



**ASIC**

Australian Securities & Investments Commission

## REPORT 260

# Market assessment report: NSX Ltd group

National Stock Exchange of Australia Limited, ACN 000 902 063

SIM Venture Securities Exchange Ltd, ACN 087 708 898

October 2011

### **About this report**

This report summarises ASIC's ninth annual assessment of NSX Limited (NSXL) group licensee National Stock Exchange of Australia Limited (NSXA) and the seventh for SIM Venture Securities Exchange Ltd (SIM VSE, formerly known as Bendigo Stock Exchange Limited (BSX)), under s794C of the *Corporations Act 2001* (Cth) (Corporations Act).

This assessment covers the period from 8 March 2010 to 7 March 2011 (the assessment period) and specific events that have arisen subsequently.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Previous reports on NSXL group licensees

The Stock Exchange of Newcastle Limited was granted an Australian market licence under the transitional provisions (s1413) of the Corporations Act on 8 March 2002. The market licence was varied with effect from 31 March 2004 and again from 20 December 2006, the latter variation including recognition of the change of name of the licensee to National Stock Exchange of Australia Limited (NSXA).

Bendigo Stock Exchange Limited (BSX) was approved as a stock exchange under s769(1) of the Corporations Law on 6 October 2000. BSX subsequently was granted a market licence under the transitional provisions (s1413) of the Corporations Act, effective from 8 March 2002. The licence was varied with effect from 13 May 2004 and again from 23 June 2010. The latter variation recognised the change of name of the licensee to SIM Venture Securities Exchange Ltd (SIM VSE).

NSXA report number	Report date
REP 206	June 2010
REP 175	November 2009
REP 157	May 2009
REP 118	January 2008
REP 82	September 2006

<b>NSXA report number</b>	<b>Report date</b>
REP 41	June 2005
REP 36	December 2004
N/A	November 2003

<b>BSX report number</b>	<b>Report date</b>
REP 206	June 2010
REP 175	November 2009
REP 151	March 2009
REP 141	April 2009 (finalised May 2007)
REP 47	July 2005
REP 35	November 2004

<b>NSXL group report number</b>	<b>Report date</b>
REP 206	June 2010
REP 175	November 2009

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# Key findings and agreed actions

## Key findings

- 1 ASIC is satisfied that during the assessment period NSXA and SIM VSE had:
  - adequate arrangements for the operation and supervision of their markets in accordance with their obligations under s792A(c) of the Corporations Act; and
  - sufficient resources to comply with their obligations under s792A(d) of the Corporations Act.

## Agreed actions

- 2 ASIC's view is that the NSXA and SIM VSE (NSXL group) licensees complied with their supervisory obligations as they existed at the time of the assessment period and that, during that period, NSXL group continuously monitored and improved the performance of its supervisory activities. However, there are two areas for attention that the NSXL group has agreed to address:
  - listing and other admission decisions will continue to be made by the NSXA/SIM VSE listing and admissions committee (L&AC), with appeals from those decisions to be heard by the NSXA/SIM VSE compliance committee (the NSXL/NSXA or SIM VSE boards may review listing and admission policy but will continue to have no operational role to review or otherwise influence pending supervisory decisions); and
  - should entities seek to migrate from the SIM VSE official list to the NSXA official list, they will individually apply for NSXA listing.

## A The assessment

### Key points

ASIC conducts annual assessments of market licensees, such as the NSXL group licensees NSXA and SIM VSE, because it is required to do so under s794C of the Corporations Act.

The scope of our assessment must always include the obligations found in s792A(c), but we can include other Ch 7 obligations too.

We use the licensee's self-assessment reports, information from our previous assessments, observation of the licensee's performance, market intelligence and other things to form a view of how well the licensee has operated its market.

### Purpose and scope

- 3 On 1 August 2010, ASIC took over responsibility for supervising Australia's domestic licensed markets from market operators. ASIC now supervises NSXA and SIM VSE's markets using ASIC Market Integrity Rules (NSXA Market) 2010 and ASIC Market Integrity Rules (SIM VSE Market) 2010 (effective 1 August 2010).
- 4 Before the transfer of market supervision, under s792A(c) a market licensee such as NSXA or SIM VSE was required to have adequate arrangements for supervising its market, including arrangements for handling conflicts, monitoring the conduct of participants, and enforcing compliance with the market's operating rules.
- 5 Following the transfer of supervision to ASIC, a market licensee (such as NSXA or SIM VSE) is required to have adequate arrangements for operating its market, including arrangements for handling conflicts and monitoring and enforcing compliance with the market's operating rules.
- 6 In recognition of the transfer of supervision of market integrity rules to ASIC, the obligation on a market licensee to supervise its market in s792A(c) was amended. Accordingly, now under s792A(c) a market licensee is required to have adequate arrangements for operating the market, including arrangements for:
  - handling conflicts between the commercial interests of the licensee and the need for the licensee to ensure that the market is fair, orderly and transparent; and
  - monitoring and enforcing compliance with the market's operating rules.

- 7 More broadly, since 1 August 2010, a market licensee continues to have:
- the overarching obligation to ensure that its market operates, to the extent reasonably practicable, in a manner that is fair, orderly and transparent; and
  - the same responsibilities in the critical area of its listings function and in respect of its frontline supervision of compliance with the listing rules.
- 8 ASIC is required to assess how well a market licensee complies with its obligations under s792A(c) at least once a year: s794C(2).
- 9 In addition, in accordance with s794C(1) we are permitted to extend the scope of our assessment to review how well a licensee complies with any or all of its obligations under Ch 7. In this instance, we extended the scope of the assessment to include a review of whether NSXA and SIM VSE had sufficient financial, technological and human resources to comply with their obligations under s792A(d).
- 10 This report covers the period from 8 March 2010 to 7 March 2011, although we have had regard to subsequent developments, taking account of matters after 1 August 2011.

## Background

- 11 As at 7 March 2011, NSXA is a wholly owned subsidiary of NSXL, a company listed on the ASX. Although NSXL is a widely held ASX-listed public company, Financial and Energy Exchange Limited (FEX) and FEX-associated parties dominate its share register. The boards of NSXL and its wholly owned subsidiary NSXA share the same three directors.
- 12 The SIM VSE board has four directors, and is chaired by the NSXL chairman. In addition to the two NSXL FEX-appointed directors, a third FEX-appointed director, Mr Brian Price, is a director of SIM VSE, but is not an NSXA director. FEX also owns the Mercari Pty Limited licensed market for interest rate, commodity, energy, environmental and foreign exchange derivatives, and has applied to the Minister for a licence to operate a derivatives market. ASIC's report on the two NSXL group market licensees for the period to 7 March 2010 was published on the ASIC website in June 2010: see *Market assessment report: NSX Ltd group* (REP 206).
- 13 On 13 May 2011, FEX Equity Markets Pty Limited, a wholly owned subsidiary of FEX, issued a bidder's statement in relation to an off-market takeover bid for NSXL. The offer closes on 4 November 2011. Initially, the offer was conditional on shareholders voting to remove an NSXL constitution provision limiting NSXL share voting rights to a maximum 15%

- of shareholding. NSXL shareholders voted to amend the constitution to remove this voting limitation on 28 July 2011.
- 14 NSXA and SIM VSE's market licences permit them to operate markets in the financial products that they traded before they made the transition to the Corporations Act licensing regime. The products they are permitted to trade are described on their licences (i.e. government debentures, stocks or bonds; shares and debentures of a body; managed investment scheme interests; options; and agreements of a kind to which s92A of the Corporations Law applied).
- 15 Since our last assessment report, NSXL has divested itself of markets for water rights and taxi licences, neither of which are a financial product, in order to focus on its public exchange businesses.
- 16 On 3 June 2010, NSXL shareholders approved the sale of 50% of BSX (now named SIM VSE) to FEX. FEX have been issued 50% of the capital in the licensee's parent company, SIM VSE Group Holdings Ltd. The shares are partly paid. The capital is to be paid up by FEX over a period of three years to achieve a point where the capital is fully paid up. As at early October 2011, FEX have paid the first instalment of \$500,000, which equates to a paid-up value of 8.33% of the total issued capital. The value of the total transaction when all shares are fully paid is \$3 million.
- 17 At FY 2010–11 end, NSXA had 36 issuers on its official list (40 at the close of FY 2009–10) and SIM VSE ended FY 2010–11 with 43 issuers (49 at the close of FY 2009–10). Declines in trading volumes have persisted, with average executed trades now reduced to about two per day.
- 18 In October 2011, the NSXA market had 30 entities on its official list, with those entities accountable for 85 quoted products. SIM VSE had 43 listed entities with 43 quoted products. At October 2011, combined market capitalisation was about \$2.8 billion. NSXA monthly average trading volume/value for FY 2010–11 was 18,767,307 shares/units/\$10,990,779. SIM VSE monthly average trading volume/value for FY 2010–11 was 77,908/\$58,056.
- 19 From the end of FY 2011–12, SIM VSE proposes to reserve its official list for 'clean-tech' entities. As noted above, at October 2011, there were 43 listed entities admitted to the SIM VSE official list. Of these, 38 are Bendigo Bank franchisee community entities, which will have to decide whether to delist from SIM VSE and seek exempt market status on the basis of ASIC registration as a low volume market, or apply for listing on NSXA or another licensed market.
- 20 As at October 2011, NSXA had 16 participants, and SIM VSE three. The NSXA participants include 11 that are also ASX trading participants. Two of the three SIM VSE participants are trading participants in the ASX market.



- 21 Copies of the NSXA and the SIM VSE market licences, and variations to them, are available on our website at [www.asic.gov.au/markets](http://www.asic.gov.au/markets).

### **The nature of the markets**

- 22 The NSXA and SIM VSE operating rules differ in the way they approach the question of whether an issuer is admitted to its official list and its product(s) is admitted for quotation. SIM VSE has a listing admission requirement that entities have minimum net tangible assets (NTA) of \$500,000. NSXA does not have a minimum NTA requirement and, instead, applies both a suitability and an ‘adequate track record’ test, the latter based on two years of trading under the same management, who must be of known character and integrity.
- 23 NSXA requires issuers applying for admission to its official list to have a sponsoring broker and an exchange-registered nominated adviser (NOMAD). The role of a sponsor is described in *Market assessment report: NSX Ltd group* (REP 175). The role of NOMADs is described in *Market assessment report: National Stock Exchange of Australia Limited* (REP 157).
- 24 Around the time of the transfer to ASIC of real-time supervision of trading, both markets agreed with ASIC protocols for enforcement of overlapping licensee operating rules and ASIC market integrity rules severally for the NSXA and SIM VSE markets.
- 25 Both licensees make provision to enforce their business rules (operating rules that are a contract under seal between the market operator and market participants) through disciplinary panels. NSXA listing rules, in addition to provision for suspension or delisting, make provision to discipline by fines or public censure of listed entities and—through individual contracts executed during the listing admission process as provided for in the listing rules—listed entity directors, sponsoring brokers and NOMADs that fail to perform their obligations to NSXA. SIM VSE’s listing rules’ ongoing obligations are enforced through the sanctions of suspension and delisting only.
- 26 The two licensees’ ongoing obligations to monitor and enforce compliance with their listing rules and their performance in monitoring and enforcing these rules are a critical ingredient in the overall integrity of the two markets. It is also critical for investors and consumers to be confident and to make informed investment decisions. NSX group’s obligations to monitor and enforce its remaining market operating rules, dealing with market participants and trade execution, are also unchanged and are important ingredients in its ability to ensure that its markets are operating in a fair and proper manner.

- 27 NSXA rules and policy make allowance for ‘compliance listings’ for entities for which there is no prospect of a change of control. NSXA practice notes 8A, 8B and 8C relate to three separate listed cooperatives whose constitutions limit votes for control of the respective entities and restrict share transfer rights.

### **Clearing and settlement**

- 28 The NSXL group does not operate a clearing and settlement facility.
- 29 NSXA is an ASX Settlement Pty Limited (ASX Settlement) Recognised Market Operator and CHESS settlement participant. As at October 2011, NSXA trades are not cleared on a delivery versus payment (DvP) basis. For clearing of NSXA trades where the NSXA participant is not an ASX Settlement participant, NSXA produces the net settlement report. Participants deposit funds into NSXA’s account. When ASX Settlement CHESS produces daily net holdings reports that detail shares that need to be transferred in CHESS, NSXA issues CHESS messages to its trading participants to effect settlement of securities.
- 30 NSXL is currently seeking to negotiate with ASX Clear Pty Limited (ASX Clear) for provision of DvP clearing.
- 31 As at October 2011, SIM VSE securities are not CHESS registered, and clearing and settlement is performed by participants bilaterally. SIM VSE’s licence and operating rules now provide for CHESS settlement, and SIM VSE has applied to ASX Settlement to become a Recognised Market Operator for ‘clean-tech’ products. Other legacy SIM VSE-listed entities’ quoted products will continue to settle bilaterally on a T+5 basis until they migrate to the NSXA platform, as is proposed to happen in 2012.

## **Our methodology**

### **Our assessment process**

- 32 A market licensee’s obligations are ongoing. Whether it is likely to comply with its obligations in the future cannot be judged merely by reference to its past compliance.
- 33 We therefore use the assessment process to:
- reach conclusions about the adequacy of the arrangements a market licensee has in place in accordance with its obligations under s792A(c) of the Corporations Act at the time of the assessment; and
  - identify issues, which in our view need, or may need, to be addressed to ensure ongoing compliance.

## What we focused on for this assessment

- 34 Despite the 1 August 2010 transfer of market participant and trading supervision to ASIC, with regard to markets' listing rules, these remain the responsibility of the licensed public exchanges. They are responsible for monitoring and enforcement of listing rules. They are also still required to ensure that they adequately manage their conflicts of interest.
- 35 ASIC is focusing on three key strategic outcomes. These are:
- fair and efficient financial markets;
  - confident and informed financial investors and consumers; and
  - efficient registration and licensing.
- 36 The first two of these are particularly important for licensed markets. For example, the effective monitoring and enforcement by a market operator of its continuous disclosure requirements is critical for investors and consumers to be confident and to make informed decisions. Similarly, appropriate resourcing is fundamental to ensuring that markets operate in an efficient manner. For these reasons, ASIC regards the assessment process as an important tool by which it continues to strive to meet its strategic priorities.
- 37 Our focus in this assessment was to review NSXL group licensees' supervision of their listing rules. In particular, we examined decisions about listing applicants' suitability for admission to the official list, and the obligation under reg 7.2.07(g)(ii) of the Corporations Regulations 2001 to, where appropriate, have arrangements for the disciplining of listed disclosing entities that breach listing rules.
- 38 In addition, we looked closely at arrangements and procedures around ensuring timely disclosures to the market of information that potentially may materially affect price formation or lead to a disorderly market.

## What we considered

- 39 In conducting our assessment we considered:
- material received under a notice served under s30 of the *Australian Securities and Investments Commission Act 2001* (Cth);
  - NSXA and SIM VSE's annual regulatory reports required under s792F of the Corporations Act;
  - information received from and about NSXA and SIM VSE in the ordinary course of our dealings with them;
  - information received from other market licensees, data vendors and foreign regulators about entities seeking to be admitted to NSXA;
  - publicly available information on the NSXA and the SIM VSE websites;

- discussions held with NSXL group personnel, including directors; and
- listed entity disclosure processes and procedures.

40 We visited NSXL premises in Newcastle on 10 March 2011, and met with NSXL directors, committee contractors and staff.

### **Consultation**

41 NSXL has had the opportunity to view and comment on the findings in this report and has agreed actions to improve practices and procedures. Where appropriate, this report reflects NSXL's responses.

## B Our observations

### Key points

We have considered the adequacy of NSXL group's arrangements and resources for meeting its statutory obligations, including arrangements for:

- handling conflicts between the commercial interests of the licensees and the need for the licensees to ensure that their markets are fair, orderly and transparent; and
- monitoring and enforcing compliance with the markets' operating rules.

We have agreed with NSXL group two measures to provide assurance that its arrangements to meet its statutory obligations will remain adequate.

We also note that the NSXL licensees have complied with their market licence reporting obligations under the Corporations Act.

### Compliance with statutory obligations

- 42 We conclude that the NSXL group has:
- adequate arrangements for meeting its statutory obligations under s792A(c) of the Corporations Act; and
  - sufficient resources to operate its markets properly and for the required arrangements in place for meeting its statutory obligations under s792A(d).
- 43 Our conclusion is based on the following observations:
- the nature of the markets as described in paragraphs 22–26;
  - NSXL group's confirmation that the arrangements to meet its statutory obligations have not changed from the previous reporting period, and that board review and overturning of an L&AC decision during the review period was anomalous, and peculiar to the particular circumstances;
  - no serious market failures or disruptions have come to our attention; and
  - during the assessment period, although information came to our attention to suggest departure from established arrangements to meet statutory obligations to adequately manage conflicts of interest, NSXA has agreed procedures will be improved to ensure greater clarity around these.

44 A description of NSXL group's framework for its two markets to meet their statutory obligations is set out at paragraphs 34–38, 49–50 and 52–54 of REP 175.

### **Managing conflicts of interest**

45 Significant decisions that may be unduly influenced by the licensees' commercial interests are referred by NSXL management to two committees: the listing and admissions committee (L&AC) and the compliance committee. The L&AC, which is made up of three independent members, makes decisions on suitability for entities that apply to list, and registration of new participants, NOMADs and sponsors. The compliance committee, which is chaired by a contracted compliance officer and which includes three other contractor members, makes decisions under the operating rules on:

- rule waiver requests; and
- initiation of disciplinary tribunal action (and other disciplinary options) against NSXA and SIM VSE participants, listed entities and a listed entity's directors, sponsors and NOMADs.

46 The NSXL board charter, which also deals with the NSXA and SIM VSE boards, states that the board is to have no operational involvement in the supervision of its licensee markets, and that its powers to supervise the NSXA and SIM VSE markets is delegated to the two independent supervisory committees. Committee decisions are reported to the board.

47 The L&AC charter states that it functions to 'assess, evaluate and, as appropriate, approve applications by entities for admission to the Official List ... as delegate of the Exchange Board'.

48 NSXA practice note 4 states that when the independent L&AC determines that an applicant for admission to the NSXA official list does not meet threshold criteria established in the listing rules, any appeal from that decision should be made by the rejected applicant to the independent compliance committee.

49 These arrangements were tested with a decision to permit the admission to the NSXA official list of International Petroleum Limited (IPL). The NSXL board advises that the application was referred to it for consideration, and that its consideration of the company's application was a referral and not an appeal from a decision of the L&AC. The episode is discussed in detail below at paragraphs 57–72.

## Monitoring the conduct of participants

- 50 From 1 August 2010, ASIC commenced supervision of participants in relation to discrete ASIC market integrity rules for the NSXA and SIM VSE markets.
- 51 Under NSXA business rule E1.3, and SIM VSE business rule 3.1, all NSXA and SIM VSE participants are required to maintain an ongoing capital position of \$50,000 or 5% of adjusted liabilities, whichever is greater. To allow NSXL to monitor compliance, participants are required to lodge surplus liquid funds (SLF) calculations each month (for the previous month) with the Exchange Examining Accountant (EEA), McCosker & Partners Pty Ltd. This is described in greater detail in paragraphs 73–81 of REP 175.
- 52 In last year's report we noted that although there had been a significant proportion of SLF returns not lodged on time in 2008–09, this had been largely rectified by the end of March 2010. As at March 2011, participant capital adequacy supervision remains adequate.

## Enforcing compliance with operating rules

### Suitability of entities for admission to the official list

- 53 In general, the admission procedures for NSXL management and independent L&AC's determinations of suitability are based on a checklist. The checklist includes commentary and is not merely a box-ticking exercise. Suitability for listing rests mainly on an NSXL conclusion that the entity following admission will disclose immediately material new information, including related party transactions, to the market.
- 54 Suitability depends, too, on whether it will be possible for NSXA to enforce its rules on the particular listed entity. NSXA's rules and contracts required for admission of entities to the official list give it the capacity to directly discipline listed entities, their directors and listed entities' professional advisers (where these are sponsors or NOMADs). Mechanisms such as use of sponsors and NOMADs in the NSXA market assist to secure listed entity compliance. NSXA-listed entities' appointment of an NSXA-registered sponsor and a NOMAD are therefore important aspects of suitability for listing.
- 55 NSXA suitability analysis needs to address whether a NOMAD is both independent from the listed entity and has the capacity to proactively identify material developments and assist NSXA to secure continuous disclosure. We noted in REP 157 that, in response to ASIC's recommendation, NSXA requires NOMADs to annually attest that they remain independent of the listed entities they assist NSXA to supervise.

- 56 We looked at how NSXL staff and the L&AC had interpreted NSXA listing rule 3.6, which requires issuers' management to be 'of known character and integrity', and NSXA listing rule 1.5, which requires that an entity be suitable for listing.
- 57 In order to assess how NSXA and SIM VSE made their judgements about suitability for admission of the issuer to the official list, we reviewed applications for listing, in particular those for IPL and African Petroleum Corporation Limited (APCL). The listing of these two entities increased capitalisation of the NSXA market from about \$850 million to \$2.03 billion.
- 58 Unless identified to the contrary, the below distillation of relevant facts is drawn from records held by NSXA that were available to it when it made the decisions to admit IPL and APCL to its official list.
- 59 IPL was originally listed on the ASX on 27 April 2006 as a platinum explorer, but agreed in October 2009 to acquire and facilitate the back-door listing on ASX of Mr Frank Timis' UK company Eastern Petroleum Corporation Limited (Eastern Petroleum), which had subsoil use rights in Kazakhstan. In conjunction with this acquisition, IPL divested its platinum exploration rights. Global Iron Limited was also originally listed on ASX and agreed around the same time to acquire and facilitate the back-door listing on ASX of another of Mr Timis' companies, APCL.
- 60 At the date of applications for NSXA listing, Mr Timis was a director and substantial shareholder of IPL and APCL. On 7 May 2002, the Toronto Stock Exchange (TSX) issued a letter to Mr Timis that said that due to his failure to disclose criminal convictions to the exchange in connection with a listing application, Mr Timis was unsuitable to be a director, officer or major or controlling shareholder of a TSX-listed issuer.
- 61 This determination was upheld and expanded in November 2007 when Mr Timis appealed the decision as a prerequisite to an application to list another company on TSX. On 17 November 2009, Mr Timis was executive chairman of AIM-listed Regal Petroleum plc, which was publicly censured and fined by the London Stock Exchange (LSE) for breach of AIM listing rules dealing with misleading statements and market abuse, receiving a then record fine of £600,000. Mr Timis was also executive chairman of another AIM-listed company that received a private censure and a fine of £75,000 for misleading announcements. These details initially were not volunteered to Australian investors or shareholders of IPL or APCL.
- 62 IPL shareholders approved the change in nature and scale of activities as well as a \$30 million capital raising to develop the Kazakhstan project on 24 November 2009. IPL's ASX-quoted shares were placed in suspension on this date and remained in suspension throughout the events discussed below.



- Due to these same events, member approval of the APCL transaction was not sought until May 2010.
- 63 On 8 February 2010, IPL lodged a prospectus with ASIC in order to raise up to \$30 million and to comply with Chapters 1 and 2 of the ASX listing rules. At the time, ASIC identified a number of concerns with the prospectus, among other things relating to there being no disclosure of Mr Timis' involvement. Subsequently, IPL lodged a replacement prospectus on 24 February 2009, which disclosed the details known to ASIC at the time. It included information about the role of Mr Timis in managing the new asset, his shareholding in IPL following the acquisition, plans for him to join the board, and the Regal Petroleum AIM censure and fine.
- 64 Due to ASIC's continued concerns about the replacement prospectus, IPL consented to a final stop order on 24 February. On 26 March 2010, the ASX listings committee determined not to readmit IPL to ASX's official list if it completed the transaction with Eastern Petroleum. IPL appealed this decision and a hearing was scheduled for 30 April 2010. In the meantime, IPL contacted NSXA.
- 65 On 1 April 2010, the NSXA L&AC was asked to consider as a preliminary issue whether the LSE and TSX disclosure censures would affect decisively IPL's suitability for NSXA listing. This resulted not from an application but from a letter to NSXA from IPL's lawyers asking for an opinion on the threshold issue. The L&AC decided that it would not recommend IPL be admitted. To satisfy listing requirements of the NSXA, IPL issued a replacement prospectus for a \$30 million fundraising through a share issue, which proceeded on 8 April 2010. On 14 April, notwithstanding the decision on the threshold issue, IPL lodged with NSXA its formal listing application.
- 66 ASIC had concerns about the 8 April prospectus, and a replacement prospectus was lodged on 24 April 2010. The replacement prospectus was revised to state, among other things, that Mr Timis would not be involved in the day-to-day operations of the company and would limit by deed his capacity to vote his shareholding.
- 67 On 10 May 2010, the ASX listing committee tribunal affirmed ASX's initial decision, but determined that it should have taken into account additional submissions. On 19 May, ASX Issuers revisited and affirmed its decision not to readmit IPL to ASX's official list. IPL appealed this determination.
- 68 On 21 May 2010, the NSXA L&AC formally considered IPL's full application. The applicant submitted that it would accept conditions on its listing that would require the company to ensure that Mr Timis had no involvement in the company's continuous disclosure of material developments to the market. However, on the basis of NSXA listing rule 3.6, which requires that the applicant issuer have an adequate track record of at

least two years under substantially the same management who must be of known character and integrity, the L&AC rejected IPL's listing application. The L&AC considered that the track record of Eastern Petroleum was not adequate. NSXA staff, on the same day, formally advised the applicant accordingly.

- 69 The L&AC wrote to the NSXL/NSXA board on 24 May 2010, inviting the board to review its decision on the basis of NSXA listing rule 1.10. This rule states, among other things, that 'the *Exchange* may vary or revoke its decision, either on the application of an *issuer* or of its own accord'. We were advised that the chair of the compliance committee in his turn was invited by the board to comment on whether a board review was appropriate. According to the NSXL board, he confirmed that it was.
- 70 On 25 May 2010, the NSXL board reviewed the matter and decided that conditions upon admission to listing could be devised such that the basis for the L&AC decision could be nullified. IPL was admitted subject to 10 conditions that circumscribed Mr Timis' involvement with the company, and the appointment of a Perth NOMAD with intimate knowledge of the company's affairs.
- 71 A month later, on 24 June 2010, bypassing the L&AC—which did not have a quorum due to the resignation of its chairman and travel on business of another of its three members—the board heard at first instance the application of APCL for admission to the official list. APCL required a decision by financial year end, so the board determined that because it was familiar with the issues from the IPL application it would be available in the stead of the L&AC to consider the application. The board decided to admit APCL on the same conditions as those imposed on IPL.
- 72 In respect of its obligation to handle conflicts of interest, ASIC is concerned as to the departure from long-established NSXA published policy and procedures, which were designed to ensure that significant pending supervisory decisions were delegated by the NSXL licensee boards to the two independent supervisory committees.

#### Agreed action 1: Issuer listing and security quotation

NSXL group has agreed to adhere in future to its published policies and procedures for determining issuer suitability for admission to the official lists of NSXA and SIM VSE, and admission of listed issuers' financial products to quotation.

#### Community bank issuers

- 73 NSXL is considering 'migrating' community banks from the official list of SIM VSE to that of NSXA.

- 74 In previous BSX/SIM VSE assessment reports, we have noted that BSX/SIM VSE routinely waived admission criteria for the listing of ‘community type’ enterprises. As noted in those previous reports, ASIC considers that the listing of an entity on a public exchange operating in Australia gives rise to certain expectations in the minds of investors about the nature of the entity listed and the obligations by which an entity will be bound.
- 75 ASIC considers that community entities should not migrate to the NSXA market unless NSXA’s L&AC considers each entity’s application for NSXA listing on its merits.

#### Agreed action 2: Possible migration of SIM VSE community entities to the NSXA official list

NSXL group has agreed that, should SIM VSE community entities delist from SIM VSE and seek listing on NSXA, they will individually have to apply to NSXA, agree to list on NSXA, and agree to be bound by NSXA rules.

#### Continuous and periodic disclosure supervision

- 76 Upon identification of continuous disclosure breaches, or apparent false and misleading disclosures, the NSXL licensees send a ‘please explain’ query to the relevant listed entity and to its NOMAD, and, when not comfortable with the response, publish as a market announcement both the query and listed entity’s response.
- 77 NSXL has adequate procedures for enforcing its disclosure rules. It suspends SIM VSE and NSXA listed entities that do not make the required periodic disclosures by the dates required, and refers suspected breaches of s674 of the Corporations Act to ASIC. NSXL also retains the option to discipline listed entities. NSXA may, through its disciplinary tribunal, censure or fine listed entities, their directors, an issuer’s sponsors, and the entities’ NOMADs. SIM VSE can suspend or delist.

## Resources

### Financial resources

- 78 We are satisfied that NSXL group’s financial, technological and human resources were adequate for the required arrangements to be provided in respect of the markets it operated during the assessment period.
- 79 We focused on NSXL group’s financial resources in our 2009 assessment report (REP 175). Because the NSXL group’s cash flow is currently negative but has moderated and is relatively constant, we assess that—based on

current activity and subject to any unanticipated developments—the group has sufficient financial resources to operate for at least two years.

### **Technological resources**

- 80 NSXL group has a technology agreement with OMX NASDAQ for the supply and maintenance of trading technology for the NSXA and SIM VSE markets. The NASDAQ OMX X-Stream trading system is sized to perform at least 100,000 trades per day. The announcements platform in its current configuration is capable of handling at least 300 announcements per day. NSXL licensees therefore have considerable excess capacity. During the assessment period there were no outages that affected trading.

### **Human resources**

- 81 NSXL market licensees share supervisory resources. In addition to six non-staff committee members (on the two independent committees that make supervisory decisions—the L&AC and the compliance committee), and a contracted compliance officer, the NSXL group has four full-time and two part-time employees. There are sufficient staff and procedures to ensure that absences will not compromise supervision of ongoing listing rule obligations, such as continuous disclosure.

## **C Responses to 2010 assessment recommendations**

82 In our 2010 report we did not make recommendations.

### **Conclusion**

83 There have been no significant changes in the way the NSXA and SIM VSE markets operate since our last assessment.

## Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
Australian market licence	Australian market licence under s795B of the Corporations Act that authorises a person to operate a financial market
Ch 7 (for example)	A chapter in the Corporations Act (in this example, numbered 7)
Corporations Act	<i>Corporations Act 2001</i> (Cth), including regulations made for the purposes of that Act
market licensee	Holder of an Australian market licence
s794C (for example)	A section of the Corporations Act (in this example, numbered 794C), unless otherwise specified