



**In the matter of National Foods Limited
[2005] ATP 8**

Catchwords:

agreement contributing to need to give substantial holding notice – association – confidentiality – content of bidder's statement – failure to disclose to the market – material omission – Panel procedures – power or control – relevant interest – undertaking to Panel – voting power – withdrawal rights – undertakings to lodge a supplementary bidder's statement – [undertakings to release a substantial holding notice (without any agreement attached)]

Corporations Act 2001 (Cth), section 636(1)(c), 643, 671B, Part 6C.1

LV Living Limited [2005] ATP 5

These are the Panel's reasons for its decision in response to an application by San Miguel concerning the entry into, and disclosure (or lack) of, a Joint Venture agreement between Fonterra (a rival bidder for National Foods) and Sodima and Yoplait. The Panel found that Fonterra had not made adequate disclosure concerning the Joint Venture. Fonterra undertook to make further disclosure concerning the proposed Joint Venture. In regard to the second part of the application, the Panel found that the Joint Venture agreement had caused Yoplait and Sodima to become associates of Fonterra and that this required Yoplait and Sodima to give substantial holding notices. Yoplait and Sodima undertook (without admission) to give substantial holding notices once they received relief from the requirement to attach the Fonterra/Yoplait Deed to their substantial holding notice. However, after San Miguel won the bidding for National Foods, the Panel accepted that in light of the disclosures to the market that had been made as a consequence of these proceedings and the fact that the Joint Venture would not be proceeding, it was no longer in the public interest to require Yoplait and Sodima to give substantial holding notices nor to attach a copy of the deed setting out the Joint Venture agreement.

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel from San Miguel Foods Australia Holdings Pty Ltd (**San Miguel**) on 7 March 2005 in relation to the affairs of National Foods Limited (**National Foods**).

THE PANEL

2. The President of the Panel appointed Kevin McCann (sitting President), Mark Paganin (sitting Deputy President) and Michael Ashforth as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.

SUMMARY

3. The Application concerned a proposed joint venture (the **Joint Venture**) which Fonterra Foods Pty Ltd (**Fonterra**¹), Yoplait SAS (**Yoplait**) and Sodima SAS

¹ Fonterra Co-operative Group Ltd's subsidiary Fonterra Foods Pty Ltd is the entity which actually made the takeover bid. For convenience, both Fonterra Foods and Fonterra Cooperative are both referred to simply as Fonterra, unless the context requires the individual entity to be identified.

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(Sodima) announced on 2 March 2005. The Joint Venture may have been implemented if Fonterra acquired 100% of the shares in National Foods.

4. San Miguel and Fonterra were rival bidders for National Foods. The Application alleged that unacceptable circumstances existed in relation to the affairs of National Foods in that:
 - Fonterra had not made adequate disclosure of the terms of the Joint Venture and its intentions in light of the Joint Venture; and
 - Sodima and Yoplait had not lodged substantial holding notices which they were required to lodge because in entering the Joint Venture they had become associates of Fonterra or had a relevant interest in shares owned by Fonterra;
 - Sodima and Yoplait consequently had not attached copies of an agreement between themselves and Fonterra in connection with the Joint Venture (the **Fonterra/Yoplait Deed**) to any substantial holding notice.
5. In relation to the first part of the Application, the Panel found that unacceptable circumstances existed because of inadequate disclosure by Fonterra concerning the Joint Venture as it related to Fonterra's intentions for National Foods' fixed assets, employees and businesses. The Panel accepted undertakings from Fonterra to make further disclosure, concerning the Joint Venture and Fonterra's intentions, to National Foods shareholders in a supplementary bidder's statement.
6. In relation to the second part of the Application, the Panel found that entry into the Joint Venture with Fonterra caused Yoplait and Sodima to become associates of Fonterra. In turn, this required them to give substantial holding notices and to attach a copy of the Fonterra/Yoplait Deed to their substantial holding notices.
7. Initially, Yoplait and Sodima gave the Panel undertakings that, in response to the Panel's findings, they would give a substantial holding notice. However, the undertaking was subject to their gaining an exemption from the requirement to attach the Fonterra/Yoplait Deed to their substantial holding notice (either from the Australian Securities and Investments Commission (**ASIC**) or the Panel on review of any refusal by ASIC)². If Yoplait and Sodima failed to gain such an exemption the Panel reserved the right to continue its proceedings on the basis of Yoplait and Sodima not having given substantial holding notices concerning their voting power in the 19% of National Foods held by Fonterra.
8. Pending the outcome of the application for relief, the Panel did not believe it was necessary to require Sodima and Yoplait to release a copy of the Fonterra/Yoplait Deed. It considered that Sodima and Yoplait would not cause unacceptable circumstances to result if they did not publish the Deed. This was because (amongst other things) all information about the Deed which was material to National Foods shareholders had been disclosed in a supplementary bidder's statement.
9. Prior to a decision being reached on the exemption, San Miguel won the bidding for National Foods and on 11 April 2005 Fonterra announced it would not continue its bid for National Foods and would accept San Miguel's offer, once unconditional.

² The undertakings were given without admission.

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On that basis, San Miguel sought the Panel's consent to withdraw the remaining parts of the Application and Yoplait and Sodima sought the Panel's consent to withdraw their undertakings.

10. The Panel decided that it was not in the public interest to continue with the Proceedings, nor to require Yoplait and Sodima to give a substantial holding notice. The Panel therefore declined San Miguel's original application on the basis that Fonterra's undertakings and disclosure had remedied any unacceptable circumstances in relation to the first part of the Application and the additional disclosures made, and the fact of the Joint Venture not proceeding, removed any material public interest in substantial holding notice disclosure by Yoplait and Sodima in the second part of the Application. It also consented to Yoplait and Sodima withdrawing their undertakings.

APPLICATION & PROCESS

Background

Fonterra's bid

11. On 28 October 2004, Fonterra announced a conditional takeover bid for National Foods at \$5.45 per share (\$5.35 after the National Foods' dividend of 10 cents per share).
12. On 4 November 2004, Fonterra lodged the bidder's statement in relation to Fonterra's bid. Subsequently, Fonterra lodged supplementary bidder's statements on 15 November 2004, 29 November 2004, 2 March 2005 and 11 March 2005. Fonterra's bid was conditional, among other things, on the release or waiver of any rights to terminate material contracts with National Foods in the event of Fonterra acquiring shares in National Foods.
13. On 6 December 2004, National Foods lodged its target's statement in response to Fonterra's bid. The target's statement disclosed that Sodima (a company controlled by Yoplait) has the right to terminate certain agreements signed in 1998 and 2000 between Sodima and companies controlled by National Foods (under which those companies are granted an exclusive licence to produce, distribute and sell Yoplait products in Australia and New Zealand) if a competitor of Sodima's Yoplait products anywhere in the world acquires control of National Foods without Sodima's consent (**Sodima's Termination Rights**). On the evidence provided, it appears Fonterra was considered by National Foods to be a 'competitor' and therefore required Sodima's consent in order to avoid triggering Sodima's Termination Rights, while San Miguel was not considered by National Foods to be a 'competitor'.

San Miguel's bid

14. On 30 December 2004, San Miguel Corporation and National Foods jointly announced that San Miguel Corporation intended to make a conditional takeover offer for all of the issued shares in National Foods at \$6.00 cash per share (\$5.90 after the National Foods' dividend of 10 cents per share). The takeover bid is being conducted through San Miguel, a wholly owned subsidiary of San Miguel Corporation. The National Foods board unanimously recommended that

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shareholders accept San Miguel's bid in the absence of a superior proposal. The bidder's statement in relation to San Miguel's bid was lodged on 24 January 2005. The offer period under San Miguel's bid opened on 1 February 2005. San Miguel had, at the time of the application, received acceptances for just over 1% of National Foods shares.

National Foods' interim dividend

15. On 30 January 2005, National Foods paid an interim dividend of \$0.10 per share. The effect of that interim dividend was to reduce the offer consideration payable under the bids of each of San Miguel and Fonterra by \$0.10 per share.

Fonterra's 2 March announcement

16. On 2 March 2005, Fonterra made an ASX announcement (the **2 March Announcement**) that Fonterra proposed to increase the consideration offered under its takeover bid for National Foods to \$6.00 per share. Fonterra's bid will be increased to \$6.20 per share if Fonterra has a relevant interest in at least 90% of the shares in National Foods. Both of these amounts are "ex" the interim dividend paid by National Foods on 31 January 2005. Fonterra also announced that it would waive all of the conditions to Fonterra's bid other than the 50% minimum acceptance condition.
17. Fonterra also announced that Fonterra's bid would include an option for National Foods shareholders to accept redeemable preference shares in lieu of cash (so that National Foods shareholders could receive entirely cash, entirely redeemable preference shares or a mixture of cash and redeemable preference shares).
18. The 2 March Announcement contained the following statements in relation to a waiver of the Sodima Termination Rights and possible entry into a joint venture:

"Fonterra also confirmed that Yoplait has agreed to continue to support National Foods under Fonterra ownership. Fonterra will waive all of the conditions of its offer, other than the 50% minimum acceptance condition."

"If Fonterra ends up owning 100% of National Foods, Mr Ferrier [Fonterra's CEO] said that Fonterra and Yoplait may establish a joint venture in Australia and New Zealand, but that decision would be taken at a later date".
19. On 2 March 2005, National Foods made an ASX announcement that the Board of National Foods unanimously recommended that National Foods shareholders accept Fonterra's revised bid in the absence of a superior proposal.
20. National Foods advised the Panel that prior to recommending Fonterra's revised bid, the National Foods board sought and obtained some information about the arrangements between Sodima/Yoplait and Fonterra and, on the basis of that information, assessed how those arrangements might affect minority shareholders in National Foods if Fonterra acquired control, but not 100%, of National Foods. National Foods advised that the information provided by Fonterra included confirmation that the waiver of Sodima's termination rights referred to below was irrevocable. However, full details of the Fonterra/Yoplait Deed were not released by Fonterra to National Foods.

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21. Fonterra's third supplementary bidder's statement (the **Third Supplementary Bidder's Statement**) which accompanied the 2 March Announcement contained the following statements in relation to the waiver of the Sodima Termination Rights:
- "Sodima and Yoplait have now consented to any acquisition by [Fonterra Foods] of shares in National Foods and waived any rights which may accrue as a result of that acquisition including the right to terminate the manufacturing, distribution and franchise agreements for Yoplait products in Australia and New Zealand."
22. The Third Supplementary Bidder's Statement also referred to the proposed Joint Venture in the following terms:
- "The schedule to this Third Supplementary Bidder's Statement contains disclosure in relation to ... an agreement which has been reached with Yoplait SAS and Sodima SAS (a company controlled by Yoplait SAS) regarding the franchise, distribution and manufacturing agreements relating to the Yoplait brand".
23. The schedule to the Third Supplementary Bidder's Statement referred to the proposed Joint Venture in the following terms:
- "Fonterra, Yoplait SAS and Sodima SAS have agreed that, if Fonterra is able to acquire all of the shares in National Foods, then Sodima SAS and National Foods may create a joint venture company for the production and sale of yoghurt, Petit Suisse, fromage frais, fresh dairy desserts and other similar products in Australia and New Zealand."
24. The parts of National Foods' business to be included in the contemplated Joint Venture i.e. National Foods' **Fresh Cultured Products and Fresh Dairy Desserts** businesses, comprise a material part – but not all– of National Foods' business.

San Miguel's increased offer and Fonterra's response

25. On 6 April 2005, San Miguel announced an increase in its offer to \$6.40 per share (ex-dividend and conditional only on 50% minimum acceptance). On 11 April 2005, Fonterra announced that it would not increase or extend its offer and, that it intended to accept the San Miguel offer if it was unconditional.
26. On the basis of Fonterra's response, San Miguel then wrote to the Panel seeking the Panel's consent to withdraw the Application. San Miguel also noted that it would not object to:
- (a) Yoplait and Sodima seeking the Panel's consent to withdraw their undertakings; or
 - (b) Yoplait and Sodima seeking the Panel's consent to withdraw their application in the National Foods 02 proceedings.

Interests in National Foods

27. Prior to announcing its takeover bid, Fonterra Investments Limited (**Fonterra Investments**) (a wholly owned subsidiary of Fonterra) was the beneficial owner of 19.03% of the shares in National Foods. Since then, no member of the Fonterra

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group of companies announced a movement of 1% or more in its voting power in National Foods.

28. During the Proceeding, Yoplait and Sodima represented to the Panel that they did not have a relevant interest in any shares in National Foods.

Declaration and orders sought

29. San Miguel applied to the Panel for a declaration under section 657A of the Corporations Act³ to the effect that the following circumstances (or one or more of the following circumstances) constituted unacceptable circumstances in relation to the affairs of National Foods:

- (a) Fonterra's failure to give National Foods shareholders adequate information in the Third Supplementary Bidder's Statement in relation to:
- (i) the change in its intentions in relation to the continuation of the business of National Foods, the redeployment of National Foods' fixed assets or the future employment of any present employees of National Foods; and
 - (ii) the detailed terms of arrangements connected with the Joint Venture (the **Joint Venture Connected Arrangements**) and a summary of any unwritten terms of the proposed Joint Venture Connected Arrangements between Sodima and National Foods,

in that:

- (iii) acquisition of control over National Foods shares was not occurring in an efficient, competitive and informed market; and
 - (iv) National Foods shareholders had not been provided with sufficient information to assess the value of their National Foods shares, being information as to the implied value that Yoplait and Sodima place upon a material part of National Foods' business through the terms of the Joint Venture (including the amount of any payment or other consideration received for agreeing to waive Sodima's Termination Rights) and, hence, did not have enough information to assess the merits of Fonterra's bid; and
- (b) Sodima's and Yoplait's failure to lodge a notice of initial substantial holding as required under Part 6C. 1 of the Act in relation to their voting power in National Foods and association with Fonterra, including disclosing:
- (i) a copy of the Joint Venture Connected Arrangements (where the arrangements had been reduced to writing); or
 - (ii) a statement giving full and accurate details of any Joint Venture Connected Arrangements (where they had not been reduced to writing) and a summary of any unwritten terms of the proposed Joint Venture Connected Arrangements.

30. San Miguel also sought final orders to the effect that:

³ All section references are to sections in the Corporations Act unless otherwise specified.

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- (a) Fonterra must, as soon as practicable, issue a supplementary bidder's statement under section 643 (in a form acceptable to the Panel) to:
 - (i) update its intentions in relation to the continuation of National Foods' business, any major changes to be made to National Foods' business and the future employment of National Foods' employees having regard to the Joint Venture Connected Arrangements; and
 - (ii) disclose the detailed terms of the Joint Venture Connected Arrangements and a summary of any unwritten terms of the Joint Venture;
- (b) Fonterra must permit any shareholder in National Foods who accepts or has accepted Fonterra's offer between the period starting on 2 March 2005 and ending on the date on which Fonterra provides the information referred to in paragraph (a) to withdraw their acceptance within a period of 14 days after disclosure of all the information referred to in paragraph (a); and
- (c) Sodima and Yoplait must, as soon as practicable, give a notice of initial substantial holding as required under Part 6C. 1 of the Act in relation to their voting power in National Foods and association with Fonterra, including disclosing:
 - (i) a copy of the Joint Venture Connected Arrangements (where the arrangements had been reduced to writing); or
 - (ii) a statement giving full and accurate details of any Joint Venture Connected Arrangements (where they had not been reduced to writing) and a summary of any unwritten terms of the proposed Joint Venture Connected Arrangements.

Process

31. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
32. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

DISCUSSION

Dealing with commercially sensitive material between contesting parties

33. San Miguel submitted that it had made its application because the acquisition for control of National Foods was not taking place in an efficient, competitive and informed market. However, the Panel was concerned at the prospect that San Miguel's application might result in the publication of commercially sensitive information (in the form of the Joint Venture Connected Arrangements) with tactical effects during the takeover bid. Similarly, disclosure to San Miguel of a copy of the Joint Venture Connected Arrangements during the course of the Panel proceedings might have unintended commercial consequences if the Panel ultimately determined that the full terms of the Joint Venture Connected Arrangements were not required to be disclosed to the market.
34. At the same time, the Panel recognised that it would be essential for it to have reliable information concerning the detail of the Joint Venture Connected

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Arrangements in order for it to consider San Miguel's application. In particular, the Panel would need detail concerning those aspects of the Joint Venture Connected Arrangements pertaining to whether or not an association existed between Fonterra (on the one hand) and Yoplait or Sodima (on the other hand).

35. The Panel was also concerned that the requirements of natural justice should be met in that San Miguel (and National Foods) should have the opportunity to comment on the aspects of the Joint Venture Connected Arrangements which were relevant to the proceedings and to National Foods shareholders.
36. Taking all of those considerations into account, the Panel adopted the following procedure:
 - (a) the Panel sought submissions on the issues set out above;
 - (b) the Panel accepted submissions to the effect that the only relevant document was the Fonterra/Yoplait Deed;
 - (c) two members of the Panel Executive reviewed a copy of the Fonterra/Yoplait Deed with particularly sensitive information blacked out and a summary of the Fonterra/Yoplait Deed (the **Summary**) prepared by Fonterra. The Summary addressed matters relating to the questions whether Fonterra was an associate of Yoplait or Sodima, whether Yoplait or Sodima had a relevant interest in Fonterra Investments' shares in National Foods and whether Fonterra had made appropriate disclosure of the Joint Venture or its intentions in light of the Joint Venture;
 - (d) the Panel members considered a list of issues prepared by San Miguel which San Miguel submitted that the Summary should address;
 - (e) the two members of the Panel Executive reported to the Panel on whether the Summary represented an accurate and complete summary of the Fonterra/Yoplait Deed in relation to the issues which the Panel considered relevant; and
 - (e) on receiving a positive report from the Panel Executive, the Panel directed that the Summary be provided to it and all parties to the Proceeding.
37. The parties then made submissions and rebuttal submissions as would occur in normal proceedings, and the Panel reached its decision, on the basis of those submissions and the Summary.

The Summary

38. So far as relevant, the Summary disclosed that:
 - (a) Under the Fonterra/Yoplait Deed, the parties agreed to create a Joint Venture to own and operate the business of manufacturing, distributing and selling Fresh Cultured Products and Fresh Dairy Desserts in New Zealand and Australia. The Joint Venture will include assets currently owned by Fonterra as well as assets of National Foods.
 - (b) The Fonterra/Yoplait Deed included a detailed and binding set of terms for the establishment of a Joint Venture between National Foods (as a wholly owned subsidiary of Fonterra) and Sodima.

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- (c) If:
- (i) Fonterra completed compulsory acquisition of all of the issued shares in National Foods; and
 - (ii) Sodima was satisfied with a due diligence that it and its financiers would undertake in relation to National Foods,
- the parties would form a 50/50 Joint Venture.
- (d) The Joint Venture arrangements would only come into effect when Fonterra owned all of the shares of National Foods. If implemented, the Joint Venture would relate to the production and sale of Fresh Cultured Products and Fresh Dairy Desserts and other similar products in Australia and New Zealand.
- (e) Fonterra/National Foods would transfer to the Joint Venture sufficient assets to enable the Joint Venture to achieve an agreed level of financial performance. Yoplait would contribute to the Joint Venture a perpetual licence in relation to the Yoplait brand, as part of its contribution to the Joint Venture. The Joint Venture would include assets of Fonterra as well as assets of National Foods.
- (f) The Joint Venture arrangements included provisions for:
- i. establishment of the Joint Venture;
 - ii. provision of services to the Joint Venture;
 - iii. governance of the Joint Venture;
 - iv. brands and know how;
 - v. non-competition;
 - vi. standstill;
 - vii. deadlock;
 - viii. change of control;
 - ix. funding of the Joint Venture;
 - x. default and unwinding the Joint Venture.
- (g) The Joint Venture arrangements included provision for senior appointments to be agreed by the Joint Venture partners prior to establishment of the Joint Venture. The Fonterra/Yoplait Deed also contemplated that all other employees directly related to the production, sales, marketing, distribution and administration of the Fresh Cultured Products and Fresh Dairy Desserts business would be part of the business of the Joint Venture.
- (h) The Fonterra/Yoplait Deed included arrangements for parties to end their participation in the Joint Venture in a number of different circumstances and for the Joint Venture to be terminated. In the event of such a termination, some parties will have rights to the transfer of some specific assets. The Joint Venture would provide for the distribution of those and other interests to the parties for amounts determined under the agreement.
- (i) Yoplait and Sodima agreed not to do anything or deal with the Yoplait brands in a manner which would negate the effect of their consent or the ability of

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Sodima to enter into the Joint Venture arrangements described above. (This obligation is referred to in these reasons as the **Preservation Obligation**.)

- (j) Following Fonterra achieving majority control of National Foods and pending Fonterra acquiring all of the shares in National Foods, Fonterra would use all reasonable efforts (without being required to act against its own interests) to be in a position to implement (and to be in a position to cause National Foods to implement) the Joint Venture in accordance with the Fonterra/Yoplait Deed. (This obligation, which the parties to the Fonterra/Yoplait Deed subsequently agreed to delete, is referred to in these reasons as the **Joint Venture Preparation Obligation**.)

Fonterra' disclosure Obligations

Disclosure of intentions

39. Paragraph 636(1)(c) requires a bidder to disclose its intentions with respect to the business, fixed assets and present employees of the target company. Section 643 requires that a bidder include in any supplementary bidder's statement information on any matter which would have been required to be included in the bidder's statement if it had arisen before the bidder's statement was lodged, provided that the information is material from the point of view of a target shareholder.
40. The information requirements of section 636(1)(c) are not subject to a materiality threshold at the time of preparing a bidder's statement or a confidentiality carve-out. They reflect an underlying policy that the intentions which are addressed in section 636(1)(c) will generally be material to investors in a target company. Accordingly, the Panel proceeded from the starting point – for the purposes of section 643 – that matters pertaining to those intentions will generally be material from the point of view of a target shareholder.
41. The Panel considered that unacceptable circumstances existed in that the bidder's statement and the various supplementary bidder's statements issued by Fonterra did not, between them, adequately disclose intentions of Fonterra which the Summary revealed that Fonterra held in relation to the three specified areas. The Panel considered that those intentions were material to target shareholders.
42. The relevant intentions are set out below.

Business

- (a) In the case where Fonterra acquired between 50% and 100% of National Foods, that Fonterra would use reasonable efforts to be in a position to implement the Joint Venture, and thus, impliedly, maintain the Fresh Cultured Products and Fresh Dairy Desserts business of National Foods and make such changes as were reasonable and necessary in order to implement the Joint Venture (subject to such maintenance or changes not being contrary to the interests of Fonterra).
- (b) In the case where Fonterra acquired 100% of National Foods and the Joint Venture proceeded:
- (i) that Fonterra would:

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- i. transfer to Yoplait or Sodima a 50% equity interest in a significant proportion of National Foods' Fresh Cultured Products and Fresh Dairy Desserts business;
 - ii. provide intercompany support services to the Joint Venture vehicle;
 - iii. contribute, and procure that National Foods will contribute, business units to the proposed Joint Venture;
- (ii) that Yoplait would provide licences and technical and other expertise and services to the proposed Joint Venture; and
- (iii) that the Joint Venture arrangements would contain terms dealing with the matters set out in paragraph (f) under the section headed 'The Summary'.

Assets

- (c) In the case where Fonterra acquired 100% of National Foods and the Joint Venture proceeded, that Fonterra would ensure the transfer to a Joint Venture vehicle, in which Sodima held a 50% equity interest, of sufficient assets of National Foods and Fonterra to meet an agreed level of financial performance.

Employees

- (d) In the case where Fonterra acquired 100% of National Foods and the Joint Venture proceeded, that:
- (i) National Foods' Fresh Cultured Products and Fresh Dairy Desserts employees would be engaged in the business of the Joint Venture; and
 - (ii) Fonterra and Yoplait would agree arrangements with respect to the appointment of existing executives of National Foods to senior executive appointments in the Joint Venture.

Disclosure of material terms of the Fonterra/Yoplait Deed

43. The Panel also considered that corrective disclosure was required to address the following misleading impressions created by the disclosure in the Third Supplementary Bidder's Statement and the 2 March Announcement:

- (a) That the Joint Venture proposal was not particularly developed.

The minimal statements concerning the Joint Venture in the Third Supplementary Bidder's Statement and 2 March Announcement conveyed the impression that the Joint Venture proposal was at an embryonic stage. In fact, the Summary disclosed that '[t]he Fonterra/Yoplait Deed contained a detailed and binding set of terms for the establishment of a joint venture between National Foods and Sodima.'

- (b) That Fonterra had some discretion as to whether to proceed with the Joint Venture.

This impression was conveyed by the omission from the Third Supplementary Bidder's Statement and 2 March Announcement of the precise conditions to which the Joint Venture proposal was subject. In fact, the Summary disclosed that (if Fonterra acquired 100% of National Foods) only Sodima had a discretion

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not to proceed with the Joint Venture. (Disclosure that Fonterra had no such discretion was also necessary in order to properly explain the circumstances in which Fonterra had the intentions described in paragraphs (b) to (d) of the section titled ‘Disclosure of intentions’ above).

44. Except in relation to the intentions discussed above and based on the Summary, the Panel did not consider that any other aspects of the Fonterra/Yoplait Deed would be material to the making of a decision by a National Foods shareholder as to whether to accept Fonterra’s bid.

Disclosure of issues pertaining to value

45. Based on the Summary and the additional information concerning the content of the Fonterra/Yoplait Deed set out in submissions from the parties, the Panel did not consider that Fonterra’s failure to disclose information contained in the Fonterra/Yoplait Deed relating to questions of value of business units to be contributed to the Joint Venture, if indeed there was discernable information relating to current assets of National Foods in the Fonterra/Yoplait Deed, constituted unacceptable circumstances.
46. The Panel did not consider that such information would be material to a shareholder’s decision as to whether or not to accept Fonterra’s bid. In particular, the Panel was mindful that:
- (a) Fonterra, Yoplait and Sodima all submitted that the Fonterra/Yoplait Deed did not ascribe a value to National Foods as an entity, the assets of National Foods or those assets of National Foods which might be contributed to the proposed Joint Venture;
 - (b) Any material information relating to value in the Yoplait/Fonterra Deed would have been agreed for the purposes of a joint venture following commercial negotiations conducted in the context of:
 - (i) change of control provisions which applied to Fonterra but not San Miguel, and under which (as a practical matter) consent was required if Fonterra was to proceed with its bid; and
 - (ii) an apparent attempt by Yoplait and Sodima to generate pricing tension between San Miguel and Fonterra (including by holding out the prospect that Sodima and Yoplait might enter into exclusive arrangements with San Miguel to ‘lock-out’ Fonterra from the bidding contest for National Foods).

Accordingly, any value information in the Fonterra/Yoplait Deed would be of doubtful utility to National Foods shareholders. Indeed, disclosure of that information might have misled such shareholders as such shareholders might have regarded it as Fonterra’s assessment of the value of some assets, rather than as Fonterra’s assessment of the value which it was prepared to agree to in negotiations in exchange for various other concessions and the continued opportunity to acquire National Foods;

- (c) the Panel understood from Sodima’s rebuttal submissions that the Fonterra/Yoplait Deed did not disclose the agreed level of financial performance of the Joint Venture (which San Miguel submitted to be material to

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an analyst's ability to ascribe a value to National Foods' Fresh Cultured Products and Fresh Dairy Desserts business) and addressed questions of value in relation to parties' contributions on the basis of formulae;

- (d) based on the Summary, the Fonterra/Yoplait Deed only concerns part of National Foods' business (so that any information relating to value would relate only to that part of National Foods' business rather than National Foods as an entity) and also concerns part of Fonterra's business; and
 - (e) no submissions were made as to how such information would be material to a shareholder's decision in relation to Fonterra's bid. San Miguel's submissions merely stated that they would enable a shareholder or analyst to ascribe a value to material parts of National Foods' business, without stating whether the ability to ascribe such a value would be material. For instance, even if that value were disclosed, it might not be material having regard to the fact that the shareholder would not know Fonterra's valuation of the other assets of National Foods not to be included in the Joint Venture to determine whether those valuations correlate with the offer price under the takeover bid.
47. The Panel was also conscious that there is no current requirement under the Act, or in market practice, that a bidder must disclose its views as to the value of the target or the target's assets, other than through the price which it offers for securities in the target. The Panel was concerned that to require the details of the Fonterra/Yoplait Deed to be disclosed in a supplementary bidder's statement might set such a precedent.

Disclosure by Fonterra

48. Fonterra made some disclosure in relation to the Joint Venture in a supplementary bidder's statement which it published at the same time as its 2 March announcement. However, the Panel considered that Fonterra had not given National Foods shareholders adequate information about certain matters in relation to the Joint Venture and required Fonterra to make corrective disclosure addressing the following matters:
- (a) the material effects of the Joint Venture Preparation Obligation originally contained in the Fonterra/Yoplait Deed under which Fonterra was required to use all reasonable efforts (without being required to act against its own interests) to be in a position to implement (and to be in a position to cause National Foods to implement) the Joint Venture, following Fonterra achieving majority control of National Foods and pending Fonterra acquiring all of the shares in National Foods;
 - (b) the fact that the parties had agreed detailed and (subject to the satisfaction of certain conditions) binding terms for the proposed Joint Venture;
 - (c) the fact that the Joint Venture arrangements would contain terms dealing with certain specific matters (for example, the governance, funding and winding up of the Joint Venture);
 - (d) the fact that Fonterra had no discretion as to whether the proposed Joint Venture would proceed (that is, that Fonterra must proceed with the Joint

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Venture if Fonterra acquired 100% of National Foods and Sodima chose to proceed with the Joint Venture); and

- (e) further detail in relation to Fonterra's intentions with respect to the conduct of National Foods' Fresh Cultured Products and Fresh Dairy Desserts business (yoghurt, Petit Suisse, fromage frais, fresh dairy desserts and similar products, being that part of National Foods' business to be included in the Joint Venture):
 - (i) in the case of Fonterra owning 50% to 100% of National Foods.

The Panel considered that the corrective disclosure should address how Fonterra would procure the conduct of National Foods' Fresh Cultured Products and Fresh Dairy Desserts business pending satisfaction of the conditions precedent to the formation of the proposed Joint Venture in light of the Joint Venture Preparation Obligation and what that conduct might entail in preparing the National Foods businesses for entry into the Joint Venture; and

- (ii) in the case of Fonterra ultimately owning 100% of National Foods.

The Panel considered that the disclosure should address the following:

- a. the fact that Fonterra may have established a 50/50 joint venture with Sodima (as distinct from a joint venture of undisclosed or undetermined equity interests);
- b. the fact that National Foods may have provided intercompany services to the Joint Venture;
- c. the fact that Fonterra would procure the transfer to the Joint Venture vehicle, in which Sodima would hold a 50% equity interest, of sufficient assets of National Foods and Fonterra to meet an agreed level of financial performance;
- d. the fact that National Foods' Fresh Cultured Products and Fresh Dairy Desserts employees would be engaged in the business of the Joint Venture;
- e. arrangements with respect to the appointment of existing executives of National Foods to senior executive appointments in the Joint Venture;
- f. the fact that both Fonterra and National Foods would contribute business units to the Joint Venture; and
- g. the fact that Yoplait would provide licences and technical and other expertise and services to the Joint Venture.

- 49. Fonterra prepared a corrective supplementary bidder's statement, addressing the above matters which the Panel reviewed, and undertook to release that supplementary bidder's statement to ASX immediately following the release of the Panel's announcement of the initial part of its decision. Fonterra also undertook to dispatch the supplementary bidder's statement to National Foods shareholders

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within 14 days and, in any event, at least 11 days prior to the close of Fonterra's offer.

50. Fonterra also undertook to extend withdrawal rights (exercisable for a period of five business days) to shareholders who accept or have accepted Fonterra's offer between 2 March 2005 (when the Joint Venture was first announced) and receipt by them of the supplementary bidder's statement.

Yoplait and Sodima's substantial holding notice obligations

Should Yoplait or Sodima have lodged a substantial holding notice?

51. The question whether Yoplait or Sodima should have lodged a substantial holding notice in relation to National Foods depended on whether either of them was an associate of Fonterra (and thus had voting power of greater than 5% by reason of the relevant interests in National Foods shares held by Fonterra), or whether either of them had a relevant interest in the National Foods shares beneficially owned by Fonterra.

Is or was Yoplait or Sodima an associate of Fonterra?

52. The Panel considered that entry into the Joint Venture agreement (as evidenced by executing the Fonterra/Yoplait Deed) caused Yoplait and Sodima to become associates of Fonterra in relation to National Foods.
53. Paragraphs 12(b) and (c) of the Act contain the relevant definitions of associates. A and B are associates in relation to company C if they have a relevant agreement for the purpose of controlling or influencing the composition of the board of C, or the conduct of the affairs of C, or if they are acting in concert in relation to the affairs of C.

Board of National Foods

54. Based on the Summary, there is no overt mention in the Fonterra/Yoplait Deed of the composition of the board of National Foods, and any implied agreement about the board must be by inference from the terms of the Fonterra/Yoplait Deed concerning the conduct of the affairs of National Foods.

Affairs of National Foods

55. The affairs of a company, on ordinary concepts and without reliance on section 53, include its business and its internal affairs, such as board and company meetings and its dealings with its subsidiaries. Accordingly, an agreement to control or influence the conduct of a company's affairs must be aimed at exerting pervasive control or influence over the company's direction and management.
56. The concept used in paragraph 12(2)(c) of acting in concert in relation to a company's affairs is of similar generality, as "acting in concert" implies an ongoing course of conduct and the subject-matter of the concert is the affairs of the company in general, as in paragraph 12(2)(b).
57. This reading not only takes into account the wording of the provisions, it fits with the repeated observation of the Courts that association is used in the tracing provisions as an extension of the concept of control over shares defined as a relevant interest. Section 12 does not, however, require that the agreement or

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concerted action relate expressly to shares in any way, or to the exercise of votes attached to shares. Rather, the legislature has decided to aggregate the voting power of people who are cooperating in ways which might be advanced by the use of such power.

58. Paragraphs 12(2)(b) and (c) should not be read unduly widely, as many agreements relate to the conduct of a company's affairs, which should not ordinarily be treated as within the policy of the association provisions, and which have never been held to be associations. For instance, covenants in an arm's length loan agreement may intrude into the conduct of a borrower company's business and intellectual property agreements commonly intrude into the conduct of the licensee's business. At the same time, an agreement or concerted action in relation to a company's affairs may amount to an association, although it is not intended to confer total control over the conduct of the company's affairs: an agreement for the purpose of influencing the conduct of the company's affairs is enough, and the role of association is to extend the concept of a relevant interest in shares, which itself requires only imperfect control over their voting or disposal.
59. On balance, it seemed that the Joint Venture Preparation Obligation reflected an agreement for the purpose of controlling the conduct of the affairs of National Foods. The Panel considered it likely that the Joint Venture Preparation Obligation required Fonterra to manage National Foods (from the time it acquired control until the Joint Venture was set up) in a way which, at the least, did not impede setting up the Joint Venture. Further, the Panel considered that the Joint Venture Preparation Obligation required Fonterra to prepare National Foods' businesses for transition into the Joint Venture. For instance, subject to Fonterra not being adversely affected, the Joint Venture Preparation Obligation would prevent Fonterra from causing National Foods to close down or sell off its Fresh Cultured Products and Fresh Dairy Desserts business.

Future application of the Joint Venture agreement

60. The Panel did not consider it relevant that the Joint Venture agreement would only have full operation when and if Fonterra had 100% of the shares in National Foods, and that there would then be no other shareholders in National Foods. It is clear from the Fonterra/Yoplait Deed that the Joint Venture Preparation Obligation may have begun to operate much sooner and may have affected National Foods while it still had other shareholders. In any event, the Fonterra/Yoplait Deed existed already, although these obligations had yet to be enlivened and the concept of association in paragraphs 12(2)(b) and (c) includes *proposals* to enter into relevant agreements and to act in concert.

LV Living

61. In reaching its decision, the Panel considered the decision in *LV Living Limited*. The Panel considered its decision in this matter to be consistent with the *LV Living* decision.
62. The *LV Living* Panel considered that a Cooperation Agreement between certain persons (including LV Living Limited) evidenced a common purpose or plan in relation to the establishment of a joint venture (the **LVL Joint Venture**). However,

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the *LV Living* Panel was not convinced that the Cooperation Agreement evidenced a common purpose or plan to control the operations or composition of the board of LV Living which was to continue once the LVL Joint Venture was established. The Panel considered that the Cooperation Agreement was equally consistent with parties being free to pull in opposite directions once the LVL Joint Venture was established and to seek to protect their interests even when they diverged. Further, the Cooperation Agreement did not require the exercise of, or the threat of the exercise of, voting power in LV Living in order for it to be effective. In this respect, the operative agreement controlling or influencing the affairs of LV Living was the Cooperation Agreement, which bound LV Living itself.

63. Similar to the circumstances in *LV Living*, the Panel considered that Yoplait and Fonterra were associates in relation to National Foods because of a common purpose or plan in relation to the establishment of a joint venture. Although the Joint Venture will not involve only National Foods assets, or all National Foods assets, it nevertheless relates to the affairs of National Foods (and a material part of those affairs). The Panel was entitled to infer from the Summary that the parties were co-operating to achieve a shared goal, namely to enable the Joint Venture to be implemented (the Joint Venture Preparation Obligation was a manifestation of that from the perspective of Fonterra, the Preservation Obligation i.e. Sodima's obligation to maintain its ability to enter into the Joint Venture is a manifestation of that from the perspective of Yoplait). On that basis, the Panel considered that section 12(2)(c) applied so that the parties were associates.
64. Further, unlike the circumstances after the establishment of the LVL Joint Venture where the LV Living Panel found that the association between the parties had fallen away, in this case National Foods is not a party to the central agreement, that is, the Fonterra/Yoplait Deed. The consequence of this is that the shared goal cannot be achieved by contractual obligations of National Foods, and is dependent on Fonterra exercising, or threatening to exercise, voting power in relation to National Foods. Accordingly, the Panel considered that section 12(2)(b) applied because the Fonterra/Yoplait Deed could be characterised as an agreement for the purpose of influencing (and perhaps controlling) the conduct of the Fresh Cultured Products and Fresh Dairy Desserts related affairs of National Foods through the exercise of (or threat of exercise of) voting power and that agreement must continue to operate for the Joint Venture to be brought into operation.
65. The unlinking of the association, which occurred when the LV Living parties entered into the Cooperation Agreement, will not occur in relation to National Foods until Fonterra has acquired 100% of National Foods and is in a position to cause National Foods to enter into contractual agreements with Yoplait and Sodima. In the *LV Living* case, the corresponding unlinking had already occurred before the application was brought before the Panel. In the present proceedings, the association is still in existence. On that basis, the decisions in *LV Living* and the current proceedings are essentially consistent, having regard to the fact that each association has been found to exist over a more or less definite time span.

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Does or did Yoplait or Sodima have a relevant interest in any of Fonterra Investments' shares in National Foods?

66. The Panel considered the appropriate construction of the Joint Venture Preparation Obligation. In light of that construction, the Panel was inclined to think that Yoplait and Sodima had a relevant interest in Fonterra Investments' shares in National Foods consisting of a power to control the exercise of voting rights attaching to shares in National Foods. However, in light of its conclusions in relation to the question of association, it was not necessary to reach, and the Panel did not reach, a concluded view on this question.

Disclosure of full agreement pursuant to Part 6C.1 of the Act

67. Given that Fonterra Investments at all relevant times beneficially owned 19.03% of National Foods and Fonterra had a relevant interest in Fonterra Investments' shares, it follows from the above analysis that each of Yoplait and Sodima, as an associate of Fonterra, had voting power in National Foods of at least 19.03% upon entering into the Fonterra/Yoplait Deed. On that basis, each of Yoplait and Sodima acquired a substantial holding in National Foods at the time it entered into the Fonterra/Yoplait Deed. Therefore, the terms of Part 6C.1 of the Act required each of Yoplait and Sodima to lodge a substantial holding notice by 9.30 a.m. on the next business day after entering into the Fonterra/Yoplait Deed, with a copy of the Fonterra/Yoplait Deed attached (the Deed being attached because it was the document from which the association arose).
68. The Panel considered that unacceptable circumstances existed in that no such substantial holding notices had been lodged. The Panel considered that this should be rectified, including so that the market would be informed that Yoplait or Sodima had no interest in shares independently of Fonterra.
69. Yoplait and Sodima offered, without admission, and the Panel accepted, undertakings to lodge a substantial holding notice on the basis of the Panel's finding that they had a substantial holding. Their undertaking was to lodge a notice (but not to attach a copy of the Fonterra/Yoplait Deed), when and if they were exempted from the obligation to annex a copy of the Deed to the notice. The Panel advised them that it would suspend its proceedings pending the outcome of that application for relief.
70. Yoplait and Sodima advised the Panel that they were not aware of having relevant interests or voting power over any other National Foods shares.
71. In considering whether any substantial holding notice lodged should annex the Fonterra/Yoplait Deed, the Panel was mindful that:
- (a) any relevant interest which existed would be limited in scope and reasonably remote;
 - (b) the association which it had found to exist did not pertain to the manner in which a takeover bid would be executed and was limited in scope to preparations for a Joint Venture which would only proceed if National Foods became a wholly owned subsidiary of Fonterra;

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- (c) the Panel had been told that the Fonterra/Yoplait Deed contained considerable detailed confidential information and both Fonterra and Yoplait would suffer considerable commercial detriment if the whole of the Fonterra/Yoplait Deed was disclosed publicly;
- (d) the need to comply with the disclosure requirements of Chapter 6 would ensure that all information in the Fonterra/Yoplait Deed which was material to target shareholders would be disclosed in a supplementary bidder's statement (see above);
- (e) the apparent policy objective behind the requirement to attach the documentation underlying an association to a substantial holding notice is to ensure an informed market in securities in a company. The Panel did not consider that, based on the Summary, the terms of the Fonterra/Yoplait Deed contained information which would be material to the market in National Foods' shares which would not be disclosed in the supplementary bidder's statement required by the Panel;
- (f) ASIC is granted power, under Part 6C.3 of the Act, to grant exemptions from, or modifications of, the requirement to attach a document which causes a person to be a substantial shareholder to a substantial holding notice. It has exercised that power in the past to allow persons to excise parts of a document from, provide a summary of, or not attach, a document which would otherwise be required to be attached to a substantial holding notice. However, the Panel notes that it received submissions from ASIC that ASIC is generally reluctant to grant relief of this nature, and has only granted such relief infrequently; and
- (g) requiring publication of unnecessary detail of collateral transactions which are necessary to allow bids to proceed might have a chilling effect on bids for companies with change of control clauses in material customer, supplier or joint venture arrangements (because such arrangements may lead to complex negotiated arrangements requiring that the bidder procure that the target do certain things).

ASIC / Panel Discretion

- 72. ASIC was granted the modification power to take into account the sort of considerations outlined above, and it is regrettable that none of Fonterra, Yoplait and Sodima sought a modification from ASIC to modify the terms of Chapter 6C prior to entering into the Fonterra/Yoplait Deed.
- 73. Nevertheless, it was open to the Panel to exercise a similar discretion by deciding that the failure to attach the Fonterra/Yoplait Deed to the substantial holding notices (once lodged) would not constitute unacceptable circumstances.
- 74. Having regard to the various considerations outlined in paragraphs (a) to (g) above, the Panel could have exercised its discretion to require the lodgement of a substantial holding notice, but not to require that the Fonterra/Yoplait Deed be annexed to it. The Panel has such a discretion as its role is to determine whether circumstances are unacceptable and, if so, any appropriate remedy, and it is directed not simply to enforce the terms of the Act. Further, in framing orders, the Panel is required to avoid inflicting unfair prejudice on any party.

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75. The Panel could not relieve Yoplait from its obligations under Chapter 6C, however, and it did not want to be taken as excusing a breach of Chapter 6C, which is an important part of the legislative framework relating to takeover transactions.
76. Further, the Panel emphasised that ASIC is the body with the primary role of granting or withholding exemptions. The Panel wanted there to be no incentive for entities to fail to comply and take their chances on being challenged without asking ASIC first.

Decision

77. Accordingly, the Panel gave considerable thought to making a declaration of unacceptable circumstances at this stage even though undertakings were forthcoming. The Panel however, decided (albeit with some hesitation and having regard to the undertakings which it had received) that it would not be in the public interest to make a declaration of unacceptable circumstances before the final resolution of the application which Yoplait had made to ASIC for exemption from the requirement to annex a copy of the Deed to a substantial holder notice. In coming to this decision, the Panel bore in mind the limited impact of the voting power to be disclosed in the notice, that Yoplait had no additional voting power to be aggregated with the shares controlled by Fonterra and that there was no evidence to support an inference that Yoplait was consciously avoiding or failing to comply with Part 6C.1 of the Act.
78. The Panel also bore in mind that San Miguel's application sought the disclosure of information which related to the commercial arrangements between Yoplait and Fonterra, beyond what the Panel regarded as necessary to achieve the policy objectives of ensuring that:
 - (a) the directors and shareholders of National Foods had the information they required to make their decisions on Fonterra's bid; and
 - (b) the market in shares in National Foods was informed.

Removal of the Joint Venture Preparation Obligation

79. After the Panel advised the parties of its preliminary decision, Fonterra, Sodima and Yoplait decided to remove the Joint Venture Preparation Obligation from the Fonterra/Yoplait Deed. This decision was not reached in response to a Panel request or suggestion.
80. Regardless of whether the removal of the Joint Venture Preparation Obligation had the effect of terminating the association which the Panel had found to exist, it did not affect the fact that unacceptable circumstances existed by reason of the failure of Yoplait and Sodima to lodge substantial holding notices in relation to the period when the association did exist.
81. Accordingly, it was not necessary for the Panel to decide, and the Panel did not decide, whether the association between Fonterra, Sodima and Yoplait survived the removal of the Joint Venture Preparation Obligation. However, the Panel was inclined to the view that the mere removal of the Joint Venture Preparation Obligation after being advised of the Panel's preliminary views did not affect the substance of the relations between the parties. Further, the Panel was mindful that

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a similar obligation might be implied into the Fonterra/Yoplait Deed in any event by reason of the common objective to establish the Joint Venture.

Form of corrective disclosure

Fonterra's supplementary bidder's statement

82. Given its conclusions concerning disclosure, the Panel considered it appropriate for Fonterra to issue the corrective disclosure described in the Summary.
83. Fonterra provided a draft of a supplementary bidder's statement to the Panel and the Panel gave National Foods and San Miguel an opportunity to make submissions regarding it. The Panel decided that the supplementary bidder's statement provided by Fonterra would address the deficiencies identified by the Panel.
84. The Panel accepted undertakings from Fonterra to:
 - i. lodge the supplementary bidder's statement with ASIC, ASX and National Foods promptly;
 - ii. send a copy of the supplementary bidder's statement to each National Foods shareholder within 14 days, provided that it must be sent at least 11 days before the end of the offer period for Fonterra's bid;
 - iii. offer withdrawal rights to each shareholder (an **Affected Shareholder**) who has accepted or accepts the Fonterra offer between 2 March 2005 and the business day after the supplementary bidder's statement is sent to each National Foods shareholder. Such withdrawal rights are to be exercisable for five business days after the later of notices concerning them being dispatched to each Affected Shareholder and the supplementary bidder's statement being sent to each Affected Shareholder; and
 - iv. notify each Affected Shareholder of their withdrawal rights
85. Fonterra obtained from ASIC a modification of the Act to facilitate the withdrawal rights.
86. The Panel settled with Fonterra the form of the supplementary disclosure, Fonterra then provided it to the other parties for comment. Fonterra issued its fifth supplementary bidder's statement on 4 April 2005 containing the additional and corrective disclosure required by the Panel.

Yoplait and Sodima substantial holding notice

87. As noted above, the Panel also accepted undertakings from Sodima and Yoplait. Sodima and Yoplait each undertook, without admission, to lodge a substantial holding notice, without annexing a copy of the Fonterra/Yoplait Deed, when and if they obtained relief to allow them not to attach the Fonterra/Yoplait Deed to a substantial holding notice. The Panel accepted that Yoplait and Sodima could await the outcome of their application for relief prior to lodging their substantial holding notice.
88. If the application was successful, the notice, when lodged, would be one which complied with the Act except for being lodged late, and the Panel proposed to dismiss the remainder of the application without making a declaration or order.

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89. If the application was unsuccessful, the notice would not comply with the substantial holding notice provisions of the Corporations Act putting to one side the fact that there had not been non-compliance with the time requirements of the provisions. In that case, the Panel considered it would need to decide, having regard to the outcome of the application to ASIC and to any substantial holder notices Yoplait and Sodima may have lodged, whether to make a declaration or order.

ASIC/Panel relief

90. Yoplait and Sodima applied to ASIC under section 673 for relief from the requirement in section 671B(4)(a) to attach a copy of the Fonterra/Yoplait Deed to any substantial holding notice they lodged. ASIC refused their application on the basis that it did not consider that the relief would advance the objectives of the takeovers provisions as set out in section 602.
91. Yoplait and Sodima subsequently applied to the Panel for a review of the ASIC decision. That review was the subject of the National Foods 02 proceedings announced by the Panel in Media Release [TP05/33](#) published on 6 April 2005. In light of the increased offer by San Miguel, Fonterra's 11 April announcement, and this Panel's decision, Yoplait and Sodima sought the National Foods 02 Panel's consent to withdraw the National Foods 02 application. The National Foods 02 Panel consented to San Miguel withdrawing the application before the Panel had reached a decision in the National Foods 02 proceedings.

San Miguel request to withdraw

92. Following its 6 April announcement of its increased offer, and Fonterra's 11 April announcement that it would end its offer for National Foods and accept San Miguel's offer if it became unconditional, San Miguel wrote to the Panel on 13 April asking for the Panel's consent to withdraw the Application. San Miguel said:

"In the light of the announcement by Fonterra Foods Pty Ltd (Fonterra Foods) on 11 April 2005 that it will end its offer and divest its 19% shareholding, it appears that the Fonterra/Yoplait Deed now deals only with a hypothetical situation which will never eventuate. Accordingly, at this point in time it appears that the purposes of section 602 of the Corporations Act are not undermined by the failure to disclose the Fonterra/Yoplait Deed."

93. San Miguel also advised that it would not object to either of:
- (a) Yoplait and Sodima seeking the Panel's consent to withdraw the undertakings they had given to the Panel in the Proceedings; or
 - (b) Yoplait and Sodima seeking the Panel's consent to withdraw their application in the National Foods 02 proceedings.

CONCLUSION

Initial decision – disclosure concerning the Joint Venture

94. The Panel considers that unacceptable circumstances existed as a consequence of Fonterra's initial failure to make adequate disclosure of the terms of the Joint Venture, and its intentions for the fixed assets, employees and businesses of

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National Foods in light of the Joint Venture. However, the Panel considers that those unacceptable circumstances were properly remedied by Fonterra's supplementary bidder's statement issued as part of an undertaking to the Panel in these proceedings.

95. Consequently, it did not appear to be in the public interest to make any declaration or orders.

Final decision – substantial holding notice by Yoplait and Sodima

96. The Panel considers that unacceptable circumstances existed as a consequence of Yoplait and Sodima's failure to give a substantial holding notice by 9.30 a.m. on the business day following the entry by Yoplait, Sodima and Fonterra into the Joint Venture (as evidenced by executing the Fonterra/Yoplait Deed). However, the Panel notes that at that time Yoplait and Sodima believed that the Fonterra/Yoplait Deed did not cause an association between themselves and Fonterra.
97. The Panel considers that its Media Release TP05/32, Fonterra's fifth supplementary bidder's statement published on 4 April 2005, the media coverage surrounding the Panel proceedings and the announcements by both Fonterra and National Foods, meant that the market and National Foods shareholders had been given the material information which would have been provided in a substantial holding notice from Yoplait and Sodima. The Panel also considers that National Foods shareholders would have been provided with the information which would have been material to them which was contained in the Fonterra/Yoplait Deed.
98. Further, the Panel considers that the announcements of 6 and 11 April by San Miguel and Fonterra respectively, made the prospect of the Joint Venture purely hypothetical and made the information in the Fonterra/Yoplait Deed essentially irrelevant to the market for National Foods shares and to National Foods shareholders. However, the Panel recognised that the commercial harm to Yoplait and Sodima which might occur as a consequence of disclosing the Fonterra/Yoplait Deed would still likely remain to a very similar extent as previously.
99. As a consequence of the Panel's decision in the first and second parts of the proceedings, the Panel's final decision is to refuse the application by San Miguel on the basis that the unacceptable circumstances alleged by San Miguel have either been rectified by Fonterra's fifth supplementary bidder's statement, or overtaken and rendered no longer relevant by the announcements of 6 and 11 April. The Panel also consented to Yoplait and Sodima withdrawing their undertakings to the Panel to give a substantial holding notice in respect of National Foods shares.

Future Agreements

100. The Panel considers that the proceedings before it and its decision will serve as a useful and timely reminder for persons considering entering into agreements in relation to the conduct of target companies' affairs, as to the potential for those agreements to trigger substantial holding notice obligations.
101. The Panel recognises that the circumstances of National Foods meant that it may have been commercially and practically essential for Yoplait, Sodima and Fonterra to enter into some form of agreement such as the Joint Venture. The Panel also recognises that it may be similarly essential for other bidders in the future, either

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Reasons for Decision - National Foods Limited

because of joint operational issues as in the National Foods case or, for example, as a result of competition policy requirements, to enter into such agreements. However, it appears clear to the Panel that obligations which are either express or implied on the bidder to run the affairs of the target in any period of partial ownership subject to the agreement, are likely to cause similar association issues.

102. The Panel expects that parties to such agreements will either:
- (a) limit the obligations (express or implied) in the agreements to ensure that there is no risk of an association being formed, nor any risk of the parties gaining relevant interests in the shares of the others; or
 - (b) promptly make substantial holding notice disclosure which complies with the Corporations Act.

Kevin McCann
President of the Sitting Panel
Decision dated 4 April 2005
Reasons published 9 May 2005

Takeovers Panel

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Annexure A - Undertakings from Fonterra

In the matter of National Foods Limited

Undertaking by Fonterra Foods Limited

Background

The undertaking set out below relates to the off-market takeover bid by Fonterra Foods Pty Ltd (**Fonterra Foods**) for all the issued ordinary shares in National Foods Limited (**National Foods**) in respect of which a bidder's statement was lodged with ASIC on 4 November 2004 and a target's statement was lodged with ASIC on 6 December 2004.

Defined terms used in the Panel's Brief have the same meaning in the undertaking below, unless otherwise stated.

Undertaking

Pursuant to subsection 201A(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), Fonterra Foods undertakes to

- (a) release a supplementary bidder's statement in the form attached as Annexure "A" (or as otherwise agreed by the Panel) to ASX promptly, and mail it to National Foods shareholders within 14 days (provided that the mail out occurs at least 11 days before the close of Fonterra Foods' takeover offer);
- (b) extend withdrawal rights (to be open for five business days after the later of the dispatch of the disclosure referred to in paragraph (a) above to National Foods shareholders and the dispatch of all of the notices referred to in paragraph (c) below) to all National Foods shareholders (the **Affected Shareholders**) who accept or have accepted Fonterra Foods' offer between 2 March 2005 and the business day after the dispatch of the disclosure to National Foods shareholders; and
- (c) notify by post all Affected Shareholders of the existence of the withdrawal rights referred to in paragraph ((b) above and how to exercise those withdrawal rights.

Dated 31 March 2005

Takeovers Panel

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Annexure B – Undertakings from Sodima and Yoplait

TAKEOVERS PANEL

IN THE MATTER OF NATIONAL FOODS LIMITED

PROCEEDING NO: 0812005

UNDERTAKING by Yoplait SAS and Sodima SAS

Background

The undertakings set out below relate to the preliminary decision of the Panel in relation to the affairs of National Foods Limited, dated 24 March 2005 (**Preliminary Decision**).

Yoplait and Sodima note that the Panel may continue proceedings and make a declaration of unacceptable circumstances and orders if the modification contemplated by paragraph 1(b) below is not made.

Capitalised terms not otherwise defined in this undertaking have the meaning given to them in the Preliminary Decision.

Undertaking

Pursuant to section 201A(1) of the Australian Securities and Investments Commission Act (Cth),

Yoplait and Sodima each undertakes as follows:

1. (a) Subject to paragraph 1(b), Yoplait and Sodima will each lodge with National Foods and ASX a substantial holding notice disclosing its voting power in National Foods, prepared on the basis that Yoplait is an associate of Fonterra by reason of the Fonterra/Yoplait Deed, as determined by the Panel in its Preliminary Decision (Notice).
- (b) The Notice will be lodged within one business day following the later to occur of:
 - (i) the Australian Securities and Investments Commission (ASIC) granting Yoplait an exemption from, or modification to, section 671B(4) of the Corporations Act in accordance with an application lodged by Yoplait with ASIC on 29 March 2005 (ASIC Application) such that Yoplait is not required to attach a copy of the Fonterra/Yoplait Deed to a substantial holding notice that it lodges; or
 - (ii) in the event that ASIC does not grant the exemption or modification which is sought in the ASIC Application and Yoplait makes an application to the Panel for review of that decision, the Panel making orders pursuant to section 656A of the Corporations Act varying the decision of ASIC, in consequence of which Yoplait is not required to attach a copy of the Fonterra/Yoplait Deed to a substantial holding notice that it lodges pursuant to the undertaking in paragraph 1 (a).
2. If ASIC refuses to grant the modification or exemptions sought in the ASIC Application Yoplait will lodge with the Panel an application for review of ASIC's decision within 2 business days following the date when Yoplait is advised by ASIC that the ASIC Application will not be granted.

Takeovers Panel

Reasons for Decision - National Foods Limited

3. If any person lodges an application for review of the Panel's decision, Yoplait and Sodima reserve their right to submit their case to that Review Panel that they are not associates of Fonterra and that no obligation exists for them to give any substantial holding notice.

Dated 4 April 2005

Signed for and on behalf of Yoplait SAS

Signed for and on behalf of Sodima SAS