

**NZX Regulation Decision**  
**Life Pharmacy Limited**  
**Application for Waiver from Listing Rules 9.2.1, 9.3.1**

## Background

1. Life Pharmacy Limited (“LPL”) is an Issuer with equity securities quoted on the NZSX market.
2. In September 2008, LPL undertook a capital raising by way of a pro rata renounceable rights issue (“Rights Issue”) of partly paid ordinary shares (“PPS”). The issue price of \$0.40 for the PPS is payable in two tranches. The first tranche of \$0.20 was paid on subscription. The second tranche of \$0.20 is due to be paid a year following the allotment of the PPS (being 18 September 2009). The Rights Issue resulted in the issue of 93.3% of the PPS to Life Pharmacy Trustee Limited (“LPL Trustee”), the majority shareholder in LPL. The stated reason for undertaking the Rights Issue was to raise cash for future expansion and acquisition opportunities.
3. The sole shareholder and Director of LPL Trustee is Mr Andrew Bagnall, who is also a Director of LPL. LPL Trustee is a Related Party of LPL for the purposes of the NZSX Listing Rules (“Rules”).
4. LPL intends to undertake a pro rata buyback of up to 8,200,000 of the PPS currently on issue, at \$0.32 per share (“Buyback”). As the total value of the Buyback will be \$2,624,000, the Buyback is a Material Transaction with a Related Party (LPL Trustee) for the purposes of the Rules. Rule 9.2.1 restricts an Issuer from entering into a Material Transaction with a Related Party, without prior shareholder approval. However, as the Buyback is pro rata LPL will not be required to obtain shareholder approval, as the exception to Rule 9.2.1 contained in Rule 9.2.4(b) will apply. LPL does, however, intend to seek shareholder approval to undertake the Buyback under Rule 7.6.5, and in connection with such approval LPL will provide an Appraisal Report as required by Rule 6.2.2(c).
5. Additionally, LPL intends to make a full takeover offer for all of the issued share capital in Pharmacybrands Limited (“PBL”) (“Takeover”), the consideration for which will be satisfied by the issue of fully paid ordinary shares of LPL. PBL is a non-listed company which is a code company for the purposes of the Takeovers Code (“Code”). LPL’s offer must therefore comply with the provisions of the Code. Neither PBL or its majority shareholder Cape Healthcare Limited (“Cape”) are Related Parties of LPL. LPL is required to seek shareholder approval for the issue of shares in consideration of the Takeover by Rule 7.3.1.
6. Pursuant to the Takeover shares in LPL will be offered to all shareholders in PBL. There are a number of minor shareholders in PBL that also hold shares in LPL. These shareholders together hold, either directly or indirectly, approximately 28.3% of the shares in LPL, and approximately 2.6% of the shares in PBL. Rule 9.3.1 prohibits any person to whom it is proposed to issue new Equity Securities referred to in the resolution, or Associated Persons of those persons, from voting on a resolution under Rule 7.3.1(a).
7. LPL considers that the Buyback and the Takeover form a ‘related series of transactions’ for the purposes of Rule 9.2.1. The PPS were originally issued for the purpose of obtaining cash for potential expansion and acquisitions. As the Takeover is being undertaken through a scrip issue to PBL, the board of LPL consider that a return of capital raised under the Rights Issue is appropriate, and therefore have determined to

undertake the Buyback. Furthermore, the Buyback also has the effect of diluting the shareholding of LPL Trustee so that it will not exceed that of the majority shareholder in PBL following the Takeover. The proximity in both time and effect between the Takeover and the Buyback makes the two transactions related for the purpose of Rule 9.2.1. As the two transactions are Material Transactions, and LPL Trustee is a party to the Buyback, the effect of Rule 9.2.1 is that shareholder approval of the Takeover is also required by Rule 9.2.1.

## Application 1

8. LPL has approached NZX Regulation (“NZXR”) seeking a waiver from Rule 9.2.1, to the extent that such a waiver would allow LPL Trustee to vote on the Buyback and the Takeover .
9. LPL makes the following submissions in support of its application:
  - (a) Without a waiver, even though the two individual transactions do not trigger any Rule 9.2.1 consequences, the Buyback (which by itself does not require any Related Party approvals) “taints” the Takeover (which otherwise has no Related Party aspects), requiring shareholder approval and preventing LPL Trustee (the Related Party in the context of the Buyback) from voting;
  - (b) LPL does not consider that it is a fair result that simply because LPL Trustee may reduce its shareholding in LPL by accepting the Buyback, it should be prevented from voting on the resolution to approve the Takeover;
  - (c) The policy of Rule 9.2.1 is to prevent “Related Parties” from pushing through “Material Transactions” in which they have a direct or indirect interest. This is simply not the case here, where LPL Trustee has no PBL shareholding and will in fact be diluted (although still retaining a cornerstone holding) as a result of the Takeover.
  - (d) LPL Trustee and Cape have acted independently to pursue their own interests, and it is only due to a very technical application of the Rules (and because Rule 9.2.4(b) only partly applies to provide relief in respect of the Buyback) that a Rule 9.2.1 issue arises. The Buyback has not resulted in any material interest in the Takeover for LPL Trustee, and has not influenced the promotion of the Takeover by LPL.
  - (e) If not for the technical application of Rule 9.2.1 to the transactions, LPL Trustee would not be prevented from voting on the shareholder resolution to approve the Buyback by the operation of Rule 9.3.1. LPL does not consider it a fair result to exclude LPL Trustee from the Buyback vote solely as a result of the technical applications of the Rules.

## Rules 9.2.1 and 9.3.1

10. The relevant parts of Rule 9.2 provide:

### **9.2 TRANSACTIONS WITH RELATED PARTIES**

9.2.1 **Restriction:** An Issuer shall not enter into a Material Transaction if a Related Party is, or is likely to become:

- (a) a direct or indirect party to the Material Transaction, or to at least one of a related series of transactions of which the Material Transaction forms part; or

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unless that Material Transaction is approved by an Ordinary Resolution of the Issuer.

9.2.2 **Definition of Material Transaction:** For the purposes of Rule 9.2.1, “Material Transaction” means a transaction or a related series of transactions whereby an Issuer:

- (a) purchases or otherwise acquires, gains, leases (as lessor or lessee) or sells or otherwise disposes of, assets having an Aggregate Net Value in excess of 5% of the Average Market Capitalisation of the Issuer; or
- (b) issues its own Securities or acquires its own Equity Securities having a market value in excess of 5% of the Average Market Capitalisation of that Issuer; or

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11. The relevant parts of Rule 9.3.1 provide:

9.3.1 **Restriction:** Notwithstanding anything to the contrary in the Rules, on any resolution of the nature listed in column 1 of the table below, no Vote in favour of any such resolution shall be cast on any Securities held by a person of the nature listed in respect of that resolution in column 2 of the table below, or by any Associated Person of such a person.

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Column 1 RESOLUTION	Column 2 DISQUALIFIED PERSON
Resolution under Rule 9.2.1	Any person referred to in Rule 9.2.3 who is a party or beneficiary (in terms of Rule 9.2.1(a) or (b)) to or of the transactions the subject of the resolution.

### Application 1 - Decision

12. On the basis that the information provided to NZXR is full and accurate in all material respects, NZXR declines to grant LPL a waiver from Rule 9.2.1 in relation to the Takeover, but instead NZXR grants LPL:
- (a) a waiver from the requirements of Rules 9.3.1, in order to allow LPL Trustee to vote on the Takeover resolution; and
  - (b) a waiver from the requirement of Rule 9.2.5(b) that LPL obtain an Appraisal Report for the Takeover.

### Application 1 - Reasons

13. In coming to the decision to decline to grant LPL a waiver from Rule 9.2.1, and to instead grant LPL a waiver from Rule 9.3.1 and 9.2.5(b) in respect of the Takeover, NZXR has considered that:

- (a) Waivers from Rule 9.2.1 are usually sought in situations where an Issuer seeks relief from the requirement for shareholders to approve a transaction. In this instance LPL is intending to have both PPS and ordinary shareholders vote on the Buyback, and to have ordinary shareholders vote on the issue of shares as part of the Takeover. NZXR considers that the relief sought by LPL, namely that LPL Trustee be entitled to vote on the transactions, can be more appropriately provided by granting LPL a waiver from Rule 9.3.1.
- (b) If either of the transactions were undertaken separately, LPL Trustee would be entitled to vote on the resolutions to approve the transactions. It is only through the technical application of Rule 9.2.1 and the proximity of the transactions that LPL Trustee is prohibited from voting on the Takeover and the Buyback.
- (c) The policy underlying Rule 9.2.1 is to ensure that no unfair value transfer results from a Related Party using its power over the Issue to influence the terms of a proposed transaction. It would be an unfair result if LPL Trustee, the majority shareholder in LPL, was prevented from voting on the Takeover transactions through a technical application of the Rules, especially considering that there is no suggestion that it will derive any disproportionate benefit from the Takeover.
- (d) The purpose of the Rule 9.2.5(b) requirement for the provision of an Appraisal Report, is to ensure shareholders are provided with an independent appraisal of a transaction in which there is a possibility of unfair value transfer as a result of Related Party influence present in that transaction. Given that there is no Related Party element to the Takeover, the expense of providing an Appraisal Report (an expense ultimately borne by shareholders) is not justified in this instance, especially when weighed against the minimal additional shareholder benefit that such a report would provide. NZXR notes that the requirement to provide an Appraisal Report in respect of the Buyback, pursuant to Rule 6.2.2, remains in force and is not affected by the granting of this waiver.
- (e) NZXR notes that the notice of meeting to approve the Takeover must comply with the disclosure obligations required by Rule 6.2.3, and that NZXR will have the opportunity to review the notice of meeting prior to it being sent to shareholders.

## Application 2

- 14. LPL has approached NZXR seeking a waiver from Rule 9.3.1 to allow all shareholders with mutual shareholdings in LPL and PBL to vote on the issue of shares to PBL shareholders for the purposes of the Takeover.
  - (a) LPL believes that persons who directly or indirectly hold approximately 28.3% of the shares on issue in LPL hold approximately 2.6% of the shares on issue in PBL.
  - (b) LPL Trustee does not hold any shares in PBL, and nor does PBL nor Cape hold any shares in LPL.
  - (c) LPL considers that the PBL shareholdings of such persons are negligible, and would not have a material influence on the manner in which those persons exercise their voting rights in respect of the Takeover.
  - (d) LPL believes that all shareholders should be entitled to vote on the Takeover irrespective of whether they may also hold minimal shareholdings in PBL. The primary aim of LPL in this regard is to give all

shareholders of LPL the right to have their say on the proposed Takeover, an aim which LPL believes is in the best interests of fairness.

- (e) LPL believes that shareholder approval for the transactions should be obtained, but wishes to do so simply by way of an ordinary resolution. Pharmacists who operate under LPL’s brands often also hold shares in LPL (and form a significant number of the shareholders in LPL). As opposed to the typical situation where shareholders in listed companies have no other association with the company, pharmacist shareholders have a vested interest in LPL as it is also the franchisor or co-owner of their pharmacy business. LPL is cognisant of this and does not want to see any of its shareholders unable to vote on the transaction.

## Rules 1.3 and 9.2

15. The relevant parts of Rule 9.3.1 provides:

**9.3.1** Restriction: Notwithstanding anything to the contrary in the Rules, on any resolution of the nature listed in column 1 of the table below, no Vote in favour of any such resolution shall be cast on any Securities held by a person of the nature listed in respect of that resolution in column 2 of the table below, or by any Associated Person of such a person.

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Column 1 RESOLUTION	Column 2 DISQUALIFIED PERSONS
Resolution under Rule 7.3.1	Subject to Rule 9.3.2: (a) Any person to whom it is proposed to issue the new Securities referred to in the resolution; or

## Application 2 - Decision

16. On the basis that the information provided to NZXR is full and accurate in all material respects, NZXR grants LPL a waiver from Rule 9.3.1, to allow all shareholders that have mutual shareholdings in LPL and PBL to vote on the resolution to approve the issue of shares for the purposes of the Takeover.

## Application 2 - Reasons

17. In coming to the decision to grant LPL a waiver from Rule 9.3.1, NZXR has considered:
- (a) The policy underlying the prohibition in Rule 9.3.1 of recipients of shares in a proposed share issue voting on the resolution to approve that share issue, is to prevent shareholders who may gain a disproportionate benefit from the share issue influencing or controlling the shareholder vote on that issue. NZXR considers that the mischief that this prohibition seeks to prevent is not present in this case.
- (b) Persons who hold, directly or indirectly, 28.3% of shares on issue in LPL, hold 2.6% of the shares in PBL. Considering these shareholders hold proportionately larger investments in LPL than PBL, there

is a low likelihood of unfair value transfer in this instance. The PBL shareholders are likely to be more concerned about their more significant investments in LPL, than the personal gain in the form of further LPL shares that they may receive as a result of their shareholdings in PBL

- (c) The shareholders that would be prohibited from voting by operation of Rule 9.3.1 represent a significant percentage of the shareholders in LPL. NZXR agrees with LPL that, in the interests of equality, these shareholders should be entitled to vote on whether or not to undertake the Takeover.
- (d) As a general principle, all shareholders should be entitled to vote on resolutions to determine important decisions in relation to their shareholdings.

## **Confidentiality**

18. LPL has submitted that this application and the information contained within it are commercially sensitive. LPL has requested that this decision be kept confidential pending an announcement by LPL regarding the entry into the transactions, if any.

19. NZXR grants LPL's request as it accords with Rules 1.7.2 and 1.7.4 and the footnotes to those Rules.

**ENDS.**