

## 4. TAKEOVER PROVISIONS FOR ISSUERS WHICH ARE NOT CODE COMPANIES

### 4.1 INTERPRETATION

4.1.1 **Definitions:** In this section 4 unless the context otherwise requires:

“**Acquisition Notice**” has the meaning given in Rule 4.8.1.

“**Affected Group**” means:

- (a) in respect of a Restricted Transfer effected otherwise than by trades matched through NZX’s order matching market each of:
  - (i) the group comprised of persons who are not recipients (disregarding inadvertent non-receipt) of the offer or invitation which would implement the proposed Transfers;
  - (ii) if the Transfers are not of an equal proportion of all holdings which are offered for disposal, the groups comprised of Transferors whose Transfers represent substantially identical proportionate parts of the holdings offered by them; and
  - (iii) the group comprised of persons who are not members of the groups described in (i) and (ii) and who are not the Transferees and other persons whose Relevant Interests would be taken into account in determining whether the Transfer is a Restricted Transfer, but disregarding the proviso to the definition of Restricted Transfer;
- (b) in respect of a Restricted Transfer effected by trades matched through NZX’s order matching market, the group comprised of those other than:
  - (i) the persons whose control of Votes would in aggregate determine whether the Transfer is a Restricted Transfer; and
  - (ii) insiders.

“**Affected Securities**” has the meaning given in Rule 4.8.1.

“**Compulsory Acquisition Provisions**” means provisions in the Constitution of an Issuer complying with Rules 4.8.1 to 4.8.6 inclusive.

**“Default”** by a holder of Equity Securities of an Issuer, means non-compliance with Notice and Pause Provisions, or Minority Veto Provisions, in the Constitution of the Issuer.

**“Defaulter”** means a person with a Relevant Interest in Quoted Equity Securities of an Issuer who has acquired that Relevant Interest in breach of Notice and Pause Provisions or Minority Veto Provisions (other than a breach committed by the Issuer itself or its Directors).

**“Director”** includes in relation to an Issuer that is a Managed Fund a Director of the Manager.

**“Differential Offer”** means an offer, or invitation to agree on Transfers, which:

- (a) is made to some but not all holders of a Class of Equity Securities; or entitle any person other than NZX to the benefit of, or to exercise, the rights and powers provided in NZAX Listing Rule A2.3; or
- (b) would result in different prices or other terms applying among holders of the same Class of Equity Securities; or
- (c) would result in the Transfer of different proportions of those portions of holdings of Equity Securities of the same Class which are offered for disposal.

**“Effective Date”** means 1 July 2001 or any other date on which the Takeovers Code comes into force.

**“Enforcement Provisions”** means provisions in the Constitution of an Issuer complying with Rules 4.7.1 to 4.7.7 inclusive and Rule 4.9.

**“Insider”** means in respect of an Issuer:

- (a) Directors or Associated Persons of Directors;
- (b) persons who hold Material Information of the Issuer which has not been disclosed to the market.

**“Majority Holder”** has the meaning given in Rule 4.8.1.

**“Minority Veto Provisions”** has the meaning given in Rule 4.6.1.

“**Notice and Pause Provisions**” has the meaning given in Rule 4.5.1.

“**Relevant Group**” in respect of an Issuer means each of the groups comprising;

- (a) holders of Securities who are Members of the Public; and
- (b) holders of Securities who are not Members of the Public;

in each Class of Quoted Equity Securities of that Issuer the rights of which are governed by the Constitution of that Issuer.

“**Remaining Holders**” has the meaning given in Rule 4.8.1.

“**Restricted Transfer**” means:

- (a) the Transfer which would result in the Votes controlled by any person or group of persons who are Associated Persons of each other, of any Class of Quoted Equity Securities of an Issuer:
  - (i) exceeding 20% of the Votes attached to that Class; or;
  - (ii) if the person or group of persons controls 20% or more of the Votes attached to that Class, increasing by more than 5% in any period of 12 months excluding increases as a result of Transfers pursuant to a Restricted Transfer notice previously given by the person or group of persons; together with
- (b) any other Transfer which is likely to be contemporaneous with, or subsequent to, the Transfer in sub-paragraph (a) of this definition and comprises with that Transfer part of a scheme or linked series of transactions:

Provided that for the purposes of this definition acquisition of interests in Equity Securities of an Issuer may be disregarded:

- (a) where it is determined by NZX that the acquisition was involuntary and occasioned by the action of another party over which the acquiring party had no effective control or influence in the matter; or
- (b) where, and to the extent that, it is determined by NZX that the aggregation of holdings among Associated Persons would include holdings of persons who have no practical likelihood of acting in concert, or exercising Votes

or otherwise acting in collusion, with each other or any common party:

Provided also that this definition shall not apply:

- (a) where the Transfer is between two entities, one of which is directly or indirectly wholly owned beneficially by the other, or both of which are directly or indirectly wholly owned beneficially by the same entity; or
- (b) where the Transfer is in performance of the obligations of an underwriter pursuant to an underwriting agreement disclosed in a registered Prospectus for an offering of the relevant Class of Quoted Equity Securities.

*(Amended 1/12/99)*

**“Special Resolution”** means a resolution passed by a majority of 75% of Votes of holders of Equity Securities entitled to vote and voting.

**“Transfer”** in relation to an Equity Security includes sale of that Security, and the grant of rights or interests, whether conditional or not, which are intended to create for the recipient benefits which are substantially equivalent to ownership of that Security (or of an interest in that Security). In particular it includes:

- (a) a transaction whereby one party disposes of, alienates, or proposes to dispose of or alienate (temporarily or permanently), any interest or right of title to any Equity Security or in the Votes, dividends or income arising in respect of any Equity Security;
- (b) any agreement arrangement or understanding in respect of Equity Securities under which the Votes attaching to them may be exercised by a person other than the registered holder, alone or jointly with the registered holder, or with other persons acting in concert, other than by reason of a bona fide appointment of a proxy or other representative for voting purposes under which the appointment may be terminated at will, and the appointor is entitled, if the appointor so wishes, to direct the proxy as to the manner in which Votes are to be cast;
- (c) any transaction whereby the holder of the Equity Securities enters into a commitment (whether conditional or unconditional) to sell the Equity Securities, or to grant an option over them or any part thereof, or at any future time to grant any of the rights referred to above;

- (d) the creation of a charge or other security interest enforceable by a right of possession or a power of sale or other disposition which would fall within other parts of this definition of “Transfer”, other than the creation of such an interest for bona fide financing purposes; or
- (e) any transaction, agreement or arrangement that has substantially the same effect as (a), (b), (c) or (d) above,

but excludes the issue, or acquisition, of Equity Securities by the Issuer in accordance with the Rules. *(Amended 1/5/04)*

“**Transferor**” and “**Transferee**” have corresponding meanings.

**4.1.2 Non-application to Code companies:** Subject to Rules 4.1.3 and 4.1.4, as from the Effective Date nothing in this Section 4 shall apply in respect of any Issuer which is a Code Company.

**4.1.3 Transitional Provision – Non-compliance:** This section 4 shall continue to apply in respect of any non-compliance with this section 4 which occurred before the Effective Date.

**4.1.4 Transitional Provision – Compulsory Acquisition:** Rule 4.8 shall continue to apply in respect of a Code Company if:

- (a) Rule 4.8.1 applies in respect of that Code Company before the Effective Date; and
- (b) Part 7 of the Code does not apply in respect of that Code Company.

If Rule 4.8 continues to apply in respect of a Code Company by virtue of this Rule 4.1.4, Rules 4.7.1 to 4.7.5 shall also continue to apply in the circumstances recorded in Rule 4.8.5.

## **4.2 RESTRICTIONS AND DEFENSIVE MEASURES**

**4.2.1 Prohibited Conduct:** Except as permitted or required by Rule 4.3 no Issuer may:

- (a) include in its Constitution any provision; or
- (b) do anything or omit to do anything;

which would have the effect of causing or permitting an outcome or condition described in Rule 4.2.2.

**4.2.2 Transfer Restrictions and Defensive Measures Prohibited:** An outcome or condition is prohibited for the purposes of Rule 4.2.1 if

- (a) registration of any transfer of a Quoted Equity Security is prevented or restricted, or made subject to a precondition, other than as permitted by section 11; or
- (b) the enjoyment by a new holder of any benefit or right conferred by the Issuer on the holder of a Quoted Equity Security, is conditional on anything other than registration of the relevant transfer; or
- (c) any benefit or right conferred by the Issuer on the holder of a Quoted Equity Security is cancelled or varied or made contingent by reason of a Transfer of that Quoted Equity Security; or
- (d) any Quoted Equity Security may be redeemed, cancelled, made forfeit, disposed of or otherwise dealt with, by reason of a Transfer of that or any other Quoted Equity Security without the consent of the holder, other than as permitted by Rules 8.2 and 8.5; or
- (e) any benefit or right conferred by the Issuer on the holder of a Security is enhanced, extended, or crystallises or attaches by reason of a Transfer of a Quoted Equity Security; or
- (f) any material benefit, right or asset of the Issuer terminates or is disposed of or is made contingent or the subject of a third party option by reason of a Transfer of a Quoted Equity Security of the Issuer; or
- (g) any material liability or obligation of the Issuer crystallises or arises or can be made due and payable before its normal maturity by a third party by reason of a Transfer of a Quoted Equity Security of the Issuer.

Nothing in this Rule limits any rule of law, whether relating to the duties of Directors or otherwise.

**4.2.3 Exceptions:** Notwithstanding Rule 4.2.1 an Issuer may enter into an agreement which may have one or more of the effects specified in Rule 4.2.2(f) or (g) if that agreement is entered into with a person who is not a Related Party (as defined in Rule 9.2.3) of the Issuer and if, in approving the entry into of that

agreement, the Directors of the Issuer act in good faith in the best interests of the Issuer, and not with the intention of restricting or preventing Transfers of Securities of the Issuer.

### 4.3 CONSTITUTIONAL PROVISIONS

**4.3.1 Compulsory Provisions:** The Constitution of each Issuer shall contain or incorporate by reference:

- (a) Notice and Pause Provisions (which may be modified in accordance with Rule 4.4.2);
- (b) Enforcement Provisions; and
- (c) Compulsory Acquisition Provisions. *(Amended 1/5/04)*

**4.3.2 Optional Provision:** The Constitution of an Issuer may (subject to Rule 4.4.1) contain Minority Veto Provisions.

**4.3.3 Routine Disclosure:** Each Issuer the Constitution of which:

- (a) contains Minority Veto Provisions; or
- (b) contains provisions modified in accordance with Rule 4.4.2,

shall, in any report to holders of its Quoted Equity Securities, in any Offering Document relating to its Quoted Equity Securities, and otherwise to any person who requests in writing, clearly disclose that fact.

**4.3.4 Copies of Constitutional Provisions:** An Issuer shall provide, to any person who requests in writing, a copy of the provisions of its Constitution which deal with the matters dealt with in this section 4.

**4.3.5 Explanation:** An Issuer the Constitution of which contains Minority Veto Provisions or the Constitution of which contains provisions modified in accordance with Rule 4.4.2 shall, with the copy of the relevant provisions of its Constitution to be provided on request under Rule 4.3.4, supply also a summary and explanation of those provisions in the form previously approved by NZX.

#### 4.4 ADOPTION AND MODIFICATION OF PROVISIONS

- 4.4.1 Adoption of Minority Veto Provisions:** An Issuer shall not include Minority Veto Provisions in its Constitution unless:
- (a) those provisions are approved by a Special Resolution of each Relevant Group; or
  - (b) those provisions are included in the Constitution of the Issuer at the time at which Equity Securities of the Issuer are first Quoted.
- 4.4.2 Modification of Notice and Pause Provisions:** An Issuer may modify Notice and Pause Provisions in its Constitution so that those provisions apply only to Restricted Transfers in which the Transferees are Insiders. An Issuer shall not do so unless:
- (a) that modification is approved by a Special Resolution of each Relevant Group; or
  - (b) that modification is included in the Constitution of the Issuer at the time at which Equity Securities of the Issuer are first Quoted.
- 4.4.3 Subsequent Modifications:** An Issuer may delete Minority Veto Provisions from its Constitution, or cancel any modification to Notice and Pause Provisions in terms of Rule 4.4.2 (so that the Notice and Pause Provisions apply to all Restricted Transfers) only with the approval of a Special Resolution of each Relevant Group.
- 4.4.4 Procedure for Meetings:** The Constitution of each Issuer shall contain provisions governing the calling of meetings for the purposes of Rules 4.4.1, 4.4.2, and 4.4.3. The Constitution may provide that, for the purposes of voting by Relevant Groups for the purposes of those Rules, one meeting may be held of holders constituting both Relevant Groups, so long as voting is by way of poll, and proper arrangements are made to distinguish between the Votes of members of the different Relevant Groups.

**In respect of the contents of a notice of meeting for the purposes of Rules 4.4.1 to 4.4.3, see Rules 6.2.3 and 6.2.4.**



**4.4.5 Meeting On Request:** The Directors of an Issuer may at any time, and shall upon receipt of a request of the nature referred to in the next sentence, submit for the consideration of the holders of Securities of the Issuer a change to the Constitution to include or exclude Minority Veto Provisions, to modify the Constitution in accordance with Rule 4.4.2, or to cancel any such modification. A request to the Directors shall:

- (a) be in writing, and be signed by or on behalf of the holders of Quoted Equity Securities of the Issuer carrying 5% or more of the Votes attaching to all Quoted Equity Securities of the Issuer; and
- (b) specify in general terms the change to the Constitution which is proposed.

**4.4.6 Procedure:** If the Directors wish, or are required in accordance with Rule 4.4.5, to submit for consideration a change to the Constitution of the Issuer, the Directors shall without delay:

- (a) cause draft amendments to the Constitution to be prepared, and approved by NZX in accordance with Rule 6.1; and
- (b) cause those amendments to be submitted for the approval by Special Resolutions of the Relevant Groups, and by such other resolutions as may be necessary to effect an amendment to the Constitution of the Issuer.

## 4.5 NOTICE AND PAUSE PROVISIONS

**4.5.1 Introduction:** Notice and Pause Provisions are the provisions set out in Rules 4.5.2 to 4.5.9 inclusive.

**4.5.2 Notice Requirements:** No Restricted Transfer of Quoted Equity Securities shall take place unless notice is given to the Issuer, and to NZX in a manner complying with Rule 10.2.3 for release to the market, not later than the time specified in Rule 4.5.3, containing the following particulars:

- (i) the price or consideration, either specified as a fixed amount or expressed as a range with the higher price or consideration being not greater than 20% more than the lower price or consideration of that range;
- (ii) any conditions or arrangements directly or indirectly associated with the Transfer which could be material to the assessment of the price or price range by prospective Transferors of the Equity Securities;

- (iii) identification of the Class, and the maximum number of Securities and percentage of the relevant Class, to which the Transfer proposal relates;
- (iv) the identity of all persons reasonably expected to acquire Relevant Interests in the Equity Securities as a result of the Transfer proposal;
- (v) the number of Equity Securities (expressed in each case as a percentage of the total number in each relevant Class of Securities) which will be held, or in which Relevant Interests will be held, upon completion of the proposed transactions, by each Transferee and Associated Persons of each Transferee;
- (vi) the times within which the Transfers are intended to occur;
- (vii) how the Transfers are to be effected (for example, through NZX’s order matching market, by widespread direct offer, private treaty, etc);
- (viii) the date the notice is given. *(Amended 1/12/99)*

**4.5.3 Time for Initial Notice:** Each notice referred to in 4.5.2 shall be given:

- (a) if any Transferee under the Transfer in question is an Insider, at least 15 Business Days before the Transfer; or
- (b) if no Transferee is an Insider, and subject to Rule 4.5.5, at least three Business Days before the Transfer.

**“Transfer” includes entering into any agreement or commitment concerning the sale of Equity Securities. Refer to the full definition in Rule 4.1.1.**

**4.5.4 Notice of Change:** Any change in, or addition to, particulars notified under Rule 4.5.2 shall be made by giving a notice of change. Each such notice shall be given:

- (a) if any Transferee under the Transfer in question is an Insider, at least two Business Days before the change takes effect in the case of a change to price or other consideration, and at least 15 Business Days before the change takes effect in the case of a change to any other particulars listed in 4.5.2; or

- (b) if no Transferee is an Insider, and subject to Rule 4.5.5, at least one Business Day before the change takes effect in the case of a change to price or other consideration, and at least three Business Days before the change takes effect in the case of a change to any other particulars listed in Rule 4.5.2. *(Amended 1/12/9)*

**4.5.5 NZX Transactions:** If:

- (a) a Restricted Transfer is effected solely by trades matched through NZX's order matching market;
- (b) no Transferee is an Insider; and
- (c) the conditions specified in the next sentence are satisfied,

then the period of notice referred to in Rule 4.5.3(b) shall be one Business Day, and the periods of notice referred to in Rule 4.5.4(b) shall be two hours during which NZX is open for business, and one Business Day, respectively. The conditions referred to above are:

- (a) before notice is given, the Trading Participant instructed to make the offers must be satisfied that the entire offer in the notice has been the subject of instructions accepted by Trading Participants; *(Amended 1/5/04)*
- (b) the consideration must be readily capable of settlement through the FASTER system;
- (c) the Transferee must have previously undertaken to the Trading Participant through whom its orders are placed, for the benefit of holders of the relevant Securities, to complete the transaction in accordance with the notice given, if offers or acceptances are sufficient to enable it to do so; *(Amended 1/5/04)*
- (d) the instructions must be in terms that orders will be matched and completed by NZX's order matching system even if the entire offer is not accepted completely; and
- (e) the period during which transactions will be effected does not end before one Business Day after it begins or until Transfers have been agreed to complete the maximum number of Securities to which the Transfer proposal relates, whichever is the earlier.

**4.5.6 Immediate Response Requirement:** Directors of an Issuer whose Quoted Equity Securities are the subject of a notice under Rule 4.5.2 shall give notice as soon as can be achieved, and before the expiry of the notice periods referred to in Rule 4.5.3 or 4.5.5:

- (a) whether any Director or Associated Person of a Director is expected by any Director to be a Transferee in the notified transaction;
- (b) whether there is any Material Information pertaining to the Issuer which any Director believes is likely to be available to any Transferee in the proposed transaction, which has not been made generally available to the market;
- (c) whether any Director considers there is any undisclosed Material Information which should materially affect the decision of a reasonably informed prospective Transferor in the proposed Transfer and, if so, an indication whether the Director would consider the Transfer to be made more or less desirable to the prospective Transferor by the Material Information; and
- (d) a statement as to the timing, and expected significance of any further action, investigation, report, or disclosure which the Directors or any of them, intend to make in response to the relevant proposals for Transfers.

**These obligations (and others on directors in this section) recognise that boards commonly divide these matters into:**

- (a) the Directors perceived to have a conflict of interest in relation to an offer; and**
- (b) those who can be seen to be affected only by concern for the best interests of the Issuer and shareholders not connected with the offeror.**

**4.5.7 General Response Requirement:** The Directors of an Issuer whose Quoted Equity Securities are the subject of a notice under Rule 4.5.2, or who become aware that a Restricted Transfer proposal is more likely than not in the immediate future, shall:

- (a) take all steps necessary to ensure that they and the Issuer are in a position to respond to the offer as required by these Rules, including under Rule 10.1;
- (b) not be relieved of their disclosure obligations under these Rules by reason of a conflict of interest arising from involvement as or with a prospective Transferee or Transferor, but such Directors shall disclose in any notice or statement the nature of their possible conflict;
- (c) in the case of a conflict of interest or of views as to how to proceed, if necessary release separate statements or notices to inform NZX promptly, with appropriate explanation; and
- (d) ensure that holders of the relevant Equity Securities are well informed to consider competitive offers for the control of Votes attached to the Equity Securities where there is any reasonable prospect of competition emerging to the completion of a Restricted Transfer proposal.

**4.5.8 Appraisal Report:** If any Transferee under a Restricted Transfer is an Insider, then (subject to Rule 4.5.9) the Directors shall, forthwith upon a notice being given under Rule 4.5.2 in respect of that Restricted Transfer, commission an Appraisal Report in respect of that Restricted Transfer. That report may contain such reasonable qualifications and limitations as are needed to recognise the deadlines within which it is required to be produced. That report shall:

- (a) be delivered to NZX for release to the market at least two Business Days before expiration of the relevant notice, accompanied by a summary (approved by the reporter) suitable for release to the market; and
- (b) be copied to the Issuer and to any holder of Quoted Equity Securities of the Issuer upon request; and
- (c) be dispatched to all holders of Securities to whom the offer may be made at least three Business Days before the expiration of the relevant notice.

**4.5.9 Exceptions:** The requirement for an Appraisal Report in Rule 4.5.8 shall not apply if:

- (a) all Transferors consent to waive the requirement; or

- (b) a majority of the Disinterested Directors certify that in their opinion the cost and difficulty of providing the Appraisal Report will outweigh the benefit, because prospective Transferors are not at an information disadvantage in relation to prospective Transferees and their Associated Persons or because the Appraisal Report would not materially remedy any such information prejudice.

For the purposes of this Rule, “Disinterested Directors” means Directors who are not involved as prospective Transferors (in relation to a proposal for a Differential Offer) or as Transferees, and who are not Associated Persons of any such Transferors or Transferees.

**4.5.10 Restricted Transfer Status Report:** If a Restricted Transfer is not completed within three months of the notice required to be given under Rule 4.5.2, or any status report given under this Rule 4.5.10 then, before continuing with the Restricted Transfer, additional market information on the status of the Restricted Transfer must be provided to the Issuer and NZX in a manner complying with Rule 10.2.3 for release to the market. The additional market information shall include:

- (a) when the Restricted Transfer is intended to be completed; and
- (b) details of the Transfer(s) that comprise the Restricted Transfer which have not been completed. *(Inserted 1/12/99)*

**4.5.11 Issuer Response to Restricted Transfer Status Report:** On receipt of the information provided under Rule 4.5.10, the Directors of the Issuer shall promptly advise NZX:

- (a) of any change in circumstances (and the implications of the change) which would affect the continuing relevance and currency of any Appraisal Report or the response initially provided under Rule 4.5.6; and
- (b) that they are complying with Rule 10.1. *(Inserted 1/12/99)*

## 4.6 MINORITY VETO PROVISIONS

**4.6.1 Introduction:** Minority Veto Provisions are:

- (a) Notice and Pause Provisions not modified as permitted by Rule 4.4.2, but modified so that:

- (i) the notice period referred to in Rule 4.5.3(b) is 15 Business Days;
  - (ii) the notice periods referred to in Rule 4.5.4(b) are two Business Days and 15 Business Days respectively; and
  - (iii) the notice periods referred to in Rule 4.5.5 are five Business Days, two Business Days, and five Business Days respectively; and
- (b) the further provisions set out in Rules 4.6.2 and 4.6.3.

**4.6.2 Additional Requirements:** Except with the sanction of resolutions passed by a simple majority of Votes of each Affected Group:

- (a) all Transfers involved in a Restricted Transfer shall be pursuant to:
  - (i) an offer in writing to all holders of Equity Securities of any Class which is the subject of the proposed Restricted Transfer, on the same terms; or
  - (ii) orders placed through a Trading Participant for execution in and through NZX's order matching market and in accordance with the requirements of Rule 4.5.5; and *(Amended 1/5/04)*
- (b) the Transfers must not result from Differential Offers, other than differences which arise from a change in the price of an on-market offer authorised under (a)(ii).

**4.6.3 Report:** Upon the giving of a notice under Rule 4.5.2, (but not if that notice is given in respect of a Transfer complying with Rule 4.5.5) the Directors shall commission a report from an independent appropriately qualified person previously approved by NZX. That report shall:

- (a) be addressed to the holders of Securities of the Class or Classes the subject of the Restricted Transfer referred to in the notice;
- (b) express the opinion of the reporter as to the consideration and other terms of the proposed transaction; and
- (c) comply with the provisions of Rule 1.2.2(e), (f), (g) and (h) as if that report were an Appraisal Report.

The provisions of Rule 4.5.8 (a), (b) and (c) shall apply to the report as if it were an Appraisal Report required by that Rule.

#### 4.7 ENFORCEMENT PROVISIONS

**4.7.1 Right to Enforce:** An Issuer may, following a Default, exercise a power described in Rule 4.7.2(a) or (b) in respect of all or any Quoted Equity Securities in which the Defaulter has a Relevant Interest (“Defaulter’s Securities”).

**4.7.2 Default Consequences:** In the event of a Default:

- (a) no Vote may be cast on a poll, and if it is cast shall be disregarded, on Defaulter’s Securities while the Default is unremedied;
- (b) a Defaulter’s Securities may be sold by the Issuer. This power may not be exercised until one month after the Issuer has given notice to the Defaulter of its intention to exercise this power. It shall not be exercised if, during that month:
  - (i) the Defaulter has remedied the Default (where it can be remedied); or
  - (ii) the Defaulter has transferred its Relevant Interest in the Securities to a person who is not a Defaulter.

If the power to sell is exercised, the Issuer shall sell the Defaulter’s Securities through NZX, or in some other manner approved by NZX, and shall account to the holder of those Securities for the proceeds of sale after deduction of all sale expenses. The Issuer shall be deemed to be authorised to take all steps, and sign all documents, necessary to effect the sale of the Defaulter’s Securities.

- (c) neither the Issuer nor its Directors shall be liable to a Defaulter or apparent Defaulter for or in connection with the exercise or purported exercise of the powers permitted by this Rule 4.7;
- (d) the Issuer shall have a lien on the Defaulter’s Securities for, and deduct from the proceeds of sale pursuant to Rule 4.7.2(b), any costs to the Issuer of determining whether a person is a Defaulter and exercising powers permitted by this Rule 4.7;



- (e) the Issuer may treat as its costs for the purposes of paragraph 4.7.2(d) preceding, reimbursement by it of expenses of members of any Affected Group acting pursuant to Rule 4.7.3; and
- (f) if NZX makes a Ruling dealing with the matters dealt with by this section 4, or with provisions of the Constitution of the Issuer required or permitted by this section 4, that Ruling shall be binding upon the Issuer and all holders of Securities of the Issuer, and shall take effect as if that Ruling were itself incorporated in the Constitution.

**4.7.3 Powers of Affected Group:** The Directors of an Issuer shall, if so directed by a resolution of an Affected Group (passed by a simple majority of Votes), exercise the power referred to in Rule 4.7.2(b), if that power has become exercisable. The holders of 5% or more of the Securities of an Affected Group may by notice to the Directors require the Directors to convene a meeting of the Affected Group for the purpose of considering such a resolution.

**4.7.4 Voting Restriction:** An Issuer shall use reasonable endeavors to ascertain for the purposes of Rule 4.7.2(a) whether any Securities are Defaulter's Securities, and accordingly whether a holder of those Securities is entitled to vote. If any holder of Securities of the Issuer, or NZX, alleges that any Securities are Defaulter's Securities, the Issuer shall properly consider and investigate that allegation.

**4.7.5 Proceedings at Meeting:** The ruling of the chairperson of any meeting as to whether any holder of Securities is or is not entitled to vote at that meeting pursuant to Rule 4.7.2(a) shall, for the purposes of proceedings at that meeting, be conclusive, and the proceedings of, or any resolution passed at, any meeting shall not be impugned by reason of a breach of Rule 4.7.2(a). This Rule shall not prejudice any action which any person may have against the holder of any Securities by reason of that holder having cast a Vote at any meeting in breach of Rule 4.7.2(a).

**4.7.6 Limitation of Remedies:** Subject to Rule 4.7.7, the sole remedy of an Issuer, a holder of Securities of an Issuer, a Director of an Issuer, or any other person, in respect of a breach or alleged breach of this section 4, or of provisions in the Constitution of an Issuer required or permitted by this section 4, shall be to exercise, or require the Issuer or its Directors to exercise, the powers referred to in Rule 4.7.2(a) and (b). Without limiting the preceding sentence, no person shall be entitled to seek any injunction or other remedy to prevent a transaction alleged to be in breach of the provisions referred to in that sentence.

**4.7.7 Exception:** Nothing in Rule 4.7.6 shall affect the remedies of a holder of Securities of an Issuer against the Directors of that Issuer in respect of a breach of this section 4, or the provisions of the Constitution referred to in Rule 4.7.6, by that Director.

**4.7.8 Special Provisions as to Rulings:** NZX (in this Rule 4.7.8 an “Arbiter”) may, for the purposes of making a Ruling as to whether any person is a Defaulter, give notice to any person who the Arbiter believes may be a Defaulter. That notice shall:

- (a) set out in general terms the grounds on which the Arbiter believes that person to be a Defaulter; and
- (b) require that person, within a reasonable time specified in the notice, to produce evidence to rebut the Arbiter’s belief that that person is a Defaulter.

If the person to whom the notice is given fails within the time specified in the notice to produce to the Arbiter evidence satisfactory to the Arbiter that that person is not a Defaulter, then the Arbiter shall be entitled to assume without further evidence that that person is a Defaulter, and to make a Ruling to that effect.

**Rulings will take effect as if part of the Constitution. See Rule 4.7.2(f).**

#### **4.8 COMPULSORY ACQUISITION PROVISIONS**

**4.8.1 Acquisition Notice:** If a person, or a group of Associated Persons, acquires beneficial ownership of 90% or more of a Class of Quoted Equity Securities of an Issuer, that person or group of persons (the “Majority Holder”) shall, within 20 Business Days after that circumstance arises, give notice (the “Acquisition Notice”) to all other holders (the “Remaining Holders”) of Securities of that Class (“Affected Securities”) and at the same time to the Issuer and NZX:

Provided that when calculating the total number of Quoted Equity Securities in that Class, Treasury Stock shall not be regarded as part of that Class.

**4.8.2 Contents of Notice:** The Acquisition Notice shall specify:

- (a) that the Majority Holder has beneficial ownership of 90% or more of the Affected Securities;
- (b) either:
  - (i) that the Majority Holder intends to acquire all Affected Securities held by the Remaining Holders; or
  - (ii) that any Remaining Holder may require the Majority Holder to acquire the Affected Securities held by that Remaining Holder by giving notice to that effect to the Majority Holder within one month after the date of the Acquisition Notice; and
- (c) the consideration to be provided by the Majority Holder for Affected Securities.

**4.8.3 Obligation of Majority Holder:** Upon giving an Acquisition Notice, the Majority Holder shall be entitled and bound:

- (a) if the Acquisition Notice contains the statement in Rule 4.8.2(b)(i), to acquire all Affected Securities held by the Remaining Holders; or
- (b) if the Acquisition Notice contains the statement in Rule 4.8.2(b)(ii), to acquire all Affected Securities held by Remaining Holders in respect of which the holder, within one month after the date of the Acquisition Notice, gives notice requiring the Majority Holder to acquire.

**4.8.4 Consideration:** The consideration to be provided for Affected Securities which the Majority Holder is entitled and bound to acquire shall be determined as follows:

- (a) the Acquisition Notice shall specify the consideration which the Majority Holder is prepared to provide. The Majority Holder shall, before giving the Acquisition Notice, provide to NZX a report from an independent appropriately qualified person, previously approved by NZX, confirming that that consideration is fair to the Remaining Holders, using the same criteria set out in paragraph (c)(iv) of this Rule;
- (b) if, within 10 Business Days after the date of the Acquisition Notice, the Issuer receives written objections to the consideration specified in the

Acquisition Notice from the holders of 10% or more of the Affected Securities held by the Remaining Holders, then the consideration shall be determined in accordance with (c) and (d). If objections are received, the Issuer shall forthwith notify the Majority Holder and NZX of that fact. If such objections are not received, the consideration shall be as specified in the Acquisition Notice;

- (c) if objections of the nature referred to in (b) are received by the Issuer the consideration shall be determined by an independent appropriately qualified person. That person shall:
  - (i) be a different person from the person referred to in (a); and
  - (ii) act as an expert and not as an arbitrator; and
  - (iii) be directed to provide a decision within 20 Business Days after his or her appointment; and
  - (iv) be directed to determine the consideration on the basis that it is fair to the Remaining Holders and is the pro-rated value of the Affected Securities based on the value of the Issuer as a whole and the rights and obligations attached to those Securities without taking into account any strategic or hold out value of the Affected Securities or any other factors relating to the Remaining Holders, the Majority Holder, their respective holdings in the Issuer or the relative extent of those holdings; and
  - (v) be appointed by the disinterested Directors (as defined in Rule 4.5.9) of the Issuer (if any, and otherwise by the Directors of the Issuer) after approval by NZX;
- (d) if the consideration determined by the person appointed in accordance with (c):
  - (i) is less than, or the same as, the consideration specified in the Acquisition Notice, the fee and expenses of that person shall be borne by the Remaining Holders who made the objections referred to in (b);
  - (ii) is more than the consideration specified in the Acquisition Notice, the fee and expenses of that person shall be borne by the Majority Holder.

If the fee and expenses of that person is to be borne by the objectors in terms of (i), the Majority Holder shall deduct that amount from the consideration payable by the Majority Holder to the objectors, in proportion to their holdings (and may, if the consideration is not cash, deduct and sell sufficient of that consideration to produce sufficient cash).

**As to the approval of a person for the purposes of Rule 4.8.4(a) or (c), see the note to Rule 1.2.1.**

**4.8.5 Default Consequences:** If a Majority Holder fails to give an Acquisition Notice, or, after having become bound to acquire the Affected Securities of Remaining Holders in accordance with the provisions of this Rule 4.8, fails to do so, then the provisions of Rules 4.7.1 to 4.7.5 shall apply with the following modifications:

- (a) the Affected Securities held by the Majority Holder shall be deemed to be Defaulter's Securities;
- (b) the failure to comply with this Rule 4.8 shall be deemed to be a Default; and
- (c) the Remaining Holders shall be deemed to be an Affected Group.

**4.8.6 Further Provisions:** The Constitution shall also contain provisions:

- (a) providing for the payment or provision of consideration to each Remaining Holder within 12 Business Days after the Majority Holder becomes bound to acquire the Affected Securities of that Remaining Holder, or if consideration requires to be determined pursuant to Rule 4.8.4, within 2 Business Days after the consideration is determined;
- (b) providing for the consideration payable to Remaining Holders who cannot be found to be held in trust for those holders for at least five years; and
- (c) providing for the Issuer, upon payment or provision of the consideration, to execute transfers on behalf of the Remaining Holders, and to take all other steps necessary to transfer to the Majority Holder the Affected Securities of the Remaining Holders.

#### 4.9 HOLDING BY BARE TRUSTEE

4.9.1 **Bare Trustee:** For all purposes of this section 4, and notwithstanding anything in this section 4:

- (a) the Transfer of Quoted Equity Securities, or of any interest in Quoted Equity Securities, to a bare trustee shall be deemed to be a Transfer to the person or persons for whom that bare trustee holds those Securities or that interest as trustee (the “**Beneficial Owners**”);
- (b) Quoted Equity Securities, or any interest in Quoted Equity Securities, held by a bare trustee shall be deemed to be held by the Beneficial Owners; and
- (c) a trustee may be a bare trustee notwithstanding that that trustee is entitled as a trustee to be remunerated out of the income or property of the relevant trust.

4.9.2 **Specific issues:** Without limiting Rule 4.9.1:

- (a) a bare trustee and a Beneficial Owner shall not, by reason solely of their relationship as bare trustee and Beneficial Owner, be Associated Persons;
- (b) a bare trustee of Quoted Equity Securities shall not, solely by reason of its position as bare trustee for the Beneficial Owner, have a Relevant Interest in those Quoted Equity Securities; and
- (c) a Beneficial Owner of Quoted Equity Securities shall not have a Relevant Interest in the Quoted Equity Securities of another Beneficial Owner solely because the same bare trustee acts as trustee for both of those Beneficial Owners.

4.9.3 **Separate registration of Defaulter’s Securities:** In the event of a Default, if any Quoted Equity Securities held by a person as bare trustee on behalf of different Beneficial Owners include any Defaulter’s Securities:

- (a) the bare trustee shall, on request by the Issuer or NZX, provide to the Issuer and NZX details of the Beneficial Owners of those Defaulter’s Securities; and

- (b) the Issuer may at any time, and shall upon request by the bare trustee or any Beneficial Owner, take appropriate steps to ensure that those Defaulter's Securities are separately designated in the register recording those Quoted Equity Securities.