



15 December 2021

**APPLICATION FOR WAIVER FROM NZX LISTING RULE 2.11  
NZX LIMITED**

1. This is a decision of the Special Division of the NZ Markets Disciplinary Tribunal (*Special Division*).
2. Capitalised terms that are not defined in this decision have the meanings given to them in the NZX Listing Rules (*the Rules*).

**Background**

3. NZX Limited (*NZX*) is a Listed Issuer with Securities Quoted on the NZX Main Board.
4. NZX operates New Zealand's national stock exchange, including being responsible for monitoring, enforcing and developing the market rules under which the NZX markets operate. The exchange's regulatory functions are currently performed by NZX Regulation Limited (*NZ RegCo*), a subsidiary of NZX.
5. NZ RegCo was established in August 2020 to undertake regulatory decision-making under the various market rules that regulate New Zealand's licensed markets, subject to delegations of authority in place with NZX and its wholly-owned subsidiaries (*the NZX Group*). NZ RegCo is governed by its own board separate from the board of NZX.
6. The Directors of NZ RegCo are appointed and removed by NZX, as the sole shareholder of NZ RegCo, following consultation with the Financial Markets Authority. NZX Directors may be appointed to the NZ RegCo board.
7. The NZ RegCo constitution and its board charter requires that NZ RegCo will:
  - (a) have a minimum of three Directors;
  - (b) include at least one Director who is also a director of NZX; and
  - (c) have a majority of Directors, including the Chair, who are independent of the NZX Group (*NZ RegCo Independent Directors*).
8. NZX currently pays the NZ RegCo Independent Directors out of the NZX shareholder approved fee pool. In doing so, it relies on Rule 2.11.3 in that when NZ RegCo was incorporated and the NZ RegCo Independent Directors were first appointed, the number of Directors of NZX and its subsidiaries increased.

9. NZX has sought a waiver from the requirements of Rule 2.11 to remove the requirement that the remuneration payable to NZ RegCo Independent Directors must be approved by NZX shareholders. In seeking the waiver, NZX advised the Special Division that it was principally concerned to minimise the perception of any influence over the regulatory arm that NZ RegCo provides.

**Decision**

10. Subject to the conditions in paragraph 11 below and on the basis that the information provided by NZX is complete and accurate in all material respects, the Special Division grants NZX a waiver from Rule 2.11 (*the Waiver*) to the extent this Rule applies to the NZ RegCo Independent Directors specifically.
11. The Waiver is provided subject to the following conditions:
- (a) in order to seek any change to the NZ RegCo Independent Director remuneration, NZX and NZ RegCo comply with the following process:
    - (i) NZ RegCo seeks remuneration benchmarking advice, which is relevant to the regulatory role which NZ RegCo performs, in respect of the NZ RegCo Independent Directors from an independent professional remuneration adviser (excluding NZX's audit firm) from time to time when it considers that it is appropriate for remuneration to be reviewed.
    - (ii) The NZ RegCo board proposes remuneration for the NZ RegCo Independent Directors to the board of NZX that is no greater than the recommendation it has received in the benchmarking advice.
    - (iii) The remuneration is subject to approval by the board of NZX as the shareholder of NZ RegCo. Such approval will not be unreasonably withheld. Remuneration of the NZ RegCo Independent Directors may be approved as an individual amount for directors or as a pool.
  - (b) the NZ RegCo board complies with the requirements under section 161 of the Companies Act 1993 to resolve and certify that the remuneration is fair to the company, and the grounds for that opinion;
  - (c) the NZ RegCo board remuneration is disclosed in the annual report of NZX as is required under the Companies Act 1993;
  - (d) the Waiver only applies to the NZ RegCo Independent Directors. Any fees paid to any NZ RegCo director who is also on the board of NZX will remain subject to approval under Listing Rule 2.11;
  - (e) the Waiver, its conditions and its implications are disclosed to the market and in each of NZX's annual reports for so long as the Waiver is relied upon; and

- (f) for the avoidance of doubt, any NZX notice of meeting to consider a resolution under Rule 2.11.1 must include disclosure of the Waiver and the current NZ RegCo Independent Directors' remuneration for so long as the Waiver is relied upon.
12. The Waiver will not apply if (a) the information provided to the Special Division is not, or ceases to be, full and accurate in all material respects; or (b) any of the conditions are not complied with.
13. The Rule to which this decision relates is set out in Appendix One.

### **Reasons**

14. In coming to the decision to grant the Waiver, the Special Division has considered the following:
- (a) the purpose of Rule 2.11 is to ensure Directors of an Issuer cannot reward themselves or their associates without the scrutiny of shareholders. The Special Division is satisfied that granting the Waiver will not offend the purpose of Rule 2.11 given the conditions set out in paragraph 11, including that the remuneration will (i) be based on relevant independent benchmarking advice; (ii) be disclosed to NZX shareholders in each annual report enabling continued oversight; and (iii) will only apply to the NZ RegCo Independent Directors;
  - (b) the nature of NZ RegCo as a separate entity responsible for performing the regulatory functions required to meet NZX's obligations as a licensed market operator and as operator of the designated settlement system is unique to NZX. NZ RegCo's governance structure was designed to separate the exchange's commercial and regulatory roles and requires an Independent Chair and a majority of Independent Directors. Other Issuers do not typically have subsidiaries that perform regulatory functions;
  - (c) the Waiver, and its conditions, will likely further minimise any influence (or perceived influence) of the commercial arm of NZX over the regulatory functions of NZ RegCo by removing the need for the NZ RegCo Independent Directors' remuneration to be approved by the shareholders of NZX. Any change to the remuneration of the NZ RegCo Independent Directors must instead be based on independent benchmarking advice relevant to their regulatory role and approved by the board of NZX (as shareholder of NZ RegCo). The NZX board's approval may not be unreasonably withheld; and
  - (d) the Waiver, and its conditions, will likely increase the independence of NZ RegCo from NZX as the remuneration of the NZ RegCo Independent Directors will be based on independent benchmarking advice relevant to their regulatory role.
15. In coming to its decision to grant the Waiver, the Special Division notes that the circumstances are unique to the NZ RegCo Independent Directors given the regulatory role they perform in respect of the NZX Markets and the oversight the Financial Markets Authority has in respect of the performance of that role.

## **Appendix One - Listing Rule 2.11**

### **2.11 Directors' Remuneration**

- 2.11.1 No remuneration may be paid by an Issuer, or its Subsidiaries (unless such Subsidiary is Listed), to a Director in his or her capacity as a Director without prior authorisation by an Ordinary Resolution. Such resolution must express Directors' remuneration as either a monetary sum per annum payable to:
- (a) all Directors of the Issuer in aggregate, or
  - (b) any person who from time to time holds office as a Director of the Issuer.
- 2.11.2 A resolution for the purposes of Rule 2.11.1:
- (a) must only be approved if notice of the amount of any increase in remuneration has been given in the notice of meeting, and
  - (b) may provide that the remuneration may, in whole or in part, be through an issue of Equity Securities, provided the issue is in compliance with Rule 4.7.
- 2.11.3 If remuneration is expressed in accordance with Rule 2.11.1(a) and there is an increase in the number of Directors from the number when the remuneration was approved by an Ordinary Resolution, the Board may, without an Ordinary Resolution, increase the remuneration payable to all Directors of the Issuer in aggregate. The amount of the increase per additional Director may not exceed the amount necessary to enable the additional Director or Directors to be paid the average amount then being paid to each non-Executive Director (other than the chairperson) of the Issuer.
- 2.11.4 A lump sum payment or pension may be made to a Director or former Director, or to his or her dependents, on retirement or cessation of office provided that the amount of the payment, or the method of calculation, has been authorised by an Ordinary Resolution.
- 2.11.5 The resolutions referred to in this Rule 2.11 are subject to the voting restrictions in Rule 6.3.