

## **Takeovers Code (Foodstuffs North Island Limited) Exemption Notice 2023**

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 (Foodstuffs North Island Limited) Exemption Notice 2023.

### 2 Application

This notice applies to acts or omissions occurring on or after 22 January 2024.

### 3 Expiry

This notice expires on the close of 21 January 2029.

### 4 Interpretation

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

**Act** means the Takeovers Act 1993

**“C” shares** means the “C” shares in Foodstuffs, having the rights set out, inter alia, in clause 6.12 of the constitution

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

**constitution** means the constitution of Foodstuffs

**Foodstuffs** means Foodstuffs North Island Limited

**Foodstuffs Members’ Protection Trust** means the trust established by the trust deed

**Tetrad** means Tetrad Corporation Limited

**trigger event** means the occurrence of any of the events or circumstances set out in clause 6.12(b) of the constitution which will result in the “C” shares conferring voting rights on the holder of the “C” shares

**trust deed** means the trust deed of the Foodstuffs Members’ Protection Trust dated 23 June 1988 as amended and in force on 27 November 2023

**trustee** means a person appointed as a trustee of the Foodstuffs Members’ Protection Trust in accordance with the trust deed.

(2) In this notice, a reference to a person increasing voting holding or control or the extent to which a person shares in voting control is a reference to the person becoming the holder or controller (as applicable) of an increased percentage of the voting rights in Foodstuffs, including as a result of:

(a) that person being deemed to become the holder or controller (as applicable) of voting rights; or

- (b) it being deemed that there was an increase in the percentage of voting rights held or controlled (as applicable) by that person,

under rule 6(2) of the Code.

- (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.

#### ***Exemptions in relation to occurrence of a trigger event***

### **5 Exemptions from rule 6(1) of Code in relation to a trigger event**

- (1) Every trustee is exempted from rule 6(1) of Code in relation to any increase in that person's voting control which occurs as a result of a trigger event.
- (2) Tetrad is exempted from rule 6(1) of the Code in relation to any increase in Tetrad's voting holding which occurs as a result of a trigger event.

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

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

- (a) the constitution is not amended in a way which (directly or indirectly) affects the voting rights of any holders or controllers of "C" shares, including the number of voting rights attached to the "C" shares or the circumstances in which such voting rights will (or will not) become exercisable;
- (b) the occurrence of the relevant trigger event was not within the control of the trustees;
- (c) the trust deed is not amended in any way which would limit the operation or effect of—
  - (i) the co-operative concept set out in Recital A of the trust deed; and
  - (ii) the prohibition on the trustees selling shares in Tetrad set out in clause 17.03 of the trust deed; and
- (d) the trustees for the time being of the Foodstuffs Members' Protection Trust remain the sole controllers of all of the "C" shares.

#### ***Exemptions in relation to changes of trustees***

### **7 Exemptions from rule 6(1) of Code in relation to changes of trustees**

- (1) If and to the extent that the trustees become the controllers of shares in Foodstuffs which carry voting rights, every person who becomes a trustee is exempted from rule 6(1) of the Code in relation to any increase in that person's voting control as a result of being appointed as a trustee.
- (2) If and to the extent that the trustees become the controllers of shares in Foodstuffs which carry voting rights, every person who is a trustee is exempted from rule 6(1) of the Code in relation to any increase in that person's voting control as a result of a reduction in the number of trustees.

## **8 Conditions of exemptions in clause 7**

Each exemption in clause 7 is subject to the conditions that—

- (a) the trust deed is not amended in any way which would limit the operation or effect of—
  - (i) the co-operative concept set out in Recital A of the trust deed; and
  - (ii) the prohibition on the trustees selling shares in Tetrad set out in clause 17.03 of the trust deed;
- (b) the trustees for the time being of the Foodstuffs Members' Protection Trust remain the sole controllers of all of the "C" shares; and
- (c) the appointment of a new trustee or reduction in the number of trustees—
  - (i) reflects a bona fide reorganisation of the Foodstuffs Members' Protection Trust or is the result of an event beyond the control of the trustees;
  - (ii) does not have a collateral purpose of enabling a person to increase the person's voting control or the extent to which that person shares in voting control, otherwise than in compliance with the Code; and
  - (iii) but for rule 6(2) of the Code, would not result in any increase in the percentage of voting rights held or controlled by the trustees or the extent to which the trustees share in voting control.

Dated at Auckland this 21st day of December 2023:

[signed]

A E Buchly  
Deputy Chair

### Statement of reasons

This notice applies to acts or omissions occurring on or after 22 January 2024 and expires on the close of 21 January 2029.

Foodstuffs North Island Limited (**Foodstuffs**) is a Code company by virtue of having 50 or more shareholders and 50 or more share parcels and being at least medium-sized. Foodstuffs Members' Protection Trust (the **Foodstuffs Trust**) is a trust established to ensure the continuity of the "co-operative concept" referred to in the trust deed establishing the Foodstuffs Trust (the **trust deed**).

The trustees of the Foodstuffs Trust (the **trustees** or, each individually, **trustee**) indirectly control a voting interest in Foodstuffs through a wholly-owned intermediate holding company, Tetrad Corporation Limited (**Tetrad**), which is the holder of the relevant voting rights.

Foodstuffs has three classes of shares on issue, including, as is relevant for this exemption, the "C" shares (the **"C" shares**) which, inter alia, have the rights set out in clause 6.12 of Foodstuffs' constitution (the **constitution**). The trustees are the controllers of all of the "C" shares, which are held via Tetrad (the holder of the "C" shares).

On one interpretation of the constitution:

- The "C" shares do not carry any voting rights in the ordinary course.
- However, should one of various specified events occur (a **trigger event**) the "C" shares will carry voting rights.
- Following the occurrence of a trigger event, the "C" shares will carry more than 20% of the voting rights in Foodstuffs, albeit that the precise number of voting rights will vary depending on the circumstances. To explain, the number of voting rights which the "C" shares will carry is determined by a formula set out in the constitution (and differs depending on the number of other votes cast and whether the relevant resolution is a special resolution or an ordinary resolution). However, mathematically, the formula will operate to ensure that the "C" shares have sufficient voting rights to pass (or defeat) either an ordinary resolution or a special resolution irrespective of any other votes cast.

Notably, a trigger event can be a matter which the trustees will not be able to control (e.g., the receipt of a takeover notice by Foodstuffs).

There are two categories of issues from a Code perspective:

- the increase of voting rights held by Tetrad and controlled by the trustees from zero to a percentage greater than 20% which occurs on the occurrence of a trigger event; and
- following a trigger event, the increase in voting control of a trustee as a result of any changes in the identity of the trustees.

### Exemptions in relation to occurrence of a trigger event

If a trigger event occurs, on the interpretation of the constitution described above:

- the trustees will increase the percentage of voting rights they control from zero to a percentage which is greater than 20%; and

- Tetrad will increase the percentage of voting rights it holds from zero to a percentage which is greater than 20%.

Accordingly, absent an exemption, a trigger event could place the trustees and Tetrad in breach of rule 6(1) of the Code via the deeming provisions of rule 6(2).

The Takeovers Panel (the **Panel**) has granted exemptions from rule 6(1) of the Takeovers Code (the **Code**) to Tetrad and the trustees in relation to any increase in voting holding or control (as applicable) which might occur as a result of a trigger event.

The conditions of these exemptions are designed to ensure that the underlying purposes of the Code are still fulfilled. Accordingly, the exemptions only apply if the following conditions are met—

- the constitution is not amended in a way which affects the voting rights of any holders or controllers of “C” shares;
- the occurrence of a relevant trigger event was not within the control of the trustees;
- the trustees will be bound to control the relevant voting rights in accordance with the co-operative concept set out in Recital A and clause 17.03 of the trust deed; and
- the trustees for the time being of the Foodstuffs Trust remain the sole controllers of all of the “C” shares in Foodstuffs.

The Panel considered whether these exemptions should be conditional on a shareholder vote as is sometimes included as a condition to exemptions. The Panel determined that such approval was not required on consideration of all of the relevant circumstances, including that:

- the “C” shares effectively operate as instruments to ensure Foodstuffs continues to operate as a co-operative company;
- the terms of the “C” shares are a longstanding provision of the constitution and other shareholders acquired their shares in the knowledge of the rights attached to the “C” shares and the consequences of a trigger event; and
- holding a vote in advance of a trigger event would be problematic as the relevant circumstances would not be known before such an event occurred.

### **Exemptions in relation to changes of trustees**

From time to time, there may be appointments or retirements of, or unforeseen events befalling, trustees.

On the interpretation of the constitution set out above, prior to a trigger event, a change in trustees would not result in a breach of a Code. However, following a trigger event, the trustees would control more than 20% of the voting rights in Foodstuffs, and an appointment of a new trustee would cause that person to increase their voting control as they would join other trustees, directly or indirectly, in the holding or control of voting rights in Foodstuffs, as associates (see rule 6(2)(b) of the Code). Similarly, a reduction in the number of trustees would cause the remaining trustees to increase the extent to which they share in the voting control of Foodstuffs under rule 6(2)(c) of the Code.

The Panel has granted exemptions from rule 6(1) of the Code to every trustee in respect of any increases in that person's voting control in Foodstuffs resulting from—

- the appointment of that person as a trustee; or
- a reduction in the number of trustees.

The conditions of the exemption are designed to ensure that the underlying purposes of the Code are still fulfilled. Accordingly, the exemption applies only if—

- the change of trustees is, or is part of, a bona fide reorganisation of the Foodstuffs Trust, or results from an event beyond the trustees' control;
- the trustees control the relevant voting rights in accordance with the co-operative concept set out in Recital A and clause 17.03 of the trust deed;
- the increase in voting control is not a collateral purpose of the change; and
- but for rule 6(2) of the Code, it would not result in any increase in the trustees' percentage of voting rights or extent to which the trustees share in the voting control in Foodstuffs.

#### **Panel's reasoning as to why the exemptions are appropriate and consistent with the objectives of the Code**

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

- the Foodstuffs shareholding arrangements are unique and reflect the nature of Foodstuffs as a co-operative company. Notably:
  - the terms of the "C" shares are a longstanding provision of the constitution;
  - shareholders in Foodstuffs have acquired shares:
    - on the basis that shareholders' voting control will change if a trigger event occurs; and
    - in a context where some shareholdings do not carry voting rights and others carry voting rights which are not directly related to the number of shares held, such that the operation of the Code's usual restrictions would not be appropriate; and
  - the trustees are not a group of shareholders seeking to acquire control over Foodstuffs – rather, the trustees are required to exercise control over the relevant voting rights subject to the duties and obligations arising under the trust deed or other rules governing the Foodstuffs Trust and at law (including the co-operative concept set out in Recital A of the trust deed);
- the shareholders of Foodstuffs would not be disadvantaged by not having the opportunity to vote on:
  - an increase in voting rights held or controlled in respect of the "C" shares following a trigger event for the reasons set out in the bullet point above, and a vote in advance of a trigger event would be problematic as the relevant circumstances which would result in the trigger event would not be known; and/or

- the appointment of a trustee or a reduction in the number of trustees, because changes in trustees do not increase the voting control of the trustees as a group, and would not have a real effect on those shareholders;
- the exemptions related to matters outside the control of the trustees:
  - in the case of the exemptions relating to a trigger event, the exemptions are conditional on the occurrence of the relevant trigger event being outside the trustees' control; and
  - in the case of the exemptions relating to changes in trustees, the appointment of a new trustee or a reduction in the number of trustees must relate to a reorganisation of the Foodstuffs Trust, or an event outside the control of the trustees; and
- an exemption would encourage the efficient allocation of resources. Absent an exemption, the costs of compliance are not proportionate to the benefits resulting from it.

Date of notification in *Gazette*: 12 January 2024.