

29 June 2023  
Kristin Brandon  
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## **NZX Consultation on Director Independence Settings**

Dear Kristin,

We welcome the opportunity to provide feedback on director independence settings contained in the NZX Corporate Governance Code (**Code**) and NZX Listing Rules (**Rules**).

The New Zealand Corporate Governance Forum (**NZCGF** or the "**Forum**") is committed to promoting good corporate governance of New Zealand companies for the long-term health of the capital market. We believe that good governance improves company performance and increases shareholder value, which is a core focus for NZCGF members as custodians of capital.

We acknowledge NZX's efforts in undertaking a review of director independence settings and NZX's constructive engagement with the NZCGF, through the NZX Corporate Governance Institute, in response to our advocacy on this issue. We look forward to engaging with NZX further as this consultation exercise progresses.

We set out below our more general feedback under headings which largely correspond to the key areas covered in the consultation paper. In the Appendix, we respond to the more specific consultation questions.

### **Summary**

By way of general comments, we believe that corporate governance is primarily concerned with maximising corporate performance and minimising the inherent agency costs that can arise within corporations.

Independent directors are a critical element of good governance, in that the principal purpose of independent director requirements is to ensure the impartial management of conflicts that can contribute to agency costs. We summarise these conflicts in our detailed analysis below.

In our responses to the most recent NZX Corporate Governance Code review<sup>1</sup>, we highlighted that:

- the current definition of independence does not in all cases ensure independent directors have the qualities required to address the underlying conflicts; and
- issuer practice in making independence assessments has not developed in the manner NZX intended as part of the 2017/18 Listing Rule review. This is because in certain instances independent assessments appear to apply only the objective/qualitative thresholds in Recommendation 2.4 of the Code and to do so in a relatively technical/checklist-type manner.

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<sup>1</sup> We have not repeated all of the feedback in this response, but it remains relevant and is available at <https://www.nzcgf.org.nz/assets/Uploads/pdf/20220128-NZX-Corporate-Governance-Code-Review-2021-final.pdf>

We consider that three key areas where practices on director independence should be improved are:

1. The Code should set out the underlying fundamental purpose of director independence (i.e. the appropriate management of the conflicts, as identified further below). We believe this will provide greater clarity on the key purpose and function of independent director status, which alongside our other suggestions should lead to improved market practices.
2. NZ RegCo should actively monitor director independence assessments to ensure that boards are undertaking a holistic and meaningful assessment of independence. It should publish examples of good and bad practice.
3. In situations where there is a dominant/controlling shareholder, the other/minority shareholders should have rights in respect of the appointment of at least some of the independent directors. In other words, for such a director to be appointed at all (or in a weaker structure to be considered/classified independent), the director should have to be elected by a majority of minority shareholders. The definition of Disqualifying Relationship could also explicitly recognise the matters that could impact on the director's capacity to represent the interests of minority (non-conflicted) shareholders.

Finally, we consider director independence reporting to be sufficiently important that it should apply to all listed companies on the NZX.

Our key observations follow in the remainder of this letter, and we raise certain matters not specifically covered by consultation.

### ***The purpose of director independence requirements.***

The NZCGF believes that corporate governance is primarily concerned with maximising the performance of corporations and minimising the agency costs within corporations. Independent directors are a critical element of good governance, and their principal purpose is to ensure the impartial management of conflicts.

The Forum considers that the notion of director independence has evolved over time. We believe that director independence, as commonly understood now, is an over-arching umbrella term which can be broken down into the following components:

- *Independent Perspective.* A personal virtue of independent thought, intellectual robustness and curiosity, the inclination and ability to challenge in-place (and proposed) beliefs, strategies and processes.
- *Board Diversity.* Ensuring that there are diverse points of view on the board to eliminate groupthink and the possibility of a faction of the board being overly dominant to shareholders' detriment, thereby improving corporate performance.
- *Conflicts of Interest.* The absence of conflicts which would challenge the perception that the director will act in the interests of the issuer (i.e. as defined by Disqualifying Relationship). Disclosure of director's conflicts of interest to shareholders is important, especially concerning existing and prior relationships that directors have had with the business and its operations.
- *Minority Shareholder Rights.* Independent directors perform an important role in safeguarding the interests of minority shareholders. The Listing Rules and Guidance Notes allocate critical functions to independent directors such as the determination that significant transactions and waivers granted by NZ RegCo in respect of the NZX Listing Rules are in the shareholders' overall best interests.

Hence, the notion of director independence as used in the market generally is not well-defined (or too broad). Thus, our proposal is to focus this review exercise and the definition of director

independence in the Listing Rules and Code on conflicts of interest related to management / shareholder agency costs and minority shareholder rights.

The two most critical conflicts that shareholders rely on independent directors to manage are:

- (i) conflicts between management and the board (the separation of governance and management and wide-ranging agency issues, which sit at the nexus of corporate governance); and
- (ii) conflicts between shareholders which have disparate interests – most commonly between a dominant (often controlling) shareholder and other shareholders more generally.

The rules around director independence are therefore concerned with ensuring that the relevant 'independent' directors are free from the relationships or interests which would influence (or be perceived to influence) their ability to effectively manage those conflicts and "to be able to act in the best interests of the Company without bias".

***The benefits of director independence requirements.***

As noted above, the essential purpose of director independence is to ensure the impartial management of critical conflicts that can arise in corporates. The time at which independence is important is when conflicts are being addressed at the board.

We have a significant concern that the consultation paper places excessive focus on seeking to identify and understand any causal link between director independence and corporate performance. In places the consultation paper suggests that the independence requirements will be calibrated to reflect "the relative value of independence as a performance factor". This unnecessarily complicates the review exercise and distracts from addressing the central issue – the effective management of conflicts.

We believe that there is rationale for director independence to result in improved corporate performance, *ceteris paribus*<sup>2</sup>. However, the Forum believes that good governance is a broader topic with a range of complex and interlinked variables beyond director independence (diversity, board skills, etc) and the relative importance of those variables can depend on other factors such as the nature and activities of the issuer. In our view, it is fraught with complexity to isolate the performance impact of director independence factor alone, as distinct from other characteristics that contribute to good governance.

We also note that:

- The judgment and disclosure regarding director independence is inconsistent. There are many examples in the NZ market of long-tenured directors being considered independent, and examples where directors are appointed by the major shareholder yet still deemed independent.
- There have been high profile instances of NZ corporates which have outperformed despite there being material concerns regarding director independence, and vice versa.

While we agree with NZX's sentiment around evidence based regulatory policy, we respectfully suggest that this particular focus is tangential to the purpose of director independence and the wrong area on which to focus efforts.

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<sup>2</sup> We also note that independence requirements are a feature in all major markets, but so far as we are aware none of the relevant exchanges are seeking to undertake academic evidence to reconfirm the value and importance of independent status. We suggest the better starting point is that this is accepted good practice, and that NZX instead focuses efforts on understanding the different ways to define and implement the principle, and evidence on these outcomes in terms of effective conflict management (see further below).

***The nature of the test for director independence and considerations relating to the assessment of director independence. Whether changes should be made to the requirements and recommendations relating to the reporting of a director's independence status.***

We have argued previously that the disqualifying relationships outlined in Table 2.4 of Recommendation 2.4 of the Code should be considered holistically, and that boards should be continually interrogating and disclosing directors' conflicts of interest.

We recommend that NZ RegCo actively monitors director independence assessments to ensure that boards are undertaking a holistic and meaningful assessment of independence. NZ RegCo should publish examples of good and bad practice. Over time this could lead to a greater body of acceptable market practice, particularly given there is now a requirement for issuers to publish their rationale where they determine that a director is independent notwithstanding that one of the indicia in Recommendation 2.4 of the Code applies.

***Whether amendments should be made to the board and audit composition requirements contained in the Rules and recommendations contained in the Code. Whether changes are required in relation to the director independence settings to better manage the conflicts between majority and minority shareholders.***

Given NZX and the NZX Corporate Governance Institute's intent of evidence based regulatory policy, we suggest that their academic research focuses on assessing different international independent director settings and any evidence on the effectiveness of those settings on managing the underlying conflicts they are designed to address.

One area that we consider should be improved is the director independence settings in the context of issuers with a dominant/controlling shareholder(s). In that situation, the existing arrangements for director independence are in our view ineffective. This is because the dominant shareholder(s) has determinative power to appoint and remove the directors, which creates a structural alignment/incentive that can influence (or be perceived to influence) the director where there is a conflict of interest between the dominant/controlling shareholder and minority shareholders. Non-conflicted shareholders have no ability to influence either the selection of the independent directors or their classification.

There is general support within the Forum that, for issuers with a dominant shareholder(s), there is a requirement for one or more directors to be appointed (or, in a weaker formulation, classified independent), they are supported by a majority of minority shareholders (i.e. shareholders other than the dominant shareholder(s)). This ensures that boards comprise at least one or two directors whom minority shareholders believe are capable and aligned to represent their interests.

Directors which have the support of the minority shareholders are often referred to in the literature as having 'enhanced independence'. These enhanced independent ("enhanced") directors would play a significant role in self-dealing transactions, such as approval of a related party transaction or a take private transaction where the dominant shareholder is the acquirer.

We note that Lucian Bebchuk<sup>3</sup> has written extensively on these issues, providing a guide for regulators seeking to improve shareholder protections in the context of issuers with controlling shareholders, covering the rationale and general pros/cons of this approach and market examples where it has been implemented<sup>4</sup>.

We also note that there are a range of ways that such a system can be configured, ranging from minority shareholders having decisive board appointment rights, a veto right or a

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<sup>3</sup> James Barr Ames Professor of Law, Economics and Finance and Director of the Program on Corporate Governance, Harvard Law School

<sup>4</sup> L.A. Bebchuk and A. Hamdani, *Independent Directors and Controlling Shareholders*, University of Pennsylvania Law Review, **Vol. 165 (6)**, May 2017, pp. 1271 – 1315, accessed on 22 June 2023 at [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9583&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9583&context=penn_law_review)

classification right. There are also considerations as to the number of such “enhanced” directors that should be appointed. While there are a range of views within the Forum, our general sense is that there should be at least two enhanced directors but they (as distinct from independent directors generally) should not be a majority of the board, and that (at least at the outset) minority shareholders should have a veto right over appointment or classification as independent director status.

We also consider the definition of Disqualifying Relationship could be improved by explicitly recognising the matters that could impact on the director’s capacity to represent the interests of minority (non-conflicted) shareholders. This recognises a situation where a dominant/controlling shareholder(s) has a conflict with the interests of other shareholders.

For completeness, the Forum discussed, and there was support from some members, that rather than getting the Board in its entirety to determine a director’s independence, a committee for minority shareholders (the “Minority Shareholders Committee”) is formed (analogous to the Takeover Committee) which consists only of independent directors when there are significant and substantial shareholders with voting power (the Committee’s size would be proportional to the minority shareholders’ holdings). Directors would be nominated to this Committee only by a vote of minority shareholders (that is, without the influence of major shareholders), and this Committee would represent the voice of minority shareholders in all major and related-party transactions.

As directors would have to “opt-in” or declare their independence to be on the Minority Shareholders Committee in the cases where there are significant substantial and/or majority shareholders, and indeed be appointed by minority shareholder vote, other Directors would not have to declare whether they were independent with regard to minority shareholders (but perhaps detail their conflicts of interest in a register). The relevant Forum members considered that this would remove the stigma associated with director independence, especially with regard to founder shareholders, and effectively return the materiality assessment of directors’ conflicts of interest back to shareholders. Naturally, the Board would still have to ensure that the chair and the majority of the Board were non-executive directors and so still address the main board-management conflict.

In the end, however, the Minority Shareholders Committee was not unanimously supported by the Forum. Other members were not necessarily opposed to the broad conceptual approach, but wanted to further understand how it could work in the context of existing board appointment and governance framework and what advantages it provides over the approach outlined above which is consistent with other market examples. This is something NZX could explore further for the second round of consultation.

#### ***Whether differential settings should apply to certain categories of Issuer.***

The Forum is conscious that many listed New Zealand companies, particularly those outside of the NZX20 Index, are suffering from a high burden of compliance and reporting. Nevertheless, we consider director independence reporting to be sufficiently important that it should apply to all listed companies on the NZX.

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Once again, we welcome the opportunity to provide feedback on director independence settings that are contained in the NZX Corporate Governance Code and NZX Listing Rules and acknowledge NZX's constructive engagement through the NZX Corporate Governance Institute with the NZCGF in response to our advocacy on this issue.

Please note that individual Forum members may make their own submissions directly to NZX, and this submission will be published on our website ([www.nzcgf.org.nz](http://www.nzcgf.org.nz)) and LinkedIn page.

Yours sincerely,

Sam Porath  
*Chair*  
**NZ Corporate Governance Forum**

## APPENDIX

### ***Consideration of the purpose of the director independence requirements***

#### **1. Do you consider that a clearer articulation of the purpose of the director independence requirements would assist issuers in assessing a director's independence?**

Yes, the Code should set out the underlying fundamental purpose of director independence (i.e. the appropriate management of the conflicts we identified in our covering note). We believe this will provide greater clarity on the key purpose and function of independent director status, which alongside our other suggestions should lead to improved market practices in respect of director independence determinations.

We believe focusing independence on the absence of relationships that could influence (or be perceived to influence) a director's capacity to impartially address conflicts could assist to alleviate the stigma currently attached to being classified as non-independent, as it is not a judgment on whether the director is professional or will, as a matter-of-fact, act for the benefit of all shareholders.

In our view, the current settings have not provided adequate protections to shareholders subject to the underlying conflicts which independent directors are there to address. We note that the protections are dependent on appropriate classification of directors as independent.

#### **2. What do you consider an appropriate purpose statement to be?**

Shareholders' interests are subject to material agency costs (arising from disparate interests between shareholders and management, and between shareholder groups) and depend on appropriate board composition to minimise these agency costs and manage the underlying conflicts when they arise.

*The purpose of independent directors is to reduce the agency costs resulting from conflicts of interests which are borne by shareholders over time.*

Independent directors are a critical component because they enable the effective management of these conflicts of interest. It is critical that the independent directors have both the skills and capabilities to represent the non-conflicted shareholders and the confidence of those non-conflicted shareholders.

To that end, it is important that the directors' conflicts of interest are clearly defined, and the process to classify directors as independent is adequate to ensure that the independent directors can effectively also represent the interests of minority (non-conflicted) shareholders.

#### **3. Are there any disadvantages with including a clearer articulation of the purpose of the requirements in the Code?**

This depends on the articulation given by the NZX. We would not support a purpose which does not address the management of agency costs, and the effective management of the resulting conflicts.

#### **4. Do you agree that the conflicts of interest articulated above reflect the concerns that the director independence settings are designed to address?**

Yes, the conflicts espoused:

- Management and board,
- Shareholder groups,
- Inter-board,
- Related parties,
- Personal interest,

are all reasonable. We would add that the inter-board conflict should also include the notion of 'over-boarding'.

#### **5. Should any of the interests or relationships set out be articulated differently?**

The critical change is to enable minority (non-conflicted) shareholders' interests to be central to the classification of independent directors.

We see a critical role for Guidance Notes for each conflict to comprehensively cover the director conflicts which may arise and when they would trigger a 'non-independent' classification, and for NZ RegCo to actively monitor and comment on good/bad practices.

#### **6. Are there additional purposes that should be reflected in the Code?**

As set out in the covering letter, we consider that the current notion of director independence, as now commonly understood, is an umbrella term which also includes a component relating to board diversity. According to this line of thought, ensuring that there are diverse points of view on the Board to eliminate groupthink, and the possibility of a faction of the Board being overly dominant to shareholders' detriment, results in improved corporate performance. However, we do not consider that the purpose of independent directors articulated in the Code should conflate board diversity arguments (which are important in their own right) with directors' conflicts of interests.

### ***Benefits of Director Independence***

#### **7. What benefits do independent directors bring to a board?**

The essential purpose of director independence is ensuring the impartial management of critical conflicts that can arise in corporates.

Of course, independent and diverse perspectives are an essential quality for directors to bring to the board, as are intelligence, integrity and industry experience. However, director independence as defined in the Listing Rules has nothing to do with these characteristics – it relates to directors' conflicts of interest. Hence, the key purpose of independent directors is not to act as a "performance factor" (independent of other aspects of good governance) but rather to fulfil a more specific role of managing conflicts.

#### **8. How important do you consider a director's independence is to enable the director to fulfil the director's duties, compared to other factors?**

We respectfully suggest that this question is not relevant, in that the quality of independence is essential for the function of ensuring the impartial management of conflicts. The ability to fulfil director duties is a broader concept which depends on a range of factors that contribute towards overall effectiveness. Moreover, these factors are better assessed at an overall board level since directors will contribute different qualities to the overall board effectiveness.

While many of the factors that contribute to overall director/board effectiveness are well aligned with independent status, we do acknowledge that extended tenure and proximity to management are less consistent with independence. That is why the Forum notes above that independence is part of an overall range of factors and skills that contribute to good governance overall. The Forum has previously noted that non-independent directors can be highly effective and critical to the company's performance given their deep industry knowledge and connections, etc. This reinforces why the Forum suggests the narrative around independence is focused more directly on the management of conflicts, rather than trying to characterise it as a discrete 'performance factor'.



**9. In what specific circumstances is the independence status of a director particularly important (for example consideration of takeover proposals, or the determination of a particular offer structure)?**

We consider that independent directors play key roles during major and related transactions, capital raisings, and the appointment of senior management. For example, these include takeovers, mergers, large-scale acquisitions and disposals (of assets and companies), debt and equity financing, dealings with significant suppliers and service providers, and the appointment and termination of the CEO and other senior management roles.

We also consider director independence critically important for the board's audit committee (see further below).

**10. In relation to the consideration of takeovers, what is the importance of a director being an Independent Director under the Rules (i.e. not an Employee and having no Disqualifying Relationship) compared to independence from the bidder?**

We consider that independence from the bidder should be at least equally as important as not being an employee and having no Disqualifying Relationship. That is, a director could not be classed as independent in this situation if they had a conflicted relationship with the bidder. We support the conflicts areas espoused in our answer to Q4 and consider a conflict arising in a takeover could most likely be classified under 'related parties'.

**11. What are your views as to the necessary levels of director independence to enable a board to operate effectively? Are these levels affected by the size or complexity of an issuer (e.g. for issuers in the S&P / NZX 20 Index, or S&P/NZX 50 Index)?**

We support the current approach of a Listing Rule requirement for at least two independent directors, with a Code recommendation that a majority of the board is independent.

In addition:

- As noted in our recent response to NZX's consultation on the Corporate Governance Code, we also consider that Recommendation 3.1 should provide that at least one of the audit committee members should be both independent and have an accounting or financial background.
- Several Forum members suggest that as part of its review, NZX should consider including additional commentary in recommendation 2.9 of the Code to the effect that (notwithstanding recommendation 2.9) an issuer has a non-independent chair, then the independent directors should appoint a lead independent director.

**12. Do you consider that issuers whose boards have a larger number of independent directors perform better?**

Refer to our covering letter.

**13. Do you consider that the benefits of independent directors are affected by the size and complexity of an issuer (e.g. for issuers in the NZX 20, or NZX 50)?**

No. However, we do believe that the conflicts which are likely to be managed through independent directors will differ with the size and complexity of the issuer. For example, smaller issuers (by market cap) will likely have a greater level of substantial shareholders and/or majority founder shareholdings, and directors with conflicts concerning minority shareholders' rights.

**14. Do you consider the current hybrid regulatory model to be appropriate whereby the Rules contain mandatory director independence requirements, and the Code contains settings which issuers may elect to adopt on a voluntary basis?**

The Forum considers that the current Settings have not achieved their objectives – essentially because the Rules do not appropriately define the concept of director independence and do not allow minority (unconflicted) shareholders any recourse when it comes to the classification of independent directors.

***Nature of Director Independence***

**15. Do you consider that the definition of an Independent Director should be expanded to include a director who is able to conduct himself in an independent manner and exercise an independent judgment, as well as having no Employee relationship or Disqualifying Relationship?**

The Forum believes that the essential purpose of director independence is ensuring the absence of relationships that could influence, or be seen to influence, the impartial management of critical conflicts that can arise in corporates.

We see the ability to act in the best interests of the Company and exercise good judgment as threshold skills for any director of a listed company – not as a distinctive characteristic for listed directors. We would like to understand more about the drivers behind the SGX approach, but have a concern that this could perpetuate the current stigma around a finding of independence by implying that it is a judgment on the director's ethics or ability to act professionally.

**16. How would the change to the definition of Independent Director referred to in question [15] change the manner in which the board of an issuer assesses a director's independence?**

It would duplicate the ethical and diversity considerations undertaken by the board upon appointment of the director (which are already subjective).

**17. Do you consider that the purpose of the requirements needs to be better reflected in the definition of an Independent Director in the Rules, for example by referring to independence from the interests of management and substantial holders?**

Yes. Independence should be related to the underlying conflict. As noted previously, the two essential conflicts are management-board conflicts and board-shareholder (inter-shareholder) conflicts. These could be addressed separately.

**18. Do you have any comments around the advantages and disadvantages of tailoring the director independence composition settings so that an assessment of a director's independence is tied to the conflict of interest that a factor indicates?**

We believe that there are advantages, mainly clarification and simplification, in tailoring director independence composition requirements to specific conflicts of interest. As discussed previously, we believe that the two main conflicts areas revolve around the board-management relationship (non-executive directors) and the board-shareholder relationship (minority shareholder rights).

Refer to the suggestions in our cover letter, for example where we have proposed a concept of enhanced directors which addresses the particular conflict arising where there is a dominant/controlling shareholder. This allows appropriate tailoring of the definition to better address the distinct conflicts which require management, but without triggering the

complexities identified in the consultation paper in respect of applying different independence tests to different situations on a more ad hoc basis.

**19. Should a director's shareholding in an issuer be considered as a factor that indicates non-independence? If so, what level of shareholding or relevant interest in shares should trigger this as a consideration?**

Yes, but the nature and circumstances of the holding are important to the determination of independence. In general, the interests of minority shareholders will not be completely congruent with the interests of substantial shareholders. However, perceptions regarding influence of substantial shareholders will be strongly informed by other relationships with the issuer, other directors, other shareholders, stakeholders.

We also note that the current factor in the Code is broader than simply being a substantial shareholder, in that it refers to "a senior manager of, or person otherwise associated with" a substantial product holder and can therefore pick up more remote connections which have no serious likelihood of compromising independence.

The Forum generally considers that 5% is an appropriate threshold for boards to start actively considering an impact on independence and explaining their determination to shareholders, but some Forum members recognise that in some instances given the breadth of the test the scale and nature of the relationship would not ultimately compromise independence.

**20. How do you consider the benefits of long tenure should be weighted against the effects of long tenure on a director's independence, when considering the effects on board and director performance?**

Concerns over director independence stemming from tenure are driven by the perception of influence (working in both directions, i.e. management capture of the director and director capture of management) and partiality with regard to the management of shareholder/management conflicts that are influenced by long-tenure. There is trade-off as suggested; long tenured directors effectively become non-independent directors at some level of tenure. The NZCGF continues to advocate for approximately 9-10 years for the point in a director's tenure at which they become non-independent, which is consistent with ASX guidance, the NZCGF guidance, and the UK Corporate Governance Code which are set at nine years. We note that a shorter timeframe than 12 years is entirely appropriate, noting that this is effectively the trigger for issuers to begin explaining to shareholders why they have made a determination of independence.

**21. Are there any additional matters that should be considered in relation to the definition of director independence?**

Simplicity and parsimony. We have argued that the notion of director independence has become an umbrella term which is losing its meaning and adding to investor and director confusion. We propose retaining the existing focus of the Rules on defining director independence by identifying conflicts of interest, recognising that this includes considering minority shareholder rights. We consider that Board skills, diversity and director ethics, and their impact on corporate performance, should be considered separately from director independence.

### **Minority Shareholder Interests**

**22. Do you consider that the current director independence requirements do not appropriately protect the role of minority shareholders?**

Yes, they are inadequate. In our view, minority shareholder rights (or inter-shareholder conflicts) are material and integral to the purpose of independent directors. We agree with the consultation paper, which notes that shareholders have no rights to assess, or classify, a

directors' independence and in the case of majority control, have no influence on the appointment of independent directors.

**23. Should issuers be encouraged to engage with minority shareholders in relation to the assessment of a director's independence?**

Yes, we believe that issuers should be encouraged and reminded to engage with minority shareholders when determining director independence. However, in reality, we do not believe that such engagement would influence classifications materially. Accordingly, the Forum believes that more effective, and material, minority shareholder protections are required – either that the definition of Disqualifying Relationship be changed to refer to the interest of minority shareholders and/or that minority shareholders support is required for the independent classification or appointment.

**24. What benefits and disadvantages would arise if minority shareholders were able to veto a board's assessment as to the independence of a director?**

There is strong support within the Forum that, where there is a controlling/dominant shareholder, a necessary condition for a director to be classified as independent is election by a majority of minority investors. This is to prevent a situation where an independent director is supported by a majority shareholder/s, but not minority shareholders, and is able to be elected (and continually elected), at odds with minority shareholder sentiment. Directors which have the support of the minority shareholders are often referred to in the literature as having 'enhanced independence'.

However, the Forum is cognisant that such a veto needs to be implemented carefully and balanced against the valid interests of the majority shareholder(s) to set the tone and direction of the business via board appointments. In our view the appropriate balance is that the majority shareholder controls the business but that minority shareholders have confidence that their interests are being appropriately represented and protected (as defined by law and the Listing Rules) See further comment in our covering letter and our reference to academic materials , which we encourage the NZX Institute to explore further.

**25. Are there alternative or additional changes that you consider should be made to the director independence settings more appropriately address the conflicts between majority and minority shareholders?**

Yes. To restore some majority shareholder rights, the veto of the director independence classification could apply to the subset of the directors deemed independent with respect to the Listing Rules and the Code. That is, the number of enhanced directors could be limited. On the other hand, this introduces an element of additional complexity into director independence practices.

**Disclosure**

**26. Do you consider that there are changes to the Rules or the Code that should be made to enhance the quality of director independence assessment disclosures?**

We support that the requirement for disclosure of the reasons for changes in classifications of a director's independence be set out in the Listing Rules.

**27. Should further disclosures be required by Rule 2.6.2. within 10 business days of a director's initial appointment, beyond the determination of a director's independence?**

Yes. In addition to the determination of a director's independence classification, the Issuer should have to confirm that it has considered the independence of the director holistically with respect to the guidance and factors described in the NZX Corporate Governance Code, and if not then provide a suitable explanation.

**28. Should the Rules require an issuer to disclose the reasons for its assessment of a director's independence in a notice of meeting that contains a resolution to elect or re-elect a director?**

Yes. Especially if minority shareholders are to have a veto on the independent director classification.

**29. Should the Rules place more direct obligations on issuers to ensure that directors provide updated information in relation to changes to interests and relationships that are relevant to an assessment of whether the director has a Disqualifying Relationship?**

Yes, enhanced disclosure in these matters is beneficial to all shareholders.

**30. Should the Rules place more direct obligations on issuers to re-assess a director's independence when the issuer becomes aware that a director's interests or relationships that relate to the independence assessment have changed?**

Yes, enhanced disclosure in these matters is beneficial to all shareholders.