

Takeovers Code (Smith & Caughey Holdings Limited) Exemption Notice 2013

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

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Notice

1 Title

This notice is the Takeovers Code (Smith & Caughey Holdings Limited) Exemption Notice 2013.

2 Application

This notice applies to acts or omissions occurring on or after 27 August 2013.

3 Revocation

This notice is revoked on the close of 27 August 2018.

4 Interpretation

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

Act means the Takeovers Act 1993

Caughey Preston Trust Board means The Marianne Caughey Smith-Preston Memorial Rest Homes Trust Board, a trust constituted by a deed dated 30 September 1950 and incorporated under part 2 of the Charitable Trusts Act 1957

Code means the Takeovers Code under the Act

constitution means the constitution of Smith & Caughey

exempted person means a person specified in the third column of the Schedule

multi-stage transfer means a transfer of voting securities between relevant shareholders in accordance with clause 7.25 b. of the constitution that is part of one series of related or linked transfers in respect of those voting securities

notice of an exemption approval meeting means a notice of a meeting of shareholders to approve either or both of the exemptions in clauses 5 and 7

past transfer means a transfer of voting securities set out in the Schedule

future clause 7 transfer means a transfer of voting securities in accordance with clause 7 of the constitution

relevant shareholder means -

- (a) a person who is a descendant, naturally or by virtue of an adoption order, of Andrew Clarke Caughey and Lucy Hannah Caughey, or the spouse of that person; and
- (b) the Caughey Preston Trust Board; and
- (c) a person who is a present or former director or employee of Smith & Caughey or a subsidiary; and
- (d) a person, including a company or the trustees of a trust, who represents the interest or interests, or who holds or will hold voting securities on behalf of or for the benefit, of a person referred to in paragraphs (a) to (c) of this definition

75 % majority resolution means a resolution that is passed at a meeting of the shareholders by -

- (a) a 75% majority of the total voting rights in Smith & Caughey; and
- (b) a 75% majority by number of the shareholders entitled to vote and voting on the resolution at the meeting (whether voting in person, or by proxy, or by postal vote)

shareholder means a shareholder in Smith & Caughey

Smith & Caughey means Smith & Caughey Holdings Limited

spouse means, in respect of a person, the husband or wife of that person, or the civil union partner of that person, or a person who lived together with that person as a couple for more than three years, or a person who was formerly in any such relationship

voting security means a voting security in Smith & Caughey.

- (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 Smith & Caughey.
- (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 the Code for exempted persons in respect of past transfers

Each of the exempted persons is exempted from rule 6(1) of the Code in respect of any increase in that person's voting control that resulted from a past transfer to that person.

6 Condition of exemption in clause 5

The exemption in clause 5 is subject to the condition that each of the past transfers must be retrospectively approved by a 75% majority resolution.

7 Exemption from rule 6(1) of the Code for relevant shareholders in respect of future clause 7 transfers

Each of the relevant shareholders is exempted from rule 6(1) of the Code in respect of any increase in that person's voting control that results from a future clause 7 transfer.

8 Conditions of exemption in clause 7

The exemption in clause 7 is subject to the following conditions:

- (a) it must be approved by a 75% majority resolution; and
- (b) the number of voting securities transferred in reliance on the exemption in any 12 month period must not carry an aggregate of more than 10% of the total voting rights at the commencement of the 12 month period but, in calculating whether that number of voting securities has been exceeded, -
 - (i) a transfer of voting securities to a relevant shareholder effected under rule 7 of the Code, or under any other exemption from the Code, is not to be taken into account; and
 - (ii) in the case of a multi-stage transfer, only the first transfer is to be taken into account and subsequent transfers are not to be taken into account; and
- (c) a shareholder, who-
 - (i) holds or controls less than 20% of the voting securities, must not become the holder or controller of more than 20% of the voting securities; and

- (ii) holds or controls 20% or more of the voting securities, must not increase the percentage of voting securities held or controlled by that shareholder; and
- (d) every annual report by Smith & Caughey must contain, or be accompanied by, -
 - (i) information setting out a summary of the terms and conditions of the exemption in clause 7 and the effect of the exemption; and
 - (ii) a description of each and every transfer that took place during the financial year to which the annual report relates under the exemption in clause 7; and
- (e) clause 7 of the constitution must not be amended or revoked.

9 Conditions in relation to multi-stage transfers

The exemption in clause 7 is subject to the following conditions in relation to multi-stage transfers:

- (a) the multi-stage transfer must be made in accordance with clause 7.25 b. of the constitution; and
- (b) the final transfer of the multi-stage transfer must be completed no later than 4 months after the day on which the first transfer of the multi-stage transfer was completed; and
- (c) the transferee in each transfer that is part of the multi-stage transfer is a relevant shareholder.

10 Additional conditions of exemptions in relation to notice of exemption approval meeting

- (1) Each exemption in clause 5 and in clause 7 is subject to the condition that a proposed resolution of shareholders approving that exemption must be contained in, or accompanied by, the notice of meeting of shareholders that is to consider the resolution sent to the shareholders in advance of the meeting.
- (2) A notice of an exemption approval meeting in relation to the exemption in clause 5 must state or include, in respect of that exemption, -
 - (a) the name of each exempted person; and
 - (b) the details of the past transfers set out in the Schedule; and
 - (c) the number of voting securities held by, and the voting control of, each exempted person immediately prior to the first transfer of voting securities to that exempted person set out in the Schedule; and

- (d) the number of voting securities held by, and the voting control of, each exempted person immediately after the last transfer of voting securities to that exempted person set out in the Schedule; and
 - (e) a statement to the effect that the increase in each exempted person's voting control, if approved, will be permitted as an exception to rule 6 of the Code; and
 - (f) a statement by the directors of Smith & Caughey in relation to the increase in each exempted person's voting control that complies with rule 19 of the Code (prepared as if the reference in that rule to acquisition under rule 7(c) of the Code was the transfer of voting securities that resulted in the exempted person increasing that person's voting control).
- (3) A notice of an exemption approval meeting to consider a resolution approving the exemption in clause 7 must include a statement to the effect that -
- (a) the Panel has granted the exemption on the basis of an application to the Panel that assumed that all of the shareholders are associates for the purposes of the Code; and
 - (b) if the shareholders are associates, transfers between shareholders should be approved by shareholders in accordance with rule 7(c) of the Code because otherwise each transfer will result in the transferee breaching rule 6(1) of the Code; but
 - (c) compliance with rule 7(c) of the Code is, however, not possible because the parties to the transfer and their associates (who are likely to include all of the shareholders of Smith & Caughey) are not permitted by rule 17 of the Code to vote on the resolution to approve a transfer between shareholders; and
 - (d) in these circumstances, the procedure for shareholders to approve transfers between shareholders under rule 7(c) of the Code is unworkable; and
 - (e) the Panel has granted the exemption to address this issue and to enable limited transfers of shares between shareholders in a manner that is consistent with the principles of the Code.
- (4) The form of a notice of an exemption approval meeting must be approved by the Panel.
- (5) A notice of an exemption approval meeting must contain, or be accompanied by, a summary of the terms and conditions of each exemption proposed to be approved at the meeting.
- (6) A notice of an exemption approval meeting must display, in a prominent position, a disclaimer stating that the Panel is -

- (a) neither endorsing nor supporting the accuracy or reliability of the contents of the notice; and
 - (b) in the case of a notice relating to the exemption in clause 5, not implying it has a view on the merits of any transfer of voting securities that resulted in an exempted person increasing that person's voting control.
- (7) At the same time that a notice of an exemption approval meeting is sent to the shareholders, Smith & Caughey must send to the Panel, in electronic form, a copy of the notice, and any document accompanying it that relates to the meeting referred to in the notice.
- (8) At the same time that Smith & Caughey publishes or sends to the shareholders, in respect of a meeting of shareholders to approve an exemption in either or both of clauses 5 and 7, any statement or information that was not required to be published or sent by the Code or this exemption notice, Smith & Caughey must also send to the Panel, in electronic form, a copy of that statement or information.

Dated at Auckland this 27th day of August 2013

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

[Seal]

David Oliver Jones
Chairman

Statement of Reasons

This notice applies to acts or omissions occurring on or after 27 August 2013 and expires on 27 August 2018.

The Takeovers Panel (the **Panel**) has granted exemptions from rule 6(1) of the Takeovers Code (the **Code**) in respect of:

- any increase in voting control in Smith & Caughey Holdings Limited (**Smith & Caughey**) that resulted from the transfers of voting securities set out in the schedule accompanying this notice (the **schedule**) to the persons listed in the third column of the schedule; and
- any future increase in the following persons' voting control in Smith & Caughey that results from a transfer under clause 7 of Smith & Caughey's constitution (**clause 7 of the constitution**):

- (a) any person who is a descendant, naturally or by virtue of any adoption order, of Andrew Clarke Caughey and Lucy Hannah Caughey, or the spouse of such person; and
- (b) the Marianne Caughey Smith-Preston Memorial Rest Homes Trust Board (the **Caughey Preston Trust Board**); and
- (c) any person who is a present or former director or employee of Smith & Caughey or a subsidiary; and
- (d) any person, including the trustees of any trust and any company, who represents the interest or interests, or who holds or will hold voting securities on behalf of or for the benefit, of any person in paragraph (a) to (c) above.

Smith & Caughey is a Code company because it has 50 or more parcels of shares and 50 or more shareholders. Various members of the extended Caughey family and/or trusts established for their benefit hold 51.97% of the shares in Smith & Caughey. Smith & Caughey is essentially a private family company. The Caughey Preston Trust Board holds 48.02% of the shares in Smith & Caughey. The remaining 0.01% of the shares in Smith & Caughey is held by the trustees of the T R Cornelius Family Trust. Smith & Caughey elected to treat all of its shareholders as being possibly associated for the purposes (and only for the purposes) of the exemptions in this notice. The Panel considered the exemption on the assumption that the shareholders were all associates.

Since 1 July 2001, a number of transfers of Smith & Caughey shares took place that may have contravened the Code (the **past transfers**). A list of the past transfers is in the schedule. All share transfers to date have taken place under clause 7 of the constitution and any future transfers will take place under clause 7 of the constitution.

Rule 6(1) of the Code prohibits a person who holds or controls, together with their associates, 20% or more of the voting rights in a Code company from becoming the holder or controller of an increased percentage of voting rights. The Caughey Preston Trust Board, as a 48.02% shareholder, is subject to this restriction. The remaining shareholders (the Caughey family members and their related family trusts), although they each individually hold or control less than 20% of the voting rights in Smith & Caughey, and the T R Cornelius Family Trust, will hold or control 20% or more of the voting rights in Smith & Caughey when aggregated with their associates. Accordingly, the Caughey family members/family trusts and the T R Cornelius Family Trust cannot increase the percentage of the voting rights in Smith & Caughey that they hold or control either.

Rule 7(c) of the Code states that a person may become the holder or controller of an increased percentage of the voting rights by an acquisition of voting securities in the Code company from one or more other persons if the acquisition has been approved by an ordinary resolution of the Code company in accordance with the Code. Rule 17(a) of the Code provides that the persons acquiring and disposing of the securities and their associates must not vote on a resolution for the approval of an acquisition referred to in rule 7(c) of the Code.

As all of the shareholders in Smith & Caughey are being treated as associates, then no share transfer may be approved (or could have been approved, in the case of the past transactions) in accordance with the requirements of rules 7(c) and 17(a) because no shareholder would be able to vote on the resolution. All of the transfers in the schedule were transacted pursuant to clause 7 of the constitution and were not approved in accordance with rule 7(c) of the Code. Accordingly, each of the persons who increased the percentage of voting rights they hold or control in Smith & Caughey as a result of those transfers may have contravened the Code.

If all existing shareholders are associates then any future acquisition of shares by an individual Caughey family member and/or family trust or the T R Cornelius Trust will contravene rule 6(1)(a). In addition, any future acquisition of shares by the Caughey Preston Trust Board, as a shareholder with over 20% of the voting rights in Smith & Caughey, will contravene rule 6(1)(b).

The Panel considered that it was appropriate and consistent with the objectives of the Code to grant the exemption in respect of the past transfers, because-

- any contraventions of the Code that resulted from the historic transactions were inadvertent; and
- an exemption is a mechanism to ratify historic transactions in a manner consistent with the principles of the Code; and
- the conditions of the exemption are broadly consistent with the shareholder approval mechanisms contained in rules 7(c) and 15 of the Code, as the exemption requires certain information in respect of increases in voting control to be disclosed to shareholders and shareholder approval.

The Panel considered that it was appropriate and consistent with the objectives of the Code to grant the exemption in respect of the future transfers, because-

- all of the shareholders in Smith & Caughey (including, for this purpose, the Caughey Preston Trust Board) are members of, or closely associated with, a single extended family; and
- the exemptions are intended to facilitate transfers of shares between family interests; and
- the exemptions are necessary to address an unintended consequence of the Code (being, the inability for shareholders to approve share transfers pursuant to rule 7(c) of the Code if all shareholders are associated); and
- the proposed conditions of the exemptions ensure that the exemptions could not be used to effect a material change of control of Smith & Caughey: and
- Smith & Caughey shareholders have the opportunity to approve the exemptions, by a resolution which requires a very high level of shareholder participation and on the basis of a notice of meeting that must be satisfactory to the Panel.