



NZX Director Independence Review: Second Round

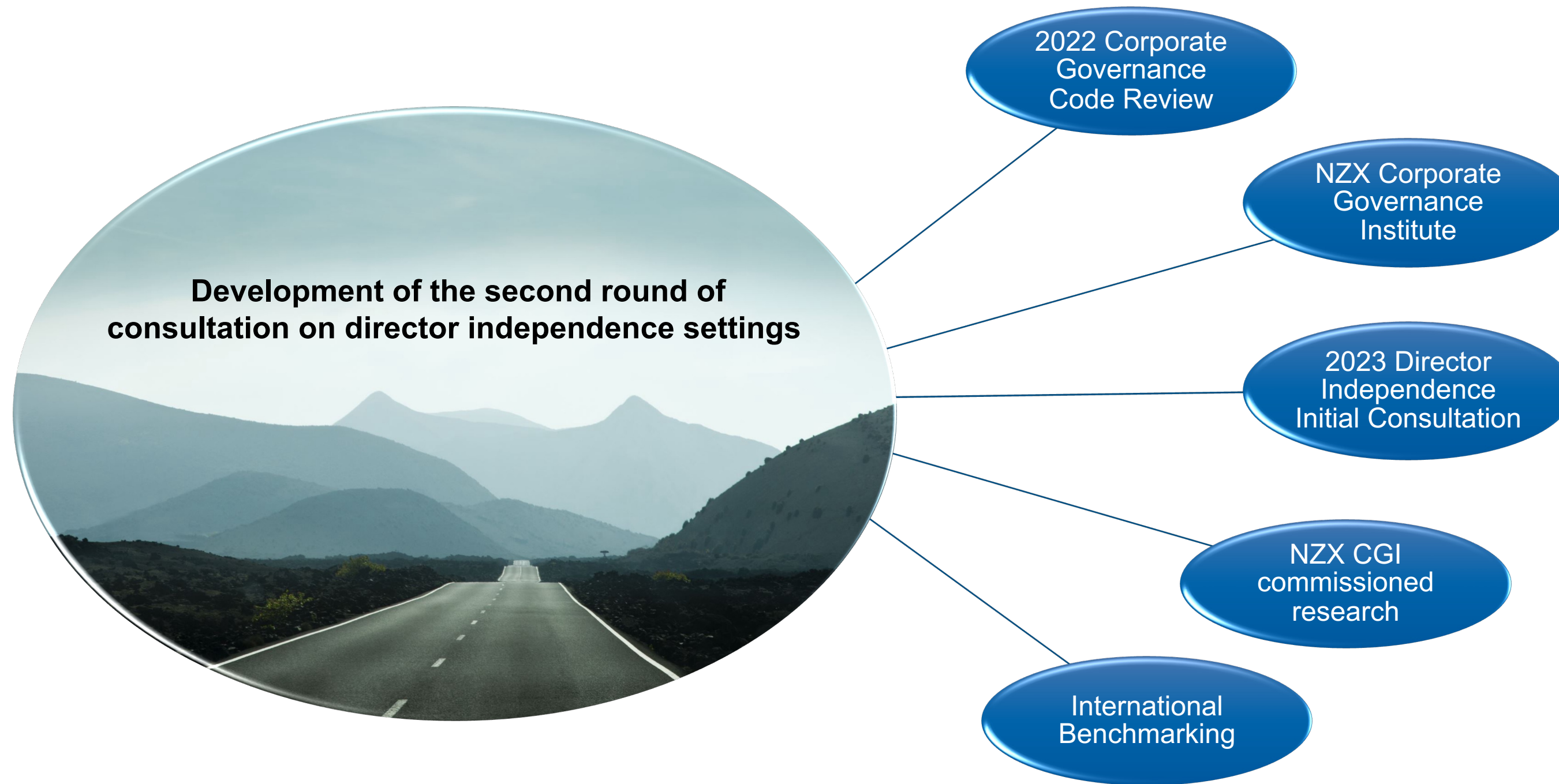
Webinar

31 May 2024

We welcome your submissions at policy@nzx.com

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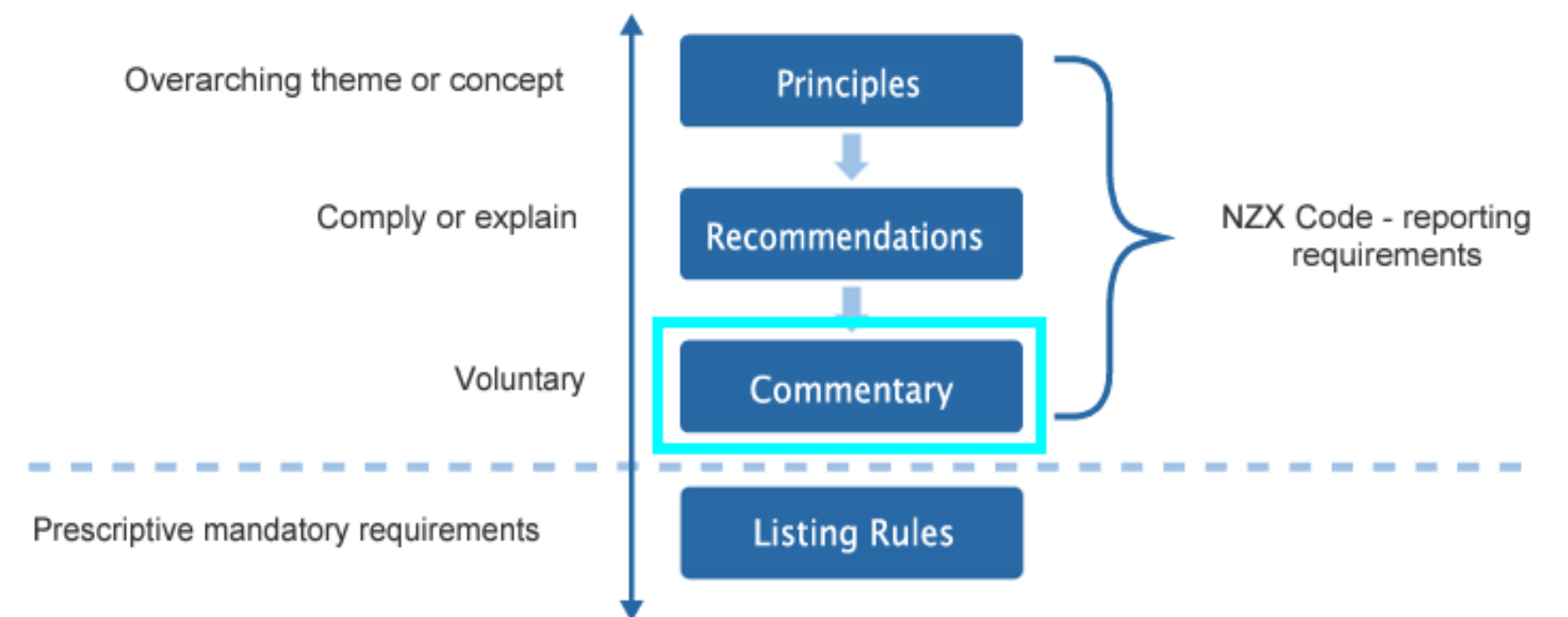
Consultation Background



Current Settings

- Listing Rule requirements that a board of an equity issuer have two Independent Directors.
- Code recommends that a majority of directors be independent.
- An Independent Director is one who has no Disqualifying Relationship and is not an Employee.
- Disqualifying Relationship definition requires a board to consider relationships and interests that could reasonably influence or be *perceived* to influence in a *material* way a Director's *capacity* to:
 - bring an independent view to decisions in relation to the issuer;
 - act in the best interests of the issuer, and
 - represent the interests of the issuer's financial products generally,including relationships identified in Code recommendation 2.4.

NZX Corporate Governance Code



Consultation Proposals

Summary of proposals of the second round of review:

- **Purpose Statement**
Inclusion of a purpose statement in the Corporate Governance Code (**Code**) to clarify the need for director independence requirements. No change to the 'Disqualifying Relationship' definition contained in the Rules.
- **Independence Assessment and Code Factors**
Amendments to the Code settings for cross directorships, director shareholdings, tenure and director self-attestation of independence.
- **Board and Board Committee Composition Settings**
Retention of current Board composition settings. Possible amendments to the Code in relation to Audit and Nominations Committee composition settings.
- **Enhanced Disclosure Requirements**
Additional requirements for notices of meeting and market announcements in relation to board independence determinations.
- **Minority Shareholder Protections**
Proposal not to introduce further minority shareholder rights in relation to independent director appointment.
- **Director Residency Proposals**
Amend Listing Rule requirement for 2 New Zealand resident directors, to a single director resident in New Zealand, or two directors resident in either New Zealand or Australia.



Purpose Statement

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Inclusion of a Purpose Statement

Development of the Proposal

- During the initial consultation, NZX consulted on the nature of a purpose statement relating to the director independence requirement and the nature of the conflicts that director independence settings were intended to address.

Submitter Feedback

- Issuers, legal advisers and NZICA viewed the purpose of director independence requirements as ensuring that directors can bring an independent perspective to board's decision making.
- Investor groups however were of the view that the main function of director independence requirements was to reduce shareholder agency costs and help manage conflicts between majority and minority shareholders.

Inclusion of a Purpose Statement

NZX Corporate Governance Institute

- The NZX Corporate Governance Institute also considered submitter feedback from the initial consultation and acknowledged that these views were not contradictory.
- The Institute recognised that director duties require a director to consider the best interests of all shareholders, and that these duties apply equally to independent and non-independent directors.

Proposed Amendments

- Amending the commentary to Code recommendation 2.4 to include a purpose statement to provide additional guidance to issuers when interpreting these settings.
- The proposed purpose statement reflects the views of both the investor and issuer groups.
- The proposed purpose statement reflects that the director independence requirements:
 - ensure there are a sufficient number of directors on an issuer's board who do not have relationships or interests that would reasonably cause them to be, or perceived to be, aligned with management or a particular shareholder group in a material way; and
 - provide additional confidence for shareholders that an issuer's board is comprised of members who do not have interests or relationships that could reasonably be considered (or could reasonably be perceived) to materially affect their capacity to bring an independent perspective to board decision making.

Disqualifying Relationship Definition

Development of the Proposal

- During the initial consultation, we queried whether the definition of a ‘Disqualifying Relationship’ should be more aligned to the purpose of the requirements of director independence by either:
 - being expanded to refer to the ability for a director to conduct themselves and exercise judgment independently; or
 - providing more focus on ensuring independence from management and shareholders.

Submitter Feedback

- Legal and issuer submitters’ view - could be confusing to broaden the definition.

Proposal

- NZX considers definition already captures independence from management and shareholders.
- NZX does not propose any changes to the definition of Disqualifying Relationship.



Code Factors and Assessment Arrangements

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Corporate Governance Code Factors

Cross Directorships

- We do not propose to amend the Code to introduce cross-directorships as a factor that may indicate the presence of a Disqualifying Relationship, noting Code factor relating to personal relationships.

Director Shareholdings

- We propose to increase the Code factor threshold at which a director's shareholding in an issuer may indicate a Disqualifying Relationship from 5% to 10%.

Tenure

- NZX remains comfortable with the settings in the Code that after a period of 12 years a director should be considered long tenured. We are consulting on whether to introduce more frequent rotation for long tenured directors.
- Code commentary to highlight effect of long tenure on a director's independence will depend in part on the agency risk that it creates, which may be affected by other factors relating to the issuer, such as changes in senior management.

Arrangements for Updating Interests and Relationships

Proposed Amendments

- Amend the commentary to recommendation 2.4 of the Code to note that Issuers should have in place arrangements to ensure that directors provide up to date information regarding interests and relationships which would be relevant to a board's determination of their independence.
- Amend the Code commentary to suggest that an issuer should consider whether it would be appropriate to include a self-attestation process as part of its independence assessment arrangements.



Composition Settings

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Board and Board Committee Composition

Board Composition

- We consider our current settings to be relatively consistent with comparable exchanges and that these settings are suitable for New Zealand's market conditions.
- NZX does not propose to amend the Code to introduce additional board composition settings.

Audit and Risk Committee Composition

- We are seeking feedback on whether to amend Recommendation 3.1 of the Code to recommend that an Issuer's Audit Committee includes one member who is both an Independent Director and has an accounting or financial background.

Nominations Committee

- We are consulting on an amendment to the Code that would recommend that an issuer's Nominations Committee be comprised solely of Independent Directors.

Takeovers Committee Composition

- Amendments to Code commentary to clarify the most important consideration in a takeover context is the director's independence from the bidder, along with the director's independence in relation to the takeover transaction.



Issuer Disclosures

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Issuer Disclosures: Notice of Meeting Requirements & Market Announcements

Code Recommendation 2.4

- Annual report disclosure is recommended where a board determines a director to be independent when a Code factor applies of:
 - relationship/interest that triggers a Code factor; or
 - why the board has assessed the director to be independent.

Notice of Meeting and Market Announcements

- Proposal to align the disclosures that would be required in a notice of meeting for the appointment of a director, or the market announcement relating to a change in a director's independence status with those of the Code.



Minority Shareholder Protections

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Minority Shareholder Regime

Strong Initial Engagement

- Strong opposing views from issuers/legal advisory submitters and investor groups as to whether minority shareholders should have:
 - a greater role in the independence assessment
 - a greater role in appointing independent directors.

NZX and NZX CGI Consideration

- NZX and the NZX CGI developed a proposal favoured by investor groups that would apply to 'controlled companies' – where there is a major shareholder holding of 30% or more of the voting rights.
- The proposal was to introduce a new recommendation to the Code allowing minority shareholders the sole right to appoint two independent directors. As the Code operates on a 'comply or explain' basis, this would enable Issuers to disclose their reasoning for not adopting the practice.

Minority Shareholder Rights: Appointment of Independent Directors

NZX and NZX CGI Consideration

- NZX has determined not to proceed with amendments in this areas, for the reasons that we have outlined in the consultation paper, including:
 - proposed additional disclosure obligations;
 - test for director independence is appropriately calibrated;
 - recent changes to the Related Party and Major Transactions Guidance Note, and new Capital Raising Guidance Note which provide greater minority shareholder protections; and
 - NZX ensures its regulatory settings are not an outlier internationally, in the context of New Zealand market conditions.



Director Residency

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Director Residency

Guidance on current test

- Our preliminary view is that the appropriate factors to consider when assessing whether a director is 'ordinarily resident' would include the following:
 - the amount of time the director spends in New Zealand;
 - the director's connection to New Zealand;
 - the ties the director has to New Zealand; and
 - the manner in which the director lives in New Zealand.

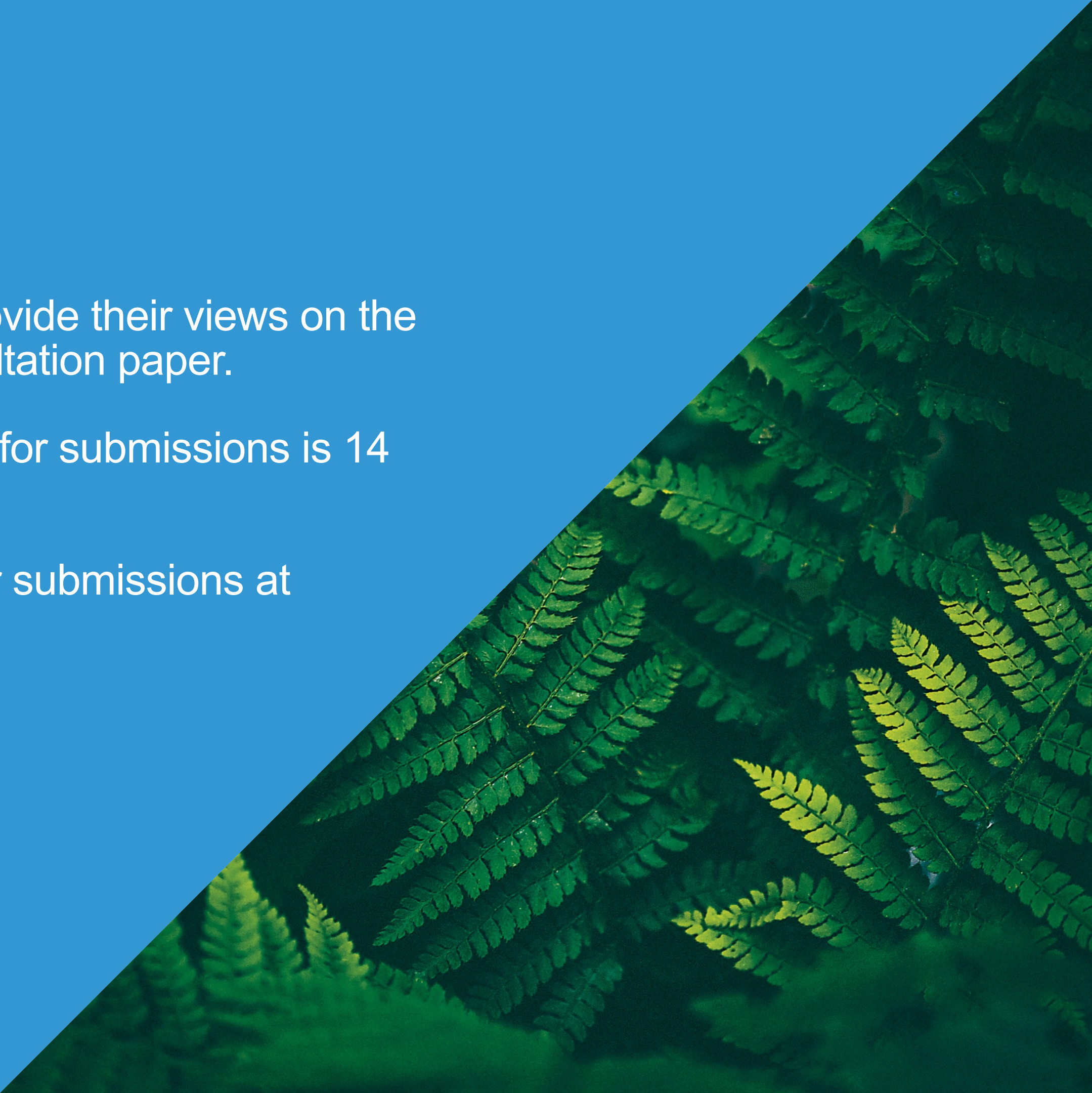
Changes to residency requirements

- Change from two NZ resident directors to either:
 - one ordinarily resident NZ director; or
 - two directors who are either resident in Australia or NZ.

We invite interested parties to provide their views on the proposals described in our consultation paper.

Please note that the closing date for submissions is 14 June 2024.

We look forward to receiving your submissions at policy@nzx.com



Thank you

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