# MinterEllison

17 April 2015

Ms Diane Lewis, Senior Manager
Regulatory & Public Policy
ASX Limited
Level 6, 20 Bridge Street
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By email: regulatorypolicy@asx.com.au

Dear Diane

**ASX Consultation – Facilitating Dual Listings by New Zealand Companies**
**Updating ASX's Foreign Exempt Listing Rules**

## 1. Overview

1.1 Minter Ellison and Minter Ellison Rudd Watts (together, **we**, **us** or **our**) welcome the opportunity to comment on ASX Limited's (**ASX**) proposal to update its Foreign Exempt Listing category to facilitate additional secondary listings on ASX of entities that already (or indeed, that are intending to) have their primary listing on the Main Board of the New Zealand Stock Exchange (**NZX**).

1.2 Subject to our comments and suggestions for ASX to consider (before the implementation of the Proposed Rule Amendments (defined below)), we strongly support ASX's proposal to remove certain of the (relatively high) entry hurdles for NZX-listed entities applying for admission to the official list of ASX as a Foreign Exempt Listing (**Proposed Rule Amendments**). We believe that the amendments will:

(a) decrease the cost of equity capital for NZX/ASX dual listed entities by reducing the significant (and largely unnecessary) compliance burden caused by those entities having to comply with two sets of (sometimes inconsistent or duplicative) listing rules;

(b) likely enhance the capital formation process for NZX-listed entities (previously deterred by the unduly high compliance burden noted in the preceding paragraph from listing on ASX) by giving them greater access to:

(i) Australia's (very large) pools of institutional capital; and

(ii) ASX's usually deep and liquid secondary markets; and

(c) perhaps most importantly, give Australian equity investors (whether retail or institutional) greater access to a wide range of high-quality and well-regulated NZX-listed public companies.

## 2. Our comments on the Proposed Rule Amendments

2.1 While, and as noted in paragraph 1.2 above that we are strongly of the belief that the Proposed Rule Amendments will aid the trans-Tasman capital formation process (thereby enhancing ASX as a market venue for both NZX-listed entities and Australian investors alike)[1], we nonetheless suggest that ASX should (before the implementation of the Proposed Rule Amendments) consider:

**Arrangements for existing NZX/ASX dual listed entities**

(a) including provisions that permit existing NZX/ASX dual listed entities (that are presently admitted as 'standard' ASX listings) to avail themselves of the benefits of the Proposed Rule Amendments[2]. Indeed, to avoid the spurious (yet, we suspect, highly unlikely) outcome of where an existing NZX/ASX dual listed entity is required to delist from, and then reapply to, ASX as a Foreign Exempt Listing, we recommend that the Proposed Rule Amendments provide for an automatic change (unless the entity requests otherwise within a specified transitional period) of all NZX/ASX dual listed entity's listing status to the Foreign Exempt Listing category and those entities should be subject to the regulations as if they were originally listed as Foreign Exempt Listings;

**Offers made by New Zealand companies under 708A and 708AA**

(b) consulting with the Australian Securities and Investments Commission (**ASIC**) to request that ASIC introduce new class order (or other regulatory) relief to ensure that all current and future NZX/ASX dual listed entities are not, as an unintended negative consequence of the implementation of the Proposed Rule Amendments, inadvertently disentitled from relying on sections 708A and 708AA of the *Corporations Act 2001* (Cth) (**Corporations Act**). We see this as a possibility because/since:

(i) section 708A(6)(d)(ii) (for sale offers) and section 708AA(7)(c)(ii) (for rights issue offers) of the Corporations Act requires entities that are seeking to rely on the 'low-doc' offering pathways in sections 708A and 708AA of the Corporations Act to certify (in the requisite cleansing notices when making such offers) their compliance with section 674; and

(ii) only 'listed disclosing entities' are required to comply with section 674 of the Corporations Act (noting that entities admitted under the Foreign Exempt Listing category are <u>not</u> 'listed disclosing entities' for the purposes of the Corporations Act given the interplay between sections 111AC[3], 111AE[4] and 111AJ[5] of the Corporations Act and Regulation 1.2A.01[6] of the

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[1] We are also of the view that the Proposed Rule Amendments complement the trans-Tasman mutual recognition scheme (**TTMRS**) in Chapter 8 of the Corporations Act and the Corporations Regulations that allows a New Zealand entity to conduct a securities offering in Australia without the use of an Australian disclosure document so long as, among other things (but primarily), that New Zealand entity complies with the applicable securities laws in New Zealand.

[2] A number of our existing NZX/ASX dual listed clients have already asked us how they might change their listing status from the 'standard 'ASX listing category to the Foreign Exempt Listing category.

[3] Section 111AC of the Corporations Act states that if any securities of a body are 'ED securities' then that body is a 'disclosing entity' for the purposes of the Corporations Act.

[4] Subject to sections 111AD and 111AJ, section 111AE of the Corporations Act states, in effect, that entities admitted to the official list, and required to comply with the listing rules, of ASX are issuers of 'ED securities'.

[5] Section 111AJ of the Corporations Act states that the Corporations Regulations may declare specified securities of bodies not to be 'ED securities'.

*Corporations Regulations 2001* (Cth) (**Corporations Regulations**)),

meaning that there is a very real risk (since entities that are Foreign Exempt Listings need not comply with section 674 of the Corporations Act) that NZX/ASX dual listed entities will be disentitled from making offers of the nature specified in paragraph 2.1(b)(i) above and accordingly will be required to exclusively rely on the TTMRS (defined above in footnote 1). This outcome is particularly problematic in the light of the recently enacted 'low doc' offering regime in the New Zealand Financial Markets Conduct Act 2013 which (and much like the Australian 'low doc' regime) permits New Zealand entities to make issue offers of new securities to both retail and institutional securityholders in New Zealand following, among other things (but primarily), the giving of a 'cleansing statement' to NZX. If a New Zealand dual listed entity (which is relying on the New Zealand 'low doc' regime to make offers to New Zealand resident securityholders) is unable to rely on the Australian 'low doc' regime when making offers to its Australian resident securityholders, it would mean, perversely, that the New Zealand entity would be required to prepare either (i) a New Zealand Product Disclosure Statement (and rely on the TTMRS) or (ii) an Australian disclosure document (ie a prospects under Chapter 6D or a Product Disclosure Statement Chapter 7, as applicable) to make the offer to Australian resident securityholders (thereby severely lessening its fundraising efficiency in Australia). Accordingly, we are strongly of the belief that ASX should address this unintended negative consequence by consulting with ASIC and requesting that ASIC issue new class order relief (rather than providing such relief by way of specific 'case-by-case relief instruments) with such class relief effective on implementation of the Proposed Rule Amendments; and

**Extending the Proposed Rule Amendments to Toronto Stock Exchange listed entities**

(c) extending the Proposed Rule Amendments to entities that have their primary listing on the Toronto Stock Exchange (**TSX**) (but not necessarily the TSX Venture Exchange) because:

(i) ASX's 'substituted compliance' approach to Foreign Exempt Listings would be equally applicable to TSX-listed (as it is to NZX-listed) entities given the robust listing rule and Canadian (and provincial) securities law frameworks that regulate TSX-listed entities;

(ii) the same benefits that we note in paragraph 1.2 that would likely accrue to NZX-listed entities (and Australian investors) would also likely accrue to TSX-listed entities (and Australian investors) were ASX to extend the Proposed Rule Amendments to TSX-listed entities; and

(iii) like ASX, the TSX is a listing venue of choice for a large number of major global energy and resource companies (including a number of TSX/ASX dual listings) making the TSX a logical choice if ASX were it to consider extending the Proposed Rule Amendments beyond the NZX.

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[6] Reg. 1.2A.01 declares the securities of a body that, under the ASX Listing Rules, is an 'exempt foreign body' (which we assume to be one which is admitted under the Foreign Exempt Listing category) not to be 'ED securities' for the purposes of the Corporations Act.

## 3. Concluding remarks

3.1 We understand that a significant number of current NZX/ASX dual listed entities (and a number proposing to list on both exchanges) consider that the requirement of having to comply with two listing rule regimes as unnecessarily burdensome (while of course noting the importance of well regulated capital markets) and complex. In particular, a number of our clients see the sometimes inconsistent financial reporting systems that dual listed entities need to be cognisant of as one area that will be meaningfully improved should the Proposed Rule Amendments be implemented.

3.2 Finally, we look forward to the implementation the Proposed Rule Amendments and to the benefits that are expected to accrue to (i) NZX/ASX dual listed as a result of the substantial lessening of the significant (and oftentimes unnecessary) compliance burden caused by those entities having to comply with two sets of (often inconsistent) listing rules as well as (ii) Australian investors who will very likely have even greater access to a wide range of high-quality and well-regulated NZX (and, potentially other major global exchange) listed entities.

Please do not hesitate to contact either of the undersigned should you require further detail in relation to any of the matters raised in this submission.

Yours faithfully

[*Sent electronically, without signature*]

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