



## COMMENTARY ON LISTED COMPANIES ASSOCIATION INC.'S FINANCIAL PRODUCT TRADING POLICY AND GUIDELINES

### Background

The Listed Companies Association Inc. (**LCA**)<sup>1</sup>, with the assistance of Chapman Tripp, has developed the accompanying [Financial Product Trading Policy and Guidelines](#), together with [Additional Trading Restrictions for Restricted Persons](#), and a [Request for Consent to Trade in Restricted Financial Products](#) form.

LCA has developed these documents to assist its members to formulate revised trading policies that comply with the Financial Markets Conduct Act 2013 (**FMCA**).

### Executive summary

The LCA recommends that New Zealand listed issuers:

- establish a trading policy that applies to all employees and directors, and that it is circulated to all employees that may at any time possess any material information about the listed issuer.
- publicise their policy in internal communications, on a regular basis, and place it on their website.
- establish a trading approval process for more senior employees and directors, who are more likely to possess material information from time to time.
- introduce “trading windows” or “black-out” periods, during which senior employees and directors may trade (if trading windows are adopted) or never trade (if black out periods are adopted). If a window or black-out is not used, particular care should be taken when considering approvals leading up to financial results announcements, and in all circumstances a person must not trade if the person holds material information.

Suggested templates, and suggestions on which employees should be required to first obtain approval, follow.

### Overview of the law

Sub-part 2 of Part 5 of the FMCA focuses on the threat that insider trading poses to the integrity and confidence of the market. Liability for insider trading is not limited to those who are connected or related to the issuer.

An **information insider** is someone who has material information about a listed issuer that is not generally available to the market, where the person knows or should know that the information is material and is not generally available.

**Material information** is information that a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of quoted financial

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<sup>1</sup> LCA is an independent and voluntary non-profit organisation established in 1981. LCA's website is at <http://www.listedcompanies.co.nz>.

products of the listed issuer, and that relates to particular financial products, a particular listed issuer, or particular listed issuers, rather than to financial products generally or listed issuers generally.

### **Formal insider trading policy and guidelines**

LCA recommends that a formal financial product trading policy be adopted by NZX listed issuers. A formal policy should assist listed issuers to raise awareness about the prohibitions under the FMCA, and assist directors and employees to comply with the FMCA.

### **Reporting on policy adopted**

NZX Main Board Listing Rule 10.4.5(h) requires an issuer's annual report to include a statement of any corporate governance policies, practices, and processes adopted or followed by the issuer, which would include the financial product trading policy.

The template policy and guidelines have been written in simplified language, to aid understanding. Although the FMCA contains a number of defences to accompany the FMCA insider conduct prohibitions, the policy does not seek to describe all of the intricacies of the defences, as very few of them have practical application to director trading or employee trading and conduct, or they apply in limited circumstances (for example, company takeovers under the Takeovers Code).

### **Specific comments on the Financial Product Trading Policy and Guidelines**

#### ***Overview of scope***

The [Financial Product Trading Policy and Guidelines](#) are intended to apply generally to all directors and employees of a listed issuer and its subsidiaries, and be circulated to employees that may at any time possess any material information about the listed issuer. The more restrictive [Additional Trading Restrictions for Restricted Persons](#) are intended to apply to directors, and a subset of employees – generally those that are most senior in the company or that are specifically designated (e.g. legal, finance team employees). Smaller listed issuers may choose to apply the more restrictive rules to all employees, for administrative simplicity.

The policy, and additional trading restrictions, have been prepared only by reference to New Zealand legal requirements under the FMCA. Thus, the policy is not intended to apply to new issues of financial products (as the insider conduct provisions of the FMCA do not apply to new issues) or to trading in unlisted financial products, other than derivatives where the underlying is a quoted financial product.

Where the issuer is also listed on a market in another country (for example, ASX), it may wish to develop an alternative policy for employees in that country, or make it clear that additional requirements may apply in relation to trading on alternative markets (for example, Australian law applies to listed and unlisted financial products, and to new issues).

#### ***Designated Officer***

The policy contemplates that a specific company officer be responsible for implementation of the policy, for example the Company Secretary or the General Counsel.

#### ***Restricted Financial products***

The **Introduction and purpose** section of the policy suggests financial products covered by the policy to be detailed in a list.

**Examples of material information**

The examples given could be expanded, or tailored for particular circumstances of an issuer. For example, for an issuer in a regulated industry, a possible change in regulation could be specifically listed.

**Short term trading**

The FMCA does not specifically prohibit short term trading – the buying and selling of financial products over a very short time period. However, best practice is to have a guideline discouraging short term trading, because it can be a key indicator of insider trading, particularly if undertaken on a regular basis or in large amounts.

**Application of policy**

Best practice would be for the issuers' board to review the policy on a periodic basis (e.g. annually).

**Specific comments on the Additional Trading Restrictions for Restricted Persons****Scope**

As noted above, the [Additional Trading Restrictions for Restricted Persons](#) are intended to apply to directors, and a subset of employees, although smaller issuers may choose to apply the more restrictive rules to all employees, for administrative simplicity.

LCA's review of a sample of ASX listed issuer trading policies indicated the additional trading restrictions comprised two elements: (i) designated periods when trading was permitted (or, alternatively, prohibited), and (ii) administrative procedures requiring declarations from the restricted person prior to trading, that material information is not held, and consent from a designated officer before trading can occur.

LCA recommends New Zealand listed issuers establish an appropriate administrative procedure for case-by-case approval of transactions by Restricted Persons. A suggestion is outlined below. LCA also recommends that New Zealand listed issuers consider establishing "trading window" or "black-out" periods, as discussed below. This has the benefit of administrative simplicity, and recognises that there is a greater likelihood of material information being held immediately before financial results announcements.

However, some listed issuers might prefer to rely only on a case-by-case approval process. If so, they should be particularly careful in their approval processes leading up to financial results announcements, and also cognisant of adverse perception issues that might arise if Restricted Persons trade leading up to financial result announcements.

**Insider trading is prohibited at all times**

Despite the policy containing designated periods when trading is permitted (or, alternatively, prohibited), if material information is held, it is illegal to trade at any time.

**"Trading window" vs. "black-out" approaches**

LCA's review of a sample of ASX listed issuer trading policies identified two general approaches to restricting trading during designated periods.

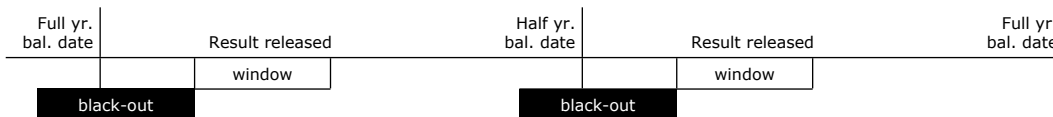
One approach is to designate a permitted "trading window", usually, following financial result announcements, or other events such as an annual meeting. The permitted period typically ranged from 30 to 60 days, following result announcements. Some ASX issuers applied a

trading window following an annual meeting (in addition to financial result announcements). In LCA's experience, annual meetings in New Zealand do not typically result in disclosures of significant new material information (given the continuous disclosure obligations to disclose such information earlier).

An alternative approach is to put in place, a "black-out" or "closed" period applying from a period just before balance date, or half-year balance date, through to the announcement of financial results. The "black-out" period typically operates one or two months prior to the end of a financial reporting period, through to the preliminary result announcement. Where an issuer makes a quarterly preliminary announcement of financial results, or has a practice of reporting regularly on operating metrics and performance, then a shorter pre-announcement black-out period may be appropriate. An advantage of using "black-out" terminology is that it avoids the implication that insiders have an indefeasible right to trade during the window period. This is not the case because, if insiders hold material information, it is illegal to trade and they are prohibited from trading under the policy, notwithstanding that a trading window may be open. Remember, insider trading is illegal at any time.

Of the sample LCA reviewed, roughly two thirds opted for a "trading window" approach. One consequence of a "black-out" approach is that, provided that the duration of any black-out period is relatively short, the total amount of time during which trading is permitted will be generally be longer than under a "trading window" policy. However, ultimately, the terminology issuers use may make little difference, as the periods defined as black-outs or windows could result in the exact same regime depending on the length of the periods.

The "trading window" and "black-out" closed period approaches can be illustrated as follows:



### ***Period for consent to trading***

Regardless of whether a "trading window" or "black-out" approach is preferred, LCA's sample of ASX listed issuer policies revealed that the period for consent to trade, once given, was typically 5 or 10 trading days.

### ***Administration of Additional Trading Restrictions for Restricted Persons***

LCA has prepared a [Request For Consent to Trade in Restricted Financial Products](#) form to be provided to the issuer's designated officer.

The form includes an acknowledgement that, in giving (or declining) consent, the issuer is not advising or encouraging the applicant to trade or hold financial products and does not provide any financial products recommendation, and declarations to the effect that the applicant is not in breach of the law.

Listed issuers will need to give careful consideration to the requisite internal approval level for consent requests, having regard to other delegations. For example, director, CEO and CFO consents might be approved by the Chairperson (or Deputy Chairperson). Approval of employee requests below a materiality threshold might be delegated to the designated officer, with requests in excess of the materiality threshold needing a second level of approval.

Listed issuers may also wish to consider a policy on the means of conveying requests, or consents, to trade. Although e-mail dissemination may be convenient, some issuers may wish to adopt requirements for written and signed requests given the relative informality of e-mail communication.

NOVEMBER 2014[ISSUER] LIMITED

## FINANCIAL PRODUCT TRADING POLICY AND GUIDELINES

*This policy applies to all Directors, officers and employees of [Issuer] and its subsidiaries [in New Zealand] who intend to trade in [Issuer]'s quoted financial products [in New Zealand]. In this policy 'trade' includes buying or selling quoted financial products, or agreeing to do so, whether as principal or agent, but it does not include subscription for, or the issue of, new financial products.*

*In addition to this Policy and Guidelines, further more specific and stringent rules also apply to trading in [Issuer]'s financial products, by Directors and certain employees (see [Additional Trading Restrictions for Restricted Persons](#)).*

### Introduction and purpose

This document details [Issuer]'s policy on, and rules for dealing in the following financial products (**Restricted Financial Products**):

- [List relevant [quoted] financial products, including any quoted financial products issued by subsidiaries];
- any other quoted financial products of [Issuer] or its subsidiaries from time to time; and
- any derivatives in respect of such quoted financial products from time to time.

The requirements imposed by the policy are separate from, and in addition to, the legal prohibitions on insider trading in New Zealand and any other country where those financial products may be listed.

**If you do not understand any part of this policy, or how it applies to you, you should raise the matter with [Designated Officer] before dealing with any financial products covered by this policy.**

### Fundamental Rule – Insider trading is prohibited at all times

If you possess "material information" (refer to definition below), then **whether or not** you are a Restricted Person below, you must not:

- trade Restricted Financial Products;
- advise or encourage others to trade, or hold any Restricted Financial Products; or
- pass on the material information to others.

The prohibitions apply regardless of how you learn of the information, and regardless of why you are trading.

The prohibition on insider trading applies not only to information concerning [Issuer]'s financial products. If a person has material information in relation to quoted financial

products of another issuer (including derivatives in respect of such quoted financial products), that person must not trade in those financial products.

### **Insider trading laws**

If you have any **material information**, it is illegal for you to:

- trade [*Issuer*]'s Restricted Financial Products;
- advise or encourage another person to trade or hold [*Issuer*]'s Restricted Financial Products;
- advise or encourage a person to advise or encourage another person to trade or hold [*Issuer*]'s Restricted Financial Products; or
- pass on the **material information** to anyone else – including colleagues, family or friends – knowing (or where you ought to have known) that the other person will use that information to trade, continue to hold, or advise or encourage someone else to trade, or hold, [*Issuer*]'s Restricted Financial Products.

This offence, called “insider trading”, can subject you to criminal liability including large fines and/or imprisonment, and civil liability, which may include being sued by another party or [*Issuer*], for any loss suffered as a result of illegal trading.

### **Confidential information**

In addition to the above, you also have a duty of confidentiality to [*Issuer*]. You must not reveal any confidential information concerning [*Issuer*] to a third party (unless that third party has signed a confidentiality agreement with [*Issuer*] and you have been authorised to disclose the confidential information), or to use confidential information in any way which may injure or cause loss to [*Issuer*], or use confidential information to gain an advantage for yourself. You should ensure that external advisers keep [*Issuer*] information confidential.

### **What is “material information”?**

“Material information” is information that:

- is not generally available to the market; and
- if it were generally available to the market, would have a material effect on the price of [*Issuer*]'s quoted financial products.

Information is generally available to the market if it has been released as an NZX announcement, or investors that commonly invest in [*Issuer*]'s quoted financial products can readily obtain the information (whether by observation, use of expertise, purchase or other means).

It does not matter how you come to know the material information (including whether you learn it in the course of carrying out your responsibilities, or in passing in the corridor, or in a lift, or at a social function).

Information includes rumours, matters of supposition, intentions of a person (including [*Issuer*]), and information, which is insufficiently definite to warrant disclosure to the public.

### **What are some examples of material information ?**

The following list is illustrative only. Material information could include information concerning:

- the financial performance of [*Issuer*];
- a possible change in the strategic direction of [*Issuer*];
- the introduction of an important new product or service;
- a possible acquisition or sale of any assets or company by [*Issuer*];
- entry into or the likely entry into or termination or likely termination of material contracts or other business arrangements which are not publicly known;
- a possible change in [*Issuer*]'s capital structure;
- a change in the historical pattern of dividends;
- senior management changes;
- a material legal claim by or against the [*Issuer*]; or
- any other unexpected liability,

which has not been released to the market.

### **Exceptions**

This policy does not apply to:

- acquisitions and disposals by gift or inheritance;
- acquisitions through an issue of new quoted financial products, such as an issue of new shares on the exercise of options, under a rights issue, or a dividend reinvestment plan.

### **[Short term trading discouraged**

You should not engage in short term trading (the buying or selling of Restricted Financial Products within a [6/3 [for quarterly reporting issuers]] month period), unless there are exceptional circumstances discussed with and approved by [*Designated Officer*].

Short term trading can be a key indicator of insider trading, particularly if undertaken on a regular basis or in large amounts. Therefore, to reduce the risk of an allegation of insider trading, do not trade Restricted Financial Products on a short-term basis.]

### **If in doubt, don't**

The rules contained in this policy do not replace your legal obligations. The boundary between what is (and is not) in breach of the law is not always clear. Sometimes behaviour that you consider to be ethical actually may be insider trading. If in doubt, don't!

### **Breaches of policy**

Strict compliance with this policy is a condition of employment. Breaches of this policy will be subject to disciplinary action, which may include termination of employment.

**Monitoring of trading**

[*Issuer*] may monitor the trading of directors and employees as part of the administration of this policy.

**Application of policy**

The Board of [*Issuer*] has approved this policy. The Board may approve updates, amendments to and exemptions to this policy from time to time, which may be implemented by [notice to you] [posting on [*Issuer's*] intranet].

To the extent of any inconsistency with any previous policy or rules relating to this subject matter, this policy prevails over them.

**[Date]**



**[ISSUER] LIMITED**

**ADDITIONAL TRADING RESTRICTIONS FOR RESTRICTED PERSONS**

**Persons covered by Restricted Financial Product Trading Restrictions**

The additional trading restrictions set out below apply to:

- all Directors;
- the Chief Executive and all [senior management] (all Chief Executive direct reports [and those directly reporting to them]);
- trusts and companies controlled by such persons; and
- anyone else notified by [*Designated Officer*] from time to time.

[OR if a smaller listed issuer]

- all Directors and employees of [*Issuer*] and its subsidiary companies; and
- trusts and companies controlled by such persons.

Persons covered by these additional restrictions are called “**Restricted Persons**”. Employees and directors will be considered responsible for the actions of trusts and companies controlled by them. In this respect, “control” is not to be construed in a technical way but by looking at how decisions are made in practice.

**Additional trading restrictions for Restricted Persons (trading window)**

Restricted Persons are prohibited from trading in any Restricted Financial Products except in the [60/30 [for quarterly reporting issuers]] days commencing on the [first] trading day after:

- [release of quarterly results to NZX];
- release of half-year results to NZX;
- release of full-year results to NZX; and
- release of a product disclosure statement for a general public offer of the same class of Restricted Financial Products or a same class cleansing notice.

Restricted Persons are not permitted to trade any Restricted Financial Products during any other period unless [*Issuer*]'s Board provides a specific exemption.

***Please note that if you hold material information you must not trade Restricted Financial Products at any time – regardless of these periods.***

OR

**Additional trading restrictions for Restricted Persons (black-out period)**

Restricted Persons are prohibited from trading in any Restricted Financial Products during the following specific “black-out” periods:

- [30/15 [for quarterly reporting issuers]] days prior to [Issuer]'s [half-year/quarterly] balance date, until the [first] trading day after the [half-year/quarterly] results are released to NZX; and
- [30/15 [for quarterly reporting issuers]] days prior to [Issuer]'s year-end balance date, until the [first] trading day after the full-year results are released to NZX.

In addition, [Designated Officer] may notify Restricted Persons of additional "black-out" periods from time to time (without the need for explanation to those affected).

Restricted Persons are not permitted to trade any Restricted Financial Products during a black-out period unless [Issuer]'s Board provides a specific exemption. The Board may consider granting a specific exemption in cases of severe financial hardship (that cannot be satisfied otherwise than by trading Restricted Financial Products) or other exceptional circumstances, and any such exemptions shall be in the Board's absolute discretion.

***Please note that if you hold material information you must not trade Restricted Financial Products at any time – regardless of these periods.***

#### **Requirements before trading**

Before trading in Restricted Financial Products, at any time, Restricted Persons must, in writing:

- notify [Issuer]'s [Designated Officer] of their intention to trade in financial products, and seek consent to do so (using the [Request for Consent to Trade in Restricted Financial Products](#) form attached);
- confirm that they do not hold material information; and
- confirm that there is no known reason to prohibit trading in any Restricted Financial products.

A consent is only valid for a period of [5/10] trading days after notification. A consent is automatically deemed to be withdrawn if the person becomes aware of material information prior to trading.

#### **Requirements after trading**

A Restricted Person must advise [Designated Officer] promptly following completion of any trade, and the Restricted Person must comply with any disclosure obligations it has under Subpart 6 of the Financial Markets Conduct Act 2013 (disclosure of relevant interests in quoted financial products by directors and senior managers of listed issuers).

**[ISSUER] LIMITED**

**REQUEST FOR CONSENT TO TRADE IN RESTRICTED FINANCIAL PRODUCTS**

To: [Designated Officer], [Issuer]

In accordance with [Issuer]'s Financial Product Trading Policy and Guidelines, Additional Trading Restrictions for Restricted Persons, I request [Issuer]'s consent be given to the following proposed transaction to be undertaken either by me or persons associated with me, within [5/10] trading days of approval being given. I acknowledge [Issuer] is not advising or encouraging me to trade or hold financial products and does not provide any financial product recommendation.

**Name:**

**Name of registered holder  
transacting (if different):**

**Address:**

**Position:**

**Description and number of  
financial product:**

**Type of proposed transaction:** Purchase/sale/other (specify)

**To be transacted:** On NZX/off-market trade/other (specify)

**Likely date of transaction  
(on or about):**

I declare that I do not hold information which:

- is not generally available to the market; and
- would have a material effect on the price of [Issuer]'s quoted financial products if it were generally available to the market.

I know of no reason to prohibit me from trading in [Issuer]'s Restricted Financial Products and certify that the details given above are complete, true and correct.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

[Issuer] hereby **consents/does not consent** to the proposed transaction described above. Any consent is conditional on the proposed transaction being completed within [5/10] trading days of the date of this consent, and in compliance with [Issuer]'s Financial Product Trading Policy and Guidelines and Additional Trading Restrictions for Restricted Persons.

\_\_\_\_\_  
Name:  
on behalf of [Issuer]

\_\_\_\_\_  
Date