2003/302

Takeovers Code (Independent Newspapers Limited) Exemption Notice 2003

Pursuant to section 45 of the Takeovers Act 1993, the Takeovers Panel gives the following notice (to which is appended a statement of reasons of the Takeovers Panel).

Contents

Notice

1 Title

This notice is the Takeovers Code (Independent Newspapers Limited) Exemption Notice 2003.

2 Application

This notice applies to acts or omissions occurring on or after 9 October 2003.

3 Expiry

This notice expires on the close of 31 March 2004.

4 Interpretation

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

Act means the Takeovers Act 1993

Code means the Takeovers Code approved by the Takeovers Code Approval Order 2000 (SR 2000/210)

Price code: 8—BY

foreign exempt shareholder means any holder of shares in Sky whose address in Sky's share register is not within a relevant jurisdiction

INL means Independent Newspapers Limited

market value of INL shares means the amount calculated in accordance with the following formula:

$$(a \times b) - c = d$$

where—

a is the amount equal to the weighted average sale price of INL shares (other than INL shares sold under clause 6(c) by the nominee appointed under clause 6(a)) traded on the same day the nominee sells the INL shares under clause 6(c)

b is the number of INL shares sold by the nominee under clause 6(c)

c is the amount equal to the applicable brokerage costs and taxes paid upon the sale of the INL shares by the nominee under clause 6(c)

d is the market value of INL shares

offer means the offer made by INL for all of the shares and share options in Sky

relevant jurisdiction means Australia, New Zealand, the United Kingdom, or the United States of America

relevant shareholders means foreign exempt shareholders who accept the offer

Sky means Sky Network Television Limited.

(2) Any term or expression that is defined in the Act or the Code and used, but not defined, in this notice has the same meaning as in the Act or the Code.

5 Exemption from rule 20 of Code

INL is exempted from rule 20 of the Code to the extent that the offer relates to foreign exempt shareholders.

6 Conditions to clause 5

The exemption in clause 5 is subject to the conditions that—

(a) INL appoints a person to act as nominee for the offer who—

(i) is designated as an NZX Firm by New Zealand Exchange Limited; and
(ii) is not, to the best of INL's knowledge, under investigation by the Securities Commission or New Zealand Exchange Limited; and

(b) in a manner consistent with the terms of the offer, INL—
(i) allots the shares in INL that would otherwise be alloted to relevant shareholders as consideration under the offer to the nominee appointed under paragraph (a); and
(ii) transfers the cash component of the consideration that the relevant shareholders are entitled to under the offer to the nominee appointed under paragraph (a) or as otherwise directed by the nominee; and

(c) INL uses its best endeavours to ensure that the nominee appointed under paragraph (a), as soon as is reasonably practicable and in a manner consistent with the terms of the offer relating to payment of consideration, sells the shares in INL alloted to the nominee under paragraph (b)(i); and

(d) INL uses its best endeavours to ensure that the nominee appointed under paragraph (a), as soon as is reasonably practicable and in a manner consistent with the terms of the offer relating to payment of consideration, pays to the relevant shareholders—
(i) the proceeds from the sale of the shares under paragraph (c), net of any applicable brokerage costs and taxes; and
(ii) the cash component of the consideration to which the relevant shareholders are entitled; and

(e) if the market value of INL shares is greater than the proceeds of the sale of the INL shares paid to the relevant shareholders under paragraph (d)(i), then INL, as soon as is reasonably practicable and in a manner consistent with the terms of the offer relating to payment of consideration, pays the difference between the two amounts to the relevant shareholders; and

(f) INL indemnifies each relevant shareholder against any costs or losses suffered as a result of any failure by the nominee appointed under paragraph (a) to perform its obligations in a proper manner.

7 Exemption from rule 56 and rule 57 of Code

INL is exempted from rule 56 and rule 57 of the Code in respect of the offer.

8 Conditions to clause 7

The exemptions in clause 7 are subject to the conditions that—

(a) INL becomes the dominant owner of Sky by reason of acceptances of the offer (whether or not INL has also acquired equity securities in Sky under rule 36 of the Code); and

(b) acceptances of the offer are received in respect of more than 50% of the equity securities in Sky that are—

(i) the subject of the offer in the class in respect of which the consideration is to be determined; and

(ii) not controlled by INL; and

(c) the consideration payable in respect of the equity securities in any class in Sky is the same as the consideration provided under the offer for equity securities in the same class.

Dated at Auckland this 21st day of October 2003.

The Common Seal of the Takeovers Panel was affixed in the presence of:

[L.S.]

D. O. Jones,
Deputy Chairperson.

Statement of reasons of Takeovers Panel

This notice applies to acts or omissions occurring on or after 9 October 2003 and expires on 31 March 2004.

Exemption from rule 20 of Takeovers Code

The Takeovers Panel has exempted Independent Newspapers Limited (**INL**) from compliance with rule 20 of the Takeovers Code (the **Code**).

Rule 20 of the Code requires an offer to be made on the same terms and provide the same consideration for all securities of the same class.

The exemption applies to a takeover offer by INL for the shares in Sky Network Television Limited (**Sky**). The consideration under the offer will have a cash and a scrip offer component. The offer will be made to all Sky shareholders, including a small number of shareholders who are spread across a significant number of jurisdictions outside of Australia, New Zealand, the United Kingdom, and the United States of America and who hold a minimal percentage of voting rights.

The exemption applies in respect of offers to shareholders who are resident outside of Australia, New Zealand, the United Kingdom, and the United States (**foreign exempt shareholders**). It provides that any shares of INL that would otherwise be transferred to foreign exempt shareholders that accept the offer will be transferred to a person appointed by INL to act as nominee for the offer. That nominee is required, as soon as is reasonably practicable, to sell the shares and to pay the net proceeds arising from the sale to the foreign exempt shareholders who accept the offer.

The nominee may sell the INL shares in an off-market transaction to avoid the consequences under the Securities Act 1978 of selling those securities to the "public". To ensure that foreign exempt shareholders are not disadvantaged by an off-market sale, this notice requires that the amount per share paid to foreign exempt shareholders is not less than the weighted average sale price of the INL shares traded on the day on which the nominee sold the relevant INL shares less any applicable costs and taxes. If the proceeds of the sale of the INL shares by the nominee are not equal to or greater than the value of the shares calculated according to the weighted average sale price, INL will need to "top-up" the amount paid to the foreign exempt shareholder.

Conditions are also imposed to ensure that the nominee is of good standing and that shareholders are protected against the nominee's failure to perform its duties in a proper manner.

The Panel considers that it is appropriate to grant the exemption for the following reasons:

- it is not practicable for INL to make an offer to all of the shareholders of Sky on the same terms, as required by rule 20 of the Code, because of the costs of complying with the securities law that applies in the various jurisdictions; and
- in the absence of an exemption it would be impractical for INL to make an offer which included a scrip component and shareholders of Sky may be denied the opportunity to consider a takeover offer from INL.

The Panel considers that the exemption is consistent with the objectives of the Code because—

- the exemption is consistent with the principle of providing equal consideration to all shareholders in the target company, while recognising the unreasonable costs of having to comply with the securities law that applies in various jurisdictions, in circumstances in which share scrip is offered as consideration and shareholdings outside of New Zealand, Australia, the United Kingdom, and the United States are minimal; and
- it is important for competition for the control of Code companies that offerors are not precluded from offering scrip as consideration in takeover transactions.

Exemption from rule 56 and rule 57 of Code

The Panel has exempted INL from compliance with rule 56 and rule 57 of the Code.

Rule 56 concerns the consideration payable in respect of equity securities if a dominant owner wishes to compulsorily acquire outstanding securities. Under rule 56, if a person becomes the dominant owner by reason of an offer under the Code, the consideration payable for the compulsory acquisition of shares will depend on the level of acceptances received. If acceptances were received in respect of more than 50% of the equity securities that were the subject of the offer, the consideration payable will be the consideration payable in respect of the securities that were the subject of the offer. However, if acceptances were received in respect of less than 50% of the equity securities that were the subject of the offer, the consideration payable must be a cash sum certified as fair and reasonable by an independent adviser (in accordance with rule 57 of the Code).

INL currently controls 66.21% of the voting rights in Sky. If INL held 66% of Sky's issued shares directly rather than through a subsidiary, its takeover offer would be in respect of the remaining 34% of Sky shares and it would only require acceptances in respect of more than 17% of Sky shares in order to be able to compulsorily acquire outstanding securities for the same consideration as payable under the offer without appointing an independent adviser.

However, INL's 66.21% shareholding in Sky is held through a wholly-owned subsidiary, Mercer Investments Limited. Accordingly, in the absence of an exemption, INL would not be able to compulsorily acquire outstanding securities for the same consideration as payable under the offer unless Mercer accepts the takeover offer. As the offer includes a scrip component, Mercer's acceptance of the offer would result in the allotment of INL shares to Mercer and, under section 82 of the Companies Act 1993, a subsidiary must not hold shares in its holding company and the transfer of shares would be invalid and of no effect.

The Panel considers that it is appropriate to grant the exemption because, as INL is the controller but not the holder of a significant percentage of Sky shares, the application of rule 56 (as a result of the requirement in rule 8(2) of the Code that a full offer must include offers in respect of all securities in each class of equity security not already held by it) could produce an unfair result, in that INL would be denied the ability to compulsorily acquire shares in Sky at the offer price. It is also necessary to exempt INL from the application of rule 57 of the Code as a consequence of the rule 56 exemption. Rule 57 sets out the consideration that must be paid for the acquisition of shares if the consideration cannot be determined under rule 56. As INL has been granted an exemption from rule 56, it must also be exempted from rule 57 in order for the first exemption to be effective.

The Panel considers that the exemption is consistent with the objectives of the Code because it—

(a) gives effect to the intention of the prescribed procedures for compulsory acquisition in the Code; and

(b) maintains a proper relation between the costs of compliance with the Code and the benefits arising from it.

Issued under the authority of the Acts and Regulations Publication Act 1989.
Date of notification in *Gazette*: 23 October 2003.
This notice is administered by the Takeovers Panel.

Wellington, New Zealand: Published under the authority of the
New Zealand Government—2003