

**Reprint  
as at 1 October 2011**



**Takeovers Code (Synlait Limited)  
Exemption Notice 2008**

(SR 2008/149)

Takeovers Code (Synlait Limited) Exemption Notice 2008: expired, on  
1 October 2011, by clause 2.

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

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**Note**

Changes authorised by section 17C of the Acts and Regulations Publication Act 1989 have been made in this reprint.

A general outline of these changes is set out in the notes at the end of this reprint, together with other explanatory material about this reprint.

**This notice is administered by the Takeovers Panel.**

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## Notice

### 1 Title

This notice is the Takeovers Code (Synlait Limited) Exemption Notice 2008.

### 2 Expiry

This notice expires on the close of 30 September 2011.

### 3 Application

This notice applies to acts or omissions occurring on or after 1 June 2007.

### 4 Interpretation

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

**Act** means the Takeovers Act 1993

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

**earn-out entitlement** has the meaning given to that term in the sale and purchase agreement

**earn-out period** means the period beginning on 1 June 2006 and ending on 31 May 2011

**June 2007 allotments** means the allotment of 34 ordinary shares in Synlait Limited to each of Penno, Dingle, and Maclean on 20 June 2007

**meeting** means the meeting of shareholders of Synlait Limited that is to be held to consider whether or not to approve, for the purposes of rule 7(d) of the Code, the allotment of voting securities to Penno, Dingle, and Maclean under the earn-out entitlement

**notice of meeting** means the notice of meeting to be sent to shareholders of Synlait Limited in respect of the meeting

**Penno, Dingle, and Maclean** means John William Penno, Ben Macfarlane Dingle, and Juliet Ann Maclean

**sale and purchase agreement** means the agreement dated 27 September 2006 for the sale and purchase of shares in Synlait Investments Limited and Waikokiri Dairies Limited made between Penno, Dingle, and Maclean as vendors and Synlait Limited as purchaser

**stapled unit** means a stapled security comprising 1 ordinary share and 3 redeemable preference shares

**voting security** means a voting security in Synlait Limited.

- (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 the voting rights in Synlait Limited.
- (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**

Each of Penno, Dingle, and Maclean is exempted from rule 6(1) of the Code in respect of any increase in that person's voting control as a result of the June 2007 allotments.

**6 Condition of exemption in clause 5**

The exemption in clause 5 is subject to the condition that, within 30 days after the date on which this notice is notified in the *Gazette*, each of Penno, Dingle, and Maclean disposes of not less than the number of voting securities allotted to each of them under the June 2007 allotments, to persons who are not associates of any of them.

**7 Exemption from rule 7(d) of Code**

Each of Penno, Dingle, and Maclean is exempted from rule 7(d) of the Code in respect of any increase in that person's voting control as a result of the allotment of voting securities under the earn-out entitlement to the extent that the notice of meeting does not comply with rule 16(b) and (d) of the Code.

**8 Exemption from rule 16(b) and (d) of Code**

Synlait Limited is exempted from rule 16(b) and (d) of the Code in respect of the notice of meeting.

**9 Conditions of exemptions in clauses 7 and 8 relating to particulars of voting securities to be contained in notice of meeting**

- (1) The exemptions in clauses 7 and 8 are subject to the condition that the notice of meeting contains, or is accompanied by,—
- (a) the following particulars of the voting securities that may be allotted under the earn-out entitlement:
    - (i) the maximum number of voting securities that could be allotted to each of Penno, Dingle, and Maclean under the earn-out entitlement in respect of each of the 12-month periods ending on 31 May in the years 2008, 2009, 2010, and 2011 (**specified periods**); and
    - (ii) the maximum number of voting securities that could be allotted to each of Penno, Dingle, and Maclean under the earn-out entitlement in respect of each specified period, expressed as a percentage of the total voting securities on issue after those allotments; and
    - (iii) the maximum percentage of the total voting securities on issue that could be held or controlled by each of Penno, Dingle, and Maclean after the allotment of the voting securities under the earn-out entitlement in respect of each specified period; and
    - (iv) the maximum percentage of the total voting securities on issue that could be held or controlled by each of Penno, Dingle, and Maclean and the associates of each of them after the allotment of the voting securities under the earn-out entitlement in respect of each specified period; and
    - (v) the maximum number of voting securities that could be allotted in aggregate to Penno, Dingle, and Maclean under the earn-out entitlement in respect of each specified period; and

- (vi) the maximum number of voting securities that could be allotted in aggregate to Penno, Dingle, and Maclean under the earn-out entitlement in respect of each specified period, expressed as a percentage of the total voting securities on issue after those allotments; and
  - (vii) the maximum percentage of the total voting securities on issue that could be held or controlled in aggregate by Penno, Dingle, and Maclean after the allotment of the voting securities under the earn-out entitlement in respect of each specified period; and
  - (viii) the maximum percentage of the total voting securities on issue that could be held or controlled in aggregate by Penno, Dingle, and Maclean and the associates of each of them after the allotment of the voting securities under the earn-out entitlement in respect of each specified period; and
  - (b) a statement to the effect that the consideration for the voting securities that may be allotted under the earn-out entitlement was provided by Penno, Dingle, and Maclean under the sale and purchase agreement and that no further consideration is payable by Penno, Dingle, and Maclean in respect of the allotments of those voting securities; and
  - (c) a statement to the effect that the value of the voting securities for the purposes of determining the number of voting securities to be allotted under the earn-out entitlement will be calculated in respect of each specified period; and
  - (d) a summary of the procedure for determining the value of voting securities to be allotted under the earn-out entitlement set out in the sale and purchase agreement.
- (2) The numbers and percentages referred to in subclause (1)(a) must be calculated on the basis that—
- (a) the value of the earn-out amount (as defined in the sale and purchase agreement) for each specified period will be \$2,500,000; and

- (b) there is no change in the total number of voting securities on issue between the date of the notice of meeting and the completion of allotments under the earn-out entitlement other than as a result of the allotment of voting securities under the earn-out entitlement; and
- (c) the value of each voting security allotted under the earn-out entitlement is a deemed value of \$1.00, calculated as 25% of the value of a stapled unit.

**10 Further conditions of exemptions in clauses 7 and 8 relating to notice of meeting**

The exemptions in clauses 7 and 8 are subject to the further conditions that—

- (a) the notice of meeting also contains, or is accompanied by,—
  - (i) full particulars of the issue of the voting securities; and
  - (ii) a summary of the terms and conditions of the exemptions granted under this notice to Penno, Dingle, and Maclean; and
- (b) the notice of meeting displays, in a prominent position, a disclaimer stating that by exempting Penno, Dingle, and Maclean from rule 7(d) of the Code, and Synlait Limited from rule 16(b) and (d) of the Code, the Takeovers Panel is—
  - (i) neither endorsing nor supporting the accuracy or reliability of the contents of the notice of meeting; and
  - (ii) not implying it has a view on the merits of the proposed issue of securities in Synlait Limited to Penno, Dingle, and Maclean; and
- (c) the form of the notice of meeting is approved by the Takeovers Panel.

**11 Condition of exemptions in clauses 7 and 8 relating to Synlait Limited's annual report**

The exemptions in clauses 7 and 8 are subject to the further condition that every annual report issued by Synlait Limited after the date of the granting of the exemption until the re-

port relating to the end of the earn-out period includes, in a prominent position and in a form approved by the Takeovers Panel,—

- (a) a summary of the terms of the earn-out entitlement; and
- (b) a summary of the terms and conditions of the exemptions granted under this notice to Penno, Dingle, Maclean, and Synlait Limited; and
- (c) a statement of the following, as at the end of the financial year to which the annual report relates:
  - (i) the number of voting securities allotted to each of Penno, Dingle, and Maclean under the earn-out entitlement; and
  - (ii) the total percentage of voting rights on issue held or controlled by Penno, Dingle, and Maclean and the associates of each of them; and
  - (iii) the maximum percentage of total voting rights that could be held or controlled by each of Penno, Dingle, and Maclean and the associates of each of them on the completion of all allotments of voting securities under the earn-out entitlement (calculated on the basis set out in clause 9(2)).

## **12 Condition of exemption in clause 7 relating to change of control**

The exemption in clause 7 does not apply to an allottee if the allottee increases his or her voting control, except as a result of the allotment of voting securities under the earn-out entitlement as approved by shareholders at the meeting, before the earlier of—

- (a) the day after the allotment of voting securities under the earn-out entitlement in respect of the period ending on 31 May 2011; or
- (b) if shares are not allotted under the earn-out entitlement in respect of the period ending on 31 May 2011, the day after the latest allotment of shares made under the earn-out entitlement.

**13 Exemption in clause 7 does not apply if percentage of voting securities exceeds disclosed maximum**

The exemption in clause 7 does not apply to an allottee in respect of any increase in voting control resulting from an allotment of voting securities under the earn-out entitlement if, immediately after the completion of the allotment under the earn-out entitlement, the total percentage of voting securities held or controlled by the allottee is greater than the maximum percentage of voting securities that could be held or controlled by that person as disclosed in the notice of meeting in accordance with clause 9(1)(a).

Dated at Auckland this 30th day of May 2008.

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

[Seal]

D O Jones,  
Chairperson.

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**Statement of reasons**

This notice applies to acts or omissions occurring on or after 1 June 2007 and expires on 30 September 2011. The Takeovers Panel (the **Panel**) has granted exemptions to—

- each of John William Penno, Ben McFarlane Dingle, and Juliet Ann Maclean (**Penno, Dingle, and Maclean**) from rule 6(1) the Takeovers Code (the **Code**) in respect of any increase in that person's voting control arising from an allotment of

voting securities in Synlait Limited (**Synlait**) on 20 June 2007:

- each of Penno, Dingle, and Maclean from rule 7(d) of the Code in respect of any increase in that person's voting control as a result of the allotment of voting securities in Synlait under an agreement for sale and purchase of shares between Penno, Dingle, and Maclean and Synlait, to the extent that the notice of meeting of shareholders of Synlait to approve the allotment of those securities does not comply with the requirements of rule 16(b) and (d) of the Code:
- Synlait Limited (**Synlait**) from rule 16(b) and (d) of the Code. Synlait is a code company, as that term is defined in the Code, by virtue of its having more than 50 shareholders.

The present form of Synlait and its subsidiaries arises from a complex restructuring of Synlait Investments Limited (**Synlait Investments**), a company owned by Penno, Dingle, and Maclean, and related entities that was principally effected in August and September 2006 (the **restructuring**). In substance, the restructuring involved the amalgamation of the various businesses that were linked to Synlait Investments into a single entity.

As part of the restructuring, Synlait entered into an agreement (the **sale and purchase agreement**) for the purchase of all of the shares in Synlait Investments from Penno, Dingle, and Maclean. The sale and purchase agreement provided for part of the consideration for the sale to be an earn-out entitlement (the **earn-out entitlement**), requiring the issue of further shares in Synlait having a value equal to the earn-out amount, which would reflect 50% of the growth in value of specified assets during the 5-year period from 1 June 2006 to 31 May 2011. The earn-out amount is capped at \$12 million. At the time of entry into the sale and purchase agreement, Synlait had less than 50 shareholders and Penno, Dingle, and Maclean held 62.5% of the shares in Synlait.

There were a number of steps in the restructuring that included, on 20 June 2007, 34 ordinary shares being allotted to each of Penno, Dingle, and Maclean to correct errors that had been made in the calculation of the number of shares to be allotted under the restructuring (the **tidy-up allotments**).

The applicants had not realised that Synlait had become a code company at the time that the tidy-up allotments were made.

Because Penno, Dingle, and Maclean are associates, with a combined holding of more than 20% of the voting rights in Synlait, the tidy-up allotments were made, inadvertently, in breach of rule 6(1)(a) of the Code. No shareholder approval was obtained under rule 7(d) of the Code for those allotments, although shareholder approval was obtained under the Companies Act 1993. Synlait is not able to seek shareholders' approval in terms of rule 7(d) of the Code in respect of the tidy-up allotments because rule 7(d) only allows for shareholder approval to be obtained prior to allotments being made.

In addition, any allotment of shares to Penno, Dingle, and Maclean under the earn-out entitlement would result in their breaching rule 6(1)(a) of the Code unless the allotment is approved by ordinary resolution of the code company in accordance with rule 7(d) of the Code.

Although Synlait is able to seek shareholders' approval, in terms of rule 7(d), for any increase in Penno, Dingle, and Macleans' voting rights that results from the allotment of shares under the earn-out entitlement, Synlait is unable to specify the information required by rule 16(b) and (d) of the Code in a notice of meeting in respect of the 12-month periods ending on 31 May in the years 2008 to 2011.

### **Exemption from rule 6(1) of Code**

The Panel considers that it is appropriate and consistent with the objectives of the Code to grant exemptions to each of Penno, Dingle, and Maclean from rule 6(1) of the Code in relation to the tidy-up allotments that resulted in each of them increasing their voting control in breach of that rule because—

- the Code contains certain mechanisms that allow shareholders to approve an increase in a person's voting control that would otherwise breach the fundamental rule. The exempted persons cannot rely on these mechanisms, as the transactions are historical in nature and the Code mechanisms do not provide for retrospective approval by shareholders; and
- it is a condition of the exemption that, within 30 days of the date of notification of this notice in the *Gazette*, Penno, Dingle, and Maclean dispose of, to persons not associated with any of

them, the voting securities acquired in breach of the Code as a result of the tidy-up allotments; and

- the apparent breaches of the Code were inadvertent.

### **Exemption from rules 7(d) and 16(b) and (d) of Code**

The Panel considers that it is appropriate and consistent with the objectives of the Code to grant exemptions to Penno, Dingle, and Maclean from rule 7(d) of the Code and Synlait from rule 16(b) and (d) of the Code because—

- it is impossible for the actual number of voting securities to be allotted and the relevant percentages required by rule 16(b) to be stated in the notice of meeting, as these numbers and percentages are dependent on the value of Synlait's shares at the time of the allotments and the extent to which the earn-out entitlement shares are allotted, which in turn depends on whether the performance of Synlait and the value of certain of its assets meet the performance criteria that trigger the allotments of shares under the earn-out entitlement:
- all non-associated shareholders will have an opportunity to vote on the potential allotments of voting securities to Penno, Dingle, and Maclean under the earn-out entitlement:
- if the non-associated shareholders approve the potential maximum allotment of voting securities to Penno, Dingle, and Maclean, then, by implication, the shareholders also approve any lesser percentage of voting rights that may be acquired as a result of the allotment of voting securities under the earn-out entitlement.

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**Notes****1 General**

This is a reprint of the Takeovers Code (Synlait Limited) Exemption Notice 2008. The reprint incorporates all the amendments to the notice as at 1 October 2011, as specified in the list of amendments at the end of these notes.

Relevant provisions of any amending enactments that contain transitional, savings, or application provisions that cannot be compiled in the reprint are also included, after the principal enactment, in chronological order. For more information, see <http://www.pco.parliament.govt.nz/reprints/>.

**2 Status of reprints**

Under section 16D of the Acts and Regulations Publication Act 1989, reprints are presumed to correctly state, as at the date of the reprint, the law enacted by the principal enactment and by the amendments to that enactment. This presumption applies even though editorial changes authorised by section 17C of the Acts and Regulations Publication Act 1989 have been made in the reprint.

This presumption may be rebutted by producing the official volumes of statutes or statutory regulations in which the principal enactment and its amendments are contained.

**3 How reprints are prepared**

A number of editorial conventions are followed in the preparation of reprints. For example, the enacting words are not included in Acts, and provisions that are repealed or revoked

are omitted. For a detailed list of the editorial conventions, see <http://www.pco.parliament.govt.nz/editorial-conventions/> or Part 8 of the *Tables of New Zealand Acts and Ordinances and Statutory Regulations and Deemed Regulations in Force*.

#### **4 Changes made under section 17C of the Acts and Regulations Publication Act 1989**

Section 17C of the Acts and Regulations Publication Act 1989 authorises the making of editorial changes in a reprint as set out in sections 17D and 17E of that Act so that, to the extent permitted, the format and style of the reprinted enactment is consistent with current legislative drafting practice. Changes that would alter the effect of the legislation are not permitted. A new format of legislation was introduced on 1 January 2000. Changes to legislative drafting style have also been made since 1997, and are ongoing. To the extent permitted by section 17C of the Acts and Regulations Publication Act 1989, all legislation reprinted after 1 January 2000 is in the new format for legislation and reflects current drafting practice at the time of the reprint.

In outline, the editorial changes made in reprints under the authority of section 17C of the Acts and Regulations Publication Act 1989 are set out below, and they have been applied, where relevant, in the preparation of this reprint:

- omission of unnecessary referential words (such as “of this section” and “of this Act”)
- typeface and type size (Times Roman, generally in 11.5 point)
- layout of provisions, including:
  - indentation
  - position of section headings (eg, the number and heading now appear above the section)
- format of definitions (eg, the defined term now appears in bold type, without quotation marks)
- format of dates (eg, a date formerly expressed as “the 1st day of January 1999” is now expressed as “1 January 1999”)

- position of the date of assent (it now appears on the front page of each Act)
- punctuation (eg, colons are not used after definitions)
- Parts numbered with roman numerals are replaced with arabic numerals, and all cross-references are changed accordingly
- case and appearance of letters and words, including:
  - format of headings (eg, headings where each word formerly appeared with an initial capital letter followed by small capital letters are amended so that the heading appears in bold, with only the first word (and any proper nouns) appearing with an initial capital letter)
  - small capital letters in section and subsection references are now capital letters
- schedules are renumbered (eg, Schedule 1 replaces First Schedule), and all cross-references are changed accordingly
- running heads (the information that appears at the top of each page)
- format of two-column schedules of consequential amendments, and schedules of repeals (eg, they are rearranged into alphabetical order, rather than chronological).

**5** *List of amendments incorporated in this reprint  
(most recent first)*

Takeovers Code (Synlait Limited) Exemption Notice 2008 (SR 2008/149):  
clause 2

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