

NZX Regulation Decision

Works Finance Limited (WKS)

Application for a Ruling under NZX Main Board Listing
Rules on Definition of Debt Security

10 March 2020

Background

1. NZX has updated the NZX Listing Rules (**Rules**), effective from 1 January 2020. This is the redocumentation of a waiver issued by NZX Regulation (**NZXR**) on 6 March 2007.
2. The information on which this decision is based is 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.
3. The Rules to which this decision relates are set out in Appendix Two.
4. Capitalised terms that are not defined in this decision have the meanings given to them in the Rules.

Ruling that ROADS are Debt Securities

Decision

5. Subject to the conditions set out in paragraph 6 below, and on the basis that the information provided by WKS is complete and accurate in all material respects, NZX Regulation (**NZXR**) grants WKS a ruling on the definition of Debt Security under Listing Rule 9.6.1 that for the purposes of the Rules, the ROADS are Debt Securities and not Equity Securities.
6. The ruling in paragraph 5 above is provided on the conditions that:
 - a. the ordinary shares of WKS remain wholly owned (directly or indirectly) by DOW;
 - b. the terms of the ROADS and the deed poll entered into by DOW do not allow for the conversion of the ROADS into any securities other than ordinary shares in DOW;
 - c. WKS carries on no other business other than the activity of issuing ROADS and other shares with similar terms, investing the proceeds of any such issue and other intragroup funding;
 - d. there are no material changes to the terms of the ROADS while they are on issue.
 - e. NZXR's understanding of the facts disclosed to NZXR in relation to the application is accurate and there is no material change to those facts or to the terms of the ROADS and the deed poll as disclosed to NZX.

Reasons

7. In coming to the decision to provide the ruling set out in paragraph 5 above, NZXR accepts the applicant's submissions that the terms of the ROADS are such that they are in substance more akin to Debt Securities than to Equity Securities. In particular, NZXR has considered the following matters:
 - a. the ROADS have been quoted as debt securities since 2007. There have been no material changes to the terms of the ROADS since 6 March 2007 when the original ruling was granted by NZXR;
 - b. although the ROADS fall within s8(2)(a) of the Financial Markets Conduct Act (**FMC Act**) definition of Equity Security as they are "a share in a company", WKS submits, and NZXR

has no reason not to accept, that the features of ROADS are more akin to debt security under s8(b)(ii) of the FMC Act; for example:

- a. the ROADS confer a right to a fixed rate of return by way of dividend payments;
- b. the ROADS do not confer voting rights on the holders commonly associated with Equity Securities;
- c. the ROADS can convert into ordinary shares in DOW without the agreement of the holder. However, the ratio of shares issued is calculated by reference to the issue price of the ROADS and the volume weighted average sales prices of DOW ordinary shares on the ASX over the period preceding the exchange. This means that on conversion, a holder would receive DOW shares with a value approximately the same as the issue price of \$1.00. Accordingly, the ROADS continue to be Debt Securities right up until the DOW shares are issued to the holder;
- d. DOW is a party to a deed poll pursuant to which it can in certain circumstances, be required to purchase ROADS. DOW has guaranteed on an unsecured subordinated basis, the payment by WKS of dividends on ROADS and of amounts payable on redemption and resale of ROADS. These payments could constitute “money otherwise owing” by DOW in respect of which the holders can have a “right to be repaid money or paid interest on money” (as per s8(1)(a) of the FMC Act definition of ‘Debt Security’). However, the interest or right is limited for the holder, as they can only request DOW to pay the money before liquidation of DOW in situations where a re-marketing process invitation is issued to holders prior to a step-up date;
- e. NZXR has granted similar rulings in relation to convertible securities. NZXR considers that, even though the ROADS have the legal form of a share in a company, overall the features of the ROADS are inconsistent with the usual features of an Equity Security, and are more consistent with the features of Debt Securities; and
- f. all offering documents relating to the ROADS contained clear disclosure to the satisfaction of NZXR of the terms of the ROADS and the ranking of the claims of the holders of ROADS against WKS and DOW with the claims of other creditors.

Appendix One

1. Downer EDI Limited (**DOW**) is a company incorporated in Australia and listed on ASX. DOW is a Foreign Exempt Issuer on NZX. DOW has incorporated a special purpose subsidiary called Works Finance (NZ) Limited (**WKS**). WKS is incorporated in New Zealand under the Companies Act 1993. WKS has Debt Securities listed on the NZDX, known as Redeemable Optionally Adjustable Distributing Securities (**ROADS**).
2. WKS was granted a ruling that the **ROADS** will be treated as Debt Securities under the Rules on 6 March 2007. WKS has applied for a ruling that the **ROADS** will continue to be treated as Debt Securities and not Equity Securities for the purposes of the Rules dated 1 January 2020 (**Rules**).
3. **ROADS** are technically Equity Securities rather than Debt Securities for the purposes of the Rules because:
 - a. they are shares in WKS; and
 - b. they do not fall under the definition of Debt Securities under the Rules as they are not a “convertible note” as defined under sYA1 of the Income Tax Act 2007, as the **ROADS** are not converted into or repaid by the issue of shares in WKS.
4. However, WKS has submitted, and NZXR has no reason to object, that the relevant terms of the **ROADS** mean they are more akin to Debt Securities than Equity Securities. The relevant terms of the **ROADS** are:

Unsecured subordinated securities

- a. Under the deed poll, DOW has guaranteed on an unsecured subordinated basis the payment by WKS of dividends on **ROADS** and of amounts payable on redemption and resale of **ROADS**.
- b. All amounts payable under the deed poll by DOW to any holder are subordinated to all other claims against DOW except those that are subordinated to the claims of unsecured creditors.

Dividends

- c. The **ROADS** carry a right to a non-cumulative dividend payable quarterly in arrears.
- d. Prior to a step-up date WKS may issue a Re-marketing Process Invitation that will include the terms of the **ROADS** that will be adjusted including the marginal rate at which the dividend is calculated. The process is complicated and may or may not eventuate in adjustment to the terms. If a new margin is not set, then the margin will increase by 2% and there will be no further step-up dates.
- e. The dividend is payable in full unless the directors of WKS or the directors of DOW declare that the dividend or any part of it is not payable. If a dividend is unpaid, it is not cumulative. If a dividend is not paid in full within 20 business days from the relevant date, then the payment of dividends on the share capital of DOW is subject to certain restrictions.
- f. Holders of **ROADS** have no right to share in the income or profits of WKS other than the right to the dividend described.

Redemption

- g. WKS may redeem the ROADS in a number of situations on a step-up date, on a dividend payment date (but only after a step-up date where the step-up margin applies) or on the occurrence of certain other events.
- h. On redemption by WKS a holder of ROADS would be entitled to NZ\$1.00 for each ROADS held.
- i. A holder of ROADS has no right of redemption.
- j. Under the terms of a deed poll, to which DOW is the party, if WKS sets a new margin, holders of ROADS who gave WKS notice indicating that they would only hold ROADS at a margin higher than that fixed by WKS are entitled to require DOW to purchase their ROADS (provided WKS has elected not to sell the ROADS to a third party).

Conversion

- k. WKS can elect that ROADS be exchanged for ordinary shares in DOW without the agreement of the holder.
- l. DOW would purchase the ROADS and exchange the proceeds for ordinary shares. An exchange will only occur if DOW ordinary shares are quoted on ASX during a period preceding the exchange. An exchange will occur at a ratio calculated by reference to the issue price of the ROADS and the volume weighted average sale prices of DOW ordinary shares on the ASX over a period preceding the exchange.

Rights in Liquidation

- m. On liquidation of WKS a holder of ROADS would be entitled to NZ\$1.00 for each ROADS held. If DOW is required to purchase ROADS, it is liable to pay a holder \$1.00 for each ROADS acquired. A holder of ROADS would have no other claim to any surplus assets of WKS than the \$1.00 amount per ROADS.

Non-Voting

- n. Holders of ROADS have no right to receive notice of, attend or vote at meetings of WKS except in respect of meetings called to amend the rights attaching to the ROADS (a full summary attaching to ROADS is set out in Section B of the Investment Prospectus dated 7 March 2007, and the 'Terms of ROADS' section of the WKS constitution).
- o. Holders of ROADS have no right to receive notice of, attend or vote at meetings of DOW.

Appendix Two

Part A – Definitions

Debt Security	has the meaning given in sections 8(1) and 8(5) of the FMC Act, subject to NZX's sole discretion to declare, by way of a Ruling, a Financial Product to be, or not to be, a Debt Security.
Equity Security	has the meaning given in sections 8(2) and 8(5) of the FMC Act and also includes a Right, subject to NZX's sole discretion to declare, by way of a Ruling, a Financial Product to be, or not to be, an Equity Security (and includes any Fund Security deemed to be an Equity Security under Rule 1.1.2).

Status of the Rules and changes to the Rules

9.6 Rulings

- 9.6.1 NZX may make Rulings in relation to the Rules for such period and on such terms and conditions as it sees fit. It may do this upon application by an Issuer or at its own instigation, and whether or not a dispute exists. A Ruling may apply to a specific Issuer, or be a class Ruling applying to the Rules generally.

Financial Markets Conduct Act 2013

8 Definitions relating to kinds of financial products

- (1) In this Act, subject to subsection (5)(a) and (b), debt security—
- (a) means a right to be repaid money or paid interest on money that is, or is to be, deposited with, lent to, or otherwise owing by, any person; and
 - (b) includes—
 - (i) a security commonly referred to in the financial markets as a debenture, bond, or note; and
 - (ii) a convertible note; and
 - (iii) a redeemable share in an entity that would otherwise be an equity security (except a share redeemable only at the option of the entity or a redeemable share in an industrial and provident society); but
 - (c) does not include—
 - (i) a share in a co-operative company that is issued or transferred to a transacting shareholder and that is, or may become, subject to the right of

a transacting shareholder to surrender the share under section 20 of the Co-operative Companies Act 1996; or

- (ii) a derivative of the kind referred to in subsection (4)(b); or
- (iii) a unit, proportionate interest, or membership interest in a registered scheme.

(2) In this Act, subject to subsection (5)(a) and (b), equity security—

(a) means—

- (i) a share in a company; and
- (ii) a share in an industrial and provident society; and
- (iii) a share in a building society; but

(b) does not include a debt security.

[...]