



# NZX Regulation Decision

Genesis Energy Limited (“GNE”)

Application for waivers from NZX Listing Rules 5.2.1 and 8.1.5, and ruling in relation to the definition of Mining Issuer.

28 January 2020



## Background

1. NZX has updated the NZX Listing Rules, effective from 1 January 2020 (**Rules**). This waiver decision re-documents a prior waiver decision granted by NZX Regulation (**NZXR**) for Genesis Energy Limited (**GNE**) dated 13 March 2014.

## Ruling in relation to the definition of Mining Issuer

### Decision

2. On the basis that the information provided to NZXR is full and accurate in all material respects, NZXR rules that GNE is not a Mining Issuer as defined in the Rules.
3. 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.
4. The Rules to which this decision relates are set out in Appendix Two to this decision.
5. Capitalised terms that are not defined in this decision have the meanings given to them in the Rules.

### Reasons

6. In coming to the decision to provide the ruling set out in paragraph 2 above, NZXR has considered that while GNE's involvement in the exploration/extraction of oil and natural gas, through its participation in the Kupe Oil and Gas Field, is significant, it is clearly not "principally" involved in the exploration/extraction of oil and natural gas. GNE is principally involved in the generation and retailing of electricity and should not be subject to the additional reporting requirements placed on Mining Issuers under Appendix 4 of the Rules.

## Application Two - Waiver from Rule 5.2.1

### Decision

7. Subject to the conditions in paragraph 8 below, and on the basis that the information provided to NZXR by GNE is complete and accurate in all material respects, NZXR grants GNE a waiver from Rule 5.2.1 so that GNE may enter into Transmission Agreements with Transpower in order to comply with the Electricity Industry Participation Code (**Code**) without obtaining shareholder approval.
8. The waiver contained in paragraph 7 is granted on the following conditions:
  - a. Amounts payable under the Transmission Agreements are determined in accordance with the Transmission Pricing Methodology Guidelines administered by the Electricity Authority and the Transmission Pricing Methodology administered by Transpower (subject to the Electricity Authority's approval of the methodology), and regulated under the Code and Part 4 of the Commerce Act 1986;
  - b. Any Transmission Agreement entered into between GNE and Transpower that constitutes a Material Transaction is in the form specified by the Code or, if the form specified by the Code is not used, the directors of GNE certify that the Transmission Agreement is entered into on an arms' length, commercial basis without regard to the Crown's common ownership of GNE and Transpower; and



- c. The waiver, its conditions and effects, and the total amount of fees payable by GNE to Transpower under the Transmission Agreements each financial year are disclosed in GNE's annual reports that relate to the periods during which GNE relies on this waiver.
9. The decision is based on the facts set out in Appendix One to this decision. This waiver will not apply if that information is not or ceases to be full and accurate in all material respects.
10. The Rules to which this decision relates are set out in Appendix Two to this decision.
11. Capitalised terms that are not defined in this decision have the meanings given to them in the Rules.

## Reasons

12. In coming to the decision to provide the waiver set out in paragraph 7 above, NZXR has considered that:
  - a. The policy behind Rule 5.2.1 is to ensure that Related Parties do not exercise undue influence or use personal connections to reach a favourable outcome for, or a transfer of value to, the Related Party in respect of a transaction and that shareholders are given an opportunity to review transactions where the board may have been subject to actual or perceived influence from a Related Party;
  - b. Given that the terms of the Transmission Agreements are regulated by the Code, and the fees payable under those agreements are determined under the Transmission Pricing Methodology and regulated by the Electricity Authority and the Commerce Commission, no party is in a position to exercise undue influence on GNE in relation to the entry into Transmission Agreements, or during negotiation of the terms and conditions of Transmission Agreements; and
  - c. The Crown has publicly stated in the Crown Ownership Monitoring Unit Owner's Expectations Manual that Crown subsidiaries are required to operate at arm's length from the Government, and be governed by independent boards.

## Application Three - Waiver from Rule 8.1.5

### Decision

13. Subject to the conditions in paragraph 14 below, and on the basis that the information provided to NZXR is full and accurate in all material respects, NZXR hereby grants GNE a waiver from 8.1.5 to allow the inclusion of the provisions in GNE's constitution that allow for the suspension of dividend and voting rights attached to GNE ordinary shares where the 10% Limit (as defined in Appendix One) is breached.
14. The waiver and approval in paragraphs 13 are granted on the following conditions:
  - a. GNE bears a non-standard designation;
  - b. A copy of GNE's constitution is published on the company's website; and
  - c. Details of the provisions in the constitution that restrict the issue, acquisition or transfer of ordinary shares and of circumstances in which dividend and voting rights may be suspended (as per the provisions in the Constitution), are appropriately disclosed in the fact sheet about GNE shares published on the company's website.
15. The Rules to which this decision relates are set out in Appendix Two to this decision.

16. Capitalised terms that are not defined in this decision have the meanings given to them in the Rules.

## Reasons

17. In coming to the decision to provide the waiver set out in paragraph 13 above, NZXR has considered that:
- a. The provisions described in Appendix One enable GNE to enforce the 10% Limit, which is a key aspect of the ownership restrictions under the Government's MOM Programme;
  - b. The conditions contained in paragraph 14 and the public availability of GNE's constitution for review will ensure that persons applying for and trading ordinary shares on market have notice of the ownership restrictions, the consequences of breaching the 10% Limit and the Crown's power of cancellation;
  - c. The policy underlying Rule 8.1.5 reflects the fundamental principle that shareholders are entitled to exercise the rights attaching to securities (especially the right to vote and receive dividends) and only in very limited circumstances should these rights be removed;
  - d. The provisions described in paragraphs 14 to 16 of Appendix One apply in limited circumstances and it is desirable that GNE has the ability to ensure the 10% Limit is adhered to and that there is an appropriate disincentive to breaching the statutory requirements in Part 5A of the PFA. The provisions are necessary to help achieve the policy objectives in Part 5A of the PFA. The PFA expressly anticipates that a company's constitution can add to the consequences set out in the PFA; and
  - e. GNE's constitution sets out a process whereby holders of a relevant interest in Excess Shares (as defined in Appendix One) are notified that they may have breached the 10% Limit, and of the consequences of this breach, including, in particular, where a breach is found not to be inadvertent. Holders of a relevant interest in Excess Shares are also able to make representations to GNE in respect of an alleged breach. This procedure will give holders of a relevant interest in Excess Shares an opportunity to respond to and rectify the breach of the 10% Limit prior to GNE suspending the dividend or voting rights attached to the GNE ordinary shares in which they have a relevant interest.



## Appendix One

1. Genesis Energy Limited (**GNE**) is a New Zealand incorporated mixed ownership model (**MOM**) company within the meaning of section 45P of the Public Finance Act 1989 (**PFA**).
2. GNE is currently Listed on the NZX Main Board and also has a series of bonds Quoted on the NZX Debt Market.
3. As GNE is a MOM company, under section 45R of the PFA, the Crown must hold at least 51% of GNE's ordinary shares and will be prohibited from reducing its holding below that level. The Crown must also hold at least 51% of any other class of shares (voting or nonvoting) and any other class of securities in GNE that confer voting rights (together the **51% Holding Restriction**). Under section 45S of the PFA, no person, other than the Crown, may have a relevant interest in more than 10% of any class of shares in GNE (including the GNE ordinary shares), or of any other class of securities in GNE that confer voting rights (the **10% Limit**).
4. If a person has a relevant interest in the ordinary shares in breach of the 10% Limit, then under sections 45T(1)(c) and 45T(2) of the PFA that person will lose the right to be paid a dividend in respect of the ordinary shares in which a relevant interest is held in excess of the 10% Limit (**Excess Shares**) and will lose the voting rights attaching to the Excess Shares.
5. In addition, section 45T(5) of the PFA provides that the Constitution may provide for the 10% Limit and the consequences of a person exceeding it, including provisions for the implementation of those consequences or which add to the consequences set out in section 45T.

## Application One – Further Background

6. GNE, through wholly owned subsidiaries, has a 46% interest in the production facility and Petroleum Mining Permit 38146 which is known as the Kupe oil and gas field (the **Kupe Oil and Gas field**).
7. GNE is not the operator of, nor does it have any full-time employees working, in the Kupe Oil and Gas Field.
8. From GNE's 2019 financial statements:
  - a. Electricity revenue comprised 82.7% of all GNE's operating revenue;
  - b. Electricity purchases, transmission and distribution comprised 61.6% of operating expenses;
  - c. Oil and gas assets comprised 7.8% of total non-current assets;
  - d. Oil and gas contributed approximately 29.9% of EBITDA; and
  - e. GNE's interest in Kupe Joint Venture was valued at \$324 million compared with generation assets valued at \$3.4 billion.



## Application Two – Further Background

9. Transpower New Zealand Limited (**Transpower**) is a state-owned enterprise that owns and operates the National Grid and provides transmission services to GNE. Transpower and all parties that are physically connected to the transmission grid, including GNE, are required to enter into a transmission agreement. This may be an individual transmission agreement or the default transmission agreement (**Transmission Agreement**) provided by the Electricity Authority, a Crown entity responsible for overseeing the operation of New Zealand's electricity market.
10. Under the Rules, Transpower is a Related Party of GNE for the following reason:
  - a. The Crown is a Related Party of GNE under definition (b) of Related Party under the Rules as it holds a Relevant Interest in more than 10% of GNE's ordinary shares;
  - b. Transpower is a related body corporate of GNE under section 12(2) of the Financial Markets Conduct Act, as the Crown holds more than half of the issued shares of both companies; and
  - c. As a related body corporate of GNE, Transpower is an Associated Person of GNE and the Crown under the Rules, and therefore is a Related Party of GNE.
11. GNE and Transpower entered into a Transmission Agreement on 1 April 2008. This agreement covers all of GNE's sites which are connected to the national grid.
12. Transmission charges under the Transmission Agreement are determined annually using the Transmission Pricing Methodology provided for in Part 12 of the Code and regulated by the Electricity Authority and the Commerce Commission.
13. Accordingly, the level of fees varies from year to year depending on the Transmission Pricing Methodology. GNE anticipates that it may need to amend the terms of the Transmission Agreement in a material way or enter into a new Transmission Agreement such that shareholder approval would be required under Rule 5.2.1.

## Application Three – Further Background

14. GNE has the following provisions in its constitution (known as a Governing Document under the Rules) that restrict the issue, acquisition or transfer of GNE ordinary shares:
  - a. any issue of equity securities in GNE must be made in accordance with Part 5A of the PFA;
  - b. the Board of GNE must refuse or delay the registration of a transfer of any shares in GNE where it has actual knowledge, or believes, that the transfer of those shares would, or would be likely to, contravene Part 5A of the PFA;
  - c. restriction on GNE from issuing, acquiring or redeeming any shares where the issue, acquisition or redemption would result in a breach of the 51% Holding Restriction or where GNE has actual knowledge that the issue, acquisition or redemption would result in a breach of the 10% Limit; and
  - d. permits the Board of GNE to refuse to register a transfer of shares in GNE where:



- i. The transferee has not provided any, or satisfactory documentary evidence when requested with respect to determining whether there has been a contravention of the 10% Limit; or
  - ii. The Board of GNE has actual knowledge, or believes, that the transfer of those shares will result in a contravention of the 10% Limit.
  
- 15. GNE's constitution contains the consequences in relation to benefits and rights attaching to GNE ordinary shares in excess of the 10% Limit including:
  - a. A provision which provides for the automatic suspension of voting rights and the entitlement to dividends or other distributions in respect of Excess Shares; and
  - b. A provision which provide for a holder of Excess Shares to have no voting rights and no entitlement to dividends or other distributions:
    - i. if a breach of the 10% Limit is determined by the board of GNE to be inadvertent, in respect of those Excess Shares; and
    - ii. if a breach of the 10% Limit is determined by the board of GNE to not be inadvertent or there is insufficient information to determine if the breach was inadvertent, in respect of all GNE shares (including GNE ordinary shares) held by that registered holder,

and provide for the sale of GNE shares (including ordinary shares) so as to ensure that there is no longer a breach of the 10% Limit.
  
- 16. There is a provision which includes the requirement for the board of GNE to give notice to the relevant registered holder before making a determination in relation to the contravention of the 10% Limit and to explain the consequence of being in breach of the 10% Limit. The board of GNE would then have the power to require the sale of Excess Securities if the registered holder did not remedy the breach within the period specified in section 45T(1)(b) of the PFA and the proceeds of the sale (less any costs of sale) would be paid to the registered holder. An exception applies if the registered holder is an "Approved Nominee" for the purposes of section 45U of the PFA, in which case certain provisions in the constitution only apply in respect of those ordinary shares held by the Approved Nominee on behalf of a person who has a relevant interest in ordinary shares in contravention of the 10% Limit.



# Appendix Two

## Definition of Mining Issuer

**Mining Issuer** has the meaning given to that term in Appendix 4, being:

means an Issuer that is principally engaged in the exploration for, or extraction of, any mineral, oil or natural gas, and includes an Issuer which holds, as a principal part of its business or assets, an interest or interests in any mining tenement

### **Rule 3.10 Announcements by Mining Issuers**

3.10.1 A Mining Issuer must comply with the requirements set out in Appendix 4

### **Rule 5.2 Transactions with Related Parties**

5.2.1 An Issuer must not enter into a Material Transaction if a Related Party is, or is likely to become:

- (a) a direct party to the Material Transaction, or
- (b) a beneficiary of a guarantee or other transaction which is a Material Transaction,

unless that Material Transaction is approved by an Ordinary Resolution (such resolution being subject to the voting restrictions in Rule 6.3) or conditional on such approval

### **Rule 8.1 Transfer of Quoted Financial Products (common rules)**

**Rule 8.1.5** Except as expressly permitted by the Rules, no benefit or right attaching to a Quoted Financial Product may be cancelled or varied by reason only of a transfer of that Quoted Financial Product.

