



# TAKEOVERS PANEL

TE PAE WHITIMANA

## Takeovers Code (Rural Equities Limited) Exemption Notice 2020

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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 (Rural Equities Limited) Exemption Notice 2020.

#### 2 Application

This notice applies to acts or omissions occurring on or after 2 September 2011.

#### 3 Expiry

This notice expires on the close of 23 December 2020.

#### 4 Interpretation

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

**Act** means the Takeovers Act 1993

**applicable period** means the period from 2 September 2011 to 23 December 2020

**buybacks** means the acquisitions by Rural Equities, in accordance with its constitution, of voting securities on the dates listed in Schedule 2

**Code** means the Takeovers Code under the Act

**control percentage** means the percentage of voting securities that a person holds or controls

**relevant holders or controllers** means the persons listed in Schedule 1

**Rural Equities** means Rural Equities Limited

**Panel** means the Takeovers Panel

**share transfer** means the transfer on 30 June 2014 by way of distribution by the trustees of the Ashfield Trust to Sir Selwyn John Cushing, as beneficiary of the trust, of 85,673 voting securities

**voting security** means a voting security in Rural Equities

- (2) 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 voting rights in Rural Equities.
- (3) 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 6(1) of Code for the relevant holders or controllers in respect of historic buybacks and share transfer**

- (1) Each of the relevant holders or controllers is exempted from rule 6(1) of the Code in respect of any increase in that person's control percentage resulting from the buybacks.
- (2) Sir Selwyn John Cushing is exempted from rule 6(1) of the Code in respect of the share transfer.

## **6 Conditions of exemption in clause 5**

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

- (a) each of the relevant holders or controllers (save for each of Sir Selwyn John Cushing and Bevan David Cushing, solely in their capacities as directors and shareholders of H&G Limited) has subsequently decreased its holding or control (as applicable) of voting securities to, or below, the percentage of voting securities held or controlled (as applicable) by that person immediately before the increase in their control percentage resulting from the buybacks and/or the share transfer; and
- (b) any exercise, during the applicable period, by a relevant holder or controller of any of the voting rights comprising the increase in that person's control percentage resulting from the buybacks and/or the share transfer did not affect the outcome of any ordinary or special resolution passed by the shareholders of Rural Equities during the applicable period.

Dated at Auckland this 22nd day of December 2020

[signed]

R A Coupe  
Chair

## Schedule 1

### Relevant holders or controllers

Sir Selwyn John Cushing  
Bevan David Cushing  
Ben Jonathan Cushing  
Makowai Limited  
Ashfield Properties Limited  
Seajay Securities Limited  
Fairway Finance Limited  
Bevan David Cushing and Paul Clothier as trustees of the Ashfield Trust  
Sir Selwyn John Cushing and Bevan David Cushing as trustees of the KD Cushing Trust

## Schedule 2

### Date of buybacks

2 September 2011  
31 March 2012  
4 October 2012  
23 April 2013  
20 January 2016  
26 October 2016  
25 October 2018  
28 March 2019

## Statement of Reasons

This notice applies to acts or omissions on or after 2 September 2011 and expires on 23 December 2020.

Rural Equities Limited (**Rural Equities**) is an unlisted Code company.

The notice exempts each of the holders or controllers of voting rights in Rural Equities Limited, named in Schedule 1 (the **Relevant Holders or Controllers**), each of which is related to the Cushing family, from rule 6(1) of the Takeovers Code (the **Code**) in relation to increases in their voting control that resulted from certain share buybacks undertaken by Rural Equities, and a certain transfer of shares in Rural Equities.

H&G Limited was at all relevant times controlled by certain of the Relevant Holders or Controllers and held more than 50% of the voting securities in Rural Equities (the control percentage being between 50.02% and 69.86%).

The Relevant Holders or Controllers and H&G Limited accepted they were, at all relevant times, associates of each other under rule 4(1) of the Code.

Between September 2011 and March 2019, Rural Equities carried out a number of share buybacks (the **Share Buybacks**) in which the Relevant Holders or Controllers (and H&G Limited) did not participate, with the result that each of them increased their control percentage in Rural Equities.

On 30 June 2014, the trustees of the Ashfield Trust made a distribution to the sole beneficiary of that trust, Sir Selwyn John Cushing, by way of a transfer of 85,673 voting securities (0.24%). This caused Sir Selwyn to increase his control percentage in Rural Equities (the **Share Transfer**).

As the Relevant Holders or Controllers (including Sir Selwyn) were associates of each other and H&G Limited, the percentage of voting rights in Rural Equities which each of them held or controlled is

aggregated when determining whether an increase in their control percentage is restricted under rule 6(1) of the Code. Specifically:

- each of the Relevant Holders or Controllers increased their control percentage following the Share Buybacks, and when aggregated with that of their associates, held or controlled more than 20% of the voting rights in Rural Equities; and
- Sir Selwyn Cushing acquired 0.24% in voting rights in Rural Equities from the Share Transfer, and therefore increased his control percentage, and when aggregated with that of his associates, held or controlled more than 20% of the voting rights in Rural Equities.

Accordingly, each of the Relevant Holders or Controllers increased their control percentage, and, under rule 6(1) of the Code, was only permitted to do so in compliance with rule 7 of the Code.

The Relevant Holders or Controllers advised the Takeovers Panel (the **Panel**) that they had been operating on the understanding that, because they were associated with H&G Limited, they could each rely on the “creep” exception in rule 7(e) of the Code to increase their control percentage by 5% (in aggregate) over any 12-month period as they had an aggregate control percentage of more than 50%.

However, in order to rely on rule 7(e) of the Code, a person must have a control percentage of more than 50% of the voting rights of the Code company. Persons who are merely associates and have an aggregate control percentage of more than 50% amongst those associates cannot rely on the Code by virtue of their aggregated control percentage.

H&G Limited and its upstream parties (in that capacity) were the only persons that could rely on rule 7(e). Each of the Relevant Holders or Controllers could not rely on rule 7(e) as they each had a control percentage of less than 50%.

The relevant increases in control percentages by the Relevant Holders or Controllers and Sir Selwyn Cushing had been eliminated on or before 10 December 2020. However, they were unable to rely on Clause 5 of the Takeovers Code (Class Exemptions) Notice (No 2) 2001 (the **Buyback Class Exemption**) as the relevant increases were not eliminated within the specified time limits, and the voting rights in relation to those securities had been exercised before those increases were eliminated.

Accordingly, in the absence of an exemption, the Relevant Holders or Controllers and Sir Selwyn would remain in breach of the Code in respect of the Share Buybacks and the Share Transfer.

The conditions of the exemption are designed to ensure that the underlying purpose of the Code is fulfilled. Accordingly, the exemptions apply only if, –

- each of the Relevant Holders or Controllers has subsequently decreased its holding or control (as applicable) of voting securities to, or below, the percentage of voting securities held or controlled (as applicable) by that person immediately before the increase in their voting control resulting from the Share Buybacks and/or the Share Transfer; and
- any exercise, during the period from 2 September 2011 to 10 December 2020 (the **Applicable Period**), by a Relevant Holder or Controller of any of the voting rights comprising the increase in that person’s control percentage resulting from the Share Buybacks and/or the Share Transfer did not affect the outcome of any ordinary or special resolution passed by the shareholders of Rural Equities during the Applicable Period.

The Panel considers that it is appropriate and consistent with the objectives of the Code to grant each of the Relevant Holders or Controllers an exemption from rule 6(1) of the Code in relation to increases in voting control that resulted from the Share Buybacks because, –

- buybacks can lead to persons inadvertently increasing their voting control in breach of the Code. The Buyback Class Exemption provides a mechanism for dealing with such increases in a manner consistent with the objectives of the Code;

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- although the relevant increases in voting control have been eliminated, the Relevant Holders or Controllers are not able to rely on the Buyback Class Exemption as the relevant increases in voting control were not eliminated within the specified time limits, and the voting rights in relation to those securities were exercised before those increases were eliminated;
  - any breaches of the Code were inadvertent, and have now been eliminated; and
  - an exemption is the only mechanism available to ratify historic transactions for Code compliance.

The Panel considers that it is appropriate and consistent with the objectives of the Code to grant Sir Selwyn John Cushing an exemption from rule 6(1) of the Code in relation to the Share Transfer because, –

- any breach of the Code was inadvertent, and has now been eliminated; and
- an exemption is the only mechanism available to ratify historic transactions for Code compliance.

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Date of Notification in the *Gazette*: 14 January 2021

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