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Private and confidential

By hand

Ref.: P1-L007

The Executive Director
Corporate Finance Division
Securities and Futures Commission
8th Floor, Chater House
8 Connaught Road Central
Hong Kong

28th October, 2003

Attention: Mr. Brian Ho

Dear Sirs,

Application for a ruling re Rule 32 of the Takeovers Code

We write on behalf of CLP Holdings Limited ("CLP") to apply for a ruling relating to Rule 32 of the Takeovers Code and whitewash applications based on on-market share repurchases. The parties to the application are CLP and ourselves and Messrs. Stephenson Harwood & Lo ("SHL"), respectively financial and legal advisers to CLP on this matter.

The material facts relevant to the application have been discussed at the meeting between ourselves, SHL and Mr. Brian Ho, Ms. Gail Humphryes and Ms. Zarina Curren of your staff on 12th May, 2003 and in subsequent telephone conversations. For ease of reference, we now enclose a submission (the "Submission") summarising the previous points made. In addition, the Submission sets out research on international practice on whitewashes for on-market share repurchases and illustrates (Appendix 6) how the creeper could be applied in such circumstances. The Submission also contains some suggestions on corporate governance protections/procedures in the context of on-market share repurchases.

As discussed, we believe that the wording of Rule 32 of the Takeovers Code in its present form is unclear, in that it provides for whitewash waiver applications in the case of share repurchases by general offer or off-market share repurchases, but is silent on the question of on-market share repurchases. We believe that it would be helpful to clarify this position, as our research into other markets shows for example that waiver applications to allow on-market share repurchases are routine in the UK and are also permitted in Singapore.

CLP is a company whose corporate governance standards are fully in line with best international practice. It would in our opinion further enhance the standing of Hong Kong's



financial markets if the interpretation of Rule 32 were clarified in line with established precedent in comparable international markets.

Accordingly, we seek a ruling that the present wording of Rule 32 does not preclude a whitewash application on the basis of on-market share repurchases and, if this is affirmative, we would intend to proceed with such an application in the manner and with the safeguards set out in the Submission, or in some other manner to be agreed; alternatively, if the present wording of Rule 32 is held to exclude such waivers, we seek a ruling that the Executive concurs with our view that the wording of Rule 32 has become out-of-line with internationally accepted practice in this respect and will be designated for appropriate revision in the next review of the Takeovers Code.

We attach a certificate from CLP and a cheque for HK\$24,000 in respect of the fee for the requested ruling. We look forward to hearing from you. Please contact the undersigned on 2869 9092 if you need any clarification of the above.

Yours faithfully,
for and on behalf of
Sommerley Limited

M. N. Sabine

M. N. Sabine
Chairman

Enc.

c.c. Stephenson Harwood & Lo
Client

**Submission to the SFC regarding a possible change in the
Takeovers Code to allow whitewash waivers for on-market repurchases**

1 Problems for CLP - recap

1.1 CLP has operated a share repurchase programme since May 1998, pursuant to which 137,007,500 issued shares of CLP have been bought back. The benefits of the share repurchase programme for CLP and its shareholders are to enhance shareholders' value and earnings per share. Shareholders have given the repurchase mandate overwhelming support.

1.2 The Kadoorie Family and its concert parties (together, the "Concert Parties") currently hold 34.84% of CLP and have registered under the transitional provisions under Rule 26.7 of the Takeovers Code. A repurchase by CLP of a mere 11 million shares on the market will have the result of pushing the Concert Parties over the 35% takeover threshold. This was advised to CLP's shareholders in the notice of annual general meeting 2003.

1.3 Without a whitewash waiver from the SFC, CLP would be forced to suspend its share repurchase programme, contrary to the wishes of its shareholders. Alternatively, if CLP continues its share repurchase programme, the Concert Parties would be obliged to sell down in anticipation of share repurchases. Such selling down is highly undesirable because:-

1.3.1 Selling down by the controlling shareholder while CLP repurchases will confuse the investing public and create suspicion of market manipulation;

1.3.2 CLP may inadvertently repurchase shares being sold by the controlling shareholder, leading to connected transaction implications; and

1.3.3 It will give an impression of lack of confidence by the major shareholders of CLP.

2 International practices generally allow whitewash waivers for on-market repurchases

2.1 Other international markets do allow for on-market repurchase whitewashes. In Australia, there is a statutory right for companies to repurchase their shares, even though the takeover threshold or the creeper limit may be exceeded by such repurchases. In both Singapore and the UK where the regulatory frameworks regarding market repurchases are highly similar to Hong Kong, on-market repurchase whitewashes are allowed.

2.2 China has recently adopted a set of takeover regulations, which imposes a takeover threshold of 30% and zero creeper between 30% to 50%. There are reports (attached as Attachment 1) that China is also drafting a set of repurchase regulations which would allow for on and off-market repurchases and repurchases by way of general offer.

2.3 We have looked in greater detail into the takeover regulation models in Singapore and the

UK. Although the US and Australia also allow for on-market repurchase whitewashes, we have not put much emphasis on these two jurisdictions in coming up with our proposals because (i) the US does not restrict share repurchases by takeover regulations; and (ii) the regulatory regime in Australia regarding repurchases is comparatively relaxed. For example, Australia does not require repurchases which exceed the takeover threshold or creeper to be approved by a regulatory authority nor independent shareholders, provided that the repurchases stay within certain statutory limits. We do not believe that there would be an appetite in Hong Kong for such an approach.

- 2.4 The takeover regulations in the UK and Singapore are of particular relevance. Historically, the Takeovers Code in Hong Kong was derived from the London City Code. Singapore also follows the London City Code structure, and its market has similar characteristics to Hong Kong in terms of controlled and family companies. Because of that, our proposals are mainly derived from a combination of the UK and Singapore models.
- 2.5 CLP shares are traded over-the-counter on the London Stock Exchange, and in the United States in the form of American Depositary Receipts (ADRs). We suggest that it could be damaging to the status of Hong Kong's financial market for a blue chip company with international investors and overseas trading to suffer undue restrictions because Hong Kong rules are out of step with other international markets. We believe that our proposals also address the SFC's concerns, such as with regard to corporate governance.

3 Proposed changes to the Takeovers Code and Share Repurchase Code

- 3.1 We suggest that the SFC should consider reviewing the Takeovers Code and the Share Repurchase Code (the "Codes") during its next round of consultations in order to allow for on-market repurchase whitewashes.
- 3.2 The Codes, as they currently stand, regulate the crossing of the general offer threshold and creeper whether this be by on-market repurchases, off-market repurchases or repurchases by way of general offer. However, unlike their counterparts in other jurisdictions, the Codes do not treat on-market and off-market repurchases equally as far as granting whitewashes is concerned.
- 3.3 The possibility of reviewing the Codes was explored at the last meeting with the SFC and it was acknowledged that CLP could put forward a proposal for the SFC to consider.
- 3.4 The table below sets out a comparison of the general features of on-market repurchase whitewashes in Singapore and the UK. As far as the UK model is concerned, the London City Code was largely amended in 1998 when the 1% creeper was abolished. In this submission, we will refer to the UK models pre and post-1998 as "old" and "new" UK models respectively. Set out against the Singapore and UK models are the hypothetical model proposed to be adopted in Hong Kong, and the model which CLP is prepared to consider for easy comparison. The latter model arises because CLP is prepared to consider to accept a more stringent model if the SFC has any reservation on the model proposed to be adopted in Hong Kong.

	Features	Singapore model	Old-UK model	New-UK model	Proposed HK model	Model which CLP is prepared to consider
1	Takeover threshold	30%	30%	30%	30%	35%*
2	Shareholding level subject to creeper	30%-50%	30%-50%	30%-50%	30%-50%	35%*-50%
3	Creeper limit (but see Box 11)	1%/6 months	1%/12 months	Zero creeper	2%/12 months	2%/12 months
4	Maximum buy-back authority sought from shareholders annually	10%	15%	15%	10%	10% (or lower)
5	Independent shareholders' approval for whitewash	Required	Required	Required	Required	Required
6	Yearly renewal of whitewash for on-market repurchases, concurrently with renewal of buy-back authority	Required	Required	Required	Required	Required
7	Maximum price for repurchases	105% of 5 days' average	105% of 5 days' average		the higher of 105% of 5 days' average or 120% of 30 days' average	
8	Independent assessment of fairness of repurchase	Pro-forma accounts	Simple analysis by auditors or financial advisers		Pro-forma accounts	Pro-forma accounts
9	Whitewash and buy-back authority to be voted upon separately	Not required	Not required		Not required	Required

*Note * : arises from transitional provisions under Rule 26.7 of the Takeovers Code*

	Features	Singapore model	Old-UK model	New-UK model	Proposed HK model	Model which CLP is prepared to consider
10	Disqualifying transactions, i.e. acquisitions by directors and concert parties which may invalidate a repurchase whitewash	Between the time when directors know that the whitewash proposal is imminent, and the expiry of the whitewash, if acquisitions together with repurchases exceed take-over threshold or creeper	Between the time when directors know the company's intention to seek whitewash, and the approval of the whitewash		<i>Same as either Singapore or the UK</i>	<i>Same as either Singapore or the UK</i>
11	Acquisitions by controlling shareholder under the permitted creeper	Allowed, provided that acquisitions together with repurchases do not exceed takeover threshold or creeper	Allowed, provided that an absolute cap is not exceeded	Not allowed (zero creeper)	<i>Same as Singapore model</i>	<i>Zero creeper for acquisitions</i>
12	Others				<i>Independent directors and auditors to opine on the financial effects of repurchases in following year's repurchase circular</i>	<i>Independent directors and auditors to opine on the financial effects of repurchases in following year's repurchase circular</i>

3.5 We attach the following documents for the SFC's case of reference:

- 3.5.1 Extracts of the pre-1998 London City Code, including Rules 5, 9 and 37 and Appendix I (**Attachment 2**);
- 3.5.2 Appendix 2 (Share Buy-back Guidance Note) of the Singapore Code on Take-overs and Mergers (**Attachment 3**);
- 3.5.3 Four sample on-market repurchase whitewash circulars in the UK (**Attachment 4**); and
- 3.5.4 Two sample on-market repurchase whitewash circulars in Singapore (**Attachment 5**);

3.6 Our proposals on whitewashes for on-market repurchases are as follows:

- 3.6.1 **Whitewashes for on-market repurchases** - The Takeovers Code and the Share Repurchase Code should be amended to specifically allow for whitewashes to be granted for on-market repurchases. Both the takeover regulations in Singapore and the UK specifically cater for whitewashes being granted for on-market repurchases.
- 3.6.2 **Waiver on a yearly basis** - On-market repurchase whitewashes should be granted on a yearly basis to have the same lifetime as the repurchase mandate (i.e. the whitewash would expire upon the conclusion of the next coming AGM or the deadline for holding an AGM, whichever is earlier). Both the Singapore and UK models have been working on that basis.
- 3.6.3 **Maximum price for repurchases** - We propose that the repurchase price of shares approved under the repurchase mandate should be subject to a maximum price limit of (a) 105% of the average market value for the 5 business days before the repurchase; and (b) 120% of the average market value for the 30 business days before the repurchase, whichever is higher. In both Singapore and the UK, the maximum repurchase price is 105% of the average market value for the 5 business days before the repurchase. However, the 30 days' formula is proposed because the 5 days' formula might prevent a company from repurchasing its own shares at a low price when share prices rebound sharply from an even lower price at the time of significant market downturn.

In both Singapore and the UK, the 105% price restriction is set out in the listing rules of the relevant stock exchanges and applies to on-market repurchases pursuant to a buy-back authority, whether the takeover thresholds are breached or not. Accordingly, if such price restriction is introduced into Hong Kong, it should be the Listing Rules instead of the Takeovers Code which should be amended.

Apart from the above price restriction and the normal "blackout" provisions (such as one month before the announcement of results and before any price-sensitive

information is announced to the public), we do not think that there are any other price and time restrictions which apply under the repurchase regulations in the UK and Singapore.

3.6.4 Independent assessment of fairness of the repurchase - Although independent advice is required in the case of off-market repurchases and repurchases by way of general offers, we think that independent advice should not be required for on-market repurchase whitewashes because:

- (a) Buy-back authorities are not specific as to price, timing or individual transactions, but are sought from shareholders as a matter of routine practice. As none of the repurchase price, timing and actual volume can be ascertained at the time when the buy-back authority is sought, it would be impracticable to ask an IFA to opine in meaningful terms on the fairness of the whitewash.
- (b) Thus, on-market repurchase whitewash circulars in Singapore and the UK do not contain independent advice. Although the Whitewash Guidance Note under the London City Code provides that the company must appoint an independent adviser to advise its independent shareholders on the whitewash resolution, it is unclear whether this requirement applies to on-market repurchase whitewashes. In fact, none of the UK circulars which we have located for on-market repurchase whitewashes contain any IFA opinions. In some of them, one-paragraph comments are given by the company's auditors or financial advisers, giving a very brief analysis on the merits of the buy-back authority or the whitewash. Examples can be found on page 3 of the circular of The Wensum Company plc dated 19th May 1998 and page 3 of the circular of Anglo St James plc dated 22nd June 1998, both contained in Attachment 4.
- (c) Instead of an IFA opinion, Singapore circulars contain a section setting out pro-forma financial figures for the companies on the assumption that the buy-back authority is exercised to the full extent at a hypothetical repurchase price of 105% of the 5 days' average using the latest practicable date of the circular as the reference date. (Please see pages 7 and 8 of the circular of Vibropower Corporation Limited dated 4th December 2002 and pages 3 and 4 of the circular of Keppel Corporation Limited dated 11th May 2002, both contained in Attachment 5.) We believe that this may be a more useful illustration of the merits of the buy-back authority to enable shareholders to assess whether to support the buy-back authority and the whitewash.

3.6.5 Inter-conditionality of buy-back authority and whitewash - In the UK, a company is free to choose whether to ask for the approval of the general mandate and whitewash in one single resolution or two separate resolutions. Singapore goes even further. In Singapore, a whitewash resolution is unnecessary if the effect of the whitewash is explained in the repurchase circular.

CLP, however, believes that shareholders should be given the option to support the repurchase mandate but to disagree with the whitewash. Although this will be a matter for the Board to decide at the time in the light of the surrounding circumstances, CLP is prepared to ask for shareholders' approval on the general mandate and whitewash separately should on-market repurchase whitewashes be allowed in Hong Kong in future. At the same time, CLP recognises that its approach may not be appropriate in all cases and that, depending on the circumstances, companies may wish to ensure that the buy-back authority is conditional on the whitewash, even if they are voted upon separately.

3.6.6 Disqualifying transactions - The Share Repurchase Code should set out the disqualifying transactions for repurchase whitewashes. Under the old-UK model, a whitewash waiver will not be granted (or if granted, will be invalidated) if a director (or his concert parties) has acquired shares in the knowledge that the company intends to seek permission from its shareholders to repurchase shares or in the period between the posting of the circular and the shareholders' meeting. Immediately following the approval of the whitewash, the controlling shareholder is then free to acquire additional shares, subject to the normal takeover threshold and creeper limit. In Singapore, the waiver is subject to the condition that the directors (and their concert parties) will not acquire shares after they know that the repurchase whitewash proposal is imminent until the buy-back authority expires if such acquisitions, taken together with the buy-back, would breach the takeover threshold or creeper limit. We submit that Hong Kong can adopt either the old-UK or Singapore model.

3.6.7 Fees - If on-market repurchase whitewashes are allowed in Hong Kong, given the routine nature of a repurchase circular, we propose that the fees payable to the SFC should be a flat fee instead of a variable fee linked to the market capitalisation. The London City Code provides for a flat fee in the case of whitewash circulars.

4 Acquisitions by controlling shareholders under the permitted creeper

4.1 In Hong Kong, where a shareholder holds between 30%-50% of a company, it will be allowed to acquire up to 2% more shares compared to the lowest percentage interest in the last 12 months without triggering a mandatory general offer. If on-market repurchase whitewashes are allowed in Hong Kong, once the whitewash is approved in the AGM by independent shareholders, the controlling shareholder's interest may increase as a result of both contemporary acquisitions and repurchases. A question arises as to whether the 2% creeper:

4.1.1 should be on top of the shareholding increase as a result of the full exercise of the whitewashed repurchase mandate (i.e. whether the company can repurchase 10% of its shares and whether the controlling shareholder can also acquire 2% more shares on top of repurchases - this is the Australia model explained in 4.2.1 below); OR

4.1.2 should be deducted from the exercise of the whitewashed repurchase mandate (i.e. whether the controlling shareholder can enjoy his creeper before the company

undertakes any repurchases, but if the company then starts to repurchase which brings him over the takeover threshold or creeper limit, whether he has to sell down at some point to avoid triggering a mandatory general offer - this is the old-UK or Singapore models explained in 4.2.2 and 4.2.3 below); OR

- 4.1.3 should be lost (i.e. whether, once a company obtains whitewash for its repurchase mandate, the controlling shareholder can no longer enjoy the creeper until the whitewash expires - this is based on the new-UK model explained in 4.2.4 below).
- 4.2 The solution lies with one of the models in other jurisdictions where on-market repurchase whitewashes co-exist with the creeper:
- 4.2.1 The **Australia model** is the most flexible and operates in a way which allows the company always to exercise the repurchase mandate in full on top of the controlling shareholder's creeper, provided that the controlling shareholder uses up his creeper first. Once the creeper limit is exceeded (whether as a result of acquisitions, repurchases or both), the company may continue to repurchase under the permitted buy-back authority but the controlling shareholder cannot buy any more shares on the market.
- 4.2.2 The **old-UK model** allowed directors (and their concert parties) to acquire shares within the permitted creeper provided that an absolute shareholding cap was not exceeded by the combined result of acquisitions and repurchases. The absolute cap is the shareholding level which would be hit by the concert parties if the repurchase mandate is exercised in full, based on the shareholding level of the concert parties at the time when the whitewash waiver is sought. As the concert parties' interest approaches the absolute cap, they will have to sell down in advance to avoid a mandatory general offer.
- 4.2.3 Under the **Singapore model**, the whitewash waiver is subject to the condition that the directors (and their concert parties) must not acquire shares after they know that the repurchase whitewash proposal is imminent until the buy-back authority expires if such acquisitions, taken together with the buy-back, would breach the takeover threshold or creeper limit. If the concert parties have acquired shares after an on-market repurchase whitewash is granted, as the concert parties' interest approaches the takeover threshold or permitted creeper limit (whether as a result of repurchases or acquisitions or a combination of both), they will have to sell down in advance to avoid a mandatory general offer, up to the number of shares that they have acquired after the whitewash is granted.
- 4.2.4 Under the **new-UK model**, the controlling shareholder cannot acquire any shares if its shareholding is between 30% to 50% since the creeper was abolished in 1998. The controlling shareholder's interest can only increase by way of whitewashed repurchases.
- 4.3 In **Appendix 6**, we set out hypothetical examples to illustrate the differences between the different models.

4.4 We do not think that the Australia model, which is the most aggressive, is suitable in Hong Kong. The old-UK model is less restrictive than the Singapore model but we do not recommend it because it is no longer in use. If on-market repurchase whitewashes are allowed in Hong Kong, we think that the Singapore model is likely to be accepted by the market and it has the advantage of being a modern proposal which has recently been adopted in a market which has regulations similar to Hong Kong (i.e. both maintain a creeper).

4.5 If the SFC has any reservation on the Singapore model, we are happy to discuss on any other possible models for the on-market repurchase whitewash. In particular, CLP itself would be prepared to consider to accept even the most stringent model out of the four - the new-UK model, which means that the creeper is effectively taken away once (a) the company has obtained a whitewash for its repurchase mandate and (b) the relevant shareholding reaches (in CLP's case) 35% (subject to any appropriate exceptions and consequential amendments to the Code).

5 Corporate governance

5.1 There seems to be no reason in principle to treat on-market share repurchases more severely than other share repurchases. The London City Code and the Singapore Take-over Code do not make such a distinction. On the contrary, they set out provisions specifically to cater for the ongoing nature of on-market repurchase whitewashes.

5.2 We understand that the SFC has a corporate governance concern over Hong Kong listed companies. We see two potential corporate governance issues which may distinguish on-market repurchases from other kinds of repurchases:

5.2.1 No restriction on the price and timing of repurchases; and

5.2.2 Lack of transparency in the identities of sellers.

5.3 Our view is that if the above issues raise corporate governance concerns, then those concerns apply equally to all on-market repurchases, not only on-market repurchases which result in Takeovers Code consequences.

5.4 Nevertheless, we believe that the solution to address these concerns should lie with:

5.4.1 Imposing further restrictions on the exercise of repurchase mandates generally (not only in relation to repurchases which result in takeover consequences), such as imposing a 105%/120% price restriction on the repurchase price (as mentioned in 3.6.3 above), or lowering the maximum repurchase mandate to below 10%.

5.4.2 Allowing on-market repurchase whitewashes and regulating them under the Takeovers Code and Share Repurchase Code (rather than disallowing on-market repurchase whitewashes totally). This seem to be the internationally accepted solution.

5.5 CLP notes that in the past, a number of blue chip companies have experienced a similar

problem to CLP and have by-passed the takeover consequences by engineering transactions such as scrip dividend or whitewashed asset injections.

5.6 As a leader in good corporate governance in Asia, CLP does not support engineered transactions. CLP is determined to uphold good corporate governance and believes that a whitewash waiver is the most transparent and straightforward solution.

5.7 CLP is not seeking freedom to deal actively in the shares (or to allow the Concert Parties to do so). All CLP wants is to allow shareholders to decide whether they wish to continue to enjoy the benefits of the share repurchase programme. To facilitate this possibility, CLP is quite happy for its own purposes to accept various additional safeguards including:

5.7.1 restrictions against any acquisitions of shares during the tenure of the on-market repurchase whitewash, effectively achieving a zero creeper (subject to any appropriate exceptions and consequential amendments to the Code); or

5.7.2 possibly, a lower repurchase mandate than 10%.

5.8 However, CLP is also aware that the rules should have a more general application and the restrictions prepared to be accepted by CLP may not be applicable to the market as a whole. Therefore, although CLP is prepared to accept more stringent rules, our proposal for achieving a rule change is principally based on the Singapore model. We are of the view that Singapore is of particular relevance because:

5.8.1 It is an exchange in the same region as Hong Kong.

5.8.2 Its regulatory framework is similar to Hong Kong. The Singapore Take-overs Code is also based on the London City Code.

5.8.3 It has similar characteristics to the Hong Kong market in terms of controlled and family companies. Whatever corporate governance issues arise in Hong Kong should also be shared by Singapore.

5.8.4 Singapore has a creeper and its rules illustrate how the creeper can co-exist with on-market repurchase whitewashes.

5.9 We submit that the corporate governance issues can be addressed by imposing safeguards on the grant of on-market repurchase whitewashes, including:

5.9.1 measures mentioned in 5.4.1 above, including the imposition of a maximum price limit on the repurchase price and the lowering of the maximum repurchase mandate limit;

5.9.2 independent shareholders' approval;

5.9.3 disclosure of pro-forma accounts in the repurchase circular to illustrate the financial impact of the repurchases;

- 5.9.4 disqualifying transaction provisions to invalidate whitewashes if directors (or their concert parties) deal in shares after they know that a whitewash proposal is imminent and at least before the whitewash is voted upon; and
- 5.9.5 possible further safeguards - the requirement for independent directors and/or auditors to opine on the financial effects of repurchases carried out in the preceding financial year (such as the source of funds, the price of repurchases and the impact on the earnings and net asset value per share) in the following year's repurchase circular. Shareholders can then review the pros and cons of the repurchase whitewash (such as whether the earnings per share were enhanced and whether the gearing or cash position was worsened as a result of repurchases) and decide whether to continue to support the repurchase mandate and whitewash. This is similar to the ongoing compliance requirements of non-exempt continuing connected transactions set out in the GEM Listing Rules.
- 5.10 As a general principle, we believe that one of the rationales for allowing the creper and on-market repurchases to co-exist is to allow the listed company to make a market as the buyer of last resort and also offer opportunities for companies to repurchase their own shares to enhance shareholders' value. Off-market repurchases and repurchases by way of general offer are no substitute for on-market repurchases, especially in times of emergency such as the Asian financial crisis in 1998.
- 5.11 Being a blue chip utility listed in Hong Kong, CLP considers that a stable share price is of great importance, not only to CLP's shareholders, but also to Hong Kong investors in general. We would be grateful if the SFC could consider CLP's submission favourably so that CLP's shareholders can decide whether CLP's share repurchase programme should be continued.

APPENDIX 6

Hypothetical examples to illustrate the differences between Singapore, old-UK, new-UK and Australia models

1 Scenario 1 - Situation where Holdco's shareholding in Listco is just beneath the takeover threshold and Listco repurchases first

- 1.1 In the first year, Holdco's shareholding in Listco stands at 28%. Listco obtains a whitewash for its repurchase mandate, which allows Listco to repurchase up to 10% of its shares.
- 1.2 If Listco repurchases 10% of its shares on the market, Holdco's shareholding will increase to 31.1%.

Market actions	No. of shares held by Holdco (millions)	Issued shares of Listco (millions)	Percentage interest
Listco obtains a whitewash for its repurchase mandate	28	100	28%
<i>If Listco exercises the repurchase mandate to the full extent (i.e. 10%)</i>	<i>28</i>	<i>90</i>	<i>31.1%</i>

- 1.3 Obviously, if Holdco's shareholding increases purely as a result of repurchases under the whitewashed repurchase mandate, no mandatory general offer obligation will arise, no matter whether under Singapore, old-UK, new-UK or Australia models.
- 1.4 Once the takeover threshold (assuming that the threshold is 30% in these examples) is breached as a result of repurchases, the 2% headroom which Holdco used to have will be lost. Holdco cannot acquire any shares without triggering a general offer unless and until the whitewash is refreshed at the next AGM, by which time the 2% creeper will apply to Holdco. That would seem to be the case under the Singapore and old UK models. Under the new UK model, no shares can be acquired by Holdco if it stands between 30% to 50% because no creeper is allowed in any event.
- 2 Scenario 2 - Situation where Holdco's shareholding in Listco is just beneath the takeover threshold and Holdco creeps first**
- 2.1 In the first year, Holdco's shareholding in Listco stands at 28%. Listco obtains a whitewash for its repurchase mandate, which allows Listco to repurchase up to 10% of its shares.
- 2.2 Before Listco has undertaken any repurchases, Holdco acquires 1.9% (1.9 million) Listco shares in the market and ends up holding 29.9% of Listco. No mandatory general offer obligation has arisen yet as Holdco's shareholding is still beneath the 30% takeover

threshold. However, Holdco cannot acquire any more shares without triggering a general offer.

2.3 If Listco then starts to repurchase, say, 1 million of its shares on the market:

Market actions	No. of shares held by Holdco (millions)	Issued shares of Listco (millions)	Percentage interest
Listco obtains a whitewash for its repurchase mandate	28	100	28%
Holdco acquires 1.9% Listco shares	29.9	100	29.9%
<i>If Listco then repurchases 1 million shares</i>	<i>29.9</i>	<i>99</i>	<i>30.2%</i>

2.4 Under the Singapore model, this would give rise to a mandatory general offer consequence on the part of Holdco. The on-market repurchase whitewash only allows Holdco's shareholding to exceed 35% purely as a result of repurchases. Any acquisitions made by Holdco, even made at a time when Holdco still enjoys headroom, may subsequently invalidate the whitewash if Holdco's shareholding is taken above 35% by a combination of acquisitions and repurchases. If Holdco wants to pre-empt the takeover consequence, it has to sell down in advance to keep pace with Listco's repurchases PROVIDED THAT it does not need to sell down more than 1 million shares, which is the number of shares that Holdco has acquired subsequent to the obtaining of the whitewash. The following table will illustrate what should have happened without Holdco having to make a mandatory general offer:

Market actions	No. of shares held by Holdco (millions)	Issued shares of Listco (millions)	Percentage interest
Listco obtains a whitewash for its repurchase mandate	28	100	28%
Holdco acquires (1.9 million) 1.9% Listco shares	29.9	100	29.9%
<i>If Listco starts to repurchase, Holdco will have to sell down in advance to stay under 30%, up to a maximum sell-down of 1.9 million shares</i>	<i>28</i>	<i>93.6</i>	<i>29.9%</i>

<i>Holdco will not be required to sell down more than it has acquired. Any shareholding increase as a result of further repurchases by Listco can be "kept" by Holdco</i>	28	90	31.1%
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2.5 Under the old-UK model, the situation in 2.3 above (i.e. a repurchase of 1 million shares by Listco following the acquisition of 1.9 million shares by Holdco) WILL NOT result in a mandatory general offer consequence on the part of Holdco. However, under the old-UK model, some whitewash resolutions put a cap not only on the maximum percentage of repurchases (10%) but also on the maximum resulting shareholding of the controlling shareholder as a result of repurchases. In this example, the waiver would read something like:

"the waiver of any takeover obligation which might otherwise fall on Holdco as a result of Listco's repurchases which (assuming a repurchase of 10 million shares) would result in Holdco's shareholding increasing to 31.1% (as a result of the reduction of issued outstanding shares from 100 million to 90 million) be and is hereby approved"

Therefore, if Holdco has already acquired 1.9 million shares before Listco repurchases any of its shares (as mentioned in 2.2 above), then the maximum number of shares that can be repurchased by Listco without triggering a G.O. will be reduced from 10 million shares to 3.9 million shares. If Listco repurchases more shares than that, Holdco will have to make a general offer, or to sell down in advance to keep pace with Listco's repurchases so that Holdco's shareholding does not exceed 31.1%.

Market actions	No. of shares held by Holdco (millions)	Issued shares of Listco (millions)	Percentage interest
Listco obtains a whitewash for its repurchase mandate	28	100	28%
Holdco acquires 1.9% Listco shares	29.9	100	29.9%
<i>If Listco starts to repurchase, provided that Holdco's shareholding does not exceed the approved maximum level of 31.1%, no G.O. obligation will arise</i>	29.9	96.1	31.1%
<i>If Listco repurchases more than 3.9 million shares, Holdco will have to sell down in advance to stay under 31.1%</i>	28	90	31.1%

2.6 It should be noted that the resulting shareholding and issued share capital under Scenario 2

(both Singapore and old-UK models) are the same as under Scenario 1 (i.e., where there are maximum repurchases and no acquisitions). The reason is that under both Singapore and old-UK models, if Holdco uses up its creeper before Listco starts to repurchase, Holdco must "unwind" the situation by selling down at some stage. The Singapore approach is to "unwind first, repurchase later", while the old-UK approach was to "repurchase first, unwind later".

- 2.7 Under the new UK model, no shares can be acquired by Holdco if it stands between 30% to 50% because no creeper is allowed in any event.
- 2.8 The Australian model is quite similar to the old-UK model, except that under the Australian model, there is no cap on the resulting shareholding of the controlling shareholder. In our example, it would mean that even though Holdco has used up its creeper by acquiring 1.9 million shares first, Listco can still repurchase up to 10 million shares afterwards without Holdco triggering any takeover obligations.

3 Scenario 3 - Situation where Holdco's shareholding in Listco stands within the creeper range and Listco repurchases first

- 3.1 Holdco's shareholding stands at, say, 40%. Listco obtains (or renews) the whitewash for its repurchase mandate in the AGM. After the approval of the repurchase mandate and whitewash in the AGM: (a) the repurchase mandate is renewed to 10%; and (b) the creeper is "reset" to 2%.
- 3.2 If Listco repurchases 10% of its shares on the market, Holdco's shareholding will increase to 44.4%.

Market actions	No. of shares held by Holdco (millions)	Issued shares of Listco (millions)	Percentage interest
Listco renews its whitewash in the AGM	40	100	40%
<i>If Listco exercises the repurchase mandate to the full extent (i.e. 10%)</i>	40	90	44.4%

- 3.3 Obviously, if Holdco's shareholding increases purely as a result of repurchases under the whitewashed repurchase mandate, no mandatory general offer obligation will arise, no matter whether under Singapore, old-UK, new-UK or Australia models.
- 3.4 Once the 2% creeper is exhausted as a result of repurchases by Listco, Holdco cannot acquire any shares without triggering a general offer unless and until the whitewash is refreshed at the next AGM, by which time the 2% creeper will also be renewed. That would seem to be the case under the Singapore, old-UK models. Under the new-UK model, no shares can be acquired by Holdco if it stands between 30% to 50% because no creeper is allowed in any event.

4 Scenario 4 - Situation where Holdco's shareholding in Listco stands within the creeper range and Holdco creeps first

- 4.1 Holdco's shareholding stands at, say, 40%. Listco obtains (or renews) the whitewash for its repurchase mandate in the AGM. After the approval of the repurchase mandate and whitewash in the AGM: (a) the repurchase mandate is renewed to 10%; and (b) the creeper is "reset" to 2%.
- 4.2 Before Listco has undertaken any repurchases, Holdco acquires 1.9% (1.9 million) Listco shares in the market and ends up holding 41.9% of Listco. No G.O. obligation has arisen yet as Holdco's shareholding is still within the 2% creeper. However, Holdco cannot acquire any more shares without triggering a general offer unless and until the whitewash is renewed in the next AGM, by which time the 2% creeper will also be renewed.
- 4.3 If after Holdco's acquisitions, Listco then starts to repurchase its shares on the market, Holdco must "unwind" its acquisitions by selling down. The Singapore approach is to "unwind first, repurchase later", while the old-UK approach was to "repurchase first, unwind later".
- 4.4 Detailed mechanisms as to the interaction between Holdco's acquisitions and Listco's repurchases are the same as set out in paragraph 2 above. The following tables illustrate the different consequences between Singapore and old-UK models:

Singapore model

Market actions	No. of shares held by Holdco (millions)	Issued shares of Listco (millions)	Percentage interest
Listco renews the whitewash for its repurchase mandate in the AGM	40	100	40%
Holdco acquires 1.9% (1.9 million) Listco shares (maximum acquisition to stay within 2% creeper)	41.9	100	41.9%
<i>If Listco starts to repurchase, Holdco will have to sell down in advance to stay within the 2% creeper, up to a maximum sell-down of 1.9 million shares</i>	40	95.5	41.9%
<i>Holdco will not be required to sell down more than it has acquired. Any shareholding increase as a result of further repurchases by Listco can be "kept" by Holdco</i>	40	90	44.4%

Old-UK model

Market actions	No. of shares held by Holdco (millions)	Issued shares of Listco (millions)	Percentage interest
Listco renews the whitewash for its repurchase mandate in the AGM	40	100	40%
Holdco acquires 1.9% (1.9 million) Listco shares (maximum acquisition to stay within 2% creeper)	41.9	100	41.9%
<i>If Listco starts to repurchase, provided that Holdco's shareholding does not exceed the approved maximum level of 44.4%, no G.O. obligation will arise</i>	<i>41.9</i>	<i>94.4</i>	<i>44.4%</i>
<i>If Listco repurchases more than 5.6 million shares, Holdco will have to sell down in advance to stay under 44.4%</i>	<i>40</i>	<i>90</i>	<i>44.4%</i>

- 4.5 The Australian model is quite similar to the old-UK model, except that under the Australian model, there is no cap on the resulting shareholding of the controlling shareholder and therefore Listco can exercise the repurchase mandate to the fullest extent without triggering any takeover obligation, even though Holdco has acquired shares (within the 2% creeper) before such repurchases.
- 5 Scenario 5 - Creeper is counted by reference to the issued share capital reduced by repurchases from time to time
- 5.1 Holdco's shareholding stands at, say, 40%. Listco obtains (or renews) the whitewash for its repurchase mandate in the AGM. After the approval of the repurchase mandate and whitewash in the AGM: (a) the repurchase mandate is renewed to 10%; and (b) the creeper is "reset" to 2%. Under the renewed creeper, Holdco can acquire 2 million (2% of the then issued no. of shares of 100 million) Listco shares before any repurchases are made by Listco.
- 5.2 But Listco repurchases 2 million shares on the market first. Holdco's shareholding increases from 40% to 40.82% (i.e. an increment of 0.82%).
- 5.3 Then Holdco wants to acquire Listco shares on the market. The headroom under the creeper available to Holdco for its acquisition is 1.18%. Under the old-UK model, it is expressly provided that such 1.18% headroom will be calculated on the basis of the reduced share capital (Rule 37.2 of the pre-1998 version of the London City Code). In other words, the headroom is 1.156 million shares (1.18% X 98 million shares).