



**In the matter of National Foods Limited 02
[2005] ATP 10**

Catchwords:

Review of ASIC decision not to grant relief from substantial shareholding provisions - agreement contributing to need to give substantial holding notice - undertakings to Panel - Panel procedures

Corporations Act 2001 (Cth), subsection 656A(2), sections 671B, 673, Part 6C.1

National Foods [2005] ATP 8

These are the Panel's reasons for its decision in response to an application by Yoplait and Sodima under section 656A of the Corporations Act. Yoplait and Sodima applied for review of a decision by ASIC not to grant relief from the requirement to attach a deed to a substantial shareholding notice. The substantial shareholding notice was required because the Panel in National Foods 01 found that Yoplait and Sodima were associates of Fonterra by virtue of them entering into a deed in relation to a proposed joint venture if Fonterra acquired 100% of National Foods under its takeover bid (Fonterra/Yoplait Deed). Yoplait and Sodima undertook to give substantial holding notices to the Panel in National Foods 01 (without admission, however, and without any undertaking that they would attach the Fonterra/Yoplait Deed to the substantial holding notice). However, after San Miguel won the bidding for National Foods, Yoplait and Sodima sought to withdraw their application for review of the ASIC decision. 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 would not be in the public interest to continue proceedings. The Panel did not make any decision on the substantive issues.

THE PROCEEDINGS

1. These reasons relate to an application to the Panel on 5 April 2005 (**Application**) from Yoplait SAS (**Yoplait**) and Sodima SAS (**Sodima**) under subsection 656A(2) of the Corporations Act 2001 (Cth) (**Corporations Act**). The application sought review of a decision of the Australian Securities and Investments Commission (**ASIC**) dated 1 April 2005 not to grant relief (**Relief**) from the substantial shareholding notice requirements of Part 6C.1 of the Corporations Act (**ASIC Decision**).

THE PANEL

2. The President of the Panel appointed Simon McKeon (sitting President), Graham Bradley (sitting Deputy President) and Karen Wood as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.

SUMMARY

3. The ASIC Decision related to an application made by Yoplait and Sodima to ASIC on 29 March 2005 requesting that ASIC grant Relief such that Yoplait and Sodima were not required to attach to a substantial shareholding notice a copy of a deed (**Fonterra/Yoplait Deed**) entered between Fonterra Foods Pty Ltd (**Fonterra Foods**), Yoplait and Sodima in connection with a proposed joint venture (**Joint Venture**).

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4. The Joint Venture was proposed in relation to the Fresh Cultured Products and Fresh Dairy Deserts business of National Foods Limited (**National Foods**) if Fonterra Foods acquired 100% of the shares in National Foods under its takeover bid.
5. The sitting Panel in National Foods 01 found that entry into the Fonterra/Yoplait Deed caused Yoplait and Sodima to become associates of Fonterra and thereby acquire voting power in National Foods of approximately 19% i.e. voting power in the National Foods shares already held by Fonterra. In turn, this required them under section 671B(1), to give substantial holding notices. Section 671B(4) also required them to attach a copy of the Fonterra/Yoplait Deed to their substantial holding notices.
6. Initially, Yoplait and Sodima gave the National Foods 01 Panel undertakings that, in response to that Panel's findings, they would give a substantial holding notice. However, the undertaking was that Yoplait and Sodima would give the substantial holding notice after obtaining Relief from the requirement of paragraph 671B(4)(a) to attach the Fonterra/Yoplait Deed to their substantial holding notice (either from ASIC or the Panel on review of any refusal by ASIC). If Yoplait and Sodima did not obtain the Relief the undertaking would be therefore of no effect. The National Foods 01 Panel accepted the undertaking but expressly reserved its right to continue its proceedings in such an event. The undertakings were given without admission as to whether an association had arisen.
7. Prior to a decision being reached on the ASIC Decision by the National Foods 02 Panel, San Miguel Foods Australia Holdings Pty Ltd (**San Miguel**) won the bidding for National Foods. On 11 April 2005 Fonterra announced it would not continue its bid for National Foods and would accept San Miguel's offer, once unconditional (**11 April Announcement**). On that basis, San Miguel sought the Panel's consent to withdraw the remaining parts of the National Foods 01 Application and Yoplait and Sodima sought the Panel's consent to withdraw their undertakings.
8. The National Foods 01 Panel decided on 15 April 2005 that it would not be in the public interest to continue with those proceedings, nor to require Yoplait and Sodima to give a substantial holding notice. The National Foods 01 Panel therefore consented to (among other things) Yoplait and Sodima withdrawing their undertakings to give a substantial shareholding notice. This decision was made on the basis that Fonterra's disclosure in its fifth supplementary bidder's statement in relation to the Joint Venture and the Fonterra/Yoplait Deed had remedied the unacceptable circumstances in relation to the lack of information on the proposal. Fonterra's disclosure, together with the fact of the Joint Venture would not proceed, removed any material benefit in substantial holding notice disclosure by Yoplait and Sodima.
9. The Panel had granted extensions to the parties to these Proceedings to consider their position in light of Fonterra's 11 April Announcement and the outcome of proceedings in National Foods 01. As a result, no submissions or rebuttals were provided to the Panel in relation to Proceedings in National Foods 02.

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10. On 19 April 2005, Yoplait and Sodima made an application to withdraw the Application in relation to National Foods 02. The withdrawal application noted that, in light of the decision in National Foods 01, Yoplait and Sodima had been released from their undertaking to lodge a substantial shareholding notice. Yoplait and Sodima submitted that the Panel should take into account the same policy matters considered by the National Foods 01 Panel.
11. The Panel finds that it would not be in the public interest to continue with the National Foods 02 Proceedings. The Panel is not in a position to affirm, vary or set aside the ASIC Decision because the parties have not argued their positions (and no longer had a commercial incentive to do so).

APPLICATION & PROCESS

Background

Yoplait and Sodima associates of Fonterra

12. The background to San Miguel's application for a declaration of unacceptable circumstances in National Foods 01 is set out in the Panel reasons for its decision in National Foods 01 at paragraphs 11 to 28.
13. The National Foods 01 Panel found that entering into the Fonterra/Yoplait Deed caused Fonterra (on the one hand) and Sodima and Yoplait (on the other hand) to become associates in relation to National Foods.
14. The Fonterra/Yoplait Deed contained a clause requiring that 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 following Fonterra achieving majority control of National Foods and pending Fonterra acquiring all of the shares in National Foods. (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.)
15. On balance, it seemed to the National Foods 01 Panel that the Joint Venture Preparation Obligation reflected an agreement for the purpose of controlling the conduct of the affairs of National Foods.
16. Given that Fonterra had a relevant interest in at least 19.03% of the shares in National Foods, the National Foods 01 Panel therefore considered that Sodima and Yoplait had voting power in National Foods of at least 19.03%. Accordingly, the failure by Sodima and Yoplait to lodge a substantial holding notice by 9.30 a.m. on the next business day after they entered into the Fonterra/Yoplait Deed constituted unacceptable circumstances.
17. The Panel in National Foods 01 provided the parties with a preliminary decision in relation to the affairs of National Foods on 24 March 2005 (**Preliminary Decision**) to the effect that (among other things) Sodima and Yoplait should lodge a substantial holding notice.

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Yoplait and Sodima undertaking to National Foods 01 Panel

18. In response to the Preliminary Decision, on 4 April 2005 Yoplait and Sodima gave undertakings to the Panel (**Undertakings**) to the following effect [*amended for context*]:
- (a) Subject to paragraph (b) below, 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 1 business day following the later to occur of:
 - (i) 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).
19. The Undertakings were given without admission.
20. The National Foods 01 Panel accepted the Undertakings. While the outcome of the application for Relief was still pending, the National Foods 01 Panel did not believe it was necessary to require Sodima and Yoplait to release a copy of the Fonterra/Yoplait Deed.

ASIC Decision

21. Yoplait and Sodima applied to ASIC for Relief from the requirements of section 671B(4), via an exemption or modification granted under section 673, in a letter dated 29 March 2005.
22. On 1 April 2005, ASIC advised Yoplait and Sodima that it had refused to grant Relief from the substantial shareholding notice requirements of Part 6C.1 of the Corporations Act.
23. ASIC noted that in its view the legislature intended the subsection 671B(4) to have a broad operation, requiring disclosure of any agreement having a reasonable nexus to the interest of the substantial holder. ASIC said its Decision was partly based on the decision of Wicks J in *New Ashwick Pty Ltd v Wesfarmers* (2000) ACSR 263 at 271-272. ASIC also referred to ASIC Policy Statement 159 *Takeovers, compulsory acquisitions and substantial shareholding notices* at paragraph 279.
24. ASIC considered that to grant the Relief sought would detract from the general objectives of paragraphs 602(a) and 602(b)(iii) in a manner which would not be appropriate given that paragraph 655A(2) requires ASIC to have consider the purposes of Chapter 6 in deciding whether to give exemptions or modifications.

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Declaration and orders sought

25. Yoplait and Sodima applied to the Panel for review of the ASIC Decision under section 656A. Yoplait and Sodima submitted that the Panel should set aside the ASIC Decision and substitute it with its own decision that either:
 - (a) Yoplait and Sodima were exempt from subsection 671B(4) in relation to any substantial shareholding notice which they each lodge pursuant to the Undertakings; or
 - (b) the provisions of subsection 671B(4) were omitted or modified such that Yoplait and Sodima are exempt from attaching the Fonterra/Yoplait Deed to any substantial shareholding notice that they lodged pursuant to the Undertakings.
26. In the Application, Yoplait and Sodima submitted that section 673 confers a relevant power for the grant of the Relief. They submitted that the purposes of Chapter 6, as set out in section 602, would not be materially jeopardised by the grant of the Relief sought (given the disclosures made by Fonterra in its fifth supplementary bidder's statement and other public disclosure, such as the reasons for decision of the National Foods 01 Panel) and that Yoplait and Sodima would suffer material commercial prejudice if they were required to disclose the Fonterra/Yoplait Deed.

Process and intervening events

27. The Panel adopted the Panel's published procedural rules (**Rules**) for the purposes of the initial steps of the Proceedings. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.
28. Parties were given time to make submissions in response to the Panel's Regulation 20 Brief in accordance with the Panel's Rules. However, parties did not ultimately make submissions to the Panel given the occurrence of intervening events.
29. On 6 April 2005, San Miguel announced that it would increase its offer for National Foods (**6 April Announcement**). On 11 April 2005, shortly before submissions were due in these Proceedings, Fonterra Foods announced that it would not increase its bid for National Foods and that it would accept San Miguel's higher offer when it became unconditional (**11 April Announcement**).
30. The Panel was concerned that the requirements of natural justice should be met in that the parties should have the opportunity to consider their positions in light of the 6 and 11 April Announcements as relevant to the Proceedings and their submissions. As Fonterra's withdrawal also removed some of the urgency of the Proceedings, the Panel agreed to extend the closing time for submissions.
31. San Miguel wrote to the Panel on 13 April 2005 asking for the Panel's consent to withdraw its application in National Foods 01. San Miguel stated that the Fonterra/Yoplait Deed then only related to a hypothetical situation which would never eventuate and that the purposes of section 602 would not be undermined by the failure to disclose the Fonterra/Yoplait Deed.
32. 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

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- (b) Yoplait and Sodima seeking the Panel's consent to withdraw their application in the National Foods 02 proceedings.
33. No submissions had been received by the National Foods 02 Panel at that time. The Panel agreed to a further extension for submissions to allow for parties to take into account the decision of the Panel in National Foods 01.
34. A media release for the National Foods 01 decision was issued on 15 April 2005. The National Foods 01 Panel concluded their proceedings, without making any declaration in relation to the substantial holding notice issues and consented to Yoplait and Sodima withdrawing their undertakings to the Panel to give a substantial holding notice (discussed in more detail below).

Yoplait and Sodima application to withdraw National Foods 02 Application

35. On 19 April 2005, Yoplait and Sodima made an application to the Panel withdrawing their Application for review of the ASIC Decision. Yoplait and Sodima submitted that they had been released from the undertakings given in National Foods 01 and that the National Foods 02 proceedings were now largely hypothetical. They reiterated that they did not consider the Fonterra/Yoplait Deed gave rise to an association with Fonterra.
36. In Yoplait's and Sodima's submissions, the same policy considerations that led the National Foods 01 Panel to conclude proceedings should also be taken into account by the National Foods 02 Panel in considering the application to withdraw the Application.

DISCUSSION

National Foods 01 decision that material information disclosed

37. The National Foods 01 Panel, in concluding proceedings, stated that Panel Media Release TP05/32, Fonterra Foods' Fifth Supplementary Bidder's Statement, 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 National Foods 01 Panel also considered that National Foods shareholders would have been provided with the information which would have been material to them and which was contained in the Fonterra/Yoplait Deed.

6 and 11 April Announcements

38. Following San Miguel's increased offer for National Foods set out in the 6 April Announcement, Fonterra Foods announced that it would not increase its offer. In the 11 April Announcement, Fonterra Foods stated that it would dispose of its National Foods shares under the San Miguel bid, once it became unconditional. The effective result of the 11 April Announcement was that Fonterra Foods was no longer a bidder for National Foods. It would not achieve control of National Foods under its bid and, accordingly, the Joint Venture Obligation and other obligations under the Fonterra/Yoplait Deed would not arise.

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39. The result was that the prospect of the Joint Venture was purely hypothetical and the information in the Fonterra/Yoplait Deed was no longer relevant to the market for National Foods shares and to National Foods shareholders. This Panel agrees with the findings of the National Foods 01 Panel in this regard.
40. Yoplait and Sodima applied to this Panel to withdraw their Application. Fonterra and San Miguel consented to the withdrawal application. ASIC submitted that the Panel should not consent to Yoplait and Sodima's request to withdraw their Application.
41. The Panel did not receive submissions or rebuttals on the substantive matters arising in the Proceedings. However, Yoplait and Sodima submitted (by reference to the factors taken into account by the National Foods 01 Panel), 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 despite the fact that the Joint Venture itself was hypothetical.

CONCLUSION

42. The Panel has considered the policy considerations taken into account by the National Foods 01 Panel, such Panel having the benefit of detailed submissions and rebuttals from parties. However, this Panel is not in a position to affirm, vary or set aside the ASIC Decision where parties to these Proceedings have not fully argued their positions (and no longer had a commercial incentive to do so).
43. Accordingly, this Panel has not made a decision on the substantive matters in these Proceedings and the outcome of these Proceedings should not be taken to set a precedent in relation to the level of detail to be included in substantial shareholding notices. Nor should these Proceedings be taken to represent the Panel's approach to reviewing ASIC's decisions.
44. The Panel is mindful of the National Foods 01 Panel's view that Media Release TP05/32, Fonterra Foods' 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.
45. Further, the Panel considers that the 6 and 11 April Announcements by San Miguel and Fonterra Foods respectively, made the prospect of the Joint Venture purely hypothetical and made the information in the Fonterra/Yoplait Deed no longer relevant to the market for National Foods shares and to National Foods shareholders.
46. Accordingly, the Panel considers that it is not in the public interest to continue these proceedings and accepts Yoplait and Sodima's application to withdraw the Application for review of the ASIC Decision.

Simon McKeon

President of the Sitting Panel

Decision dated 3 May 2005

Reasons published 12 May 2005