



# NZX Regulation Decision

Serko Limited (SKO)

Application for a waiver from NZX Main Board Listing Rule  
7.6.4(b)(iii)

22 July 2015



# Waiver from NZX Main Board Listing Rule 7.6.4(b)(iii)

## Decision

1. Subject to the conditions set out in paragraph 2 below, and on the basis that the information provided by SKO is complete and accurate in all material respects, NZXR grants SKO a waiver from NZX Main Board Listing Rule 7.6.4(b)(iii), to the extent required to allow SKO to provide financial assistance to the Relevant Persons to participate in the Plan.
2. The waiver in paragraph 1 above is provided on the conditions that:
  - a. The Chairman of SKO's Board of Directors certifies that the Relevant Persons:
    - i. had no significant involvement in the preparation of the Plan;
    - ii. had no significant influence over the terms of the Plan;
    - iii. will not participate in any further board discussions regarding:
      - A. the terms of the Plan;
      - B. the determination of Plan exercise hurdles;
      - C. the determination of whether Plan exercise hurdles have been met;
      - D. whether Plan shares should be awarded where the required Plan exercise hurdles have not been met;
    - iv. are not likely to be disproportionately benefitted by the financial assistance provided under the Plan;
  - b. The Relevant Persons will participate in the Plan on the same terms as all other SKO employees; and
  - c. The Relevant Persons will not be involved in the future performance assessments of other Relevant Persons for the purposes of the Plan.
3. The information on which this decision is based is set out in Appendix One to this decision. This waiver will not apply if that information is not or ceases to be full and accurate in all material respects.
4. The Rule to which this decision relates is set out in Appendix Two to this decision.

## Reasons

5. In coming to the decision to provide the waiver set out in paragraph 1 above, NZXR has considered that:
  - a. the policy objective of Rule 7.6.4(b)(iii) is to ensure that Directors are not able to exercise their discretion to provide financial assistance on terms that are unfairly advantageous to them, or are otherwise inconsistent with that provided to other employees;
  - b. the Relevant Persons will participate in the Plan on the same terms, including as to financial assistance, as all other employees, and will not be treated more favourably than any other SKO employee;



- c. the certification provided by SKO's Chairman gives NZXR comfort that the Relevant Persons:
  - i. did not significantly influence the terms of the Plan, and will not have any influence going forward over the terms of the Plan, the determination of Plan exercise hurdles, determining whether Plan exercise hurdles have been met, or whether Plan shares should be awarded where the required Plan exercise hurdles have not been met; and
  - ii. are not likely to be disproportionately benefitted by the financial assistance provided under the Plan;
- d. the situation falls within the circumstances stated in the footnote to Rule 7.6.4, which states that NZXR may waive the restriction on Directors and Associated Persons participating in financial assistance given to employees in certain circumstances; and
- e. there is precedent for this decision.



## Appendix One

1. Serko Limited (“**SKO**”) is a Listed Issuer with ordinary shares (“**Shares**”) Quoted on the NZX Main Board.
2. SKO has established a long term incentive scheme for its employees called the Serko Limited Employee Restricted Share Plan (“**Plan**”). The establishment of the Plan was approved by entitled persons' agreement in 2014 prior to SKO's Listing on the NZX Main Board.
3. It is proposed that each of:
  - a. SKO's chief executive officer, Darrin Grafton;
  - b. SKO's chief strategy officer, Bob Shaw; and
  - c. Donna Bailey, a business analyst;(together, the “**Relevant Persons**”) participate in the Plan in their roles as full-time employees. Mr Grafton and Mr Shaw are Directors of SKO. Ms Bailey is Mr Grafton's partner and is therefore an Associated Person of a Director of SKO.
4. SKO employees who are offered, and elect, to participate in the Plan (“**Participant**”) will receive financial assistance from SKO in the form of an interest free loan to purchase ordinary shares in SKO.
5. Whilst NZX Main Board Listing Rule 7.6.4(b) (“**Rule**”) allows financial assistance to be given to employees in certain circumstances, the financial assistance may not be given to a Director or Associated Person without obtaining shareholder approval or a waiver from NZXR. To facilitate the provision of financial assistance to the Relevant Persons under the Plan, SKO has sought a waiver from NZX Regulation (“**NZXR**”) in respect of the Rule. The relevant terms of the Plan are as follows:
  - a. SKO offers Shares to each Participant which are held on trust on behalf of the Participant subject to restrictions and are released strictly in accordance with the Plan.
  - b. The number of Shares granted to a Participant is based on a percentage of the Participant's base salary, the Participant's individual performance as an employee in the preceding year, SKO's performance against financial targets and the volume weighted average market share price for the 20 Business Days immediately preceding the date (“**Grant Date**”) on which the Shares are granted (or deemed to have been granted) to the Participant.
  - c. On the Grant Date, the Participant makes a payment to SKO equal to the issue price for the Shares allocated to that Participant. SKO provides financial assistance to the Participant to fund that payment by the Participant. The financial assistance is in the form of an interest free loan equal to the amount paid by the Participant for the Shares allocated to the Participant on the Grant Date (“**Loan**”).
  - d. The Shares are vested with a Trustee for a specified vesting period (for example, three years) and are released to Participants at the end of that period (“**Transfer Date**”) upon, and subject to, satisfaction of any pre-determined requirements (“**Exercise Hurdles**”). In respect of the Shares proposed to be allocated to Participants under the Plan in 2015, there are to be no Exercise Hurdles.



- e. The Participant has beneficial title to the Shares until the Shares are released from the Plan and legal title is transferred to the Participant. If a Participant ceases employment with SKO, breaches the prohibition on divestment of the Shares or SKO is put into liquidation (or suffers a similar event), legal title in the shares will not be transferred to that Participant. The Shares held in trust on behalf of that Participant are sold to the Trustee to repay the Loan in full.
  - f. The Trustee will pay to the Participant any cash dividends in respect of Shares held for such Participant as soon as practicable after they are paid to the Trustee (although the Board of SKO, in its discretion, may require that the Trustee apply any cash dividends attributable to the Shares held by the Trustee for a Participant to be applied towards repayment of the relevant Loan).
  - g. On the Transfer Date, subject to continued employment, SKO will pay an after-tax bonus to the Participant equal to the price paid by the Participant for the Shares and the bonus will be used to repay the balance of the Loan. The legal title in the Shares will be transferred to the Participant and those Shares shall be released from the Plan.
6. While Mr Grafton and Mr Shaw (in their capacity as Directors) voted on the board resolution in 2014 pursuant to which the Plan was established, they did not participate in the Plan in that year. Neither Mr Grafton nor Mr Shaw was significantly involved in the preparation of the Plan or significantly influenced the terms of the Plan when it was established in 2014. From the term sheet stage of the Plan onwards, SKO's Chief Financial Officer, Head of Human Resources and Company Secretary ran the process for finalising the plan, and there was no input from Mr Grafton or Mr Shaw. As conditions of this waiver, Mr Grafton and Mr Shaw will not participate in any further Board discussions regarding the Plan.
7. The 2015 allocations to Participants were assessed in the following way:
- a. Mr Grafton, in his role as CEO of Serko, made an initial recommendation to the Board of the allocation to Participants based on their individual performance. Mr Grafton's initial recommendation did not include a recommendation in respect of Mr Grafton and Mr Shaw.
  - b. After Mr Grafton presented to the Board his assessment (and the basis for assessing) Participants' recommended allocations under the Plan, he and Mr Shaw left the Board meeting. Mr Grafton and Mr Shaw did not participate in the Board's final determination of the individual performance of Participants and did not participate in any discussions of their own performance. Mr Grafton and Mr Shaw abstained from voting on the associated Board resolutions and related directors' certificates.
  - c. The Board (absent Mr Grafton and Mr Shaw) tested Mr Grafton's recommendations and made the final determination of the performance of all Participants (including the Relevant Persons) and their allocation under the Plan and, in particular:
    - i. carried out the initial assessment of the performance of Mr Grafton and Mr Shaw and determined their proposed allocation under the Plan; and
    - ii. scrutinised the proposed allocation to Ms Bailey and determined that the recommended allocation was reasonable relative to peers who held roles at an equivalent level and in similar roles within the organisation.



8. NZXR is satisfied that the 2015 allocation process did not offend the policy of the Rule. However, it is a condition of this waiver that, going forward, the Relevant Persons will not assess their own performance or the performance of other Relevant Persons for the purposes of the Plan.
9. Capitalised terms that are not defined in this decision have the meanings given to them in the NZX Main Board Listing Rules.



## Appendix Two

### **Rule 7.6 Buybacks of Equity Securities, Redemption of Equity Securities and Financial Assistance**

Rule 7.6.4 An Issuer may give financial assistance of the nature referred to in Rule 7.6.3 if:

...

- (b) the financial assistance is given to Employees of the Issuer and:
  - (i) the amount of the financial assistance, together with the amount of all other financial assistance given under this paragraph (b) by the Issuer during:
    - (A) the shorter of the period of three years preceding the date of giving of the financial assistance and the period from the date on which the Issuer was Listed to the date of giving of the financial assistance, does not exceed \$1 million; or
    - (B) the shorter of the period of 12 months preceding the date of giving of the financial assistance and the period from the date on which the Issuer was Listed to the date of giving of the financial assistance, does not exceed 5% of the Average Market Capitalisation of the Issuer; and
  - (ii) the amount of the financial assistance, together with the amount of all other financial assistance given under Rule 7.6.4(b)(i) during the shorter of the period of five years preceding the date of the giving of financial assistance and the period from the date on which the Issuer was Listed to the date of the giving of the financial assistance, does not exceed 10% of the Average Market Capitalisation of the Issuer; and
  - (iii) the financial assistance is not given to any Director of the Issuer or Associated Person of a Director; or ...

The footnote to Rule 7.6.4 provides:

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

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

