting rights to which the creep allowance relates

first increase date means the date of the first increase in A's voting control in reliance on any of the exemptions referred to in clause 14.

- (6) *See* clause 18(6), which relates to the adjustment of a control reduction requirement and the aggregate increase cap if there is an other-means increase during the restricted period (as those terms are defined in clause 17).

16 Restriction on exercising voting rights

- (1) Subclause (2) applies if a person (A) holds or controls voting rights that would be subject to a control reduction requirement under clause 15 (**control reduction voting rights**) if the 2-year date were to occur at that time.
- (2) A must do either or both of the following to the extent necessary to ensure that A's aggregate control percentage (that is actually exercised) does not exceed

A's aggregate control percentage immediately before the first increase date by more than the aggregate increase cap:

- (a) A must not exercise the control reduction voting rights and must otherwise ensure that the control reduction voting rights are not exercised:
- (b) A must ensure that each of its associates—
 - (i) does not exercise the control reduction voting rights that they hold; and
 - (ii) otherwise ensures that the control reduction voting rights that the associate controls are not exercised.
- (3) If a person holds or controls any voting rights in reliance on the creep allowance, that person must not exercise those voting rights until the first anniversary of the first increase date.
- (4) *See* clause 18(6), which relates to the adjustment of a control reduction requirement and the aggregate increase cap if there is an other-means increase during the restricted period (as those terms are defined in clause 17).

17 Other-means increases

- (1) During the restricted period, a person who has increased their control percentage in a code company in reliance on this notice must not increase their voting control in the code company by way of an other-means increase unless—
 - (a) the other-means increase—
 - (i) is by an acquisition of voting securities approved in accordance with rule 7(c) of the Code; or
 - (ii) is by an allotment of voting securities approved in accordance with rule 7(d) of the Code; or
 - (iii) is permitted under rule 7(e) of the Code (subject to clause 19); or
 - (iv) is permitted by an exemption granted by the Panel under section 45(1)(a) or (b) of the Act; and
 - (b) the applicable requirements in clause 18 are complied with.
- (2) During the restricted period, a person who has increased their control percentage in a code company in reliance on this notice must ensure that each current associate of the person does not increase their voting control in the code company by way of an other-means increase unless—
 - (a) the other-means increase—
 - (i) is by an acquisition of voting securities approved in accordance with rule 7(c) of the Code; or
 - (ii) is by an allotment of voting securities approved in accordance with rule 7(d) of the Code; or
 - (iii) is permitted under rule 7(e) of the Code (subject to clause 19); or

- (iv) is permitted by an exemption granted by the Panel under section 45(1)(a) or (b) of the Act; and
- (b) the applicable requirements in clause 18 are complied with.
- (3) In subclause (2), **current associate** of the person, at a particular time, means an associate of the person at that time.
- (4) In this clause and clause 18,—
 - other-means increase** means an increase in voting control in the code company that is effected by a means other than in reliance on this notice
 - restricted period** means the period starting on the first increase date and ending on the close of the day on which the person who has relied on this notice has complied with their obligations under clause 15.

18 Requirements for approval of code company's shareholders

- (1) If the approval of the code company's shareholders is required under clause 17(1) or (2), the notice of meeting containing the resolution to approve the other-means increase must contain or be accompanied by the following:
 - (a) a summary of the terms of each COVID-19 exemption transaction and the reasons for entering into it; and
 - (b) a statement of the particulars specified in subclause (2); and
 - (c) a statement of the assumptions on which those particulars are based.
- (2) The particulars are—
 - Information about voting securities issued under this notice*
 - (a) the number and percentage of voting securities on issue that were allotted under the COVID-19 exemption transaction (or under each COVID-19 exemption transaction if there is more than 1)—
 - (i) to each person (**A**) who has increased their control percentage of the code company in reliance on this notice; and
 - (ii) to each of A's associates;
 - (iii) to A and those associates in aggregate; and
 - (iv) to all persons in aggregate; and
 - Information about voting securities currently held or controlled*
 - (b) the total number of all voting securities on issue (as at the relevant date); and
 - (c) the number and percentage of all voting securities on issue (as at the relevant date) that are held or controlled—
 - (i) by each person, or associate, referred to in clause 17(1) or (2) (**B**) who will increase their voting control by way of the other-means increase; and
 - (ii) by each of B's associates; and

- (iii) by B and those associates in aggregate; and
- (d) the number and percentage of all voting securities on issue (as at the relevant date) that are held or controlled by B, by each of B's associates, and by B and those associates in aggregate and—
 - (i) that are subject to a control reduction requirement; and
 - (ii) that are subject to voting restrictions under clause 16; and

Information about maximum voting securities that could be held or controlled if other-means increase is approved
- (e) the maximum number and percentage of all voting securities on issue that would be held or controlled by B, by each of B's associates, and by B and those associates in aggregate (calculated as if the voting securities were acquired or allotted under the approved other-means increase); and
- (f) the maximum number and percentage of all voting securities on issue that would be held or controlled by B, by each of B's associates, and by B and those associates in aggregate (calculated as if the voting securities were acquired or allotted under the approved other-means increase) and—
 - (i) that are subject to a control reduction requirement; and
 - (ii) that are subject to voting restrictions under clause 16; and
- (g) the maximum number and percentage of all voting securities on issue that would be held or controlled by B, by each of B's associates, and by B and those associates in aggregate (calculated as if the voting securities were acquired or allotted under the approved other-means increase) and that would not be subject to either of the following:
 - (i) a control reduction requirement;
 - (ii) voting restrictions under clause 16.
- (3) The reference to—
 - (a) A's associates in subclause (2)(a), is a reference to the persons who were A's associates at the time that the voting securities were allotted under the COVID-19 exemption transaction;
 - (b) B's associates in subclause (2)(c) to (g), is a reference to the persons who were B's associates on the relevant date.
- (4) The information under subclause (2)(d)(ii), (f)(ii), or (g)(ii) must separately identify the voting securities (if any) that will cease to be subject to a voting restriction on the first anniversary of the first increase date.
- (5) The information under subclause (2)(f) and (g) must be calculated in a manner consistent with the adjustments under subclause (6).
- (6) If an other-means increase is approved by shareholders in accordance with this clause,—

- (a) the applicable threshold under clause 15(1) must be adjusted to take account of the other-means increase; and
 - (b) the references in clauses 15 and 16 to a control reduction requirement, the aggregate increase cap, or control reduction voting rights must be taken to be a reference to a control reduction requirement, the aggregate increase cap, or control reduction voting rights adjusted to take account of the other-means increase.
- (7) In this clause,—
- COVID-19 exemption transaction**, in relation to a person who will increase their voting control by way of the other-means increase, means a transaction under which the person (or the person's associate) increased their control percentage in the code company in reliance on this notice
- relevant date** means—
- (a) the date of the notice of meeting; or
 - (b) the date that is as close as is reasonably practicable to the date of the notice of meeting so as to enable the information under subclause (2) to be determined.

19 Restriction on increasing control percentage in reliance on rule 7(e) of Code

If a person increases their control percentage in reliance on this notice by 10% or more, they must not increase their control percentage in reliance on rule 7(e) of the Code until after the first anniversary of the first increase date.

20 Person must not become dominant owner

A person must not increase their control percentage in reliance on this notice to become a dominant owner (within the meaning of rule 50 of the Code).

Exemption for professional underwriters

21 Exemption for professional underwriters

- (1) Every person who is, or is an upstream party of, a professional underwriter is exempted from rule 6(1) of the Code in respect of any increase in the person's voting control in a code company that occurs on or before 31 October 2020.
- (2) In this clause and clause 22,—
 - additional voting rights**, in relation to any person who has increased voting control, means the portion of the voting rights in a code company held or controlled by the person that corresponds to the person's increase in voting control
 - professional underwriter** means a person whose ordinary business includes entering into underwriting or subunderwriting contracts
 - upstream party**, in relation to a person, means any other person who directly or indirectly has effective control over the person.

22 Conditions of exemption in clause 21

The exemption in clause 21 is subject to the conditions that—

- (a) the increase in voting control results from 1 or more of the following in connection with an offer of voting securities of the kind described in clause 7, 8, or 9:
 - (i) the professional underwriter acting as an underwriter under an underwriting contract;
 - (ii) the professional underwriter acting as a subunderwriter under a subunderwriting contract;
 - (iii) the professional underwriter being allocated voting securities under a shortfall bookbuild; and
- (b) under the offer referred to in paragraph (a), the voting securities—
 - (i) have been offered to, and not taken up by, existing holders of voting securities; or
 - (ii) were not offered to existing holders of voting securities who are excluded overseas shareholders; and
- (c) the professional underwriter acts under paragraph (a) in the professional underwriter's ordinary course of business; and
- (d) the purpose of the professional underwriter acting under paragraph (a) is to earn fees, commission, or similar remuneration; and
- (e) neither the professional underwriter nor any upstream party or associate of the professional underwriter had a collateral purpose or intention, in respect of the professional underwriter acting under paragraph (a), of enabling any or all of the following persons to increase their control percentage:
 - (i) the professional underwriter;
 - (ii) the upstream parties of the professional underwriter;
 - (iii) the associates of the professional underwriter; and
- (f) immediately before the professional underwriter increases their voting control under paragraph (a), the aggregate control percentage of the person who relies on the exemption does not exceed 20%; and
- (g) the aggregate control percentage of the person who relies on the exemption is decreased on or before the second anniversary of the date of the increase in the person's voting control so that their aggregate control percentage does not exceed 20%; and
- (h) the additional voting rights of that person are not exercised before the decrease of the person's aggregate control percentage required by paragraph (g); and
- (i) all of the requirements in clauses 19 and 20 are complied with.

Dated at Auckland this 8th day of April 2020.

R A Coupe,
Chair.

Statement of reasons

This notice applies to acts or omissions occurring on or after 10 April 2020 and is revoked on the close of 31 October 2022.

The Takeovers Panel (the **Panel**) has granted in this notice exemptions for classes of persons, transactions, and offers from compliance with rule 6(1) of the Takeovers Code (the **Code**). The terms and conditions of the exemptions are designed to ensure that the underlying purpose and intent of the Code are fulfilled while also allowing code companies to access sufficient equity capital urgently should the need arise.

COVID-19 has been causing significant issues with the economy and a number of companies have come, or are expected to come, under pressure because of rapidly changing economic conditions.

While the usual balance that the Code strikes among the objectives of the Code is appropriate in ordinary circumstances, the effects of COVID-19 have caused the appropriate balance to shift. Specifically, given the financial strain that companies are experiencing or are likely to experience, it is appropriate to temporarily refocus the balance between the objectives of the Code in favour of facilitating access to capital.

Generally speaking,—

- control of a code company can be increased under this notice without a sell down requirement:
- that increase in control is immediate, but is subject to a cap (generally of 10% more than the person would be entitled to under the Code):
- control can be increased beyond the cap, but it is subject to a requirement to reduce control and voting restrictions.

The exemption in *clause 5* permits increases in voting control of, by and large, up to 10% above the limits imposed by the fundamental rule in rule 6 of the Code. This exemption is consistent with the objectives of the Code in that it will encourage the efficient allocation of resources, to ensure that capital finds its way to companies that are in significant need during the outbreak of COVID-19.

The exemptions in *clauses 7 to 9* are based on clauses 8 to 8B of the Takeovers Code (Class Exemptions) Notice (No 2) 2001 (but with modified conditions). They will avoid inadvertent breaches by shareholders that take up their pro rata allotment. The exemptions are consistent with the principle of providing equal consideration to all shareholders of the same class.

The exemptions are consistent with the objectives of the Code because the attaching conditions require that a portion of the increase in voting control may need to be eliminated within 2 years of the increase and that the voting rights of that portion are not exercised before that elimination.

The exemption in *clause 21* is based on that in the Takeovers Code (Professional Underwriters) Exemption Notice 2004. It does not apply to corporate investors who seek to use underwriting agreements as a means of increasing control in code companies. The Panel considers that it is appropriate to grant exemptions to professional underwriters, and upstream parties of professional underwriters, from rule 6(1) of the Code because underwriting arrangements are an accepted means of assisting companies to raise capital in New Zealand, which should be facilitated by the Panel, and the allotments pursuant to the underwriting agreements to which the exemption applies would not change the effective control of the code company.

The new exemptions apply only to increases in voting control on or before 31 October 2020.

Accordingly, the Panel considers that it is appropriate and consistent with the objectives of the Code to grant the exemptions because—

- the exemptions relate only to allotments of voting securities. They do not permit acquisitions that would exceed restrictions in the Code:
- the ability to increase effective voting control is generally capped at 10% (there is an ability to increase voting control beyond the cap but *see* the following bullet point regarding such increases):
- to the extent that a person would increase voting control by more than the cap, the conditions provide that such voting control must not be exercised and such voting control must be eliminated within a 2-year period:
- the usual sell down and voting restriction periods of 6 months (for professional underwriters) and 12 months (for shareholders) are not appropriate at this time given the level of volatility in the market. As such, the conditions retain the existing substantive protections but have adapted those protections for current market circumstances:
- the exemptions maintain a proper balance between the costs of compliance with the Code and the benefits resulting from it:
- the exemptions are temporary and will encourage the efficient allocation of resources by helping to facilitate legitimate capital raising in an extremely unusual situation:
- assisting companies to survive extreme economic pressures will help to maintain the competitiveness of New Zealand's capital markets.

Issued under the authority of the Legislation Act 2012.
Date of notification in *Gazette*: 9 April 2020.
This notice is administered by the Takeovers Panel.