13 September 2022

Head of Policy and Regulatory Affairs
NZX

Attention: Kristin Brandon

By email: policy@nzx.com

Dear Ms Brandon

NZX's Capital Raising Settings and Listing Options: Targeted Review

We refer to the consultation paper entitled NZX Capital Raising Settings and Listing Options (**Consultation Paper**) published 27 July 2022.

The Australian Financial Markets Association (**AFMA**) welcomes the opportunity to comment on the proposed changes to the NZX Listing Rules outlined in the Consultation Paper. We thank you for allowing us additional time to respond.

Given the close linkage between the equity capital markets in Australia and New Zealand, AFMA is concerned to ensure a level of cohesion between the regulation of the two markets (where that makes sense), particularly in the context of dual-listed entities on the NZX and ASX.

As a general note, our members agree with the NZX that the boards of issuers play a critical role determining what is in the best interests of the entity when it comes to raising equity capital. We also agree that they should have the flexibility to use various means of capital raising structure. This has served equity capital markets well both in Australia and New Zealand, including during the disruptions brought on by the COVID-19 pandemic. We believe the maintenance of this flexibility should be an influential factor in NZX's decision with respect to revising the NZX's capital raising settings. It is consistent with the submissions that AFMA has made to the ASX in responding to the recent ASX consultation on proposed enhanced to the ASX Listing Rules. A copy of the submission is available via this link: **AFMA ASX Submission**.

While AFMA does not propose to respond in detail to each question, the members believe that it is important to respond to each of the following:

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Q2. Should NZX's rules allow ANDREOs as a permitted pro rata offer with a 1:1 limit?

We support this proposal.

The ANREO structure is a useful alternative for boards to consider, particularly, in circumstances where markets may be volatile and underwriting certainty is required. The structure has been critical in allowing boards to respond efficiently and effectively, when necessary. For example, this may be to address an urgent funding need or secure an important acquisition.

The fact that an ANREO is selected as the capital raising mechanism does not abrogate the need of boards, with the assistance of their advisers, to consider the impact on the issuance on the entity, including its existing security-holders, and the need to assess the inclusion of a SPP or other structural feature to mitigate the dilutionary impact on those who do not have the opportunity to participate in the institutional bookbuild. In this respect, existing securityholders have the existing protection afforded by general law and statutory director duties and obligations.

We also consider that a closer alignment between the NZX Listing Rules and ASX Listing Rules with respect to the treatment of ANREOs would be beneficial for dual-listed issuers.

Q5. Should we introduce a requirement that the allocation policy for any shortfall from a pro rata offer must provide that in the first instance the shortfall will be offered to all holders who participated in the pro rata issue and indicated that they wished to apply for more than their entitlement? The offer of the shortfall must be made to them on a pro rata basis, based either on the size of their existing holdings on the record date for the pro rata issue or the number of the securities they have applied for in excess of their entitlement under the pro rata issue.

We do not support this proposal.

Existing shareholders are already entitled to participate on a pro rata basis. The allocation of any shortfall should be determined by boards and their advisers. A proposal of this nature is likely to limit the ability of listed entities to attract new investors, fundamentally making capital markets less efficient.

Q11. Should we require increased disclosure of underwriting (and sub-underwriting) arrangements through corporate action notices. We seek feedback on requiring disclosure of the following (where applicable):

- **Whether a joint lead manager (JLM) has been appointed.**
- **If so, the name(s) of the JLM(s).**
- **The fees payable to the JLM(s).**
- **Whether the issue will be underwritten.**
- **If applicable, the name(s) of the underwriter.**
- **The extent of the underwriting.**
- **The fees to be paid to the underwriters.**
- **Whether the issue will be sub-underwritten.**

- **If applicable, the name(s) of the sub-underwriters.**
- **The fees paid to the sub-underwriters.**
- **The material circumstances in which the underwriting and sub-underwriting arrangements may be amended or terminated.**

We have no objection to this proposal, subject to our response as it relates to sub-underwriting disclosure.

We do not think that the proposal to disclose sub-underwriting details should be prescribed. This could discourage the willingness of sub-underwriters to participate in capital raisings, which accordingly, could negatively affect the cost and ability of listed entities to raise equity capital. Instead of a blanket proposal, the members believe it would be relevant to focus on disclosure of sub-underwriting arrangements when related parties, associates or substantial security-holders are involved (this is also consistent with the ASX Listing Rules).

Question 12. NZX seeks feedback on whether to require disclosure of the following (some of which are addressed in the proposed amendments to the Corporate Action notice available above):

(a) Pro rata issues – require disclosure of the shortfall allocation policy, required as part of the proposal under question [5] above, within the offer document for a pro rata issue.

We do not support this proposal.

We do not think that the disclosure of the shortfall allocation policy in connection with a pro-rata issue is beneficial, in that it could restrict the ability of boards and their advisors to respond flexibly to a particular issue.

If the NZX believes that it is important in the context of investor transparency, then we think that it should be sufficient if the policy was framed in general terms.

(b) Question 12(b). Scaling policies for SPPs, Rights issues and Accelerated Offers.

We do not support this proposal.

Disclosure of scaling policies in offering documentation may unduly restrict boards in deciding about how to deal with demand in the context of a particular issue and which may not be well understood until after launch. Such a decision is likely to be best made once there is an understanding of investor demand and participation in the issue. AFMA does not object to a requirement to disclose, in general terms, the allocation decision at the completion of each relevant component of the issue.

(c) Question 12(c). Placements - to disclose:

a. details of the offer in a Corporate Action Notice, including the purpose of the placement, reason for conducting a placement rather than a pro rata rights issue or an SPP, whether Related Parties are eligible to participate in the placement and details of any escrowed shares issued in the placement.

We have no objection to this proposal.

b. within the documentation relating to the offer (and the Corporate Action Notice) whether existing shareholders will be entitled to participate in the offer, and if so, on what basis.

We do not support this proposal.

We refer you to AFMA's response on page 5 of the AFMA Submission:

> *Fundamentally, Issuers and their advisors, require flexibility regarding the allocation of securities in placements to achieve the best allocation outcomes to a mix of both existing and new investors. Issuers should not be required to disclose upon initial announcement of a placement whether existing holders will be entitled to participate and, if so, on what basis. The very nature of a placement means that no securityholder is entitled to participate (unlike a pro rata issue). When Issuers make a placement they need flexibility to achieve allocation outcomes which best suit the interests of the Issuer and meet the objectives of the placement other than raising capital. How allocations are made is very much influenced by demand for securities in the placement which is not understood until after the placement has launched. The circumstances of the transaction which exist prior to launch often change during execution, and Issuers need flexibility to adapt and make allocations which are in their best interests.*
>
> *It is unhelpful for Issuers attempting to raise capital in an efficient manner, in a competitive environment and at the best possible pricing to be required to disclose whether existing securityholders are entitled to participate in a placement and, if so, on what basis before the Issuer is able to fully understand what allocation outcomes in the context of available demand best serve the Issuer. Further, prescribing upfront the entitlement of existing securityholders to participate in a placement may be problematic for Issuers who wish to have the placement underwritten as any fetter on how allocations are made under the placement increases underwriting risk (and therefore underwriting fees). It will also be problematic if securityholders who wish to participate in the placement do not meet any on-boarding or required credit approval requirements of the underwriter.*
>
> *Issuers already take into account participation by those of its existing security holders who are eligible to participate in placements as they seek to act in the best interests of securityholders. Ultimately, the Board is accountable to its existing securityholders.*
>
> *It is market practice for existing eligible securityholders that bid for securities in a placement to be allocated to a minimum of their pro rata, should they bid for this quantum of stock. In our experience, Issuers commonly allocate securities to existing securityholders in excess of their pro rata if that is in the best interests of the Issuer and the success of the placement, taking into account multiple factors such as overall demand, past investor behaviour, bid size relative to the size of the placement and the timing of the bid in the process.*

The current practice of Issuers disclosing general information regarding the allocation of placements post offering, together with substantial holder notices, provides a level of detail to the market required by investors.

c. within 5 business days of the issue of shares under the placement, details of the approach the Issuer took in identifying investors to participate in the placement and how it determined their allocations (including the key objectives and criteria that the entity adopted in the allocation process, whether one of those objectives was a best effort to allocate on a pro rata basis to existing holders and any significant exceptions or deviations from those objectives and criteria).

We do not support this proposal.

We do not agree with the requirement for this disclosure as it acts as a constraint on the flexibility of boards and their advisors to determine how to best allocate securities in connection with an issue. It can imply that anything other than a pro rata allocation is deficient. As we have noted above, there are many reasons why a placement may be utilised, including, expanding the register base, speed to market and funding certainty. Existing shareholders are protected not only through the application of director duties and obligations, but also the natural ceiling that applies to a placement under the NZX Listing Rules.

(d) Question 12(d). Reasons for selecting an ANREO structure

We do not support this proposal.

As we have set out above, the decision to adopt an ANREO structure will often necessitate the balancing of various factors, including market conditions, use of proceeds, desire to expand the security-holder register, jurisdictional related issues and costs of facilitating a capital raising, among other matters. Directors already have a duty to consider the interests of existing securityholders in the context of the capital raising objectives.

It may be difficult to express these considerations in an appropriate way and in a way that does not reveal commercially sensitive information. It also suggests that there is something inherently different about an ANREO structure as opposed to some other structure. It may also expose the board to increased risk of liability. For these reasons, we do not think that NZ RegCo should introduced this change.

Question 13. We welcome any feedback on our proposal to introduce a mechanism for NZ RegCo to be able to request an allocation schedule as per the current proposals being consulted on by ASX noted above. This would not be for publication.

We do not support this proposal.

This information is commercially sensitive to the issuer and investors. Furthermore, such a requirement may dissuade investor participation if it is anticipated that such schedules will be provided as a routine matter to NZ RegCo. We also refer you to the comments on page 7 of the AFMA ASX Submission:

As previously indicated, AFMA is not in favour of the proposed requirement for Issuers to provide ASX, on ASX's request, with detailed allocation spreadsheets.

The basis of allocation outcomes determined by Issuers is commercially sensitive information to both the Issuer and investing securityholders and new investors. If there are circumstances where certain securityholders feel aggrieved by an allocation outcome under a particular placement then they should approach ASIC to use its powers under the Corporations Act to seek relevant information and to take appropriate action against the Issuer. Nevertheless, AFMA welcomes that such information will only need to be provided on the request of ASX and not for every material placement.

Part B: Listing Options

We note the preliminary feedback sought on special purpose acquisition companies and dual class shares. We believe that both matters are worthy of detailed consideration in their own right. They raise complex questions that our members believe would warrant separate consultation and engagement. We recommend that any change in relation to these matters should only be undertaken following a separate consultation and engagement process.

Please contact David Love either on 02 9776 7995 or by email dlove@afma.com.au in regard to this letter.

Yours sincerely

David Love
General Counsel & International Adviser