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Fundamental and affected transactions

Introduction

Present indications are that the Takeover Regulations will be promulgated during 2009 to take effect at a later date. This chapter sets out generally accepted principles of good governance which supplement the Takeover Regulations.

Chapter 5 of the Companies Act defines affected transactions as a wide range of transactions summarised as follows:

- i. a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking of a regulated company;
- ii. an amalgamation or merger, if it involves at least one regulated company;
- iii. a scheme of arrangement between a regulated company and its shareholders;
- iv. the acquisition of, or announced intention to acquire, a beneficial interest in any voting securities of a regulated company;
- v. the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert;
- vi. a mandatory offer; or
- vii. a compulsory acquisition.

Points i, ii and iii are fundamental transactions. Affected transactions may only be implemented in compliance with Chapter 5 and the Takeover Regulations.

Conflicts of interest

Directors must disclose any conflict or potential conflict of interest in relation to any contemplated affected transaction.

In an affected transaction, and during the entire course of such affected transaction, a director of an offeree or offeror company, whether executive or non-executive, must fully disclose to the offeree company board, any conflict of interest or potential conflict of interest, including its nature, in relation to such transaction. Such disclosure must be made immediately he becomes aware of such conflict. In such a case, where the director considers that such conflict or potential conflict may affect his independence, the director concerned must declare himself non-independent.

Where the director does not declare himself non-independent and the board considers such director to be non-independent, the board must declare the director non-independent.

The following provides guidance in the determination of conflicts of interest of offeree company directors. Where an offeror is not a company, references to offeror directors apply equally to trustees of trusts, partners of partnerships, members of a consortium and similar personae.

- o Directors who are members of the boards of both an offeror and offeree company are presumed to be conflicted and non-independent, but such presumption is rebuttable at the instance of the independent board.
- o A director of an offeree company who holds vested shares and/or options ("vested securities") in the offeree Company, which vested securities:

- have an intrinsic value (as defined by International Financial Reporting Statements) which represents a material amount of the director's net worth.; and/or
- represents a material holding in the offeree company;

are presumed to be conflicted and non-independent, but such presumption is rebuttable at the instance of the independent board.

Directors of an offeree company who hold unvested securities and/or options who are offered any substitute share/option scheme, offer or acceleration of vesting periods giving rise to a benefit in an affected transaction would render them non-independent.

Directors who are partial to the outcome of an affected transaction because of an increased or decreased future benefit are non-independent. The specific circumstances surrounding the loss of office or employment may result in a director becoming non-independent.

An offeree company director, who is 'related', as defined in the Act, to any person who is, or would be, non-independent, is rebuttably presumed to be non-independent.

Decisions should be taken only by directors who are not conflicted. Conflicted directors must recuse themselves from all board discussions and decisions on the issue.

Independence is the ability to make impartial decisions without fear or favour, and is a fundamental requirement to be complied with in any affected transaction.

In an affected transaction, an offeree company board must consist only of independent directors, whether executive or non-executive ("independent

board"). Non-independent directors must recuse themselves from all independent board meetings. However, the independent board may determine the extent of a non-independent director's attendance at any of its meetings for a defined purpose, such as furnishing information.

An independent board should comprise a minimum of three independent directors. Where there are fewer than three independent directors, other independent persons must be appointed to the independent board.

Affected transactions require the expansion of a director's fiduciary duties to include the general body of the company's relevant shareholders (including all securities as defined in the Act).

Each member of the independent board should ensure that he has received all necessary information in order to provide a fully informed opinion to relevant shareholders concerning the affected transaction. For that purpose the director:

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- should meet with all appointed advisers (appointed by the board) to be briefed on the details of the affected transaction mechanism;
- should, while adhering to regulatory timetables, ensure that he has sufficient time to discharge all duties and responsibilities and resist haste and pressured time deadlines;
- must ensure he is properly informed of the offeree company's value.

An independent board should do all things necessary to satisfy itself that an offeror is able to perform in terms of an affected transaction.

An independent board should form a clear basis for the expression of an opinion to shareholders dealing with value and price compared to the consideration offered. Where the consideration offered per share exceeds either the estimated fair value per share or current traded price per share, but not both, a split opinion clearly detailing the independent board's view is required, for example, fair but not reasonable or reasonable but not fair.

An independent board must form a view of a range of value, based upon an accepted valuation approach, of the offeree company shares. Any affected transaction with a consideration per share within this range is generally considered to be fair.

The independent board should consider factors that are difficult to quantify, or that are unquantifiable, and must disclose them (or state that there are none of which it is aware) and take them into account in forming its opinion in respect of fairness.

Any affected transaction may generally be considered reasonable where the consideration per offeree company share is greater than the offeree company's traded share price at the time the consideration per share was announced, or at some other more appropriate identifiable time, taking account of all company specific circumstances.

Any affected transaction with a settlement consideration comprising offeror shares requires the independent board to carefully consider the price and value per share of the offeror's shares relative to the offeree company shares.

An independent board should be cognisant of the fact that a cash consideration to settle the acquisition of offeree company shares requires the most rigorous value discovery of the offeree company by the directors. This consideration should include the present value of future benefits.

An independent board recommending an affected transaction consideration to offeree company shareholders should have exhausted all reasonable endeavours to satisfy itself that the consideration offered could not have been bettered by pursuing an alternate viable deal, that is, they should negotiate with any and all parties they believe to be reasonably interested to secure a more favourable result for shareholders.

While an independent board should take account of all advice received from all appointed advisers, it retains the primary responsibility to express an opinion to shareholders and may not abdicate such responsibility.

If the independent board is not unanimous in its opinion, all differing opinions of members, including reasons, must be provided to shareholders.

Offeree companies

Offeree companies must appoint independent, competent advisers.

The number and type of advisers to be appointed should be properly determined at an early stage by the independent board and appointed by the independent board.

An independent board must determine that the offeree company appointed advisers are independent and competent.

Independent advisers should charge a market related fee, but such fee must not be subject to increase or decrease contingent upon the outcome of the affected transaction.

Negotiations must be kept confidential. If confidentiality is breached the relevant information must be disclosed to all shareholders.

An independent board should be cognisant of the fact that confidentiality may only be able to be maintained for a short period, and sometimes not at all.

If there is reasonable suspicion of a leak of material price-sensitive confidential information, such information must immediately be disclosed to shareholders of the offeree company, and in the case of a public company, to the general public, in the appropriate manner.

An independent board should disclose as much detailed information concerning an affected transaction as early as possible.

Information provided to select offeree company shareholders must be disclosed equally and as soon as possible to all other shareholders, and in the case of a listed company to the general public, in the appropriate manner.

An independent board must ensure that all material changes to previously announced specific information concerning an affected transaction is immediately disclosed to shareholders of the offeree company, and in the case of a public company to the general public, in the appropriate manner.

The offeree company should determine and disclose any benefits, other than the consideration offered to offeree company shareholders, offered to any specific offeree company shareholder or offeree company director.

Shareholders of different classes, types and rights to shares should be treated comparably.

Where an offeror is a company, its directors are bound by their common law and statutory duties.

An offeror should not announce an offer or its intent to make an offer unless it has proper grounds for believing that it can and will continue to be able to implement the offer.

The offeror must disclose any benefits offered to any specific offeree company shareholder or Offeree Company director other than in their capacity as shareholders.

Where a director is declared independent by the independent board of the offeree company, such director is conflicted at the offeror board/management level.