



October 2, 2009

NZX Regulation Decision
The Warehouse Group Limited
Application for waiver from Listing Rule 7.6.4(a)

Background

1. In September 2005 WHS established The Warehouse Group Limited Executive Share Scheme (“Scheme”).
2. Under the Scheme, selected executives and senior management of WHS and its subsidiaries, who have elected to participate in the Scheme (“Participants”), have a right to be transferred ordinary shares in WHS (“Shares”) upon satisfaction of certain performance conditions.
3. The Shares are held legally and beneficially by The Warehouse Management Trustee Company No. 2 Limited (“Trustee”) until they vest with the Participants. Financial assistance is provided by WHS to the Trustee in the form of an interest free loan to enable the Trustee to purchase Shares on market. No shares are issued by WHS in connection with the Scheme. The loan is repayable by the Trustee on vesting of the Shares, and WHS agrees to reimburse the Trustee for the purchase price of the Shares upon vesting.
4. Past offers under the Scheme, and the associated financial assistance, were approved by shareholders pursuant to the provisions of NZSX Listing Rules (“Rule”) 7.3.1 and 7.6.6. The most recent shareholder approvals were obtained in March 2007 and are valid until March 2010.
5. Rule 7.3.9 now allows the participating WHS director (Ian Morrice) to participate in the Scheme without shareholder approval in respect of the Scheme. The process of obtaining shareholder approval, would include the obtaining of an appraisal report.
6. Graham Evans and Keith Smith are directors of WHS. They are also directors and shareholders of the Trustee. As a result, the Trustee is an Associated Person of a Director (as that term is defined in the Rules) of WHS, and financial assistance is provided to an Associated Person of a Director.

Application

7. WHS seeks a waiver from Rule 7.6.4(a) to enable it to provide financial assistance to the Trustee, being an Associated Person of a Director of WHS, on an ongoing basis in respect of the Scheme, by way of a loan as described above.
8. In support of its application, WHS submits that:
 - (a) If the financial assistance was provided directly to Participants, rather than to the Trustee, then WHS would be able to seek a waiver of Rule 7.6.4(b)(iii) to enable financial assistance to be given without seeking shareholder approval under Rule 7.6.5. It is only because WHS advances funds to the Trustee to purchase shares that this course does not appear to be open.
 - (b) If the financial assistance was provided to Participants, the footnote to Rule 7.6.4 would likely be met such that a waiver may be granted.
 - (c) In respect of paragraph (a) of the footnote, WHS considers that Ian Morrice’s participation in the Scheme falls within Rule 7.3.9 i.e. he is participating in the Scheme according to criteria

applying to eligible employees generally. Accordingly, WHS submits that it would meet the criteria in paragraph (a).

- (d) In respect of paragraph (b) of the footnote, the terms on which the financial assistance is provided are exactly the same regardless of which Participant will ultimately receive the Shares. No Directors or Associated Persons receive financial assistance on any preferential terms, or receive any other preferential treatment in respect of the Scheme. As noted above, Ian Morrice is participating according to criteria applying to eligible employees generally.
- (e) There is no policy reason why the fact that financial assistance is provided to the Trustee under the Scheme should result in completely different treatment under the Rules than it would if the financial assistance was provided directly to Participants. The policy behind Rule 7.6.4 is to ensure that a Director or an Associated Person of a Director who is provided with financial assistance is not in a position to unfairly influence the decision to provide this financial assistance, or to receive any unfair advantage. Granting WHS a waiver from Rule 7.6.4(a) in respect of the Scheme would not undermine this policy as no Director or Associated Person of WHS would unfairly influence or obtain any unfair advantage in respect of the financial assistance.
- (f) Rule 7.6.7 recognises that the provision of financial assistance to a trustee may technically breach Rule 7.6.4, but so long as the relevant Directors have no personal interest there is no real mischief. This Rule demonstrates the policy of NZX in respect of financial assistance to trustees.
- (g) The Trustee, being an Associated Person of two Directors (Graham Evans and Keith Smith), holds the Shares under the Scheme legally and beneficially prior to vesting to Participants. However, Graham Evans and Keith Smith are not Participants and the Trustee has no ultimate beneficial interest in the Shares. Any profits that might arise under the Scheme are held by the Trustee on behalf of WHS and any net proceeds on realisation of the Scheme are paid to WHS. Accordingly, the waiver sought is in line with the policy demonstrated by Rule 7.6.7.
- (h) WHS has disclosure obligations under the Companies Act 1993 to obtain board approval to provide the financial assistance and to disclose information to its shareholders regarding the financial assistance given to executives participating in the Scheme, and also the value of any benefits received by its directors during the relevant reporting period. Therefore, shareholders will be aware of the operation of the Scheme and Ian Morrice's participation and will be able to make an appropriately informed investment decision as a result of that information.
- (i) There are precedents for waivers from Rule 7.6.4 (prior to recent amendments to the Rules) where, but for the involvement of a director or Associated Person, the financial assistance would have been permitted under the Rules. For example, a waiver was granted to PGW on 29 September 2008. Further, NZX has granted waivers from Rule 7.6.4(b)(iii), including to CEN on 12 May 2009.

Rules

9. Rule 7.6.3 states:

An Issuer shall not give financial assistance for the purpose of, or in connection with, the acquisition of Equity Securities issued or to be issued by the Issuer unless the giving of that assistance:

- (a) *complies with Rule 7.6.4; or*

(b) *is approved in accordance with Rule 7.6.5.*

10. Rule 7.6.4 states:

An Issuer may give financial assistance of the nature referred to in Rule 7.6.3 if:

- (a) *the financial assistance is not given in whole or in part to any Director of the Issuer, Associated Person of a Director or Employee (as defined in Rule 7.3.6) of the Issuer, and the amount of the financial assistance, together with the amount of all other financial assistance given under this paragraph (a) by the Issuer during the shorter of the period of 12 months preceding the date of giving of the financial assistance, and the period from the date on which the Issuer was Listed to the date of giving of the financial assistance, does not exceed 10% of the Average Market Capitalisation of the Issuer; or*
- (b) *the financial assistance is given to Employees (as defined in Rule 7.3.6) of the Issuer and:*
 - (i) *the amount of the financial assistance, together with the amount of all other financial assistance given under this paragraph (b) by the Issuer during the shorter of the period of 12 months preceding the date of giving of the financial assistance and the period from the date on which the Issuer was Listed to the date of giving of the financial assistance, does not exceed 5% of the Average Market Capitalisation of the Issuer; and*
 - (ii) *the amount of the financial assistance, together with the amount of all other financial assistance given under Rule 7.6.4(b)(i) during the shorter of the period of five years preceding the date of the giving of financial assistance and the period from the date on which the Issuer was Listed to the date of the giving of the financial assistance, does not exceed 10% of the Average Market Capitalisation of the Issuer; and*
 - (iii) *the financial assistance is not given to any Director of the Issuer or Associated Person of a Director; or*
- (c) *the financial assistance is offered or given so that all holders of Equity Securities of the Issuer are treated, or given the opportunity to be treated, on the same basis.*

11. The footnote to Rule 7.6.4 states:

NZX may waive the restriction in Rule 7.6.4(b)(iii) on Directors and Associated Persons participating in financial assistance given to Employees:

- (a) *so far as it affects assistance given to bona fide full time employees who are Directors, or Associated Persons of Directors, where NZX is satisfied that the amounts and terms of the assistance will be determined according to criteria applying generally to all employees eligible to receive the assistance, and would not, if all relevant factors were publicly disclosed, be reasonably seen as being materially influenced by the relationship; and/or*
- (b) *where NZX is satisfied that the assistance is not likely disproportionately to benefit the persons controlling the Issuer and those associated with them.*

12. Rule 7.6.7 states:

For the purposes of Rule 7.6.4(b)(iii) financial assistance given to a Director or an Associated Person of a Director solely in that person's capacity as a trustee of a bona fide employee share scheme, superannuation scheme, or the like, in which that Director or Associated Person has no beneficial interest, shall be deemed not to be financial assistance given to a Director or Associated Person of a Director.

13. The footnote to Rule 7.6.7 states:
NZX may waive the prohibition on a Director or Associated Person having a beneficial interest in the scheme in question if NZX is satisfied that the beneficial interest is determined by criteria applying to employees generally, and would not, if all relevant factors were publicly disclosed, reasonably be seen as being materially influenced by the relevant relationships.

Decision

14. On the basis that the information provided to NZXR is full and accurate in all material respects, NZXR grants WHS a waiver from Rule 7.6.4(a) to enable it to provide financial assistance to the Trustee in accordance with the Scheme.
15. This waiver is granted on the following conditions:
- (a) that Ian Morrice's participation and entitlement in the Scheme is determined on the same criteria applying to all Participants; and
 - (b) that if any director (other than Ian Morrice), or Associated Person of a director of WHS (other than the Trustee) participates in the Scheme, and receives the benefit of financial assistance in accordance with the Scheme, such financial assistance must be approved by shareholders of WHS or an additional waiver must be sought.

Reasons

16. In coming to the decision to grant WHS waiver from Rule 7.6.4(a) NZXR has considered the following matters:
- (a) The policy behind Rules 7.6.4 and 7.6.5 is to ensure that directors, or their Associated Persons, do not unduly influence a proposal to receive financial assistance from an Issuer, or to receive financial assistance on unduly favourable or beneficial terms, due to their relationship with the Issuer.
 - (b) WHS has shown, in paragraph 8(g) above, that the terms of the financial assistance (to the Trustee) do not benefit the Trustee itself. Accordingly, NZXR accepts WHS's submission that the financial assistance is consistent with the policy relating to trustees contained in Rule 7.6.7 and the footnote to that Rule.
 - (c) NZXR accepts WHS submissions, contained in paragraphs 8(a) - (d) above, that if the financial assistance was provided directly to the Participants, NZXR would likely grant a waiver from Rule 7.6.4(b)(iii) to enable Ian Morrice to receive financial assistance under the Scheme. NZXR notes that if the Scheme was structured in this way no other waivers would be required.
 - (d) Rule 7.3.4 refers to "giving" financial assistance. The Trustee is "given" the financial assistance. However, it is arguable that, from a practical perspective, it is the Participants in the Scheme who receive the benefit of that financial assistance. Accordingly, it is appropriate for NZXR to consider whether the policy of Rule 7.6.4(b) would be breached by the granting of this waiver.
 - (e) As discussed in paragraph 16(a) above, NZXR accepts that the director of WHS who is a Participant receives the same benefit from the financial assistance as other Participants in the Scheme. Accordingly, NZXR is satisfied that grounds for a waiver have been met.

- (f) NZXR included the condition in paragraph 15(b) to ensure that the policy behind Rule 7.3.4(b) (iii) is not bypassed by the granting of this waiver. In the event that other directors or their Associated Persons participate in the Scheme in the future, NZXR will consider each waiver on the reasons advanced at the time of the application.

ENDS