

3. CONSTITUTIONS, TRUST DEEDS AND DIRECTORS

3.1 CONTENTS OF CONSTITUTION

3.1.1 Compulsory Provisions: The Constitution of each Issuer shall:

- (a) either incorporate by reference or contain provisions consistent with, and having the same effect as, the provisions listed in Appendix 6, as such provisions apply from time to time and as modified by any Ruling relevant to the Issuer; and
(Amended 10/05/06)
- (b) in the case of any Issuer which is not a Code Company, either incorporate by reference or contain the provisions required by section 4; and
(Amended 10/05/06)
- (c) contain a provision to the effect that, for so long as the Issuer is Listed, the Issuer shall comply with the Rules; and
- (d) contain a provision to the effect that if NZX has granted a Ruling in relation to that Issuer authorising any act or omission which in the absence of that Ruling would be in contravention of the Rules or the Constitution that act or omission shall, unless a contrary intention appears in the Constitution, be deemed to be authorised by the Rules and by the Constitution; and
- (e) not contain any provision inconsistent with the Rules as modified by any Ruling relevant to the Issuer and shall in any event include a provision that provides that if a provision in the Constitution is inconsistent with the Rules, the Rules shall prevail. *(Amended 1/5/04)*

3.1.2 Further provisions: The Constitution may contain a provision to the effect that:

- (a) failure to comply with the Rules; or
- (b) failure to comply with a provision of the Constitution corresponding with a provision of the Rules,
(Amended 10/05/06)

shall not affect the validity or enforceability of any transaction, contract, action or other matter whatsoever (including the proceedings of, or voting

at, any meeting) done or entered into by, or affecting, the Issuer, except that a party to a transaction or contract who knew of the failure to comply with the Rules or those provisions of the Constitution shall not be entitled to enforce that transaction or contract. That provision shall contain a statement making it clear that the provision does not affect the rights of any holder of Securities of the Issuer against the Issuer or the Directors of the Issuer arising from failure to comply with the Rules or those provisions of the Constitution.

- 3.1.3 Compliance: Subject to applicable law and the other provisions of the Rules (and in particular Rule 1.10), each Issuer shall comply at all times with all of the provisions listed in Appendix 6 (except insofar as they have been waived or varied in relation to that Issuer by a Ruling) as if provisions giving effect to them were incorporated in, included in, or formed part of the Constitution of that Issuer, whether or not they are so included.
(Amended 1/5/04)

3.2 TRUST DEEDS FOR DEBT SECURITIES

Every Trust Deed governing Debt Securities shall provide that:

- (a) the appointment of a new trustee is to be approved by an extraordinary resolution of the holders of the Securities to which the Trust Deed relates; and
- (b) where the Securities to which the Trust Deed relates are to be repaid or made callable on demand with interest on maturity the holder is entitled to be repaid without having to give notice that repayment is required; and
(Amended 10/05/06)
- (c) where the Trust Deed entitles the Issuer or any other person to redeem the Securities (whether for cash or for non cash consideration), the redemption shall be made either at market value or at a value not exceeding the maximum value stated in or derived pursuant to the deed; and
(Amended 10/05/06)
- (d) a meeting of Security holders shall be called on a requisition in writing signed by holders of not less than 10% of the amount of the Securities for the time being outstanding; and

- (e) the necessary majority for passing an extraordinary resolution shall be not less than 75% of the persons voting thereon on a show of hands and, if a poll is demanded, then not less than 75% of the Votes cast; and

shall contain such other provisions as NZX may require in any particular case for the protection of holders of the Securities in question.

1. NZX does not consider it appropriate or practical to lay down the nature, categories or extent of borrowing or other restrictions which a trust deed should impose. NZX may however, consider that a Trust Deed which has no, or patently inadequate, restrictions or provisions for the protection of the lenders is not in an appropriate form and may refuse Quotation of Debt Securities issued under such a deed if it considers that the inadequacies have not been properly disclosed to the market or are not readily ascertainable from the Prospectus, Advertisement or other material published by the Issuer.
2. A Trust Deed for Debt Securities which are also Equity Securities (such as convertible notes) should comply with Rule 3.1.1.
(Amended 1/5/04)

3.3 APPOINTMENT AND ROTATION OF DIRECTORS

3.3.1 Board Composition: The composition of the Board shall include the following:

- (a) the minimum number of Directors (other than alternate Directors) shall be three; and
- (b) at least two Directors shall be ordinarily resident in New Zealand; and
- (c) the minimum number of Independent Directors shall be two or, if there are eight or more Directors, three or one-third (rounded down to the nearest whole number of Directors) of the total number of Directors, whichever is the greater.
(Amended 29/10/03)

An example under Rule 3.3.1(c) is if an Issuer has ten Directors, three of them must be Independent Directors. *(Amended 29/10/03)*

- 3.3.1A **Board to Confirm Independence:** The Board must identify which Directors it has determined, in its view, to be Independent Directors. *(Inserted 29/10/03)*
- 3.3.1B **Timing of Determination:** The Board must make a determination under Rule 3.3.1A:
- (a) no later than 10 Business Days following the Issuer's annual meeting and immediately after making such determination, the Issuer shall release to the market the names of those Directors determined by the Board to be Independent Directors; and *(Amended 1/5/04)*
 - (b) no later than 10 Business Days following appointment by the Board in respect of any Director appointed by the Board and immediately after making such determination, the Issuer shall release to the market whether the Board has determined that such Director is an Independent Director; and *(Amended 1/5/04)*
 - (c) prior to publication of its annual report to enable it to comply with Rule 10.5.3(j). *(Inserted 29/10/03)*
- 3.3.1C **Issuer to obtain necessary information:** It is the responsibility of the Issuer to make the necessary arrangements to require its Directors to provide sufficient information to the Board in order for the Board to make a determination under Rule 3.3.1A. *(Inserted 29/10/03)*
- 3.3.2 **Nomination:** No person (other than a Director retiring at the meeting) shall be elected as a Director at an annual meeting of Security holders of an Issuer unless that person has been nominated by a Security holder entitled to attend and vote at the meeting. There shall be no restriction on the persons who may be nominated as Directors (other than the holding of qualification shares, if the Constitution so requires) nor shall there be any precondition to the nomination of a Director other than compliance with time limits in accordance with this Rule 3.3.2. The closing date for nominations shall not be more than two months before the date of the annual meeting at which the election is to take place. An Issuer shall make

an announcement to the market of the closing date for Director nominations and contact details for making nominations no less than 10 Business Days prior to the closing date for Director nominations. Notice of every nomination received by the Issuer before the closing date for nominations shall be given by the Issuer to all persons entitled to attend the meeting together with, or as part of, the notice of the meeting and the Issuer shall specify in such notice the Board's view on whether or not the nominee would qualify as an Independent Director.

(Amended 10/05/06)

- 3.3.3 Confirmation of Appointment by Directors: Any person who is appointed as a Director by the Directors shall retire from office at the next annual meeting of the Issuer, but shall be eligible for election at that meeting.

(Amended 1/5/04)

- 3.3.4 Alternate Directors: No Director may appoint another person to act as alternate Director for him or her, except with the consent of a majority of his or her co-Directors. That appointment may be revoked by a majority of his or her co-Directors or by the Director who appointed the alternate. A Director may not be appointed to act as alternate for another Director. No Director shall appoint a deputy or agent otherwise than by way of appointment of an alternate.

- 3.3.5 Right of Security Holder to Appoint: The Constitution may give a Security holder the right to appoint Directors, so long as:

- (a) the proportion which the number of such Directors bears to the total number of Directors expected to hold office immediately after such appointment does not exceed the proportion of the total Votes of the Issuer attaching to Securities held by the appointer; and
- (b) if the appointer exercises its rights to appoint Directors, then the appointer has no right to Vote upon the election of other Directors.

The annual report must identify Directors appointed under this Rule 3.3.5 – see Rule 10.5.4.

(Amended 1/5/04)

- 3.3.6 Term of Appointment: No term of appointment of an Executive Director of an Issuer or any of its Subsidiaries, shall exceed five years. This

provision shall not preclude reappointment of an Executive Director upon expiry of a term of appointment, and shall not affect the terms of the engagement of that Executive Director as an employee.

(Amended 1/5/04)

- 3.3.7 **Removal from Office:** All Directors (other than a Director appointed pursuant to Rule 3.3.5) shall be subject to removal from office as Director by Ordinary Resolution of the Issuer.
- 3.3.8 **Rotation:** Subject to Rule 3.3.9, at least one third of the Directors or, if their number is not a multiple of three, then the number nearest to one third, shall retire from office at the annual meeting each year, but shall be eligible for re-election at that meeting. Those to retire shall be those who have been longest in office since they were last elected or deemed elected.
- 3.3.9 **Exceptions to Rotation:** The following Directors shall be exempt from the obligation to retire pursuant to Rule 3.3.8:
- (a) Directors appointed pursuant to Rule 3.3.5; and
 - (b) Directors appointed by the Directors, who are offered for re-election pursuant to Rule 3.3.3; and *(Amended 1/5/04)*
 - (c) one Executive Director (if the Constitution so provides).

The Directors referred to in (a) and (c) shall be included in the number of Directors upon which the calculation for the purposes of Rule 3.3.8 is based. The Directors referred to in (b) shall be excluded from that number.

Rule 3.3.12 deals with the obligation of the holder of a special office such as “Founder President” to retire by rotation.

- 3.3.10 **Appointment of Directors to be Voted on Individually:** No resolution to appoint or elect a Director (including a resolution to re-elect any Director under Rule 3.3.3) shall be put to holders of Securities unless:
- (a) the resolution is for the appointment of one Director; or

- (b) the resolution is a single resolution for the appointment of two or more Directors, and a separate resolution that it be so voted on has first been approved without a Vote being cast against it. *(Amended 1/5/04)*

Nothing in this Rule 3.3.10 prevents the election of two or more Directors by ballot or poll.

3.3.11 **Special Office:** An Issuer may, with the prior approval of NZX, provide in its Constitution for the appointment of a person to a special office such as "Founder President". If the person holding that office is a Director, then (subject to Rule 3.3.12) all of the provisions of the Rules as to Directors shall apply to that person.

3.3.12 **Application of Rotation to Holder of Special Office:** A holder of a special office in terms of Rule 3.3.11 who is also a Director shall not be subject to retirement by rotation under Rule 3.3.8, provided that:

- (a) the holder of a special office shall retire every fifth year following appointment to the special office, as if Rule 3.3.8 applied to him or her in that year; and
- (b) the holder of the special office shall in each year be included in the number of Directors upon which the calculation for the purposes of Rule 3.3.8 is based; and
- (c) if an Executive Director holds office and is exempted from retirement by rotation under Rule 3.3.9, this Rule shall not apply, and the holder of the special office shall be subject to retirement by rotation under Rule 3.3.8.

NZX has a complete discretion whether or not to approve the creation of a special office. NZX will not in any event approve the creation of a special office unless:

- (a) it is created in respect of a specified individual who has had a special connection with the Issuer (e.g., a foundation director) and who is regarded as having been a very significant and outstanding contributor to the Issuer or its associated companies over a period of not less than 15 years, and who has acquired a public reputation in that regard, deserving of special recognition; and

- (b) the proposal has the unanimous support of the Directors of the Issuer.

3.4 PROCEEDINGS AND POWERS OF DIRECTORS

- 3.4.1 **Vacancies and Reduction of Numbers:** Directors may act notwithstanding any vacancy in their body but, if and for so long as their number is reduced below the number fixed by the Constitution as the minimum number of Directors, the continuing Directors may act for the purpose of increasing the number of Directors to that number or of summoning a general meeting of the Issuer, but for no other purpose.
- 3.4.2 **Restriction on Casting Vote of Chairperson:** In cases where two Directors form a quorum, the chairperson of a meeting at which only two Directors are present shall not have a casting vote.
- 3.4.3 **Interested Directors:** Subject to Rule 3.4.4, a Director shall not vote on a Board resolution in respect of any matter in which that Director is interested, nor shall the Director be counted in the quorum for the purposes of consideration of that matter. For this purpose, the term “interested” bears the meaning assigned to that term in section 139 of the Companies Act 1993, on the basis that if an Issuer is not a company registered under that Act, the reference to the “company” in that section shall be read as a reference to the Issuer. *(Amended 1/5/04)*
- 3.4.4 **Exception:** Notwithstanding Rule 3.4.3, a Director of an Issuer which is a company registered under the Companies Act 1993 may vote in respect of and be counted in the quorum for the Board for the purposes of a matter in which that Director is interested if that matter is one in respect of which, pursuant to an express provision of that Act, Directors are required to sign a certificate or one which relates to the grant of an indemnity pursuant to section 162 of the Companies Act 1993. *(Amended 1/5/04)*

3.5 DIRECTORS’ REMUNERATION

- 3.5.1 **Fixing Remuneration:** No remuneration shall be paid to a Director in his or her capacity as a Director of the Issuer or any Subsidiary, other than a Subsidiary which is Listed (including any remuneration paid to that Director by a Subsidiary, other than a Subsidiary which is also Listed)

unless that remuneration has been authorised by an Ordinary Resolution of the Issuer. Each such resolution shall express Directors' remuneration as either: *(Amended 1/5/04)*

- (a) a monetary sum per annum payable to all Directors of the Issuer taken together; or *(Amended 1/5/04)*
- (b) a monetary sum per annum payable to any person who from time to time holds office as a Director of the Issuer. *(Amended 1/5/04)*

If remuneration is expressed in accordance with (a), then in the event of an increase in the total number of Directors of the Issuer holding office, the Directors may, without the authorisation of an Ordinary Resolution of the Issuer, increase the total remuneration by such amount as is necessary to enable the Issuer to pay to the additional Director or Directors of the Issuer remuneration not exceeding the average amount then being paid to each of the other non-Executive Directors (other than the chairperson) of the Issuer. *(Amended 1/5/04)*

No resolution which increases the amount fixed pursuant to a previous resolution shall be approved at a general meeting of the Issuer unless notice of the amount of increase has been given in the notice of meeting. Nothing in this Rule 3.5.1 shall affect the remuneration of Executive Directors in their capacity as executives. *(Amended 1/5/04)*

Directors' remuneration for work not in the capacity of a Director of the Issuer or a Subsidiary may be approved by the Directors without Shareholder approval, subject to Rule 9.2 (if applicable). *(Amended 1/5/04)*

1. Rule 3.5.1 is intended to enable a meeting of an Issuer to fix Director's remuneration either as an overall sum payable to all Directors of the Issuer (which may be divided up amongst the Directors of the Issuer in such manner as they see fit) or as an amount per Director. *(Amended 1/5/04)*
2. Note that full disclosure in the annual report of Directors' remuneration is required by virtue of s.211(1)(f) of the Companies Act 1993.

3.5.2 **Payments Upon Cessation of Office:** An Issuer may make a payment to a Director or former Director of that Issuer, or his or her dependents, by way of a lump sum or pension, upon or in connection with the retirement or cessation of office of that Director, only if the amount of the payment, or the method of calculation of the amount of that payment is authorised by an Ordinary Resolution of the Issuer provided that an Issuer may make a payment to a Director or former Director that was in office on or before 1 May 2004 and has continued to hold office since that date, or to his or her dependents, by way of a lump sum or pension, upon or in connection with the retirement or cessation of office of that Director, without an Ordinary Resolution of the Issuer provided that the total amount of that payment (or the base for the pension) does not exceed the total remuneration of that Director in his or her capacity as a Director in any three years chosen by the Issuer. *(Amended 1/5/04)*

Nothing in this Rule 3.5.2 shall affect any amount paid to an Executive Director upon or in connection with the termination of his or her employment with the Issuer, or the payment of any amount attributable to the contribution (or any normal subsidy related thereto) made by a Director to a superannuation scheme.

1. Rule 9.3.1 deals with the persons entitled to vote on a resolution under this Rule 3.5.2.
2. Any resolution of Security holders that may affect the total amount payable to a Director or Directors as previously approved under Rule 3.5.2 must disclose that fact, the total amount that would be payable to that Director or Directors if the resolution is approved and why the resolution will affect the total amount payable to that Director or Directors. *(Inserted 1/5/04)*

3.6 AUDIT COMMITTEE

3.6.1 **Establishment of an Issuer's Audit Committee:** Each Issuer shall establish an Audit Committee. *(Inserted 29/10/03)*

3.6.2 **Composition of an Issuer's Audit Committee:** The Audit Committee shall: *(Amended 1/5/04)*

- (a) be comprised solely Directors of the Issuer; and
(Amended 1/5/04)
- (b) have a minimum of three members; and *(Amended 1/5/04)*
- (c) have a majority of members that are Independent Directors; and
(Amended 1/5/04)
- (d) have at least one member with an accounting or financial background.
(Inserted 29/10/03)

3.6.3 Responsibilities: The responsibilities of an Issuer's Audit Committee include as a minimum: *(Amended 1/5/04)*

- (a) ensuring that processes are in place and monitoring those processes so that the Board is properly and regularly informed and updated on corporate financial matters; and
- (b) recommending the appointment and removal of the independent auditor; and
- (c) meeting regularly to monitor and review the independent and internal auditing practices; and
- (d) having direct communication with and unrestricted access to the independent and any internal auditors or accountants; and
- (e) reviewing the financial reports and advising all Directors whether they comply with the appropriate laws and regulations; and
- (f) ensuring that the external auditor or lead audit partner is changed at least every five years. *(Amended 1/5/04)*

1. A member of the Audit Committee will be deemed to have adequate accounting or financial background if he or she:
 - (a) is a member of the Institute of Chartered Accountants of New Zealand, or has held a Chief Financial Officer position at an Issuer for a period greater than 24 months; or

- (b) has successfully completed a course approved by NZX for Audit Committee membership; or
 - (c) has the experience and/or qualifications deemed satisfactory by the Board.
2. NZX may waive the requirement to change the external auditor or lead audit partner if the Issuer is a “public entity” under section 4 of the Public Audit Act 2001. *(Inserted 29/10/03)*