

## **Takeovers Code (Smith & Caughey Holdings Limited) Exemption Notice 2024**

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 (Smith & Caughey Holdings Limited) Exemption Notice 2024.

#### **2 Application**

- (1) The exemption in clause 5 applies to acts or omissions occurring on and between 16 November 2023 and 21 November 2023.
- (2) The exemption in clause 7 applies to acts or omissions occurring on or after 13 February 2024.

#### **3 Expiry**

This notice expires on the close of 13 February 2029.

#### 4 Interpretation

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

**Act** means the Takeovers Act 1993

**clause 7 transfer** means a transfer of voting securities in accordance with clause 7 of the Company's constitution

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

**Company** means Smith & Caughey Holdings Limited

**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 7.25b. of the Company's constitution that is part of 1 series of related or linked transfers in respect of those voting securities

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

**relevant shareholder** means—

- (a) a person (**A**) who is a descendant of Andrew Clarke Caughey and Lucy Hannah Caughey, or who is A's present or former spouse or partner; and
- (b) 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; and
- (c) a person who is a present or former director or employee of the Company or a subsidiary of the Company; and
- (d) a person, including a company or the trustees of a trust, who represents the interests, or who holds or will hold voting securities on behalf, of a person referred to in paragraphs (a) to (c)

**shareholder** means a shareholder in the Company

**spouse or partner**, in relation to a person (**A**), means—

- (a) A's husband or wife; or
- (b) A's civil union partner; or
- (c) A's de facto partner within the meaning of the Property (Relationships) Act 1976

**voting security** means a voting security in the Company

**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 the Company; 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).
- (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 the Company.
  - (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 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 Conditions of exemption in clause 5**

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

- (1) each of the past transfers is retrospectively approved by a 75% majority resolution which is passed on or before 30 April 2024; and
- (2) the notice of meeting containing the proposed resolution to approve the past transfers:
  - (a) states the following particulars:
    - (i) the name of each exempted person; and
    - (ii) the details of the past transfers; and
    - (iii) 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
    - (iv) 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
  - (b) contains, or is accompanied by, the following:
    - (i) a summary of the terms and conditions of the exemption in clause 5; and
    - (ii) a statement to the effect that the increase in each exempted person's voting control, if approved, will be permitted as an exemption to rule 6 of the Code; and

- (iii) a statement by the directors of the Company 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); and
- (3) the form of the notice of meeting is approved by the Panel; and
- (4) the notice of meeting displays, in a prominent position, a disclaimer stating that, by granting the exemption contained in clause 5, the Panel is—
  - (a) neither endorsing nor supporting the accuracy or reliability of the contents of the notice of meeting or the accompanying information; and
  - (b) 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; and
- (5) at the same time that the notice of meeting is sent to the shareholders, the Company sends 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; and
- (6) at the same time that the Company publishes or sends to the shareholders, in respect of the meeting referred to in the notice of meeting, any statement or information that was not required to be published or sent by the Code or this notice, the Company also sends to the Panel, in electronic form, a copy of that statement or information.

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

- (1) Every relevant shareholder who increases voting control as a result of a clause 7 transfer is exempted from rule 6(1) of the Code in respect of that increase in voting control.
- (2) The exemption is subject to the conditions in clause 8 and, in the case of a multi-stage transfer, the additional conditions in clause 9.

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

The exemption in clause 7 is subject to the condition that—

- (a) the number of voting securities transferred in reliance on the exemption in any 12-month period does not carry an aggregate of more than 10% of the total voting rights at the commencement of the 12-month period; and
- (b) in calculating whether the number of voting securities to which paragraph (a) applies 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 included; and
- (ii) in the case of a multi-stage transfer, only the first transfer of voting securities to a relevant shareholder is included; and
- (c) a shareholder who holds or controls less than 20% of the voting securities does not become the holder or controller of more than 20% of the voting securities; and
- (d) a shareholder who holds or controls 20% or more of the voting securities does not increase the percentage of voting securities held or controlled by that shareholder; and
- (e) every annual report of the Company 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 every transfer under the exemption in clause 7 that took place during the financial year to which the Company's annual report relates; and
- (d) clause 7 of the Company's constitution must not be amended or revoked prior to the expiry of this notice.

## **9 Additional conditions in relation to multi-stage transfers**

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

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

Dated at Auckland this 13<sup>th</sup> day of February 2024

[signed]

C G Blanchard  
Chair

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### Statement of Reasons

The exemption in clause 5 of this notice applies to acts or omissions occurring on and between 16 November 2023 and 21 November 2023. The exemption in clause 7 of this notice applies to acts or omissions occurring on or after 13 February 2024 and expires on the close of 13 February 2029.

The Takeovers Panel (**Panel**) has granted:

- (a) a retrospective exemption from rule 6(1) of the Takeovers Code (**Code**) in respect of any increase in voting control in Smith & Caughey Holdings Limited (**Company**) 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
- (b) an exemption from rule 6(1) of the Code in respect of any future increase in the following persons' voting control in the Company that results from a transfer in accordance with clause 7 of the Company's constitution (**clause 7 transfer**):
  - (i) a person (**A**) who is a descendant of Andrew Clarke Caughey and Lucy Hannah Caughey, or A's present or former spouse or partner; and
  - (ii) the Marianne Caughey Smith-Preston Memorial Rest Homes Trust Board (**Trust Board**); and
  - (iii) a person who is a present or former director or employee of the Company or a subsidiary of the Company; and
  - (iv) a person, including a company or the trustees of a trust, who represents the interests, or who holds or will hold voting securities on behalf of or for the benefit, of a person referred to in paragraph (a) to (c).

The Company, which is a code company under rule 3(1)(c) of the Code, is essentially a private family company. Various members of the extended Caughey family and/or trusts established for their benefit hold 51.97% of the shares in the Company. The Trust Board holds 48.02% of the shares in the Company. T R Cornelius holds the remaining 0.01% of Company shares.

The Company applied for these exemptions on the basis that all of its shareholders are or may be associates for the purposes of the Code. The Panel considered the exemptions on this basis.

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 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 the Company, and T R Cornelius, will hold or control 20% or more of the voting rights in the Company when aggregated with their associates. Accordingly, the Caughey family members/family trusts and T R Cornelius cannot increase the percentage of the voting rights in the Company that they hold or control.

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 a 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. However, rule 17(1) 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. If all of the shareholders in the Company are associates, no share transfer may be approved in accordance with the requirements of rules 7(c) and 17(1) because no shareholder would be able to vote on the resolution.

Since the expiry of the last exemption from rule 6(1) granted by the Panel in the Takeovers Code (Smith & Caughey Limited) Exemption Notice 2018 (**2018 exemption**), a small number of transfers of the Company's shares have taken place as a result of the winding up of a trust, under which shares in the Company were transferred to the beneficiaries of that trust as part of a final capital distribution (the **relevant transfers**). As the relevant transfers took place after the expiry of the 2018 exemption, they may, for the reasons set out above, have contravened the Code. A list of the relevant transfers is in the schedule.

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

The Panel considered that it was appropriate and consistent with the objectives of the Code to grant the exemption in respect of the relevant transfers for the following reasons (in summary)—

- (a) Any contraventions of the Code that resulted from those transfers were inadvertent.
- (b) An exemption is a mechanism to ratify those transfers in a manner consistent with the principles of the Code. Importantly, unless such ratification occurs within a three month period, the exemption will be of no effect and the Panel will then have the ability to consider what enforcement action it should take.
- (c) The conditions of the exemption ensure that shareholder approval is sought in a manner which is broadly consistent with the shareholder approval requirements contained in rules 7(c) and 15 of the Code. In particular:
  - (i) The exemption is conditional upon receiving shareholder approval by way of a resolution approved by a 75% majority of the total voting rights in Smith & Caughey and a 75% majority by number of those shareholders entitled to vote and voting on the resolution at the meeting. The Panel considers that this is an appropriate standard to apply in lieu of the normal requirement for an ordinary resolution with the relevant parties and their associates being prohibited from voting – here, the issue is caused by a difficulty identifying associates, so the Panel considers imposing a higher threshold (without voting restrictions) is appropriate in all the relevant circumstances.
  - (ii) The conditions require certain information in respect of the increases in voting control to be disclosed to shareholders in the notice of meeting which is broadly equivalent to what the Code requires.

- (iii) The form of the notice of meeting must be approved by the Panel.
- (d) There is precedent for the exemption.

The Panel considered that it was appropriate and consistent with the objectives of the Code to grant the exemption in respect of a clause 7 transfer because—

- (a) Every shareholder in the Company (including, for this purpose, the Trust Board) is a member of, or is closely associated with, a single extended family. As a result, all of the shareholders of the Company are or may be associated.
- (b) The exemption is necessary to address an unintended consequence of the Code, which effectively prevents the Company's shareholders approving share transfers under rule 7(c) of the Code if they are associated.
- (c) The proposed conditions of the exemptions ensure that the exemption could not be used to effect a material change of control of the Company.
- (d) The exemption is intended to facilitate transfers of shares between family interests.
- (e) There is precedent for the exemption.
- (f) Given the above reasons, the Panel considers granting the exemption in respect of a clause 7 transfer maintains a proper relation between the costs of compliance with the Code and the benefits resulting from it.

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Date of Notification in the *Gazette*: 19 February 2024

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## SCHEDULE

Date of Transfer	Name(s) of Transferor	Name of Transferee	Number of Voting Securities
21 November 2023	Margaret Anne Goldstein, Robert Hugh Poole and Hamish Cameron Taylor as trustees of the Illahee Trust	Robert Hugh Poole	491,668
21 November 2023	Margaret Anne Goldstein, Robert Hugh Poole and Hamish Cameron Taylor as trustees of the Illahee Trust	Margaret Anne Goldstein	491,668
16 November 2023	Margaret Anne Goldstein, Robert Hugh Poole and Hamish Cameron Taylor as trustees of the Illahee Trust	Judith Jean Holland	491,668
21 November 2023	Margaret Anne Goldstein, Robert Hugh Poole and Hamish Cameron Taylor as trustees of the Illahee Trust	Sarah Kathleen Gerard	491,669
16 November 2023	Margaret Anne Goldstein, Robert Hugh Poole and Hamish Cameron Taylor as trustees of the Illahee Trust	Jennifer Helen Sefton	491,668
20 November 2023	Margaret Anne Goldstein, Robert Hugh Poole and Hamish Cameron Taylor as trustees of the Illahee Trust	Jane Pauline Sargent	491,668