BELL GULLY

By email consultation@nzx.com

Hamish Macdonald
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FROM **James Cooney**
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MATTER NO. 02-285-8289
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Dear Hamish

Submissions in response to the NZX Listing Rule Review – Consultation Paper

1. We refer to NZX's discussion paper entitled "NZX Listing Rule Review – Consultation Paper" dated 11 April 2018. Bell Gully welcomes the opportunity to be involved in the continued development of the NZX Listing Rules, and congratulates NZX on its inclusive approach to addressing some of the issues which have arisen from recent market developments. We have set out our submissions in the table included on the following pages.

2. The views expressed in our submission are those of members of our firm involved in the review of the discussion paper. They do not represent the views of our clients.

3. We do not have any objection to you releasing any of the information contained in our submission or our submission in its entirety.

4. If you wish to discuss any aspect of our submission, please do not hesitate to contact us.

Yours faithfully
Bell Gully

[Sgd: James Cooney]

James Cooney
Partner

ANNEXURE: BELL GULLY'S RESPONSES TO THE NZX LISTING RULE REVIEW CONSULTATION PAPER

#	NZX Listing Rule Review Discussion Paper Questions and Bell Gully's responses
	GLOSSARY
	To the extent possible definitions have been aligned with those in the Financial Markets Conduct Act 2013 (the FMC Act). *We have proposed to update the definition of Average Market Capitalisation to mean in relation to an issuer, the Average Market Price multiplied by the number of Equity Securities carrying votes.* *Under this definition Average Market Price must be calculated over both a 20 business day period and over a 5 business day period and the lesser value applied. This calculation has been proposed to reduce potential for manipulation or aberration results.*
1	**Is this an appropriate way to measure Average Market Capitalisation and Average Market Price of an issuer?**
	<u>Average Market Price</u> We do not believe that the proposed additional second limb (of five business days) is necessary for the purposes of calculating the Average Market Capitalisation. The 20 business day period is a more appropriate period for assessing the share price and addressing concerns of share price fluctuations. Having a separate five business day limb has the potential to create unnecessary transaction uncertainty given the risk of the share price moving sharply downwards shortly prior to entry into, or the announcement of, the relevant transaction. We are not aware of the current 20 business day period creating any issues or being susceptible to manipulation when used in the context of determining the Average Market Capitalisation. We agree with the proposed additional second limb (of five business days) applying where Average Market Price is used elsewhere in the proposed new Listing Rules (the **Proposed Rules**). <u>Average Market Capitalisation</u> As this definition is used principally for determining the issuer's size when applying the major transaction and related party transaction tests, we query why the multiplier of Average Market Price is restricted to Quoted Equity Securities which carry Votes – rather taking into account all classes of Quoted Equity Securities. (We appreciate that this is not a change from the position under the existing Listing Rules (the **Current Rules**).) Where an issuer has a class of Quoted Equity Securities on issue which do not carry Votes, excluding those securities from the calculation results in an inaccurate reflection of the true size of the issuer for the purposes of applying the relevant tests. This has the potential to significantly reduce the relevant thresholds that would otherwise apply. As a drafting matter, the definition needs to make clear what Day A is for the purposes of calculating Average Market Price. For example, in the context of a major transaction, this should be the earlier of the day on which the transaction is entered into or is announced to the market.
2	**Do you agree with the proposed change to the definition of Associated Person to align with the FMC Act.?**
	In principle we support the desire to align definitions with other relevant New Zealand legislation where possible.

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	Associated Person of the Issuer In practice, the biggest issue we encounter with the Associated Person definition is its use in the context of the related party rules in relation to an Associated Person of the Issuer (rather than the persons listed in Current Rules 9.2.3(a) and (b)). The policy underlying the related party rules is, of course, that persons with influence over the issuer should not be able to use that influence to transfer value from the issuer to them (or their connected parties). We believe that a distinction needs to be drawn between the use of the term Associated Person in relation to: • the Issuer ("**Issuer Associates**") – where association should only arise if the relevant party can exert control or significant influence over the issuer's decision making; and • Directors or Senior Managers of the group companies and holders of a Relevant Interest in 10% of more of a Class of Quoted Equity Securities of the Issuer which carry Votes ("**Other Associates**") – where a broader approach to association is justified in order to capture connected parties (essentially as an anti-avoidance mechanism). Failing to address this distinction is likely to mean that a large number of unnecessary waivers will still be required from the related party transaction rules. Accordingly, we suggest that: • a narrower definition should be used in the context of Issuer Associates – such as the relevant parts of the definition of "associate" under the ASX Listing Rules; and • the definition of "Associated Person" set out in the Proposed Rules be used in the context of Other Associates (subject to the modifications discussed below). As a drafting matter, it may be preferable to introduce a new defined term for this first category (rather than trying to address the distinction within the definition of "Associated Person"). FMCA definition of "Associated Person" We believe that the following modifications need to be made to the definition of "Associated Person" under the FMCA definition in order to make it fit for purpose when used in the Listing Rules: • limb (a) – the relevant threshold should be "more than 50%" (rather than "25% or more") in order to require a controlling interest (and the reference to "or vice versa" in this limb does not seem to make sense); • limbs (f) (and (g) – these are too uncertain to be used in the context proposed. Limb (e) (acting jointly or in concert) already provides appropriate protection; • limb (h) – the reference to "substantially the same members" should be deleted because its application is likely to create uncertainty. The limb should apply where A and B are bodies corporate that are under control of the same person or persons; and • limb (i) – should not apply because its application will be too uncertain. We believe that this limb has the potential to be even more problematic in practice than the deeming provision under Current Rule 1.8.5. Need for guidance NZX should issue guidance providing further detail in relation to how to apply the definition of "Associated Person" using practical examples. This would provide more certainty for the market.

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	We propose to update the definition of Minimum Holding to holdings with a minimum value of $1,000.
3	**Do you agree with the proposed approach to Minimum Holdings?**
	Yes. Expressing Minimum Holdings by reference to a single dollar amount is a welcome simplification.
	We propose to introduce a new definition of Senior Manager, aligned with the meaning given in section 6 of the FMC Act, namely a person who is not a director but occupies a position that allows that person to exercise significant influence over the management or administration (for example, a chief executive or a chief financial officer). We propose to use this definition within the rules to place the current term Officer. *We note a broader group than Senior Managers tends to be used for diversity reporting currently so NZX is amending that requirement to ensure comparable diversity reporting in future.*
4	**Do you agree with the proposed use of the term Senior Manager?**
	We support aligning the definition of Senior Manager with the meaning given in section 6 of the FMC Act provided that appropriate guidance is issued to provide market participants with greater clarity on how the term should be applied in practice. We disagree with the use of this definition in the context of the definition of "Aware". However, we have a broader issue with the proposal to introduce a concept of constructive knowledge (as outlined in our response to question 12 below).
	Security – This now has the meaning given in section 6 of the FMC Act. The former NZX definition of security has been deleted in favour of aligning with the terminology relating to "financial products" in the FMC Act.
5	**Do you agree with the proposed use of Security?**
	We agree with the proposed deletion of the broad definition of "Security" (as defined in section 6 of the FMC Act) and replacement of that definition with the "Financial Product" concept as defined in section 7 of the FMC Act. In our opinion, the limbs of the definition of "Security" that extend beyond the definition of "Financial Product" (i.e., limbs (a) and (b)(ii) to (iv)) are not relevant in the listed security setting. The Listing Rules should not apply to those broader categories of securities. The inclusive nature of the definition of Security adds potential uncertainty which does not arise with the definition of "Financial Product". As a drafting matter, we note that there are references to "securities" (both as a general term and as a defined term) that still remain in the Proposed Rules (e.g., in rule 1.12.2 and the headings in 4.11, 4.12 and 4.13). We propose that all such references to "Securities" are updated to "Equity Securities" or "Financial Product" (as relevant) to avoid any confusion.

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	Disqualifying Relationship – The definition of "Disqualifying Relationship" has been amended to remove the current deeming provisions and retain an overarching test. The updated definition of a Disqualifying Relationship now covers any direct or indirect interest, position, association or relationship that might influence or could reasonably be perceived to influence in a material way the Directors capacity to bring an independent view to decision making. There is also be a new recommendation in the NZX Code (2.8) director independence to support this change. Additional commentary has been included within recommendation 2.4 which will be used to assess whether there is a disqualifying relationship.
6	**Please provide feedback on the definition of a Disqualifying Relationship and the commentary under recommendation 2.4 of the NZX Code which will be used to assess independence.**
	We support the proposed definition, and note that it is a significant improvement on the existing definition. In relation to the wording in brackets at the end of the proposed definition, the current drafting suggests that the factors described in the NZX Corporate Governance Code are an exhaustive list of the matters that may impact director independence. As noted in our response to question 23 below, we believe that the list of factors should be expressed as being non-exhaustive (and this should therefore be reflected in this definition).
	ELIGIBILITY AND LISTING
	We have proposed spread and free float requirements for equity and funds issuers of 300 holders and 20%, respectively and a minimum market capitalisation requirement of $15m.
7	**Do you agree with the proposed updated eligibility requirements for equity (rule 1.1) and funds (rule 1.4)?**
	Yes – we agree with the proposed updated eligibility requirements. We also support the change to look through to beneficial holders where shares are held by a custodian. We believe this is important to reflect true liquidity. Our understanding (based on our review of the Proposed Rules) is that NZX has removed the on-going obligation to maintain the spread requirements. We support this change – given that compliance with these requirements is outside of the control of the Issuer and, in our experience, spread waivers are routinely granted.
	REVERSE/BACKDOOR LISTING PROVISIONS
	A new definition of Reverse or Backdoor Listing has been included in the rules and is broadly similar to ASX's approach. In the event of a backdoor listing, NZX may: • *Require the Issuer to re-apply for listing/quotation;* • *Suspend quotation of its securities, and/or;* • *Require a new profile to be prepared.*
8	**Do you agree with the proposed updated approach to Backdoor Listings (rule 1.11.1)?**
	Yes – we agree with the proposed updated approach to Backdoor Listings.

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	GOVERNANCE
	The director rotation requirements have been amended to align with ASX so a director qualifying for rotation is any Director who has held office (without re-election) past the third annual meeting following the Director's appointment or 3 years, whichever is longer. An Issuer may continue to rely on the Executive Director exception but we are proposing to remove the separate exception relating to a Special Office.
9	**We propose deleting the special office exception. Do you agree with the proposed amendments to the director rotation requirements under rule 2.7?**
	We agree with the proposed amendments to the director rotation requirements under rule 2.7 (including deleting the special office exception). We believe that these changes will significantly simplify the regime relating to director rotations – which in our view was unnecessarily complicated and in certain circumstances resulted in directors needing to seek re-appointment at the second AGM after their last re-election.
10	**Currently there is no cooling off period for audit partners under NZX's rules. Should there be a cooling off period of 5 years so that the transition period for NZX listed issuers aligns with Australia/ASX under proposed update auditing standards?**
	In our view, the rules around auditor independence should be dealt with by the body responsible for audit quality - the External Reporting Board. We do not believe that NZX needs to separately regulate this. The cooling off period for audit partners is already addressed under PES 1 (paragraphs 290.155 – 290.163).
11	**What is an appropriate time frame to allow issuers to update Governing Documents in response to amended rules?**
	We believe that issuers should have until their next AGM after 1 July 2019 to update their Governing Documents. Although, in practice, issuers with an AGM before 1 July 2019 may wish to update their Governing Documents at their 2019 AGM, we consider it is important that undue time pressure is not imposed on Issuers. In particular, Issuers should not have to convene a special meeting in order to make the relevant changes.
	DISCLOSURE
	Immediate Disclosure of Material Information – An issuer has an obligation to release information to NZX promptly and without delay, including where it has constructive knowledge (in line with the ASX definition of 'Aware'). This means issuers will be subject to continuous disclosure obligations where a Director or Senior Manager has, or ought reasonably to have, come into possession of material information in the course of the performance of their duties.
12	**Do you agree with the proposal to introduce a concept of constructive knowledge in respect of the continuous disclosure (rule 3.1.1) requirement?**
	We strongly oppose this proposal. This is one of the most significant changes arising from the current review and, as such, it would have been helpful to have consulted on this topic in the previous consultation round when there was more time to consider its introduction fully. The constructive knowledge concept creates uncertainty for listed issuers. Despite having no knowledge of any material information, issuers may nevertheless face liability because there is unspecified material information out there that their officers are not aware of (so could not even begin to assess materiality or whether that information falls within any of the exceptions). This will

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	all be judged with the benefit of hindsight. However, determining whether information is material involves complicated, real time assessments. Introducing a concept of constructive knowledge will mean, for example, that if any non-officer making such an assessment gets it wrong (and the information was in fact material), then arguably there will automatically be a breach of the issuer's continuous disclosure obligations (unless a safe harbour can be relied upon). We believe that such an extension has the potential to: • impose unnecessary and material compliance costs on issuers; and • even dissuade potential companies from listing on the NZX (due to these compliance costs and, more significantly, the increased risk of liability). The policy underlying the constructive knowledge extension is, of course, that an issuer should not be able to avoid or delay its continuous disclosure obligations by failing to bring market sensitive information to the attention of its officers in a timely manner. While we do not disagree with the policy underlying the proposed change, in our experience there is no suggestion either that issuers are deliberately seeking to avoid or delay their continuous disclosure obligations in this manner or that issuers are not ensuring potentially material information is raised to officers for consideration in a timely way. Introducing the constructive knowledge extension has the potential to impose significant costs on an issuer – all for a concern that has not been substantiated. We note that taking steps to deliberately avoid or delay an issuer's continuous disclosure obligations is likely to constitute a breach of directors' duties and, potentially, fraud – so there is already adequate potential legal recourse to address such conduct. Moreover, companies and directors who are reckless or wilfully blind to the existence of relevant information, may also face civil liability. NZX has not sufficiently identified any benefit to the market in introducing this new standard. The reason given is for alignment between the NZX Listing Rules with the ASX Listing Rules. However, the standard of constructive knowledge in the ASX Rules has been controversial. The test in Australia has been repeatedly used by opportunistic class action plaintiffs in cases where they are unable to plead facts supporting actual knowledge. Plaintiffs therefore add a pleading of constructive knowledge in order to survive strike out by issuers and on the chance that they will find out more information in discovery. These types of class actions in Australia place huge costs of companies, including in insurance premiums, legal fees, management time and settlements. Class actions are becoming a feature of the New Zealand legal landscape, so there is a real risk here too.
13	**Do you agree with the proposal to remove the requirement for half year reports (rule 3.5 and 3.6) and the amendment of "immediately" to "promptly and without delay"?**
	<u>Remove the requirement for half year reports</u> Yes, we support the proposal to remove the requirement for half year reports. This will materially reduce the compliance burden on issuers. <u>Amendment of "immediately"</u> Yes, we agree with amending "immediately" to "promptly and without delay". This is consistent with the interpretation of "immediately" under the continuous disclosure guidance note. We believe that it is preferable to update the relevant rule rather than continuing to rely on the guidance note to modify the interpretation of the relevant term.
14	**Do you have any feedback on the proposed updates to timing requirements within section 3 of the rules?**
	We support the proposed updates to timing requirements within section 3 of the Proposed Rules.

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	CHANGES IN CAPITAL
	Is it proposed that Equity Securities issued under a Share Purchase Plan (SPP) Equity Securities does not exceed 5% of fully paid and Vote carrying Equity Securities already on issue - see updated definition within the glossary. *We have also proposed to reduce the placement threshold to 15% under rule 4.1.2.*
15	**Do you agree with the new SPP threshold and placement thresholds?**
	We agree with the new SPP threshold. We do not believe it was necessary to reduce the placement threshold – for the reasons outlined in our submissions dated 17 November 2017.
	MAJOR TRANSACTIONS
	In response to feedback it is proposed that the Major Transaction threshold will remain at 50% of the Average Market Capitalisation (see amended definition) of an Issuer. However, in response to investor feedback, we have introduced an amended rule 5.1.1(a), which will align with the equivalent ASX requirement in this area.
16	**Do you agree with the proposed treatment of Major Transactions?**
	We disagree with the proposed inclusion of "scale" to the existing "nature" test in Proposed Rule 5.1.1(a). Although we appreciate that this is in the corresponding ASX listing rule, the scale of a transaction is already addressed through a bright line test in Rule 5.1.1(b). Therefore, the addition of a scale test in Rule 5.1.1(a) would simply create a high degree of uncertainty as to how Rule 5.1.1(a) should be applied in practice. We note that the ASX view on this same rule is that 25% is an appropriate benchmark for determining whether or not a transaction involves a significant change to the scale of an entity's activities. The feedback received by NZX during the last round of consultation resulted in NZX agreeing that the 50% threshold is more appropriate. We also note that the major transaction regime is fundamentally different under the ASX listing rules, in that the need to obtain shareholder approval once the threshold is crossed is at the discretion of ASX.
	NZ FOREIGN EXEMPT ISSUERS
	The current Overseas Listed Issuer regime will be renamed the NZX Foreign Exempt regime - see rule 1.6.1. If a company is an New Zealand incorporated company, it will no longer be prohibited from applying to be a Foreign Exempt issuer if it has a primary listing on a Recognised Stock Exchange and wishes to apply for a secondary listing on the NZX Main Board.
17	**Do you agree with the updated scope for NZX Foreign Exempt Issuers?**
	Yes – we agree with the updated scope for NZX Foreign Exempt Issuers (including the ability of a New Zealand incorporated company to be an NZX Foreign Exempt Issuer).

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	DEBT
	Current spread and free float requirements are proposed to be removed. We also have proposed to remove the requirement for NZX Regulation approval of QFP debt offer documents.
18	**Do you agree with the changes to settings for Debt?**
	Yes - we support these changes.
	We have proposed to introduce a new regime for the listing of Wholesale Debt Securities (see new defined term and rule 1.8). This will allow for the listing (but not quotation of) wholesale debt, similar to the approach in other jurisdictions.
19	**Do you agree with the proposal to introduce a listing regime for Wholesale Debt Securities?**
	Yes - we agree with the proposal to introduce a listing regime for Wholesale Debt Securities.
	FUNDS
20	**Do you agree with the proposed $15m minimum market capitalisation for new listings of funds for both open and closed ended funds?**
	Yes - we agree with the proposed $15 million minimum market capitalisation for new listings of funds for both open and closed ended funds. We believe that there should be a minimum fund size and agree that it is appropriate (at least in the first instance) to align this with the minimum market capitalisation requirement for equity listings.
21	**Do you agree with the proposal that Major transaction and Related Party Transaction provisions in the rules do not apply to funds given the operation of legislation?**
	Yes - we agree with that these rules are not appropriate for funds.
	NZX REVIEW OF DOCUMENTS
	We propose to no longer review and approve constitutions for new listings although solicitor opinions will continue to be required. We also propose not to review QFP offer documents under schedule 1 of the FMC Act - see rule 7.1.2.(b)
22	**Do you agree with these proposed changes?**
	<u>No NZX approval of constitutions</u> We agree that it is not necessary for NZX to review and approve constitutions for new listings, provided that a solicitor's opinion is obtained. <u>No NZX approval of QFP offer documents</u> We agree that it is not necessary for NZX to review QFP offer documents under schedule 1 of the FMC Act given the relatively simple nature of those documents and the likelihood that they will become even more standardised over time. Also, the NZX review process is often a significant timing factor in terms of an Issuer's ability to launch an issue using an accelerated timetable.

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	CHANGE TO NZX CORPORATE GOVERNANCE CODE (NZX CODE)
	There is a proposed new recommendation 2.8 that a majority of the board should be independent directors. *Factors which may influence independence have now been added to the NZX Code within the commentary to recommendation 2.4. These criteria are based on guidance used within the ASX Corporate Governance Council's principles and guidelines and it is proposed that these criteria are used to consider the test for Disqualifying Relationships within the Listing Rules.* *Factors that may impact director independence are:* • *recently being employed in an executive role by the issuer or any of its subsidiaries;* • *recently holding a senior role in a provider of material professional services to the issuer or any of its subsidiaries* • *a recent or current material business relationship (e.g. as a supplier or customer) with the issuer or any of its subsidiaries;* • *a substantial product holder of the issuer, or an officer of, or person otherwise associated with, a substantial product holder of the issuer;* • *a recent or current contractual relationship with the issuer or any of its subsidiaries, other than as a director;* • *having close family ties with anyone in the categories listed above;* • *having been a director of the entity for a length of time that may compromise independence.* *In each case, the materiality of the interest, position, association or relationship needs to be assessed to determine whether it might interfere, or might reasonably be seen to interfere, with the director's capacity to bring an independent judgment to bear on issues before the board and to act in the best interests of the issuer and its security holders generally.*
23	**Do you have any feedback on the proposed criteria for considering independence outlined in recommendation 2.4?**
	We agree with the proposed factors outlined but consider that they should be expressed as a non-exhaustive list (i.e. it should be "include" rather than "are" at the end of the introductory sentence) – to acknowledge that other factors may potentially be relevant based on the particular facts.
	Recommendation 8.5 - The number of days that a board should post the notice of Annual Meeting on that company's website is amended from 28 days to 20 business days in order to align with terminology used in legislation.
24	**Should this recommendation be broadened beyond Annual Meetings to cover Special Meetings as well?**
	We support this recommendation being extended to cover Special Meetings. We believe that it is appropriate for shareholders to have at least four weeks to consider proposed resolutions, where that is practicable. Where the circumstances do not permit that full notice period to be given, an issuer will have the ability to provide a shorter notice period and explain in their annual report why it considered that shorter notice period to be appropriate.