



**ASIC**

Australian Securities & Investments Commission

**REPORT 326**

# **Market assessment report: NSX Group**

**National Stock Exchange of Australia Limited  
ACN 000 902 063**

**SIM Venture Securities Exchange Ltd  
ACN 087 708 898**

February 2013

## **About this report**

This report relates to the period 9 March 2011 to 8 March 2012 (assessment period) and also comments on the sufficiency of NSX Group's financial resources from the end of the assessment period to January 2013.

### 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 NSX Group assessment reports

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).

Report number	Report date
REP 260	October 2011
REP 206	June 2010
REP 175	November 2009

# Contents

<b>A</b>	<b>Summary of observations and conclusions</b> .....	<b>4</b>
	The assessment .....	4
	Our approach to assessments.....	5
	Nature of licence obligations.....	7
	Assessment findings.....	10
	Recommendations.....	10
	Agreed actions from our previous assessment .....	10
	Market conditions.....	10
	Consultation .....	11
	Ongoing areas of consideration.....	11
<b>B</b>	<b>Our recommendations and agreed actions</b> .....	<b>12</b>
	Nature of recommendations .....	12
	Financial resources.....	13
	Conflicts handling .....	14
	Monitoring and enforcing compliance.....	18
<b>C</b>	<b>Agreed actions from previous assessment</b> .....	<b>21</b>
	<b>Key terms</b> .....	<b>23</b>

## A Summary of observations and conclusions

### Key points

ASIC conducts annual assessments of market licensees because it is required to do so under s794C(2) of the Corporations Act.

The scope of our assessment must always include the obligations found in s792A(c), which require the licensee to have adequate arrangements for operating the market, including adequate arrangements to manage conflicts of interest and monitor and enforce the operating rules. We can also include other Ch 7 obligations. In keeping with our standard practice, we extended the scope of our assessment to include a review of whether NSX Group had sufficient financial, technological and human resources to properly operate its licensed markets' facilities: see s792A(d).

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

Overall, our assessment concluded that National Stock Exchange of Australia Limited (NSXA) and SIM Venture Exchange Ltd (SIM VSE) (collectively NSX Group) met their statutory obligations during the assessment period.

However, we note that since that period NSX Group's financial position has continued to deteriorate and, without a significant improvement in the short term, there is a material risk that NSX Group will not meet its obligation to have sufficient financial resources in future assessments.

There are seven recommendations and/or agreed actions that focus on aspects of NSX Group's activities. The recommendations ASIC makes and the associated observations on financial resources are important. However, the remaining recommendations and agreed actions do not detract from our conclusion that NSX Group otherwise met its relevant statutory obligations during the assessment period.

## The assessment

### ASIC's obligations

- 1 Under s794C(2) of the *Corporations Act 2001* (Corporations Act), ASIC is required to assess how well a market licensee is complying with its obligations under s792A(c) at least once a year.

## Licensee's obligations

- 2 In line with our statutory obligations, we reviewed NSX Group's arrangements for the operation and supervision of its markets under s792A(c). This includes its two licensees' (NSXA and SIM VSE) arrangements for handling conflicts and its arrangements for monitoring and enforcing compliance with the relevant market's operating rules.
- 3 Under s794C(1), we are permitted to extend the scope of our assessment to review how well a market licensee complies with any or all of its obligations under Ch 7 of the Corporations Act. In keeping with our standard practice, we extended the scope of our assessment to include a review of whether NSX Group had sufficient financial, technological and human resources to properly operate its licensed markets' facilities: see s792A(d).

## Assessment period

- 4 Our assessment covers the period from 9 March 2011 to 8 March 2012 and this report also comments on the sufficiency of NSX Group's financial resources from the end of the assessment period to January 2013. Since the assessment period, NSX Group's financial position has continued to deteriorate and, without a significant improvement in the short term, there is a material risk that NSX Group will not meet its obligation to have sufficient financial resources in future assessments.

## Our approach to assessments

### ASIC's strategic priorities

- 5 ASIC's current strategic framework focuses on three key strategic priorities or outcomes. These are to ensure:
- fair and efficient financial markets;
  - confident and informed investors and financial consumers; and
  - efficient registration and licensing.
- 6 The first two of these are particularly important for licensed markets. For example, appropriate resourcing is fundamental to ensuring that markets operate in an efficient manner. The adequate management and transparency of matters such as conflict handling arrangements are important to the fairness of the market. Similarly, the effective monitoring and enforcement by a market operator of its continuous disclosure requirements is critical in ensuring that investors and consumers are confident and make informed decisions. For these reasons, we regard the assessment process as an

important tool by which we continue to strive to meet our strategic outcomes.

## Guiding principles

- 7 Our assessments are guided by certain principles that draw on the International Organization of Securities Commissions' (IOSCO) Objectives and Principles of Securities Regulation. The principles we use to guide assessments are:
- admission standards for issuers and participants are robust and administered in a fair and transparent way;
  - post-admission standards are robust, effectively monitored, and enforced in a fair and transparent manner;
  - operating rules promote transparency to market users of material price and trading information;
  - the deterrence of unfair trading practices is supported by robust arrangements for detection and prompt referral to ASIC of significant contraventions of the Corporations Act and ASIC market integrity rules (and notification to ASIC of licensee's enforcement action to address significant breaches of markets' operating rules where these breaches do not involve contraventions that ASIC has the power to act on);
  - conflicts are adequately managed; and
  - sufficient resources (including technological resources) are deployed to operate the market in a proper and reliable manner.

## Methodology

- 8 In conducting our assessment, we:
- held discussions with senior NSX Group personnel;
  - reviewed internal NSX Group documentation obtained under notices issued under s30 of the *Australian Securities and Investments Commission Act 2001*;
  - reviewed the annual regulatory reports given to ASIC by NSXA and SIM VSE, dated 22 September 2011, as required under s792F;
  - considered information received from and about NSX Group licensees in the ordinary course of ASIC's dealings with them as market licensees;
  - considered information from external sources, including media and industry commentary; and
  - reviewed the operation of the market throughout the assessment period.

## Focus areas for this assessment

- 9 For this assessment, in considering NSX Group's compliance with its statutory obligations, we paid particular attention to:
- the operation of NSX Group's conflict handling arrangements—in particular, the arrangements it has in place to manage entities with which it has a real or perceived conflict of interest;
  - NSX Group's framework for admitting participants to its market facilities;
  - NSX Group's approach to monitoring compliance with its licence obligations; and
  - the sufficiency of NSX Group's human and financial resources devoted to operating its markets.

## Nature of licence obligations

- 10 A licensee's obligations are ongoing and whether it is likely to comply with these obligations in the future cannot be judged merely by reference to its past compliance.
- 11 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 at the time of the assessment; and
  - identify issues, which in our view need, or may need, to be addressed to ensure ongoing compliance.
- 12 Since 1 August 2010, when responsibility for frontline supervision of certain NSXA and SIM VSE operating rules was transferred to ASIC, ASIC has supervised market participants' compliance with the ASIC Market Integrity Rules (NSXA Market) 2010 and ASIC Market Integrity Rules (SIM VSE Market) 2010. These market integrity rules are based on rules previously contained in the NSXA and SIM VSE market operating rules that predominantly dealt with matters such as participant conduct and participant–client relations. The NSX Group licensees continue to monitor and supervise the capital adequacy of NSXA and SIM VSE participants.
- 13 From 1 August 2010, s792A(c) was amended in recognition of these new arrangements. From this date, a market licensee (such as NSXA and SIM VSE) is required to have adequate arrangements for 'operating' (rather than 'supervising') its market. This still includes the requirement that a market licensee must have adequate arrangements for monitoring and enforcing compliance with its remaining operating rules, and still includes the requirement to handle conflicts of interest.

- 14 More broadly, a market licensee retains:
- the overarching obligation to do all things necessary to ensure that its market operates, to the extent reasonably practicable to do so, in a manner that is fair, orderly and transparent; and
  - the same responsibilities in the critical area of its listing functions and in respect of its frontline supervision of compliance with the listing rules.

### **Adequate arrangements**

- 15 In assessing how well a licensee is complying with its statutory obligations to have adequate arrangements in place to operate its market and monitor its market participants' compliance with its operating rules, we consider whether a licensee has adequate arrangements to monitor and enforce its operating rules, and to handle conflicts of interest.

### **Arrangements for monitoring and enforcing compliance with operating rules**

- 16 In determining whether a market licensee is complying with its obligations to monitor and enforce its operating rules, we consider how the licensee:
- deals with listed entities and monitors disclosure to detect potential or actual non-compliance with the law or the market's operating rules;
  - monitors trading and participant activity in relation to its operating rules to detect potential or actual non-compliance with the law or the market's operating rules;
  - plans and documents procedures for ensuring frequent and comprehensive assessment of its ongoing compliance with its obligations, and ongoing compliance by listed entities and market participants with their obligations;
  - deals with actual or suspected breaches of the law or the operating rules, including remedial, disciplinary and other deterrent measures;
  - deals with complaints about the market or market participants; and
  - shares information with ASIC and (where appropriate) operators of other markets and clearing and settlement facilities.

### **Arrangements for handling conflicts of interest**

- 17 In assessing the adequacy of a market licensee's arrangements for managing conflicts of interest, it is relevant that the regulatory regime does not preclude the existence of conflicts. NSX Group must, however, manage any conflicts it does have so as not to allow its commercial interests to prevail over its obligation to operate a market that is fair, orderly and transparent.



- 18 Conflicts of interest may arise in any area where a market licensee makes decisions with respect to monitoring and enforcing its operating rules. For example, conflicts of interest may arise in connection with decisions about:
- admission of a person to the market as either a participant, nominated adviser or a listed entity;
  - monitoring of a listed entity or market participant;
  - investigative or disciplinary action against participants, listed entities or listed entities' directors (as provided for under NSXA's listing rules);
  - the exercise of discretions, such as granting waivers from the market's operating rules; or
  - the determination of the fees schedule of a financial market, including any trading incentive programs and/or relevant stakeholder rebates.
- 19 In assessing a market licensee's arrangements for handling conflicts of interest, we consider a range of matters, including:
- whether, under current arrangements, actual or potential conflicts of interest are reliably anticipated, identified and appropriately responded to;
  - whether there is a sufficient level of disclosure to the market about the nature and existence of any actual or perceived conflict and the steps taken to adequately manage it; and
  - whether the licensee's organisational and reporting structures separate its commercial activities from its monitoring activities to a significant degree.
- 20 For example, a suitable organisational and reporting structure is one where employees who are responsible for assessing the market licensee's compliance with its monitoring obligations report to a person who is not responsible for making commercial decisions.

### **Sufficient resources**

- 21 In assessing how well a licensee is complying with its obligation to have sufficient resources to properly operate the market under s792A(d), we consider:
- how the licensee makes available and uses resources to support its arrangements for operating the market, taking into consideration:
    - the financial, technological and human resources made available compared with previous assessment periods; and
    - a general expectation that resourcing should increase in step with the licensees' operations and that any reduction is appropriate only where changed circumstances or specific efficiencies can be clearly demonstrated;

- the licensee's information technology system 'uptime' and instances of market disruption; and
- our own experiences and observations, as well as those of market users, that there can be confidence that the market will operate in a reliable manner.

## Assessment findings

- 22 ASIC is satisfied that, in terms of the standards set out in the Corporations Act, during the period from 9 March 2011 to 8 March 2012 (assessment period), NSXA and SIM VSE had adequate arrangements in place to meet their statutory obligations. However, we note that since that period NSX Group's financial position has continued to deteriorate and, without a significant improvement in the short term, there is a material risk that NSX Group will not meet its obligation under s792A(d), to have sufficient financial resources to operate its markets properly, in future assessments.

## Recommendations

- 23 ASIC makes three recommendations and has confirmed four agreed actions with NSX Group licensees.
- 24 Our recommendations and the actions agreed with NSX Group can be found in Section B of this report.

## Agreed actions from our previous assessment

- 25 In October 2011, we published our most recent assessment report of the NSX Group, which included two agreed actions.
- 26 The extent to which NSX Group has attended to these agreed actions is set out in Section C of this report.

## Market conditions

- 27 During 2012, the NSX Group averaged approximately 15 trades per day. At the commencement of the assessment period, NSXA had 15 registered participants and that number has since increased by four. SIM VSE has seven participants.
- 28 NSXA has a total of 67 entities admitted to its Official List (four of which are suspended) and 121 securities issued by those entities quoted on the

market. More than 60% of the listed entities have a market capitalisation of \$5 million or less. Six listed entities have a market capitalisation of greater than \$160 million. SIM VSE has three listed entities currently admitted to its Official List.

## Consultation

- 29 NSX Group has had the opportunity to view and comment on the factual accuracy of this report. Where appropriate, this report reflects NSX Group's comments.

## Ongoing areas of consideration

- 30 In Report 260 *Market assessment report: NSX Ltd group* (REP 260), published in November 2011, we examined in detail the decision to permit the admission of two entities, International Petroleum Limited (IPL) and African Petroleum Corporation Limited (APCL), to the NSXA Official List.
- 31 The directors of these two entities included Mr Frank Timis. In 2009, Mr Timis was the executive chairman of an entity, listed on the London Stock Exchange's AIM market, that was publicly censured and fined by the London Stock Exchange for breach of AIM listing rules. These rules deal with the obligation to take reasonable care to ensure that company announcements are not misleading, false or deceptive, and do not omit material information.<sup>1</sup> NSXA imposed conditions on IPL and APCL's admission to the NSXA Official List to promote adequate continuous disclosure standards. The most significant of these was to require IPL and APCL to establish continuous disclosure committees.
- 32 On 22 June 2012, IPL and APCL announced that NSXA removed a number of the conditions on the basis that the entities had exhibited professionalism and good behaviour. Removal of the conditions results in, among other things, the end of special arrangements that were designed to ensure that announcements to the market required by NSXA's continuous disclosure rules were attested by the listed entities' specially-established continuous disclosure committees, committees that were not to include Mr Timis. This decision by NSXA came after the assessment period and will be reviewed in more detail as part of our next assessment.
- 33 We will continue to monitor closely the sufficiency of NSX Group's financial resources to operate its two markets.

---

<sup>1</sup> London Stock Exchange, *Regal Petroleum publicly censured and fined £600,000* (42/09), news release, 17 November 2009, <http://mailing.londonstockexchange.com/bump/newsletter/n.S3DYM9YFGWF09H1HOILF.91Z4F9G0QLLV89Z6DQOS.html>

## B Our recommendations and agreed actions

### Key points

We have considered the adequacy of NSX Group's arrangements and resources for the operation of its markets.

Overall, our assessment concluded that NSXA and SIM VSE met their statutory obligations during the assessment period. However, we note that since that period NSX Group's financial position has continued to deteriorate and, without a significant improvement in the short term, there is a material risk that NSX Group will not meet its obligation to have sufficient financial resources in future assessments.

We have made three recommendations and have agreed four 'agreed actions' with NSX Group where we believe further action is warranted. In a number of cases, NSX Group has agreed and already commenced remedial action to address areas where we believe further action is needed. These recommendations and agreed actions relate to NSX Group licensees':

- financial resources;
- obligations to ensure they have adequate arrangements for managing conflicts between their commercial interests and the need for them to ensure that their markets operate in a fair, orderly and transparent manner; and
- obligations to monitor and enforce compliance with their operating rules.

### Nature of recommendations

- 34 Our recommendations and actions for the next assessment period can be broken down into three categories:
- *financial resources*—NSX Group licensees' obligation to have sufficient financial resources to properly operate their markets (Recommendation 1);
  - *conflict handling*—NSX Group licensees' ongoing obligation to ensure that they have adequate arrangements for managing conflicts between their commercial interests and the need for them to ensure that their markets operate in a fair, orderly and transparent manner (Agreed actions 1–4); and
  - *monitoring and enforcing compliance*—NSX Group licensees' obligation to have adequate arrangements for monitoring and enforcing compliance with their operating rules (Recommendations 2–3).

## Financial resources

35 For this assessment, we focused on the sufficiency of NSX Group's financial resources to operate its two licensed markets.

### Adequate reserves for operating costs

36 Based on a review of documented information for NSX Group, it is clear that for the two licensed markets to remain going concerns they will require the continued financial support and funding from majority shareholder and joint venture partner Financial and Energy Exchange Limited (FEX).

37 NSX Group's auditors have highlighted this issue following their most recent review, noting that

the ability of the consolidated entity to continue as a going concern and its ability to pay its debts as and when they become due and payable ... [is] dependent upon the ... success of:

- various growth strategies currently being implemented; and
- continued financial support from [FEX] in the Joint Venture.

38 As at August 2012, the joint venture agreement required FEX to contribute a further \$1.09 million, with the next \$500,000 instalment then due in September 2012. This was not received, and we understand the amount is now to be paid in the first quarter of 2013.

39 More broadly, the NSX Group continues to experience ongoing losses and the benefits of NSX Group's revenue growth initiatives remain to be fully realised at this point. As at 31 August 2012, NSX Group had working capital of \$1.5 million and an average monthly cash outflow over the past 12 months of \$150,000. At the end of 2012, not including money owing from FEX, NSX Group has sufficient cash reserves to operate its markets until mid-April 2013.

40 Under the Corporations Act, s792A(d) requires a licensed market to have sufficient financial resources to operate the market properly. We conclude that NSX Group had sufficient financial resources to operate its market properly during the assessment period. However, we note that since that period NSX Group's financial position has continued to deteriorate and, without a significant improvement in the short term, there is a material risk that NSX Group will not meet its obligation to have sufficient financial resources in future assessments.

#### Recommendation 1: NSX Limited Group to provide monthly updates on its financial situation

ASIC recommends that, from February 2013, NSX Group provides ASIC with monthly updates of its financial position, signed by two directors.

## Conflicts handling

- 41 The second category of recommendations relate to NSX Group licensees' ongoing obligation to ensure that they have adequate arrangements for managing conflicts between their commercial interests and the need for them to ensure that their markets operate in a fair, orderly and transparent manner.
- 42 Our focus was on reviewing how these arrangements operate in practice in regards to entities with which NSX Group has an inherent conflict (real or perceived).
- 43 Under NSX Group's existing conflict handling arrangements, significant supervisory decisions, including for issuer admission to an Official List and for initial registration of participants and nominated advisers, are made on referral by two independent committees whose members are paid 'per diem'.

### Remuneration linked to outcomes

- 44 During the course of our assessment, ASIC became aware that the remuneration of some NSX Group staff associated with making recommendations to the independent committees on listing applications was linked to successful listings.
- 45 This practice may lead to the appearance of bias or of undue influence in the making of decisions or recommendations when considering applications for listings.
- 46 We consider that this poses a clear actual or perceived conflict of interest.

#### Agreed action 1: Remuneration policies to be amended

NSX Group has agreed to review their remuneration and conflict of interest policies to ensure that conflicts of interest arising from remuneration of staff are adequately managed.

### Limits to contact with committee members

- 47 During our review of listing files, we queried why some of the information we considered relevant to a matter was not expressly discussed in the staff recommendation paper or minutes of the relevant committee meeting.
- 48 In response, we were advised that matters not mentioned in the papers were usually dealt with beforehand, and that issues were discussed extensively with committee members before submission of papers.
- 49 While overall we found no evidence to suggest that various listing applicants were not being treated impartially, we do have concerns about staff contact with committee members on pending supervisory decisions and lack of an

audit trail as to whether information potentially material to a decision was provided to the independent committee(s).

#### **Agreed action 2: All relevant information for a pending supervisory decision to be provided to all committee members**

NSX Group has agreed that papers making a recommendation on listing and/or waiver applications should contain all of the relevant information to allow the relevant Committee to make an informed decision.

They have also agreed that papers distributed to all committee members before their meetings should record pre-meeting discussions between the NSX Group staff who are involved in assessing applications and making recommendations and members of the committees in relation to any pending formal applications. Decisions reached before committee meetings should be itemised and disclosed to the committees as a whole. These records should be retained on NSXA and SIM VSE files.

NSX Group's policies and procedures will be amended to reinforce this.

#### **Decisions to be reviewed by Compliance Officer**

- 50 The NSX Group procedures for managing conflicts of interest (revised in June 2008) expressly identifies that a conflict of interest can arise where an employee or director holds, directly or indirectly, a substantial financial interest in any company with which the NSX Group has business dealings, including participants, listed entities and nominated advisers.
- 51 During our review of files dealing with applications to be admitted to a licensee's official list we observed that there were cases where NSX Group directors had an interest, either direct or indirect, in listed entities (or applicants for listing), or nominated advisers.
- 52 We have not formed the view that this resulted in any inappropriate outcomes; however, we do have concerns that these conflicts were not identified as such in the files, or in the listing application recommendation papers provided to the committee.

#### **Agreed action 3: Conflicts of interest to be expressly identified when they arise**

NSX Group has agreed to amend their procedures for managing conflicts of interest to make it an express requirement that if a conflict of interest is present this will be identified in the recommendation paper provided either to the Listing and Admissions Committee and/or the Compliance Committee.

NSX Group has also agreed that the Compliance Officer will be required to review all Listing and Admissions Committee decisions to ensure that formal policies have been followed and that the decisions were not subject to any bias or undue influence. The Compliance Officer will provide a six-monthly report to the board to this effect.

## Review of policy and procedures relating to conflicts

- 53 As a result of the matters discussed in paragraphs 41–52, ASIC reviewed the NSX Group’s policies and procedures relating to conflicts of interest.
- 54 The NSXA s792F annual regulatory report of 2011, at page 61, states that the Compliance Officer assists the NSX Limited/NSXA Board to identify actual and potential conflicts of commercial interest and has approved the Conflict of Interest Policy and Procedures.
- 55 The NSXA board charter states that the board is to identify, monitor and manage conflicts of interest.
- 56 We note that NSX Group procedures for managing conflicts of interest direct NSX Group staff who supervise the NSXA and SIM VSE markets to avoid situations that ‘may be in conflict with the company’s overall objectives and principles’. The document defines a conflict of interest as a situation where a staff member’s interest and NSX Group’s interest(s) are in conflict and the staff member prefers his own interest usually for a financial gain or other benefit ahead of the interests of the NSX Group.
- 57 It is not clear to ASIC how and by whom the adequacy of the conflicts of interest arrangements (including policies and procedures) are tested. Based on our observations at paragraphs 41–52, it appears to ASIC that in some instances conflicts of interest are not being appropriately identified. In other cases, where conflicts have been identified, the Compliance Officer plays no apparent role in reviewing matters to ensure that the policies and procedures have been followed and no bias or undue influence was exerted.
- 58 The documents forming the policies and procedures have not been revised since June 2008 and, in some cases, contain matters that raise concerns. For example, the NSX Group corporate governance statement states that the Listing and Admissions Committee is comprised of the Chief Executive Officer, the Compliance Officer, the General Manager and a panel of experts. There are, in fact (and appropriately), no NSX Group business development employees on the Listing and Admissions Committee. In addition, the NSXA board charter states that the board has adopted a policy to have at least one independent director, preferably two. On the basis that an independent director is someone who is free of any business or other relationship that could materially interfere with—or could reasonably be perceived to materially interfere with—the independent exercise of their judgement, there is presently grounds for a perception that there are no independent directors on the board.
- 59 More broadly, we are concerned that NSX Group managing conflicts of interest procedures do not identify the conflicts of interest the law requires it to manage. Section 792A(c)(i) of the Corporations Act expressly states that the market licensee must have adequate arrangements to handle conflicts of



interest between the commercial interests of the licensee and the need for the licensee to operate a fair, orderly and transparent market.

- 60 NSX Group procedures for managing conflicts of interest mis-identify the nature of conflicts of interest that NSX Group is required to address. The conflict of interest is not between the commercial interests of the NSX Group and a staff member or director.
- 61 Although there are presently no NSXA or SIM VSE participants or listed entities that are controlled by the NSX Group or FEX and would trigger obligations under s798C or 798DA, we are concerned that NSX Group does not clearly set out its framework and processes for managing its actual or perceived conflicts of interest.

#### Agreed action 4: Conflicts of interest policies and procedures

NSX Group has agreed to:

- update their conflicts of interest policies and procedures documents by 28 February 2013, providing a copy in draft to ASIC for our concurrence before finalisation;
- ensure that a person is charged with monitoring how these arrangements operate in practice. This person will report annually to the NSXA and SIM VSE boards on whether decisions of the Listing and Admissions Committee are in accordance with conflicts policies and procedures and that the policies and procedures are fit for purpose; and
- ensure that the NSXA and SIM VSE boards each continue to include at least one independent director and that independence of that director is continuously reviewed by the boards.

In the interests of increasing the transparency of the NSX Group markets and fostering investor confidence in those markets, NSXA and SIM VSE will also publish on their websites:

- all updated conflict of interest policy documents (existing policy is already published to websites);
- a list of review parties and those entities admitted to their Official List in which:
  - NSX Group directors hold the office of director or officer; and
  - FEX and its related entities, or directors of NSX Limited, NSXA and SIM VSE, have a material shareholding or are a material creditor; and
- the names of the entities with which the NSX Group has a commercial relationship and that relationship is such that it may give rise to material actual or potential conflicts, the nature of the conflict, and the arrangements that it has in place to manage the conflict, should be elaborated on the websites.

## Monitoring and enforcing compliance

- 62 The third category of recommendations and agreed actions relates to NSX Group's obligation to have adequate arrangements for monitoring and enforcing compliance with its operating rules. Our focus was on reviewing NSX Group's processes around supervision of its market in relation to listed entities' disclosure of price sensitive information to the market.

### Timeframes for listed entity to respond to queries

- 63 ASIC reviewed NSX Group's practices in supervising its market in relation to disclosure by listed entities of price-sensitive information to the market.
- 64 NSX Group issues a 'price query' letter to an entity where the NSX Group surveillance system identifies a significant price movement or increase in trading volumes that warrant further investigation. The letter requires listed entities to respond immediately if the entity has a matter that is considered price sensitive to release to the market or, if it cannot respond then, to request a trading halt immediately. In other instances it must respond within 48 hours.
- 65 We noted instances where, in practice, 48 hours passed before the required announcement was made. Other domestic markets in similar circumstances require responses to price query letters to be 'prompt and without delay' and given on the same day or, at the latest, one hour before the market opening for trading on the following day. Internal procedures need to address how an exchange will respond if an entity says it is not able to make a corrective announcement immediately, when price volatility indicates an announcement is, indeed, required.
- 66 We expect that even when an issuer requests a trading halt, it should respond to an NSX Group request for an explanation of material price (and/or volume) movements as soon as is possible, and that there is a case that industry practice should be that this is no later than one hour before the start of trading the following day. Because NSXA's listing rules make provision for direct NSXA enforcement through its own disciplinary panel, we consider NSXA's practice note on its continuous disclosure policies should explain circumstances where it anticipates it may take action to censure or fine listed entities, their directors and nominated advisers, when disclosure is demonstrably tardy.

#### Recommendation 2: Review of disclosure policy

ASIC recommends that NSX Group reviews its current policies, particularly NSXA practice note 6, to ensure they remain current and in keeping with best practice standards, taking account of observations in paragraph 66. ASIC also recommends that NSX Group creates internal procedures to ensure that listed entities are required to respond to a price query in a timely manner and that the revised policy is actively enforced.

## Incomplete or insufficient disclosure

- 67 An exchange should have public guidance for listed entities that makes it clear that when making timely disclosure of material information, disclosure should be complete and accurate. Even when material information has become available generally or is available to a sector of the market, NSX Group should ensure a full and accurate account is provided to the market through NSXA and SIM VSE announcement platforms.
- 68 For instance, if a listed entity announces the resignation of their auditor, this announcement should be accompanied by the reasons provided by the auditor and explanation from the entity, in some cases necessarily described as an opinion, as to why the auditor's concerns were not capable of being addressed.
- 69 We consider that, to provide most complete guidance on NSX Group's expectations of issuer, NSXA practice note 6 should be amended to address the following topics:
- Whenever there is an unexplained material price movement in the securities of an issuer, NSX Group will contact the issuer as soon as is practicable and ask whether the issuer is aware of any information that could explain the security price and/or volume movement. The practice note should make clear, for circumstances where unexplained price movements persist, how often NSX Group will re-contact the issuer. The practice note should specify at what point NSX Group will expect the issuer to request a trading halt until an announcement can be made. The practice note should also discuss circumstances where an issuer denies knowledge, and whether NSX Group will continue to:
    - formally ask the same question every day that price and/or volume aberration persists;
    - require a written response; and
    - publish that response.
  - If an issuer is unwilling to explain a continuing significant price and/or volume movement, and possibly asserting that the information should not be disclosed because it remains confidential (i.e. the issuer is not able to rely on the combined carve-outs in NSXA listing rules 6.5(1), (2) and (3)), whether NSX Group will require an appropriate announcement (on the basis that there is a false market situation, as provided for in NSXA listing rule 6.5A).
  - When an issuer is requested or required by NSX Group to make a written response, it is not appropriate for the issuer to request time to respond in the absence of a trading halt.
  - An explanation of the interaction between general continuous disclosure obligations (including the overarching obligation to maintain an orderly

market) and specific disclosure about resource and reserve estimates (volumes), production schedules, and capital and operating expenses. This specific disclosure is designed to provide a better basis for company valuation, and is explained in the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (JORC Code), as amended from time to time and enforced through NSXA listing rule 6.13(1a) and NSXA practice note 3.

### **Recommendation 3: Development of additional continuous disclosure policy**

ASIC recommends NSXA guidance to its listed entities on the application of its continuous disclosure listing rules should reflect close adherence to standards applied in all other Australian licensed markets.

NSX Group should considering amending its NSXA practice note 6 as set out in paragraph 69 and ensure active enforcement of those areas.

NSX Group should update its published continuous disclosure policy documents and should update ASIC as to progress by 28 February 2013.

## C Agreed actions from previous assessment

### Key points

In November 2011, we published REP 260, which included two agreed actions. NSX Group took steps to comply with these.

- 70 In November 2011, we published REP 260, which included two agreed actions.
- 71 Table 1 lists NSX Group's progress against each agreed action arising from our previous assessment.

**Table 1: Agreed actions from previous assessment of NSX Group**

Agreed actions	Status
<b>Agreed action 1: Issuer listing and security quotation</b>	
NSX Group agreed that listing and other admission decisions will continue to be made by the NSXA/SIM VSE listing and admissions committee, with appeals from those decisions to be heard by the NSXA/SIM VSE compliance committee (the 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).	<p>NSX Group considered that no changes were required to be made to policy and procedure documents that address its conflicts of interest because its existing Corporate Governance Statement addressed management of conflicts of interest. As such, the NSX Board has not created any new policies or procedures in relation to the Listing and Admissions Committee and the Compliance Committee.</p> <p>The NSX corporate governance statement records that the 'NSX Compliance Officer has responsibility for reviewing the compliance and risk management framework and policies within NSX' and that 'the board has no operational involvement in the supervision of the market. Its role in that area is confined to setting and reviewing policy.'</p>
<b>Agreed action 2: Possible migration of SIM VSE community entities to the NSXA official list</b>	
NSX Group agreed that should entities seek to migrate from the SIMVSE official list to the NSXA official list, they will individually apply for NSXA listing.	<p>On 3 January 2012, 25 SIM VSE (formerly Bendigo Stock Exchange (BSX)) listed entities migrated to the NSXA market.</p> <p>NSX Group staff sought comments and approval from the Listing and Admissions Committee and the Compliance Committee regarding how this agreed action requiring 'individual application' should be effected.</p> <p>The Listing and Admissions Committee considered each migration individually as an applicant, with fewer waivers granted to these migrated entities than when they were initially listed on BSX.</p>

Agreed actions	Status
	<p data-bbox="839 309 1445 427">NSXA provided migrating entities with incentives to send their requests to migrate early (before 1 December 2011), such as discounted listing fees and the promise to migrate the applicant by early 2012.</p> <p data-bbox="839 450 1437 510">Each BSX-listed company made the decision to migrate of their own accord.</p> <p data-bbox="839 533 1445 842">Waivers were granted by NSXA for SIM VSE entities that did not meet the NSXA listing rule obligation to have a minimum \$500,000 market capitalisation. However, these entities were checked against the NSXA listing rules to see what waivers were needed—and on the basis that NSX Group staff were comfortable with those entities' corporate governance standards, NSXA staff recommended to the Listing and Admissions committee and the Compliance Committee that the required waivers be granted.</p>

## Key terms

Term	Meaning in this document
APCL	African Petroleum Corporation Limited
ASIC	Australian Securities and Investments Commission
ASIC Market Integrity Rules (NSXA) 2010	Rules made by ASIC under s798G of the Corporations Act for trading on NSXA
ASIC Market Integrity Rules (SIM VSE) 2010	Rules made by ASIC under s798G of the Corporations Act for trading on SIM VSE
Australian market licence	Australian market licence under s795B of the Corporations Act that authorises a person to operate a financial market
BSX	Bendigo Stock Exchange
Ch 7 (for example)	A chapter in the Corporations Act (in this example numbered 7)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
FEX	Financial and Energy Exchange Limited
IOSCO	International Organization of Securities Commissions
IPL	International Petroleum Limited
JORC Code	The Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves
NSXA	National Stock Exchange of Australia Limited, or the exchange market operated by NSXA
NSX Group	NSXA and SIM VSE
SIM VSE	SIM Venture Securities Exchange Ltd, or the exchange market operated by SIM VSE