

24 February 2006

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**By email:** damas.potoi@nzx.com

Dear Damas

**Comments on Exposure Draft of the Proposed Amendments to the NZSX and NZDX Listing Rules ("Exposure Draft")**

The Listed Companies Association (LCA) welcomes the opportunity to comment on the Exposure Draft.

The comments contained in this letter have been prepared by the Executive of LCA. Although LCA cannot represent or express the individual views of all of its members, LCA has sought input from all members and a copy of this letter has been provided to all members.

In general LCA supports the proposed changes reflected in the Exposure Draft and considers that those changes will make a number of welcome improvements to the Listing Rules.

The only proposed changes the LCA considers should be amended are discussed below.

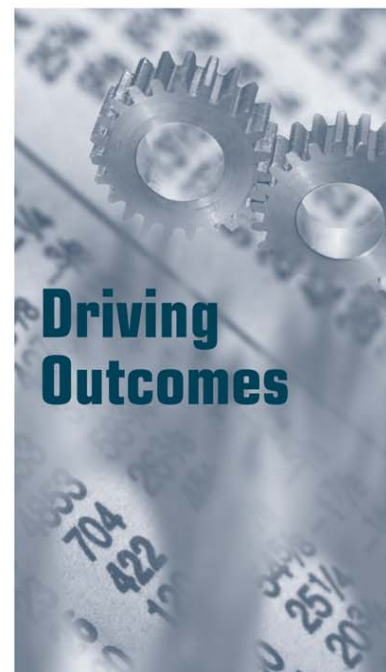
**1. Rule 1.1.2 – Definition of Disqualifying Relationship**

NZX proposes to clarify that when assessing the annual revenue derived by a Director from an Issuer, dividends and other distributions payable to all holders of a class of Equity Securities should be excluded. LCA supports that clarification and believes that such dividends and distributions should not be included in a Director's annual revenue for the purposes of determining whether the Director has a "Disqualifying Relationship".

LCA believes that clarification should not be achieved through a new footnote 3 as proposed in the Exposure Draft but through an amendment to the definition of "Disqualifying Relationship" itself.

Listing Rule 1.1.4 provides that footnotes are:

*"... intended as a guide for users and an aid in interpretation and, only to that extent, form part of the Rules."*



The proposed change in relation to dividends and distributions is more than just a “guide ... [or] aid in interpretation”. It effectively amends the definition itself because its purpose is to exclude from the definition payments that would otherwise be captured by the definition.

This can be contrasted with the existing footnotes 1 and 2 to the definition of “Disqualifying Relationship”. Those footnotes are genuinely better categorised as “guides” or “aids in interpretation” rather than as wording which should be part of the definition itself.

LCA therefore believes that the clarification should be achieved not by adding the proposed new footnote 3 but by amending paragraph (b) (iii) of the definition of “Disqualifying Relationship” to read as follows:

*“(iii) by virtue of the relationship in (b)(i) or (b)(ii) that Director or any Associated Person of that Director is likely to derive, in the current financial year of the Issuer, a substantial portion of his, her or its annual revenue from the Issuer during such financial year. For the purposes of this paragraph the annual revenue a Director or Associated Person of a Director derives from an Issuer does not include dividends and other distributions payable to all holders of a Class of Equity Securities.”*

## **2. Rule 5.2.3 – Spread**

LCA considers that there should be more than one measure used to determine whether the ongoing spread requirement is satisfied. The approach in the Exposure Draft is not to include any additional specific measure beyond the existing measure of 500 members of the public holding 25% of the securities in the class and to include an additional general provision for NZX to be “otherwise satisfied” that the Issuer will maintain a sufficient spread.

LCA considers that several alternative specific tests could be included in the Rule to provide more certainty to Issuers that they meet the ongoing spread requirement. The provision under which the NZX could be “otherwise satisfied” could be retained as a final fall back position. This would remove a requirement for Issuers which have a sufficiently widespread shareholding by other measures to have to establish to NZX’s satisfaction that there is a sufficient spread.

LCA suggests that instead of the proposed wording included in the Exposure Draft the following words should be included after the words “Minimum Holding”:

*“To maintain Quotation of a Class of Securities on the NZSX or NZDX:*

- (a) the holders of those Securities should include at least 500 Members of the Public with each Member of the Public holding at least a Minimum Holding and one or more of the following tests should also be satisfied:*
  - (i) those Members of the Public hold at least 25% of the number of Securities of the Class issued; or*
  - (ii) the Securities of the Class held by those Members of the Public have an Average Market Capitalisation of \$[ ] or more; or*
  - (iii) those Members of the Public hold [ ] million or more Securities of the Class; or*

- (b) *if the requirements of paragraph (a) are not satisfied, NZX is otherwise satisfied that the Issuer will maintain a spread of Security holders which is sufficient to ensure that there is an orderly or liquid market in the Class of Securities."*

### **3. Rule 9.2.4(c) – Exception to Related Party Transaction**

LCA supports the proposal to simplify the process and reduce NZX's involvement in decisions relating to employment and service contracts.

LCA considers that paragraph (iii) of the proposed Rule 9.2.4(c) should not be included. That paragraph would require disclosure in the Issuer's next annual report of the material particulars of an employment contract or service contract which falls within the exception.

The reasons LCA opposes that aspect of the proposal are:

- (c) section 211 of the Companies Act 1993 already contains specific mandatory requirements for the disclosure of director and executive remuneration in annual reports;
- (d) the proposed paragraph (iii) has the potential to require disclosure of different information than that required to be disclosed by section 211, ie the material terms of the contract rather than the actual remuneration paid. A requirement for the disclosure of different information has the potential to create confusion. For example, the material terms of a contract could include the payment of a variable or discretionary bonus. The actual bonus ultimately paid (if any) could fall anywhere within the parameters of the variable or discretionary bonus. In those circumstances:
- (i) there may need to be an explanation or reconciliation provided of the difference between the information disclosed under the Listing Rule and the information disclosed under the Companies Act;
- (ii) there may also be commercial sensitivities for the director and/or the company in relation to the disclosure of remuneration information which exceeds the disclosure required by law.
- (e) If the terms of an employment contract or service contract constitutes genuine "Material Information" there will, in any case, be a requirement to disclose that information under the continuous disclosure rules.

LCA appreciates the opportunity to participate in the consultation process on the proposed changes to the Listing Rules. Please do not hesitate to contact me if you have any questions or matters you wish to discuss.

Yours sincerely



Linda Cox  
**Chair**