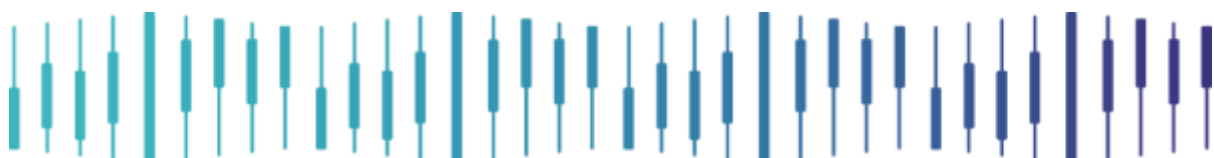


5 September 2024

NZ RegCo Decision

Synlait Milk Limited (NS) (SML)
Ruling decision in relation to the NZX Listing Rules



Introduction

Background

1. Synlait Milk Limited (NS) (**SML**) is a New Zealand domiciled company that has its ordinary shares listed on the NZX Main Board. SML is an Issuer within the meaning of the NZX Listing Rules (**Rules**).
2. As announced through MAP on 20 August 2024 in its notice of special shareholders' meeting (**SML NoM**), SML is proposing to undertake various actions in order to recapitalise itself, which includes:
 - a. a placement of new shares to Bright Dairy Holding Limited (**Bright Dairy**) for NZ\$0.60 per share, raising approximately NZ\$185 million and increasing Bright Dairy's shareholding in SML from approximately 39.01% to 65.25%. The placement is subject to various conditions, including, in summary, the matters referred to in (b) to (d) below, and various overseas regulatory approvals. The conditions are detailed on page 12 of the SML NoM (**Bright Placement**);
 - b. a placement of new shares to The a2 Milk Company Limited (**ATM**) for NZ\$0.43 per share, raising approximately NZ\$32.8 million and maintaining ATM's existing shareholding in SML at approximately 19.83%. The placement is subject to various conditions, including, in summary, the matters referred to in (a), (c) and (d). The conditions are further detailed on page 18 of the SML NoM (**ATM Placement**);
 - c. the settlement of certain disputes with ATM; and
 - d. a refinancing of SML's existing bank debt, on terms yet to be agreed as at the date of the SML NoM.
3. Under Rule 5.2.1, an Issuer cannot enter into a Material Transaction if a Related Party is, or is likely to become a direct party to the Material Transaction, or a beneficiary of a guarantee or other transaction which is a Material Transaction, unless approved by Ordinary Resolution.
4. Bright Dairy holds approximately 39.01% of SML's shares, and ATM holds approximately 19.83% of SML shares. Consequently, as each of Bright Dairy and ATM hold 10% or more of the shares in SML, each of them is a Related Party of SML within the meaning of the Rules.
5. As each of the Bright Placement and ATM Placement would result in the issuance of Equity Securities having a market value above 10% of SML's Average Market Capitalisation, they are each a Material Transaction. Approvals of each Material Transaction are being sought by SML at a special meeting to be held on 18 September 2024.
6. Rule 6.3.1 disqualifies the Related Party to whom Rule 5.2.1 applies and their Associated Persons from voting in favour of a resolution under that Rule. Rule 6.3.4 requires the Issuer to use reasonable endeavours, in summary, to ascertain to whom Rule 6.3.1 applies.
7. The SML NoM records that:
 - a. Bright Dairy and its Associated Persons cannot vote in favour of the Bright Placement;
 - b. ATM and its Associated Persons cannot vote in favour of the ATM Placement;
 - c. Bright Dairy has warranted to SML that it believes to the best of its knowledge that it is not an Associated Person of ATM or of any other SML shareholder; and
 - d. ATM has warranted to SML that it believes to the best of its knowledge that it is not an Associated Person of Bright Dairy or of any other SML shareholder.

8. Consequently, Bright Dairy may vote in favour of the ATM Placement, and ATM may vote in favour of the Bright Placement. Each have indicated to SML that they intend to do so, as recorded in the SML NoM.

Complaint from Dr. Penno

9. Dr John Penno (**Dr Penno**) owns ordinary shares in SML and is therefore a Quoted Financial Product holder of SML within the meaning of the Rules.
10. In a letter dated 27 August 2024, NZ RegCo received a written complaint on behalf of Dr Penno that the Rules should operate to disqualify Bright Dairy from voting in favour of the ATM Placement and ATM from voting in favour of the Bright Placement on the basis that:
- each of the Bright Placement and ATM Placement are a 'related series of transactions' and should therefore form one overall Material Transaction, not two separate Material Transactions;
 - each of Bright Dairy and ATM are beneficiaries to each other's respective resolutions to approve the Bright Placement and ATM Placement. Consequently, Rule 5.2.1(b) should operate to prevent them from voting in favour of the relevant resolution; and
 - both Bright and ATM are Associated Persons of each other as they are acting jointly and in concert, and therefore Rule 6.3.1 applies to each of them.

Discretionary Ruling

11. Given the significance of the matter and ensuring that the market is applying the Rules in the manner they are intended to operate, including Rule 5.2 in particular, NZ RegCo has determined to exercise its power under Rule 9.6 to issue a Ruling on the application of the Rules involved.
12. In preparing this Ruling, NZ RegCo has considered the complaint and submissions provided by Dr Penno, SML, Bright Dairy and ATM.
13. The Rules to which these decisions relate are set out in Appendix One.
14. Capitalised terms that are not defined in these decisions have the meanings given to them in the Rules.

Background

15. The background to the matters the subject of this Ruling is comprehensively set out in the SML NoM. Set out below are the key factual matters upon which this Ruling is based.
16. NZ RegCo understands, based on the information submitted to it, that:
- SML has been and continues to seek to address its debt position, and has been in negotiations with Bright Dairy, ATM and its banks amongst others, so that it can reset its balance sheet and continue to trade;
 - the first step of that process was the subject of SML's special meeting on 11 July 2024, where approval was sought for a loan from Bright Dairy International Investment Limited, a related company of Bright Dairy (**Bright Loan**);
 - the Bright Loan was required because SML's banks introduced a requirement in September 2023 that the amount of debt owed to them be reduced by \$130 million by 31 March 2024. That date was subsequently extended by agreement of the banks to 15 July 2024. The Bright Loan would effectively replace the \$130 million of debt owed to the banks. The terms of the Bright Loan were set out in SML's notice of special meeting, dated 25 June 2024 (**SML June NoM**);

- d. the Bright Loan was a Material Transaction for the purposes of Rule 5.2.1 and therefore Bright Dairy could not vote in favour of it. Therefore, ATM's vote equated to approximately 33% of the votes eligible to be cast in favour of the resolution;
- e. in the SML June NoM, it was noted that SML was in discussions with ATM, but that it had not indicated how it would vote on the Bright Loan. In the lead up to the special meeting of 11 July 2024, ATM only confirmed its voting intention on the morning of 11 July 2024. At the special meeting, the Bright Loan was approved by 99.59% of eligible votes cast, with 48.14% of total capital voting on the resolution;
- f. outside of the Bright Loan, SML engaged, though a committee of independent directors of SML, in separate negotiations on different timelines with each of Bright Dairy and ATM, in relation to each of them committing further equity into SML, and in ATM's case the settlement of certain commercial disputes;
- g. NZ RegCo has been informed by SML that there were no tripartite discussions, meetings, or calls between SML, Bright Dairy and ATM such that SML only negotiated with Bright Dairy in relation to the Bright Placement and only ATM in relation to the ATM Placement. The same has been confirmed to NZ RegCo by each of Bright Dairy and ATM. Therefore, the Bright Placement and ATM Placement as would be put to shareholders in the SML NoM are not a proposal originating from Bright Dairy and ATM;
- h. NZ RegCo further understands from SML that significant negotiations were involved and were conducted in a robust manner on an arm's length basis. The SML NoM also records the nature of these negotiations;
- i. as noted above in the introduction, the Bright Placement and the ATM Placement are on materially different commercial terms. They are for different total amounts, different prices (the Bright Placement reflecting a control premium), different conditions, result in different commercial outcomes (Bright Dairy obtains control of SML and ATM resolves certain commercial disputes and retains its percentage shareholding in SML) reflecting the different commercial aims of Bright Dairy and ATM; and
- j. NZ RegCo has been informed by SML that:
 - i. the cross-conditionality of the Bright Placement and the ATM Placement on one another (as well as various other matters including the resolution of disputes with ATM and the bank refinancing noted in the SML NoM) are driven by the commercial desire that each of ATM and Bright Dairy would invest in a sufficiently capitalised company; and
 - ii. the contemporaneous issuance of shares under the Bright Placement and the ATM Placement is a reflection of the maturity date for various bank facilities, and the contemporaneous refinancing of its bank facilities as recorded in the SML NoM.

Analysis

Two separate Material Transactions

17. The complaint submits that under Rule 5.2.1 there is in substance one Material Transaction, on the basis that the Bright Placement and ATM Placement are a 'related series of transactions'. As such Bright Dairy and ATM would be direct parties to the one Material Transaction and therefore could not vote in favour of it.
18. NZ RegCo does not consider that in the specific circumstances of this situation, the Bright Placement and the ATM Placement are a 'related series of transactions' for the purposes of the definition of a Material Transaction.

19. The NZX Guidance Note on Major and Related Party Transactions¹ notes that the general policy purpose of Rule 5.2.1 and the regulation of related party transactions is to “*ensure that shareholders have an opportunity to consider, and vote on, such transactions where there is, or may be a perception of, the potential for undue influence by a Related Party on an Issuer’s decision to enter into a transaction or agree to its terms*”.
20. In order to protect the integrity of Rule 5.2 generally, the definition of a Material Transaction includes an anti-avoidance mechanism, in the form of the words “related series of transactions”.
21. The policy behind the phrase “related series of transactions” is to prevent Issuers from artificially structuring a large transaction into several smaller transactions, which would fall below the relevant materiality threshold under the definition of a Material Transaction.
22. NZ RegCo notes that the Bright Placement and ATM Placement are each a Material Transaction in their own right, and each requiring approval by Ordinary Resolution. Nonetheless, NZ RegCo has assessed whether, despite this, they should be treated as a related series of transactions on the basis that there was an intention to avoid the application of the Rules, including Rule 6.3.1.
23. Accordingly, NZ RegCo has considered the applicable factors from paragraphs 2.2 and 3.2.1 of the NZX Guidance Note on Major and Related Party Transactions, and whether they evidence avoidance the application of the Rules.
24. The key factors relate to cross-conditionality, contemporaneousness and the presence of a specific common purpose for entering into the transactions.

Cross-conditionality

- a. NZ RegCo considers that inter-conditionality of transactions and thereby resolutions, although a common feature of related series of transactions, do not by themselves, or indeed, automatically, indicate the resolutions form an overall Material Transaction.
- b. The SML NoM states that:

“Unless the resolution relating to the Bright Placement is passed, the resolution relating to the a2MC Placement and the a2MC Settlement is passed and the refinancing of our bank facilities occurs, Synlait will not be able to reset its balance sheet by way of using the approximate proceeds of \$217.8 million to repay a portion of its third party bank debt and, including as a result of the refinancing, reduce its overall debt position. Further, the disputes relating to the a2MC Settlement will remain unresolved. In this situation, Synlait would likely need to cease trading and initiate a formal insolvency process unless it were to become clear that further support would be forthcoming from its existing banks. Further, even if the Board were to form the view in these circumstances that Synlait could continue trading, the existing banks may seek to initiate a formal insolvency process, such as appointing a receiver, were Synlait to default on its obligations to those banks.”
- c. In light of this background, NZ RegCo accepts SML’s submission that the requirement for cross-conditionality is the result of neither of Bright Dairy and ATM wishing to invest further equity into SML without comfort that SML is, in their view, sufficiently capitalised.
- d. Accordingly, NZ RegCo considers that cross-conditionality does not evidence, in these circumstances, an intention to avoid the application of the Rules, but reflects a genuine and objective commercial rationale, and importantly one arrived at under independent negotiations.

¹ <https://www.nzx.com/regulation/nzx-rules-guidance/nzx-mo-announcements/guidance-notes>

Contemporaneousness

- e. NZ RegCo considers that the contemporaneousness of transactions, can also be a common feature of a related series of transactions which are artificially split. But the presence of this factor does not automatically indicate a related series of transactions.
- f. In this case, the SML NoM and SML has itself confirmed that the key commercial driver for contemporaneousness is the need to repay certain bank facilities by 1 October 2024, to facilitate the contemporaneous refinancing of its bank facilities on that date.
- g. NZ RegCo accepts this submission, and accordingly does not consider that the contemporaneousness of the transactions is an indication of a related series of transactions designed to avoid the application of the Rules.

Common purpose

- h. The complaint referred to presence of a specific common purpose for entering into all relevant transactions, namely, the recapitalisation of SML.
 - i. NZ RegCo considers that while SML is acting to recapitalise itself by reducing debt, on the facts presented to NZ RegCo it appears that Bright Dairy and ATM are each pursuing different commercial objectives in participating the Bright Placement and ATM Placement respectively.
 - j. These different commercial objectives are reflected by the Bright Placement and ATM Placement being on substantively different terms, reflecting objective, independent and genuine commercial rationales by Bright Dairy and ATM.
 - k. NZ RegCo considers it significant, and evidence of the above, that the negotiations were conducted entirely separately on an arm's length basis with each of Bright Dairy and ATM, and that Bright Dairy and ATM have confirmed that they have not negotiated between themselves the Bright Placement and ATM Placement. This is also consistent with the policy of Rule 5.2, as there is not the prospect for Bright Dairy and ATM to unduly influence respectively the ATM Placement and Bright Placement.
 - l. Consequently, on the basis of the above information, NZ RegCo does not consider that there is evidence of a specific common purpose held by SML, ATM and Bright Dairy such that the transactions should be viewed as a related series of transactions.
25. In addition to the above matters, NZ RegCo also considers that it is not open to view the Bright Placement and ATM Placement as a single placement, and therefore single transaction, given that the terms are substantially different, and following from the above have not been structured in a way to avoid the application of the Rules. NZ RegCo's position may be different if the placements were conducted on substantively the same terms, even if the placement was not negotiated on a tripartite basis or originated from the related parties. In such a situation, the substantively similar terms could mean that there is a potential for undue influence by related parties, such that Rules 5.2 and 6.3 should operate to prohibit the related parties from voting on the issuance as a whole.
26. NZ RegCo wishes to stress that this Ruling is based on a highly fact specific assessment of the present circumstances. The Rules discussed have a purpose of regulating actual and potential undue influence from Related Parties and, in part, function as anti-avoidance measures. Therefore, NZ RegCo will apply these principles broadly where the purpose of either is applicable. If Issuers have any questions as to the application of these Rules, engagement with NZ RegCo is highly encouraged.

Parties not beneficiaries of each other's Material Transactions

27. As noted above, the complaint submits that Bright Dairy and ATM are beneficiaries of one another's resolutions, and therefore Rule 5.2(b) should apply. The benefit claimed is, in summary, that if the respective resolutions for the Bright Placement and ATM Placement are passed, the Bright Dairy and ATM benefit accordingly, and also in a general sense from the ongoing operation of SML following recapitalisation.
28. NZ RegCo does not consider that this is the correct interpretation of the Rule and specifically the term 'beneficiary'.
29. The purpose of the use of the term "beneficiary" in "beneficiary of a guarantee or other transaction which is a Material Transaction" intends to capture the direct transfer of value, or some other material benefit to the Related Party under the transaction and from the Issuer.
30. It would therefore be incorrect to classify both Bright Dairy and ATM as a beneficiary of the other's placement, in the sense intended to be captured by the Rule. This is because there is no transfer of value or a material benefit arising under the Bright Placement for ATM, nor for Bright Dairy under the ATM Placement.
31. With respect to the submission that Bright Dairy and ATM are beneficiaries in the sense that SML will be able to continue trading after it recapitalises, NZ RegCo considers that this is too broad an interpretation. The same can be said for all SML shareholders, and to the extent that they were Related Parties they could not vote in favour of the relevant transactions. This would not be a viable interpretation of that Rule and therefore NZ RegCo does not consider that it is correct.

Association

32. The complaint claims that Bright Dairy and ATM are Associated Persons under the Rules on the basis that they are acting jointly or in concert.
33. In approaching the definition of Associated Persons, NZ RegCo notes that the definition is in place, in general terms, as an anti-avoidance mechanism. So it is in the present case, as Rule 6.3.1 would be of little use if shareholding Associated Persons of the Related Party could vote in favour of the relevant Material Transaction.
34. Therefore, it is necessary that those whom the Related Party could influence to vote in favour of the Material Transaction are also prohibited from doing so. It is in this context that the definition of Associated Person is to be interpreted for present purposes.
35. The term 'jointly and in concert' is used in other definitions of association in New Zealand, and has been considered extensively in the context of the Takeovers Code.²
36. In general terms, the concept of acting jointly or in concert, requires that there is knowing conduct the result of communication between the parties and not simply simultaneous actions occurring contemporaneously. It involves at least an understanding between the parties as to a common purpose or object.³
37. While communication is interpreted broadly by NZ RegCo, it must still be present so that the understanding can form.
38. In the present case, as noted above, NZ RegCo has been informed by SML, and it has also been confirmed by ATM and Bright Dairy, that the Bright Placement and ATM Placement were negotiated entirely separately such that there were no tri-partite negotiations, each pursuing

² <https://www.takeovers.govt.nz/guidance/guidance-notes/control-and-association>

³ *Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd* (1995) 16 ACSR 501.

different commercial objectives as ultimately evidenced by the terms of the Bright Placement and ATM Placement. It has been further confirmed by Bright Dairy and ATM that they have not negotiated the Bright Placement and ATM Placement as between themselves.

39. In this respect, the inter-conditionality of the resolutions and relevant transactions does not in and of itself indicate association between Bright Dairy and ATM. Based on the information provided to NZ RegCo this reflects the commercial reality that neither Bright Dairy nor ATM would be prepared to provide funding if SML it was not, in their view, sufficiently capitalised.
40. Accordingly, NZ RegCo does not consider that on the basis of the information provided, that Bright Dairy and ATM are Associated Persons by reason of acting jointly and in concert.

Appendix One

Definitions

Associated Person

a person **(A)** is associated with, or an Associated Person of, another person **(B)** if:

- (a) A is able, directly or indirectly, to exert a substantial degree of influence over the activities of B (or vice versa),
- (b) B is a body corporate and A has the power, directly or indirectly, to exercise, or control the exercise of, more than 50% of the Votes attaching to the Financial Products of B (or vice versa),
- (c) A and B are Relatives or Related Bodies Corporate,
- (d) A and B are partners to whom the Partnership Law Act 2019 applies,
- (e) A is a director or Senior Manager of B (or vice versa), or
- (f) A and B are acting jointly or in concert,

except that:

- (g) A is not an Associated Person of B merely because:
 - (i) A acts as a professional or business adviser to B, without a personal financial interest in the outcome of that advice,
 - (ii) A's ordinary business includes dealing in Financial Products on behalf of others and A is acting in accordance with the specific instructions of B,
 - (iii) A acts as a proxy or representative of B for the purposes of a meeting of holders of Financial Products, or
 - (iv) there is another person with which A and B are both associated,
- (h) persons will not be Associated Persons if NZX makes a Ruling that they are not Associated Persons.

Material Transaction

Means a transaction, or a related series of transactions, whereby an Issuer:

- (a) buys, acquires, gains, leases (as lessor or lessee), sells or otherwise disposes of, assets having an Aggregate Net Value above 10% of the Issuer's Average Market Capitalisation,
- (b) issues its own Financial Products, or acquires its own Equity Securities, having a market value above 10% of the Issuer's Average Market Capitalisation (except where Rule 4.5 applies or in the case of an issue of Debt Securities, in which case only the market value of

Financial Products being issued to any Related Party or to any Employees of the Issuer are to be taken into account),

- (c) borrows, lends, pays or receives money, or incurs an obligation of an amount above 10% of the Average Market Capitalisation of the Issuer (except in the case of an issue of Debt Securities, in which case only the nominal amount of Debt Securities being issued to any Related Party or to any Employees of the Issuer are to be taken into account),
- (d) enters into any guarantee, indemnity, underwriting, or similar obligation, or gives any security, which could expose the Issuer to liability above 10% of the Average Market Capitalisation of the Issuer,
- (e) provides or obtains any services (including the underwriting of Financial Products or services as an Employee) where the gross cost to the Issuer in any financial year is likely to exceed an amount equal to 1% of the Average Market Capitalisation of the Issuer, or
- (f) undertakes an amalgamation, except for amalgamations of a wholly owned Subsidiary with another wholly owned Subsidiary or with the Issuer.

Related Party

means a person who, at the time of a Material Transaction, or at any time within the previous six months, was:

- (a) a Director or Senior Manager of the Issuer or any of its Subsidiaries,
- (b) the holder of a Relevant Interest in 10% or more of a Class of Equity Securities of the Issuer carrying Votes,
- (c) an Associated Person of the Issuer or any of the persons referred to in (a) or (b), except where the person becomes an Associated Person as a consequence of the Material Transaction, or
- (d) a person in respect of whom there are arrangements which are intended to result in that person becoming, or expected to become, a person described in (a), (b), or (c) other than as a consequence of the Material Transaction,

but a person is not a Related Party of an Issuer if:

- (e) the only reason why that person would otherwise be a Related Party of the Issuer is that a Director or Senior Manager of the Issuer is also a Director of that person, so long as:
 - (i) the proportion of Directors of the Issuer who are also Directors of that person is one third or less, and

- (ii) no Director or Senior Manager of the Issuer has a material direct or indirect economic interest in that person, other than receiving reasonable Director's fees or executive remuneration, or
- (f) that person is a Subsidiary or incorporated joint venture of, or unincorporated joint venture participant with, the Issuer and:
 - (i) no Related Party of the Issuer has or intends to obtain, other than through the Issuer itself, a material direct or indirect economic interest in that Subsidiary or joint venture other than receiving reasonable Director's fees or executive remuneration, and
 - (ii) the Issuer has at least 50% of the Votes in or is entitled to at least 50% of the dividends declared or paid by the Subsidiary or incorporated joint venture or is entitled to at least one half of the income or profits, and the assets, of the unincorporated joint venture (if and when distributed).

Rule 5.2 Transactions with Related Parties

- 5.2.1 An Issuer must not enter into a Material Transaction if a Related Party is, or is likely to become:
- (a) a direct party to the Material Transaction, or
 - (b) a beneficiary of a guarantee or other transaction which is a Material Transaction,
- unless that Material Transaction is approved by an Ordinary Resolution (such resolution being subject to the voting restrictions in Rule 6.3) or conditional on such approval.

Rule 6.3 Voting Restrictions

- 6.3.1 Notwithstanding anything to the contrary in the Rules, persons identified in Column 2 of the table below are unable to Vote in favour of the resolutions listed in Column 1.

Column 1 RESOLUTION	Column 2 DISQUALIFIED PERSON
Resolutions under Rule 2.11	Subject to Rule 6.3.2: <ul style="list-style-type: none"> (a) any person to whom it is proposed to issue the new Equity Securities referred to in the resolution, and any Associated Person of that person, or (b) if no persons are specified in the resolution, any Director of the Issuer who is not excluded from participation in the terms of the resolution and any Associated Person of that Director.

Resolution under Rule 4.2.1 to approve a Rights issue of Equity Securities which is not Renounceable and/or an Accelerated Offer	Any Director of the Issuer and any Associated Person of that Director.
Resolution under Rule 4.5.1(c)	Any person who has been issued, or has acquired, the Equity Securities which are subject to ratification by that resolution, and any Associated Person of that person.
Resolution under Rule 4.13.1	Any person whose effective control of the Issuer would be materially increased, and any Associated Person of that person.
Resolution under Rule 5.2.1	The Related Party referred to in Rule 5.2.1 who is a party or beneficiary (in terms of Rule 5.2.1(a) or Rule 5.2.1(b) and any Associated Person of that person).
Resolution under Rule 6.8	Any person who is intended to benefit from the reduction, deferral, or cancellation and any Associated Person of that person, unless all holders of the Equity Securities are to be treated on the same basis.

Rule 9.6 Rulings

9.6.1 NZX may make Rulings in relation to the Rules for such period and on such terms and conditions as it sees fit. It may do this upon application by an Issuer or at its own instigation, and whether or not a dispute exists. A Ruling may apply to a specific Issuer, or be a class Ruling applying to the Rules generally.

...

9.6.3 Any Ruling given under Rule 9.6.1:

- (a) will have effect as if it formed part of the Rules, either in relation to:
 - (i) the Issuer concerned, or
 - (ii) the Rules generally if a class Ruling is made,
- (b) may be recorded or publicised in such manner as NZX thinks fit, and
- (c) may be revoked by NZX at any time by giving notice to either:
 - (i) the relevant Issuer, or
 - (ii) to the market generally, if revoking a class Ruling.