



February 26, 2010

NZX Regulation Decision
PGG Wrightson Limited & PGG Wrightson Finance Limited
Application for waiver from Listing Rule 3.5.1

Background

1. PGG Wrightson Limited (“PGW”) is Listed on the NZSX market.
2. PGG Wrightson Finance Limited (“PWF”) is a Subsidiary of PGW, with Debt Securities Quoted on the NZDX market.
3. The Reserve Bank is the regulator of non-bank deposit takers. The Reserve Bank of New Zealand Act 1989 (“the Act”) defines non-bank deposit takers as entities that are not registered banks, but which issue debt securities (as defined in the Securities Act 1978) to the public and carry on the business of borrowing and lending money, or providing financial services (or both).
4. PWF is a non-bank deposit taker, and accordingly comes under the regulatory supervision of the Reserve Bank under the Act.
5. In September 2008 the Reserve Bank Amendment Act 2008 (“Amendment Act”) was passed. The Amendment Act requires that all non-bank deposit takers must have two independent directors. Section 157L of the Act provides:
 - (1) *If a deposit taker is a company or a building society, -*
 - (a) *the governing body of the deposit taker must include at least 2 independent directors;*
 - (b) *the chairperson of the governing body of the deposit taker may not be an employee of either the deposit taker or a related party.*
 - (2) *If a deposit taker is a subsidiary, the constitution of the deposit taker must not include any provision under which directors of the deposit taker may act otherwise in the best interests of the deposit taker.*
 - (3) *For the purpose of this section, independent director means a director that -*
 - (a) *is not an employee of either the deposit taker or a related party; and*
 - (b) *is not a director of a related party; and*
 - (c) *does not, directly or indirectly, have a qualifying interest in more than 10% of the voting securities of the deposit taker or a related party.*
6. It was originally announced that this requirement would come into effect from the end of March 2010. While this date has not been confirmed by Order in Council pursuant to section 2(3) of the Amendment Act, PWF is working towards compliance with this requirement on or before the end of March 2010.
7. PWF has been through an extensive search to identify two independent directors (including a suitable Chairman) for PWF and wishes to formalise their appointment as soon as practicable.
8. At PGW’s annual shareholders meeting on 21 October 2005, the shareholders approved an aggregate monetary sum of \$875,000 to be payable to all directors of PGW taken together. This is currently allocated to the directors of PGW.

9. In accordance with Rule 3.5.1 (reproduced below) if the two new directors were appointed to both PGW and PWF, and thereby increasing the total number of directors of PGW, PGW would be entitled to increase the total remuneration by such amount as would be necessary to pay the additional directors remuneration not exceeding the average amount paid to each of the non-executive directors, other than the chairperson. However, appointment to the PGW board (as well as the PWF board) would mean that the appointees would not qualify as independent directors for PWF's purposes.

Application

10. PWF seeks a waiver from the prohibition in Rule 3.5.1, to the extent applicable and necessary, to enable the appointment of the two new independent directors to the PWF board, and the payment to those individuals of directors fees without the need to obtain PGW shareholder approval.
11. In support of its application, PWF submits that:
- (a) PWF notes that Rule 1.14.2 and Appendix 5 would apply to PWF. The effect is that, as PWF is itself Listed, Rule 3.5.1 does not require PGW shareholders to approve PWF directors fees. However, PWF itself only has Debt Securities Listed. Rule 1.14.2 and Appendix 5 state that certain Rules do not apply where Equity Securities are not quoted. One of those Rules is 3.5.1. Accordingly, it would appear that on a technical reading of the Rules, there is no requirement for shareholder approval, of either PWF or PGW, for the payment of directors fees of PWF. Accordingly, there would be no limitations on the remuneration of directors of PWF. PWF does not consider this to be a desirable outcome, from a policy perspective, and seeks clarity on this point.
 - (b) The requirement to appoint additional directors at PWF arises as a result of new legislative framework which has been introduced in respect of non-bank deposit takers. It is imperative for PWF that it complies with the requirements of the Amendment Act. In addition, the introduction of two independent directors in this fashion seems commercially prudent, from a corporate governance point of view.
 - (c) Rule 3.5.1 provides a mechanism by which additional directors can be added to a Listed Issuer, and remunerated, without a need for shareholder approval at an extraordinary meeting. Where approval has been provided to a fee structure on the basis of an aggregate monetary sum, then, as noted above, Rule 3.5.1 permits an Issuer to pay fees to additional appointees on a pro rata basis. However, this mechanism is only available in respect of appointments made to the listed issuer itself (here, PGW). Appointments made solely to the subsidiary (PWF) do not appear to take the benefit of this concessionary provision.
 - (d) From a policy perspective, the purpose of Rule 3.5.1 is to ensure that aggregate fees paid to boards do not exceed the mandated monetary aggregate, and, in circumstances where board numbers are increased, do not exceed the implied per individual director amount reflected by any previously approved monetary aggregate.
 - (e) This is not a situation where the above policy considerations are jeopardised. The amounts proposed to be paid to the new appointees to PWF sit below the implied director average set by the \$875,000 monetary aggregate - which average (based on prevailing number of directors at the last re-set of that cap in October 2005, which was 12), is an amount of approximately \$72,917 per annum per director.

Rules

12. Rule 3.5.1 states:

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:

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

Such a resolution may expressly provide that the remuneration may be payable either in part or in whole by way of an issue of Equity Securities, provided that issue occurs in compliance with Rule 7.3.7.

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

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.

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).

13. Rule 1.14.2 states:

If no Equity Securities Quoted then all the provisions of the Rules, other than those listed in appendix 5, apply to an Issuer that does not have Equity Securities Quoted.

14. Appendix 5 of the Rules includes Rule 3.5.1.

Decision

15. On the basis that the information provided to NZXR is full and accurate in all material respects, NZXR Rules that PWF may appoint additional directors to its board, and remunerate those directors an amount not exceeding the average amount currently being paid to other non-Executive Directors of PGW, without seeking shareholder approval of shareholders of PGW.

Reasons

16. In coming to the decision to grant the above Ruling, NZXR has considered the following matters:

- (a) NZXR considers that the paramount policy behind Rule 3.5.1 is to require shareholder approval of remuneration paid to directors. However, the Rule also enables Issuers to increase the total amount of remuneration payable to directors, where additional directors are added to the Board, in line (pro rata) with what has been previously approved by shareholders without the need to revert to shareholders for additional approval.
- (b) Listed Subsidiaries, with Equity Securities Quoted, are excluded from this ability because such a Subsidiary will itself be subject to the Rules, and will have to comply with Rule 3.5.1 in its own right.
- (c) PWF is Listed, but it does not have Equity Securities Quoted. Accordingly, by virtue of Rule 1.14.2 and appendix 5, Rule 3.5.1 does not apply to it as an individual Issuer.
- (d) A possible reading of the Rules is, because PWF is an Issuer with only Debt Securities Quoted, it cannot rely on Rule 3.5.1 to remunerate its new directors.
- (e) However, NZXR considers that the exception for Listed Subsidiaries in Rule 3.5.1 should only apply where the Subsidiary has Equity Securities Quoted. To read the Rule in any other way would create a situation where there are no regulatory limitations on the remuneration paid to the directors of PWF. NZXR does not consider that this is the manner in which the Rules were intended to operate.
- (f) NZXR does not consider that PGW requires a waiver to enable it to rely on Rule 3.5.1 to remunerate the directors of PWF.
- (g) Accordingly, NZXR is satisfied that a Ruling is required to clarify how Rule 3.5.1 should operate and to maintain the policy of that Rule.

ENDS