

**NZ RegCo**

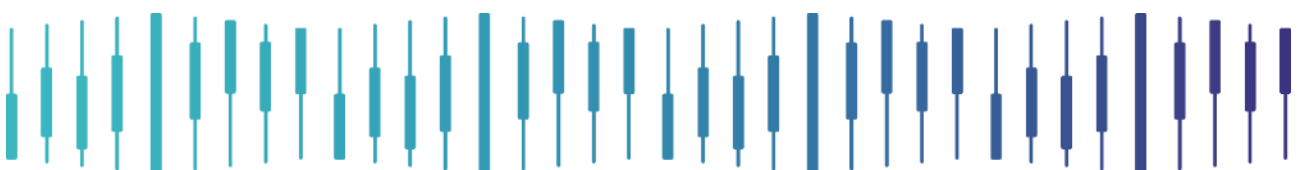
NZ'S LISTED  
MARKET REGULATOR

**27 October 2023**

# NZ RegCo Decision

Synlait Milk Limited (NS) (SML)

Application for Waivers from NZX Listing Rules 2.3.2(c),  
2.3.2(d), 2.4.1(a), 2.5.1, 2.10.2 and 2.20.1(a)(i)



## Background

1. The approval from NZX Regulation Limited (**NZ RegCo**) for the waivers set out in the decisions below will not apply if the information provided by SML is not, or ceases to be, full and accurate in all material respects.
2. This decision relates to a prior waiver decision granted by NZX Regulation (**NZXR**) to SML on 24 June 2013 and amended on 30 October 2018, and then redocumented on 27 November 2019.
3. Capitalised terms which have not been defined in this decision have the meaning given to them in the NZX Listing Rules (**Rules**).
4. The information on which this decision is based is set out in Appendix One to this decision. This decision will not apply if that information is not or ceases to be full and accurate in all material respects.
5. The Rules to which these decisions relate are set out in Appendix Two to this decision.

## Waivers from various Listing Rules

### Decision

6. Subject to the conditions in paragraph 7 and on the basis that the information provided by SML is complete and accurate in all material respects, NZ RegCo grants SML waivers from the following Rules:
  - a. Rule 2.4.1(a), to allow the Governing Document to confer a right on Bright Dairy to appoint four Directors to the Board, even though that number of Directors may be in excess of the proportion of Directors Bright Dairy would be entitled to appoint under Rule 2.4.1(a);
  - b. Rule 2.20.1(a)(i) in relation to Rule 2.5.1, to the extent that Rule 2.20.1(a)(i) would require the Governing Document to incorporate by reference provisions consistent with or having the same effect as Rule 2.5.1. This waiver is necessary to permit SML to continue to include provisions in the Governing Document which remove the right of Directors to appoint another person to act as his or her alternate, deputy or agent in the absence or unavailability of that Director and to allow a Bright Dairy Director who is unable to attend a meeting of the Board to appoint another Bright Dairy Director to exercise his or her voting rights at that meeting;
  - c. Rule 2.20.1(a)(i) in relation to Rule 2.10.2, to allow SML to continue to include a provision in the Governing Document prohibiting the Managing Director from voting on any matter relating to the Managing Director's remuneration; and
  - d. Rule 2.3.2(c) and Rule 2.3.2(d), to allow a precondition to be imposed in respect of persons who may be nominated by SML's shareholders to fill the three non-Bright Dairy Director positions, that those candidates be Independent as defined by the Rules.
7. The waivers contained in paragraph 6 are subject to conditions that:
  - a. Bright Dairy continues to hold no less than the Initial Percentage (as defined in the Governing Document) of the shares in SML, calculated in accordance with clause 22.5 of the Governing Document;
  - b. the Governance Arrangements (as defined in Appendix One) are contained in the Governing Document and will cease to apply when Bright Dairy ceases to hold between the Initial Percentage and 50% (inclusive) of the shares in SML, calculated in accordance with clause 22.5 of the Governing Document;

- c. full and accurate disclosure of all material aspects of the Governance Arrangements (including Bright Dairy's ability to control the Board) (as defined in Appendix One) and SML's reliance on this waiver is contained in any Offer Document and in every Annual Report for SML relating to a period during which this waiver is relied upon;
- d. SML continues to bear a Non-Standard designation to continue to notify the market of SML's unique Governance Arrangements (as defined in Appendix One);
- e. SML has:
  - (i) at least two Independent Directors to form a quorum of the Board, and
  - (ii) either:
    - (A) three Independent Directors, or
    - (B) two Independent Directors, provided that SML's right to rely on this sub-clause (B) to satisfy the conditions of the waivers contained in paragraph 6 shall only apply:
      - (1) where the number of Independent Directors reduces from three Independent Directors to two Independent Directors pending the appointment of a third Independent Director in accordance with the requirements of SML's constitution; and
      - (2) subject to the further condition that if any meeting of the Board is held while the number of Independent Directors (excluding the Board Appointed Director, being a director appointed by the Board in compliance with SML's constitution) holding office is less than three, then at that meeting one director appointed by Bright in accordance with SML's constitution shall abstain from voting on all resolutions put to the vote at that meeting; and
- f. As soon as Bright Dairy holds less than the Initial Percentage of the shares in SML, SML complies with clause 1 of Part B of Schedule 1 of the Governing Document.

(the **Governance Conditions**).

## Reasons

- 8. In coming to the decision to provide the waivers set out in paragraph 6 above, NZ RegCo has considered that:
  - a. The conditions on which waivers from the old Listing Rules were granted when the Governance Arrangements were put in place have ensured that the market and the shareholders of SML are aware of the Governance Arrangements. SML clearly and fully disclosed the effect of the waivers in the prospectus at the time of its IPO. SML bears a Non-Standard (NS) designation. SML discloses its reliance on these waivers in each Annual Report;
  - b. The Governance Conditions provide comfort to NZ RegCo that:
    - i SML will continue to disclose the effect of the waivers to shareholders of SML, and the wider market; and
    - ii If Bright Dairy ceases to hold between the Initial Percentage (as defined in the Governing Document) and 50% (inclusive) of the shares in SML, calculated in accordance with

clause 22.5 of the Governing Document, the Governance Arrangements will cease to apply;

- c. The Governance Arrangements have been in place since prior to SML's listing and are now being replicated as a protective mechanism in the current waiver decision. All current shareholders of SML will have either acquired shares in the SML IPO, or acquired SML shares on-market, with the ability to access information on SML's unique Governance Arrangements;
- d. The Governance Arrangements in SML's Governing Document require a minimum of three Independent Directors on the SML Board. This is more than the two Independent Directors now required by the updated Listing Rules; and
- e. To require fundamental changes to SML's Governance Arrangements could potentially cause disruption in the market of SML shares, and uncertainty for SML shareholders.

# Appendix One

## Background

1. SML is a Listed Issuer with ordinary shares quoted on the NZX Main Board, and initially listed on the NZX Main Board on 23 July 2013.
2. SML's cornerstone investor is Bright Dairy and Food Co Limited, which currently holds its shares in SML through its subsidiary Bright Dairy Holding Limited. Bright Dairy Holding Limited or such other subsidiary (as defined in section 5(1) of the Companies Act 1993) of Bright Dairy and Food Co Limited as holds its interest in SML from time to time are referred to as "**Bright Dairy**" in these waivers.
3. SML listed on the basis that Bright Dairy and Food Co Limited would be able to continue to consolidate SML into its group financial statements (that are prepared under China GAAP). At the time, Bright Dairy agreed with SML that for so long as Bright Dairy continued to hold between the Initial Percentage (as defined in the Governing Document) and 50% (inclusive) of the shares in SML in each case calculated in accordance with clause 22.5 of the Governing Document, the following governance arrangements will apply to SML:

The board of SML (the **Board**) will comprise eight directors, made up of the following:

- i. Four directors appointed by Bright Dairy (the **Bright Dairy Directors**);
  - A None of whom (i) would be required to retire from rotation under NZX Main Board Listing Rule (the **old Listing Rule**) 3.3.11, or (ii) are subject to removal by Ordinary Resolution;
  - B One of whom must be ordinarily resident in New Zealand and be a director of such standing and with such commercial and governance experience in New Zealand as is appropriate for a director of a NZX listed company; and
  - C All of whom are required to have appropriate skills and experience to ensure that SML has a suitable mix of skills and experience on the Board;
- ii. Three directors who are not appointed by Bright Dairy and who must be Independent Directors; and
- iii. One Managing Director (or, following amendments to the Governing Document on 28 November 2018, if a Managing Director is not appointed, a Board Appointed Director) who will be appointed by the Board.

(the **Governance Arrangements**).

4. To facilitate the Governance Arrangements, SML required waivers from a number of the old Listing Rules that were in force at the time of its initial listing.
5. Clause 1 of Part B of Schedule 1 of SML's Governing Document provides that as soon as Bright Dairy holds less than the Initial Percentage of the ordinary shares of SML, or ceases to be a Bright Group Company (as defined in the Governing Document):
  - i. Bright Dairy must procure the resignation or removal of that number of Bright Dairy Directors so that the proportion which the number of remaining Bright Dairy Directors bears to the total number of Directors that will hold office immediately after such removal or resignation does not exceed the proportion of the total shares of SML held by Bright Dairy; and
  - ii. any Bright Dairy Director whose resignation or removal is not effected under Part B, clause 1(i) of the Governing Document must retire by rotation (irrespective of whether those Bright Dairy

Directors are required to retire under clause 22.8 of the Governing Document) at the next annual meeting of SML.

6. Accordingly on 24 June 2013, prior to listing, NZXR granted SML the following waivers from certain of the old Listing Rules:
  - i. Waiver 1 – allowing the constitution to confer a right on Bright Dairy to appoint four directors to the SML Board, even though that number of directors was in excess of the proportion of directors Bright Dairy would be entitled to appoint under older Listing Rule 3.3.8(a) (**Waiver 1**);
  - ii. Waiver 2 – allowing SML to include a provision in its constitution prohibiting the appointment by directors of alternate directors, deputies, or agents to act in the absence or unavailability of a director stating that “no director may appoint an alternate director, a deputy or an agent to act in the absence or unavailability of the director” as well as an express provision that allows a Bright Dairy Director who is unable to attend a meeting of the Board, to appoint another Bright Dairy Director to exercise his or her voting rights at that meeting (**Waiver 2**);
  - iii. Waiver 3 – allowing SML to include a provision in its constitution prohibiting the Managing Director from voting on any matter relating to the Managing Director’s remuneration (**Waiver 3**);
  - iv. Waiver 4 – allowing a precondition to be imposed in respect of persons who may be nominated by Shareholders to fill the three non-Bright Dairy Director positions, that those candidates be “Independent” (as defined by the old Listing Rules) (**Waiver 4**);
  - v. Waiver 5 – so that only one of the three Independent Directors of SML is required to retire by rotation at each annual meeting (**Waiver 5**);
  - vi. Waiver 6 – providing that SML may require those Bright Dairy Directors remaining in office at the first annual meeting following the date on which Bright Dairy’s holding in SML shares drops below the Initial Percentage, to retire by rotation, notwithstanding that they may not have been the longest in office (**Waiver 6**); and
  - vii. Waiver 7 – allowing SML’s constitution to contain the restrictions on transfer as set out in Schedule 2 of SML’s constitution (the **Governing Document**) (**Waiver 7**).
7. At the time of listing, Bright Dairy held 39.119% of SML’s ordinary shares.
8. SML transitioned to the NZX Listing Rules then dated 1 January 2019 (the new Listing Rules). Under the new Listing Rules, Waivers 5, 6, and 7 were no longer necessary so SML did not apply to redocument these waivers. In light of the Governance Conditions outlined in the original waiver decision, NZX Regulation was comfortable granting certain waivers necessitated by the update to the new Listing Rules in the form of the Waiver Decision dated 27 November 2019 (**Waiver Decision 2019**).
9. Part A of Schedule 1 of the Governing Document provides for certain requirements whilst the Governance Arrangements are in place. Clause 6 requires the minimum number of Independent Directors to be three, and if at any time the number of Independent Directors holding office is less than three:
  - i. the Independent Directors then holding office must, as soon as is practical, appoint an additional Independent Director. An Independent Director so appointed holds office only until the next annual meeting of SML but is eligible for election at that meeting.
  - ii. if any meeting of the Board is held while the number of Independent Directors (excluding the Board Appointed Director) holding office is less than three then at that meeting one director appointed by Bright in accordance with SML’s constitution (a **Bright Director**) shall abstain from voting on all resolutions put to the vote at that meeting,

(the **Temporary Arrangements**).

10. The Waiver Decision 2019 contains a Condition that there are three Independent Directors at all times, without mirroring the Temporary Arrangements set out in clause 6 of Part A of Schedule 1 of the Governing Document (as summarised in paragraphs 9.i and ii above) that provide for transitional arrangements for such time as the number of Independent Directors reduces from three to two Independent Directors, pending the appointment of a third Independent Director.
11. In light of the Governance Conditions outlined in the waiver decision, NZ RegCo is comfortable updating the waivers granted under the Waiver Decision 2019 to mirror the Temporary Arrangements provided for in clause 6 of Part A of Schedule 1 of the Governing Document. The Temporary Arrangements are a logical mechanism that reflects the possibility that an Independent Director may cease to hold office before a replacement Independent Director can be appointed.

#### **Listing Rule 2.4.1(a) – Equity Holder appointment rights**

12. Listing Rule 2.4.1(a) provides Equity Security holders with the right to appoint one or more Directors provided that the appointment does not result in the proportion of such Directors to the total number of Directors exceeding the proportion of total Votes attaching to the Equity Securities in the Issuer held by the appointer.
13. At the date of this waiver decision, Bright Dairy holds approximately 39% of the shares in SML. Accordingly, Listing Rule 2.4.1(a) would permit Bright Dairy to appoint up to 39% of the Board.
14. SML's Governing Document provides for 8 total Directors (4 Bright Dairy Directors, 3 Independent Directors, and the Managing Director or Board Appointed Director). The waiver from Rule 2.4.1(a) permits Bright Dairy to appoint four Directors, or one more than it would otherwise be entitled to under the NZX Listing Rules.
15. However, this is balanced in part by the requirement for SML to have one more Independent Director than the Rules would otherwise require (the minimum requirement being two Independent Directors), subject to the Temporary Arrangements.

#### **Listing Rule 2.20.1(a)(i) (in relation to Rule 2.5.1)**

16. Rule 2.20.1(a)(i) requires that Issuers incorporate by reference provisions in their Governing Documents consistent with or having the same effect as Rule 2.5.1. Rule 2.5.1 provides the procedure whereby a Director can appoint an alternate, agent, or deputy to appear on their behalf.
17. The Governing Document provides an express provision stating that “no Director may appoint an alternate Director, a deputy, or an agent to act in the absence or unavailability of the Director”.
18. The Governing Document also includes an express provision that allows a Bright Dairy Director who is unable to attend a meeting of the Board to appoint another Bright Dairy Director to exercise his or her voting rights at that meeting.
19. The waiver from Rule 2.20.1(a)(i) is necessary to allow SML to continue to include these provisions in its Governing Document.
20. At the time that NZXR granted SML a waiver from the equivalent provision in the old Listing Rules, SML submitted that:
  - i. While the provisions in the Governing Document are inconsistent with the requirements under the rules, it is of benefit to shareholders as it is the appointed or elected Directors making up the Board who have the appropriate and requisite skills and expertise to govern SML and its affairs. The prohibition on appointing alternates will result in Directors consistently attending SML's Board meetings, and attending to SML matters personally;

- ii. While Bright Dairy holds between the Initial Percentage and 50% (inclusive) of the shares in SML, SML wished to allow any Bright Dairy Director who is unable to attend a meeting for the Board to appoint another Bright Dairy Director to exercise his or her voting rights at that meeting. These arrangements acknowledge the position that three of the Bright Dairy Directors are likely to be based offshore and may logistically have difficulty in attending every Board meeting; and
  - iii. Such appointments will be permitted only on a case by case basis and must be notified to the chairman of the Board (being one of the Independent Directors).
21. NZ RegCo considered that:
- i. Removing the directors' ability to appoint an alternate director is appropriate in these circumstances given the unique Governance Arrangements;
  - ii. Given that it is likely three of the Bright Dairy Directors will be resident outside of New Zealand, it is appropriate that they are able to appoint another Bright Dairy Director to exercise their vote at a Board meeting they are unable to attend; and
  - iii. It is appropriate for Bright Dairy Directors to appoint another Bright Dairy Director to exercise his or her vote, as all Bright Dairy Directors represent the interests of Bright Dairy.

**Listing Rule 2.20.1(a)(i) (in relation to Rule 2.10.2)**

22. Rule 2.20.1(a)(i) requires Issuers to incorporate by reference provisions in their Governing Documents consistent with and having the same effect as Rule 2.10.2. Rule 2.10.2 allows a Director of an Issuer incorporated under the Companies Act 1993 to vote on a Board resolution for, and be counted in a quorum for the consideration of, a matter in which that Director has an interest, if the matter:
- i. Is one in respect of which Directors are expressly required under that Act to sign a certificate; or
  - ii. Relates to the grant of indemnity under section 162 of that Act.
23. Section 161 of the Act provides that Directors who vote in favour of authorising payment of remuneration must sign a certificate that the payment is fair to the company, and the grounds for that opinion. By virtue of Rule 2.10.2, the Managing Director would be permitted to vote on a Board resolution relating to his or her remuneration.
24. This waiver effectively restricts the Managing Director from voting on any Board resolution relating to his or her remuneration.
25. In granting this waiver, NZXR considered that:
- i. Restricting the Managing Director's ability to vote on his or her own remuneration is consistent with the overarching policy of Rule 2.10.1, which is to prevent situations arising whereby directors may vote on transactions in which they have a vested interest (which would be to the detriment of shareholders); and
  - ii. Rule 2.10.2 is permissive, and it is not inconsistent with the policy of Rule 2.10.1 to allow SML to impose a more restrictive provision than that contained in Rule 2.10.2.

**Listing Rules 2.3.2(c) and 2.3.2(d) – Director Nominations and Appointment**

26. Rule 2.3.2(c) prohibits restrictions on who may be nominated as Directors, other than restrictions which relate to those set out in Rule 2.3.2(c)(i) or 2.3.2(c)(ii). Rule 2.3.2(d) provides that there must be no precondition to the nomination of a Director, other than compliance with the time limits in Rule 2.3.2.



27. This waiver allows a precondition to be imposed in respect of persons who may be nominated by SML's shareholders to fill the three non-Bright Dairy Director positions, that those candidates be Independent as defined by the Rules.
28. At the time that NZXR granted SML a waiver from the equivalent provision in the old Listing Rules, NZXR considered that:
  - i. The pre-condition is an additional protection for shareholders, and will ensure that additional directors with certain disqualifying relationships are not appointed to the Board to fill the non-Bright Dairy Director positions; and
  - ii. The pre-condition is required to ensure that SML will be able to comply with Governance Arrangements contained in its Governing Document and the Governance Conditions.

## Appendix Two

### NZX Listing Rules

#### **Rule 2.3 Director Nominations and Appointment**

2.3.2 An Issuer must comply with the following Director nomination process:

- (c) there must be no restriction on who may be nominated as a Director, unless:
  - (i) the Governing Document requires Directors to hold certain Financial Products to qualify as a Director, or
  - (ii) applicable legislation restricts who may be a Director of the Issuer,
- (d) subject to (c) above, there must be no precondition to the nomination of a Director other than compliance with the time limits in this Rule, and

#### **Rule 2.4 Equity Holder appointment rights**

2.4.1 The Governing Document may give an Equity Security holder the right to appoint one or more Directors (and to remove any Director so appointed), provided:

- (a) the appointment does not result in the proportion of such Directors to the total number of Directors (excluding alternate Directors) exceeding the proportion of total Votes attaching to the Equity Securities in the Issuer held by the appointer, and
- (b) if the appointer exercises its right to appoint one or more Directors with such Director remaining in office at the time of the election of other Directors, the appointer must not also Vote upon the election of other Directors.

#### **Rule 2.5 Alternate Directors**

2.5.1 No Director may appoint an alternate Director to act for him or her except with the consent of a majority of his or her co-Directors. The alternate appointment may be revoked by the appointing Director or by a majority of the Board. A Director may not act as alternate for another Director. No Director may appoint a deputy or agent otherwise than as an alternate Director.

#### **Rule 2.10 Interested Directors**

2.10.1 A Director must not vote on a Board resolution for, or be counted in a quorum for the consideration of, any matter in which that Director is interested. For this purpose, the term “interested” bears the meaning assigned in section 139 of the Companies Act 1993. If the Issuer is not a company registered under that Act, the reference to the “company” in that section will be read as a reference to the Issuer.

2.10.2 Notwithstanding Rule 2.10.1, a Director of an Issuer incorporated under the Companies Act 1993 may vote on a Board resolution for, and be counted in a quorum for the consideration of, a matter in which that Director has an interest, if the matter:

- (a) is one in respect of which Directors are expressly required under that Act to sign a certificate, or
- (b) relates to the grant of indemnity under section 162 of that Act.

**Rule 2.20 Governing Document requirements for Issuers of Equity Securities**

2.20.1 The Governing Document of each Issuer of Quoted Equity Securities must:

- (a) incorporate by reference provisions consistent with, and having the same effect as, the following provisions, as modified by any Ruling relevant to the Issuer:
  - (i) Rule 2.1.1, Rule 2.2.1, Rule 2.5.1, Rule 2.8.1, Rule 2.9.1, Rule 2.10.1 and Rule 2.10.2,

**SML Governing Document**

**Initial Percentage** means the number of ordinary Shares held by the Bright Shareholder at the time the Company is Listed divided by the total number of ordinary Shares in the Company on issue at the time the Company is Listed, expressed as a percentage;

[This figure is 39.119%]

**22.5 Appointment by the Bright Shareholder**

From the Company is Listed, for so long as the Bright Shareholder continues to hold between the Initial Percentage and 50% (inclusive) of the ordinary Shares of the Company and is a Bright Group Company, it shall have the right to appoint Directors to the Board as set out in Part A of Schedule 1 to this Constitution, and the other provisions set out in Part A of Schedule 1 shall apply notwithstanding any other provision in the Constitution. In the event the Bright Shareholder holds less than the Initial Percentage or more than 50% of the ordinary Shares of the Company or ceases to be a Bright Group Company, the provisions set out in Part A of Schedule 1 to this Constitution shall cease to apply and shall be deemed to be deleted from this Constitution, and the provisions set out in Part B of Schedule 1 to this Constitution shall apply. For the purposes of calculating the percentage of ordinary Shares of the Company held by the Bright Shareholder, any ordinary Shares issued by the Company to (i) Employees pursuant to Listing Rule 4.6 (or its predecessor Listing Rule, Listing Rule 7.3.6), and (ii) Directors pursuant to Listing Rule 4.7.1 (or its predecessor Listing Rule, Listing Rule 7.3.7), shall in each case be excluded from the calculation. The Bright Shareholder's rights under this clause 22.5 are subject to the Initial Percentage being not less than 37% of the ordinary Shares of the Company at the time the Company is Listed.

**Schedule 1 Part A – Director Appointment Rights of the Bright Shareholder while it continues to hold between the Initial Percentage and 50% (inclusive) of the ordinary Shares of the Company**

From the time the Company is Listed, for so long as the Bright Shareholder continues to hold between the Initial Percentage and 50% of the ordinary Shares of the Company and is a Bright Group Company, subject to the Initial Percentage being not less than 37% of the ordinary Shares of the Company at the time the Company is Listed, the following provisions of this Part A of Schedule 1 shall apply:

...

clause 6. Notwithstanding clause 22.3, the minimum number of Independent Directors shall be three (3). If at any time the number of Independent Directors holding office is less than three (3), the Independent Directors then holding office must, as soon as is practical, appoint an additional Independent Director. An Independent Director so appointed holds office only until the next annual meeting of the Company but is eligible for election at that meeting. If any meeting of the Board is held while the number of Independent Directors (excluding the Board Appointed Director) holding office is less than three (3) then at that meeting one Bright Director shall abstain from voting on all resolutions put to the vote at that meeting.