Listed Companies Association
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Dear Megan

Submissions regarding the NZX consultation memorandum and proposed amendments to the Main Board and Debt Market Listing Rules

1 Introduction

1.1 The executive of the Listed Companies Association Inc. ('**LCA**') welcomes the opportunity provided by the NZX to comment on the consultation memorandum and proposed amendments to the Main Board and Debt Market Listing Rules ('**Consultation Paper**').

1.2 The LCA is an independent and voluntary non-profit organisation established in 1981. Its members are issuers listed on the NZSX, NZAX, and NZDX. Its main purposes are:

a to help issuers further the long-term interests of their shareholders by working for a fair, adequate, and efficient regulatory system;

b to help issuers maximise the benefits of listing and to make the requirements that come with that status appropriate and reasonable to comply with; and

c to promote confidence, in and growth of, business and capital markets in New Zealand.

1.3 The LCA submission reflects a considerable range of views. Subject to the comments set out below, there is general support for the proposed amendments. We comment on specific aspects of the Consultation Paper below and for ease of reference we have used the headings used in the Consultation Paper.

1.4 Where no comment is made you can assume support.

2 Proposed Diversity Listing Rule

2.1 In general, the LCA supports diversity within the boards and senior management of issuers. It also generally supports transparency in respect of those issuers which choose to report in respect of their diversity.

2.2 However, given the variance in size, nature, and resources of issuers, the LCA believes that any disclosure requirements imposed on issuers under the Listing Rules must strike an appropriate balance between encouraging diversity and providing investors with pertinent information on the one hand, against the consequential costs and benefits of those requirements.

2.3 While the LCA agrees that diversity is important, it should not be emphasised as a stand alone requirement.

2.4 With that in mind, the LCA:

a supports the proposed rule 10.5.5(j)

b does not support the proposed rule 10.5.5(k) but would support a requirement that issuers disclose whether they maintain a diversity policy and if so, to describe the content of that policy

c seeks the removal of the words 'and any Subsidiary board' from the proposed rule 10.5.5(j).

2.5 With respect to 2.4b above, the LCA is of the view that the imposition of a mandatory requirement to have a diversity policy would be unduly onerous for smaller issuers. It is suggested that proposed rule 10.5.5(k) be recast as follows:

> 'a statement as to whether or not the Issuer has a diversity policy and, if so, a brief summary of the content of that policy'

2.6 With respect to 2.4 c above:

a the number of subsidiary companies of an issuer may in some cases be substantial with a wide range of persons appointed, some of whom (e.g. in the case of small companies in foreign jurisdictions) may be of little interest to shareholders and may also be the subject of regular change; and

b in other cases, the make up of the board of a subsidiary company will likely include directors of the parent company and/or members of the senior executive team, the identities of whom the issuer will already be required to disclose.

2.7 In the LCA's view, this approach strikes an appropriate balance between the more fulsome reporting requirements proposed by NZX and the status quo, without imposing unduly onerous requirements on smaller issuers.

3 Definition of Equity Security and Listing Rule 7.3.1 and 7.3.11(b)

3.1 The LCA understands that the correct reading of the new definition of 'Equity Security' is that any security that confers a right to be issued a security with one or more of the features set out in paragraphs (a) – (c) of the definition of equity security is deemed an equity security on issue, regardless of whether conversion is subject to the approval of the holder or approval by shareholders in accordance with rule 7.3.1. As such, if the proposed amendment is adopted, then an issue of convertible securities that cannot be completed without shareholder approval under rule 7.3.1(b) will necessarily require shareholder approval prior to issue, with no ability to defer shareholder approval until exercise of the option to convert.

3.2 Following discussions with NZX, and with regard to the following comments made by NZX in the Consultation Paper:

> 'NZX proposes to … amend Rule 7.3.11(b) … on the basis that all Securities to which this Rule is intended to apply should be Equity Securities under the amended definition and that the appropriate approval should be obtained prior to the issue of the Convertible Security, *or prior to the issue of the Equity Securities on Conversion of the Convertible Security*'

the LCA understands that NZX does not intend to change the current policy approach to the approval of the issue of equity securities. Specifically, NZX intends to preserve the ability of an issuer, in certain circumstances, to issue convertible securities without first obtaining shareholder approval on the basis that shareholder approval will be obtained prior to conversion of that security.

3.3 Given the above, it appears that the proposed amendment represents a policy change inconsistent with the stated objectives of NZX. Accordingly, the LCA seeks confirmation from NZX as to its intended approach to the issue of convertible securities and in particular the timing of when approval under rule 7.3.1 is required.

3.4 Another issue is that the amendment to rule 7.3.11(b) would remove the ability which issuers currently have to:

a issue convertible (non-equity) securities with shareholder approval; and then

b allow them to convert without further shareholder approval being required.

For example, an issuer may issue convertible notes which NZX rules to be debt securities. If the issuer obtains shareholder approval for the issue of

notes (as if rule 7.3.1 applied), then it should not be required to obtain an additional shareholder approval for conversion. In other words, the existing rule 7.3.11(b)(ii) should be preserved. Otherwise convertible non-equity securities will almost always require exemption relief, if they are to convert without shareholder approval at the time of conversion.

3.5 In addition to the above, the LCA is in favour of a technical addition to the definition of 'Equity Security'. In the LCA's view, this definition should expressly include securities that NZX has already declared by way of a ruling to be an equity security, and expressly exclude securities that NZX has already declared by ruling not to be equity security. This will provide issuers with certainty as to the application of NZX's previous declarations.

3.6 The LCA accordingly suggests amending the definition of Equity Security, so that it reads as follows:

> 'any other Security which NZX in its sole discretion declares**, or which NZX has previously declared,** by a Ruling to be an Equity Security but does not include any Security that NZX in its sole discretion declares**, or that NZX has previously declared,** by a Ruling not to be an Equity Security'

4 Board Determination of Independent Directors – Listing Rule 3.3.3(a)

4.1 As a matter of principle the LCA supports the relaxation on reporting requirements under rule 3.3.3, and believes that this will result in a reduction in compliance costs for issuers without reducing the availability of the relevant information to the market.

4.2 However, in the LCA's view, a more straightforward approach would be to simply delete rule 3.3.3(a) and replace it with a requirement (perhaps as a new rule within rule 6.2) that the board of an issuer specify in the notice of meeting preceding the issuer's annual general meeting whether a candidate for appointment to the board will be considered to be an independent director if elected. This would reduce the compliance cost on issuers as it would not require issuers to produce a separate announcement following each annual general meeting.

4.3 Rules 3.3.3(b) and (c) would continue to apply to ensure that the market continues to be informed at all times of the identity of independent directors.

5 Approval of documents by NZX – Listing Rules 6.1.2 (e) and 7.1.1(a)

5.1 The LCA agrees with the proposal to remove the requirement for NZX approval of offering documents and prospectuses in respect of securities

that are not quoted on the Main Board or Debt Market, and in respect of offers to employees under an employee share scheme ('**ESS**').

5.2 However, the proposed wording of rule 6.1.2(e) does not expressly 'carve out' an exception for offering documents and prospectuses prepared in respect of offers to employees under an ESS. While the proposed footnote to rule 6.1.2 implies that it 'may not be necessary' for issuers to obtain NZX approval for such documents, this is not reflected in the wording of the rule itself.

5.3 In the LCA's view, to ensure certainty for issuers rule 6.1.2(e) should expressly exclude the need to obtain NZX approval for offering documents and prospectuses in respect of offers to employees under an ESS (including but not limited to documents prepared in reliance on the Securities Act (Employee Share Purchase Schemes – Listed Companies) Exemption Notice 2011).

6 Statements in Offering Documents – Listing Rule 7.1.10

6.1 The LCA supports the principle underlying the proposed amendment to rule 7.1.10.

6.2 As noted by NZX, under the status quo issuers often take the view that the rule does not apply to dividend reinvestment plans ('**DRPs**') and share purchase plans. The proposed amendment does not clarify whether this is the case and as such does not provide issuers with certainty about the circumstances in which the rules applies.

6.3 In the LCA's view, rule 7.1.10 should expressly provide that it does not apply to offering documents prepared in respect of DRPs and share purchase plans. This will ensure certainty for issuers. It will also reduce issuers' compliance costs as issuers will not be required to seek NZX's agreement in respect of such documents.

7 Over-subscriptions – Listing Rule 7.3.4

7.1 The LCA does not support the proposed amendment to rule 7.3.4, but is in favour of the proposed deletion of rule 7.10.5.

7.2 The LCA supports the underlying policy of the proposed amendment to rule 7.3.4(d), which is to ensure that existing shareholders have the primary opportunity to participate in offers of new shares. However, in the LCA's view, the existing problem stems not from the application of rule 7.3.4, but from the restriction set out in rule 7.10.5 that prohibits issuers from issuing additional securities offered under a pro-rata subscription facility.

7.3 The deletion of rule 7.10.5 addresses the problem.

7.4 However, the proposed amendments to rule 7.3.4(d) are unwarranted. Rule 7.3.4 in its current form neatly addresses, with adequate flexibility, the issue of further equity securities in respect of which an offer is not accepted. Where an over-subscription facility is in place, the issuer will be required to comply with those terms. However, if and to the extent such a facility is not offered, then rule 7.3.4(d) in its current form will still apply, with the effect that the directors will still be required (and permitted) to offer the excess shares in such a manner that is equitable and in the interests of the issuer, and otherwise in accordance with rule 7.3.4(d).

7.5 The proposed change on the other hand introduces a host of questions of what is meant by pro rata and how that should be applied. In effect it would require an oversubscription facility to be offered whenever an offer shortfall is to be issued to a third party (e.g. underwriters), and in a practical sense this will almost always require an oversubscription facility to be offered, even if the directors take the view that it is not appropriate. It may also undermine an issuer's ability to appropriately structure an offer and obtain underwriting. We have little doubt that these complexities and issues explain why the rule is in its current form.

8 Offer of Securities outside New Zealand – Listing Rule 7.3.4(h)

8.1 The LCA agrees that there is uncertainty surrounding the application of rule 7.3.4(h) in relation to offers of securities outside of New Zealand.

8.2 The LCA understands that the underlying purpose of rule 7.3.4(h) is to avoid unjustifiable compliance costs for issuers with a small base of overseas investors.

8.3 In practice, complying with the regulatory requirements for securities offerings in all but New Zealand and Australia imposes significant and at times prohibitive costs on the issuer. Furthermore, there is no guidance within the rules as to how legal requirements in a particular jurisdiction can be considered 'unduly onerous' for the purposes of providing a legal opinion under that rule. The proposed amendments to the footnote to rule 7.3.4(h) do not address this.

8.4 That being the case, the LCA's preferred approach is for rule 7.3.4(h) to expressly provide that issuers will be entitled not to offer or issue equity securities to holders of existing securities in jurisdictions other than New Zealand or Australia. This will provide certainty for issuers and will generally align with market practice in respect of the application of rule 7.3.4(h) in its current form. Security holders in jurisdictions other than New Zealand and Australia would continue to be protected as issuers would still be required to account to those security holders for the

proceeds of the sale of renounceable rights on their behalf, as contemplated under the rule.

8.5 In effect, directors of issuers should be free to choose when to offer securities beyond New Zealand and Australia, having regard to their own circumstances and duties.

8.6 This could be achieved by deleting the following words from Rule 7.3.4(h), and replacing them with 'or Australia':

> 'if the legal requirements of that jurisdiction are such that it is unduly onerous for the Issuer to make the offer in that jurisdiction'

9 Employee Share Schemes

(i) Repricing/Amendment of Securities – Listing Rule 7.3.9

9.1 The LCA supports the proposed amendment to the footnote to rule 7.3.9.

9.2 Rule 3.5.1 and/or its accompanying footnote will need to be amended as a consequence. This rule requires the authorisation of a director's remuneration by ordinary resolution. If any aspect of a director's remuneration includes the issue of shares under an ESS, then such remuneration must be approved under rule 3.5.1. Accordingly, a further footnote should also be added to rule 3.5.1 to allow for the variation of the ESS to occur without further approval from shareholders under that rule (to the extent such approval would otherwise be required, and provided that the power to amend the ESS was disclosed in the notice of meeting provided to security holders for the purposes of approving the ESS).

(ii) Buy Backs and Redemptions – Listing Rule 7.6.1

9.3 Consistent with the change to Rule 7.3.6(a), new Rule 7.6.1(k) should extend to issues made to Directors and Associated Persons of Directors. The wording after 'under Rule 7.3.6' could be amended to read:

> 'in accordance with the terms of an Employee share scheme or plan (including a scheme or plan in which Directors and/or Associated Persons of Directors may participate)'

(iii) Financial Assistance – Listing Rule 7.6.4

9.4 On the basis that new rule 7.6.4(b)(i)(B) will be adopted, the LCA suggests deleting rule 7.6.4(b)(ii) (as it will then be a duplication of the new rule).

10 Allotments – Listing Rule 7.11

10.1 The LCA supports the proposed amendment to rule 7.11, except that the cross reference should be to 7.3.10(e), not 7.3.4(e).

10.2 However, the LCA believes that the proposed amendment to rule 7.1.13(a) is unnecessary or is inconsistent with the objectives stated in the consultation paper.

10.3 In the case of shares issued pursuant to a DRP, no subscription monies are 'payable' by the security holder. Rather, the amount of the dividend payable is credited towards the issue price of the relevant securities (and any fractional entitlements are eliminated by rounding). As a consequence, an issuer is not required to refund subscription monies to security holders, with the effect that the there is no need for the underlying offering document to specify the timing for a refund of those monies.

11 Material Transactions – Listing Rule 9.1

11.1 The LCA agrees that there needs to be an exception to the application of rule 9.1 in respect of transactions involving the issue of securities for cash consideration.

11.2 Raising money by issuing securities need not be considered a major transaction for the purposes of the rules, given the existing protections for shareholders within the rules targeting the issue of further securities.

11.3 However, in the LCA's view the use in new rule 9.1.3(c) of the terms 'ordinary course of business' and 'fundraising' are inappropriate. Capital raising will often not be an activity 'in the ordinary course of business' for issuers, and the concept of 'fund raising' is superfluous.

11.4 The LCA understands that the objective of the proposed amendment is to exclude from the ambit of rule 9.1 the entry into transactions by an issuer where the issuer will receive cash consideration – that is, fundraising by way of an issue of securities for cash consideration. That being the case, the LCA proposes the following alternative wording for new rule 9.1.3(c):

> 'any transaction entered into by an Issuer whereby the Issuer issues Securities solely for cash consideration'.

12 Contents of Annual Report – Listing Rule 10.5.5

12.1 The LCA generally agrees with the proposed amendments to annual reporting requirements under rule 10.5.5.

12.2 However, in the LCA's view, issuers should have more flexibility in respect of the reporting of non-financial information in an annual report. The LCA's

preferred approach is for the rule to allow the record date in respect of the disclosure of non-financial information to be as at the issuer's balance date, or such later date as selected by the issuer. This will enable issuers to provide their shareholders with more relevant and up-to-date information while at the same time allowing issuers some flexibility in the way in which that information is presented.

13 Restrictions on Transfer – Listing Rule 11.1

13.1 The LCA agrees generally with the approach proposed under rule 11.1.

13.2 However, in the LCA's view, to provide certainty rule 11.1 should permit debt issuers to impose, within their constitutions or trust deeds, transfer restrictions in respect of parcels of debt securities with a value of less than $5,000 (unless the full parcel is transferred) without the need to seek NZX's approval.

13.3 This approach would avoid debt issuers having to seek NZX approval on a case-by-case basis (thereby reducing compliance costs) in respect of situations for which NZX has previously granted waivers on the same terms.

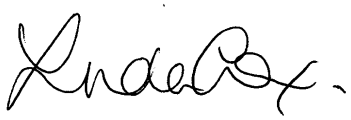
14 Further information

14.1 Thank you for providing the LCA with an opportunity to comment on the Consultation Paper. We would be happy to meet with you to discuss our submissions or any other aspect of the proposed amendments to the rules.

14.2 We trust that you will circulate a revised version of the proposed amendments to the rules following incorporation of all comments from interested parties, and we look forward to its receipt in due course.

14.3 Please contact us if you otherwise require any further information in relation to the submissions contained in this letter or wish to discuss our submissions further.

Yours sincerely



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