

1 Introduction

1.1 Requisite Standard of Corporate Governance

Paragraph 3.2 of the Board's Code of Conduct provides:

"The board aspires to the highest standards of corporate governance and requires rigorous procedures to deal with actual potential conflict situations. These rely on the total acceptance by directors of the obligations to declare an interest and to isolate themselves from any activity in which they may have a conflict."

1.2 Independent Directors

One of the policy guidelines in the Board Charter concerning the composition of the board is:

"The majority of the board should comprise directors who are both non-executive and independent."

1.3 Agreements with Shenzhen Zhongjin Lingnan Nonfemet Co.Ltd (ZL)

- (a) The Company has agreed with ZL:
 - (i) that ZL may in its absolute discretion nominate such number of directors as is equal to half of the members of the board of the Company and that the Company will procure the appointment of those appointees forthwith (ZL Nominees); and
 - (ii) to enter into good faith negotiations with respect to potential concentrate sales agreements on commercial *arm's-length terms* for so long as ZL has a voting power greater than 20% in the Company.
- (b) In addition it has been agreed in principle that ZL and the Company may enter into other forms of contract such as financing arrangements.
- (c) Any contract entered into, or proposed to be entered into, by the Company (or any company controlled by the Company) with:
 - (i) ZL; or
 - (ii) a ZL Associate (defined in section 2.2(a) below),(Relevant Contract) will be the subject of this Protocol.

1.4 Composition of the Board

- (a) The board currently comprises 6 persons of whom:
 - (i) 3 are ZL Nominees (one of whom is the Chairman);
 - (ii) 2 are non-executive directors; and
 - (iii) 1 is the CEO.
- (b) None of the 3 ZL Nominees are "independent" directors, in terms of the Board Charter.

2. Legal Background

2.1 Section 191

- (a) Section 191 of the Corporations Act requires a director who has a material personal interest in a matter that relates to the affairs of the company to give the other directors notice of that interest. A notice is not required where the interest is in:

“a contract or proposed contract with, or for the benefit of or on behalf of, a related body corporate and arises merely because the director is a director of the related body corporate.”

- (b) ZL is a related body corporate of the Company because ZL is the holding company of the Company. Any company that is a subsidiary of ZL will also be a related body corporate of the Company. Each ZL Nominee is either a director or officer of either ZL or a ZL Associates (defined in section 2.2(a) below).

2.2 Part 2E.1 - Related Parties

- (a) ZL has disclosed that the parties listed in Annexure A (ZL Associates) include all of the associates of ZL for the purposes of the Corporations Act.
- (b) Part 2E.1 of the Corporations Act regulates the provision of *financial benefits* to *related parties*.
- (c) ZL is a *related party* of the Company because it controls the Company. Each entity controlled by ZL is also a *related party* of the Company.
- (d) The Contracts Committee will assume that:
- (i) each ZL Associate is a *related party* of the Company; and
 - (ii) any Relevant Contract will provide a *financial benefit* to the ZL Associate and will therefore be regulated by Part 2E.1 of the Corporations Act .
- (e) Shareholder approval will not be required to give a *financial benefit* on terms that would be reasonable in the circumstances if the Company and the ZL Associate were dealing at *arm's length* or are less favourable to the ZL Associate than *arm's length* terms (section 210 of the Corporations Act).

2.3 Section 195

Section 195 of the Corporations Act requires a director who has a material personal interest in a matter that is being considered at a meeting of directors to not be present while the matters is being considered or to vote on that matter.

3. The Board's Power to Delegate

The constitution and section 198D of the Corporations Act allows the board to delegate any of its powers to a committee of directors on the terms and subject to any restrictions the board decides. Meetings and proceedings of a committee are subject (to the greatest extent practical) to the relevant provisions of the constitution.

4. Contracts Committee

4.1 Constitution of Contracts Committee

A Contracts Committee has been established by the board solely for the purposes of the Company considering, and if appropriate, entering into any Relevant Contract from time to time. The terms upon which it has been established and powers delegated to it in relation to certain contracts the Company may negotiate and enter into are described in the resolution of the board set out in Annexure B.

4.2 Convening Meetings

- (a) Each director is to receive notice of any matter proposed to be referred to the Contracts Committee.
- (b) If any director believes that the matter notified is not one that should properly be referred to the Contracts Committee under this policy, then a Board meeting will be convened to consider and resolve whether or not the matter is to be referred to the Contracts Committee.
- (c) Subject to clauses 4.2(a) and (b), the CEO (or in his absence, the General Counsel) will convene a meeting of the Contracts Committee as soon as practical after he becomes aware of a proposal by which the Company (or any company controlled by the Company) may enter into a Relevant Contract.

4.3 Membership

The Contracts Committee comprises:

- (a) the CEO;
- (b) 2 independent non-executive directors, one of whom will be the Chairman; and
- (c) the Company's General Counsel (in a non-voting capacity).

4.4 Powers

The Contracts Committee has delegated the power to authorise the CEO to negotiate the terms of any Relevant Contract subject to such guidelines and limitations as the Contract Committee may from time to time determine.

4.5 Proceedings

Prior to the Contracts Committee considering any proposal put before it, ZL will have the right, at its election, to make a presentation on any matter before the Contracts Committee.

The proceedings of the Contract Committee will not be disclosed to other members of the board until the Relevant Contract has been executed or, at the discretion of the Contract Committee, finalised, at which time all members of the board will be provided with:

- (a) a copy of the finalised or executed Relevant Contract (as applicable); and
- (b) the minutes of the meetings of the Contract Committee and relevant advice or reports (redacted at the discretion of the Contracts Committee).

4.6 Roles of the CEO and General Counsel

- (a) The CEO will be primarily responsible for negotiating the Relevant Contracts and for engaging non-legal expertise to assist in the contract negotiations.
- (b) The General Counsel will assist the CEO and be primarily responsible to retain the services of external lawyers to:
 - (i) provide advice upon and drafting assistance with any Relevant Contract; and
 - (ii) to assist in completion of the transaction the subject of the Relevant Contract.

4.7 Engagement of Advisers

The Contracts Committee may engage suitably qualified and experienced professional advisers and industry experts to ensure that:

- (a) the Company's interests under a Relevant Contract are protected to the fullest extent practical; and
- (b) the terms of the Relevant Contract represent the *best available commercial result* for the Company in all the circumstances.

However, the Contacts Committee cannot simply accept and rely on expert advice; its members will be expected to use their own business judgment, knowledge and experience.

4.8 Arm's-length Terms

In determining whether a Relevant Contract is on *arm's-length* terms, the Contract Committee will have regard to the factors described in Annexure C.

4.9 Participation of ZL Nominees

- (a) Subject to paragraphs (c) and (d), consistent with the Board's Code of Conduct and section 195, as a general rule ZL Nominees will not participate in, or have access to, the deliberations of the Contract Committee.
- (b) The Contract Committee may, however, in its discretion, determine that it would be in the Company's best interests for the CEO to engage with one or more of the ZL Nominees to facilitate negotiations or resolution of difficult issues. Minutes of such meetings will be made by the CEO and given to members of the Contracts Committee.
- (c) Circumstances in which it may be appropriate for the CEO to engage with a ZL Nominee include where:
 - (i) the terms proposed by a ZL Associate are represented to be better than would be offered to a competitor of the Company – in this instance the ZL Nominee would be asked to facilitate the provision by the relevant ZL Associate of proof to support this representation;
 - (ii) the ZL Associate represents that if the Company dealt with a competitor of a ZL Associate, the terms and conditions offered by that competitor would not be as favourable to the Company as those offered by the ZL Associate – in this situation the ZL Associate would be asked to provide proof to support that representation; or

- (iii) negotiations with representatives of the ZL Associate may breakdown because of apparent irreconcilable differences – in these circumstance a ZL Nominee may be asked to intervene in the negotiating process with a view to resolving those differences.
- (d) ZL will have the right, should it elect to do so, prior to any deliberation by the Contracts Committee on any proposed contract to make a presentation to the Contracts Committee with respect to that proposed contract.

4.10 Guidelines for Certain Contracts

The Contracts Committee shall have regard to the following guidelines:

- (a) Financing Contracts – testing the *arm's-length* proposition will be easier in these circumstances given the abundance of publically available information concerning interest rates and other commercial terms. Security will not be available to support any financing contract under the ASX Listing Rules.
- (b) Off-take Agreements – these contracts will be more difficult to assess in the context of an *arm's-length* test because of the number of variables affecting prices and treatment charges. What will be important in these cases is to ensure that there is evidence that the ZL Associate and Perilya did in fact deal with each other as arm's-length parties would normally do, so that the outcome of their dealing is a matter of real bargaining and represents the *best available commercial result* for Perilya in all the circumstances.
- (c) Where the Company under previous Relevant Contracts has enjoyed terms and conditions superior to those enjoyed by its competitors, this will not be relevant to determine whether a subsequent contract is on *arm's-length terms*.
- (d) In all cases the Contracts Committee should aim to satisfy itself that what has been achieved is the *best available commercial result* for Perilya in all of the circumstances.

4.11 Annual Report

The Contracts Committee will prepare a report on Relevant Contracts for inclusion in the Company's annual report as part of the disclosure by the Company of *related party* transactions.

4.12 Member Approval

- (a) The Contracts Committee may recommend to the board that a Relevant Contract should be approved by members of the Company in general meeting.
- (b) The Contracts Committee will be responsible for the preparation of the notice of meeting and information memorandum and compliance with the relevant provisions of Part 2E.1 of the Corporations Act.

Annexure A

ZL Associates:

Name of ZL Associate	Address of Registered Office
Shenzhen Zhongjin Lingnan Nonfemet Co. Ltd Fankou Mine	Fankou, Renhua, Shaoguan, Guangdong, P.R.China
Shenzhen Zhongjin Lingnan Nonfemet Co. Ltd Danxia Smelter	Fankou, Renhua, Shaoguan, Guangdong, P.R.China
Shenzhen Zhongjin Lingnan Nonfemet Co. Ltd Shaoguan Smelter	Shaoguan City, Guangdong, P.R.China
Guangxi Wuxuan Panlong Lead & Zinc Mine	325 Chaoyang Road, Wuxuan County, Guangxi
Nonfemet Transportation and Warehousing Shenzhen Co.	7/F China Nonfemet Bldg, 6013 Shennan Road, Shenzhen, P.R.China 518040
Shum Yip Nonfemet Co. Ltd	18/F, Tower 2, Admiralty Centre, Admiralty, Hong Kong
Shenzhen Kangfa Development Co.	Jinbi Estate, Luohu District, Shenzhen, P.R.China
Nonfemet International (China-Canada-Japan) Aluminium Co. Ltd	Bld 59, Majialong Industrial Area, Nanshan District, Shenzhen, P.R.China
Shenzhen Nonfemet Technology Co., Ltd	Bld 12, Fuqiao Industrial Area, Fuyong, Bao'an District, Shenzhen, P.R.China
Shenzhen Nonfemet Hi-Power Battery Material Co., Ltd	Bld 10-11, Fuqiao Industrial Area, Fuyong, Bao'an District, Shenzhen P.R.China
Nonfemet Finance Co., Ltd	20/F China Nonfemet Bldg, 6013 Shennan Road, Shenzhen, P.R.China
Tianjin Jinkang Real Estate Development Co. Ltd	Bld 1-4, Area B, Guiyang Lu, Jili Garden Estate, Heping District, Tianjin, P.R.China
Hunan Yongxing Zhongjin Material Co., Ltd	Xiaokang Street, Chengguang Zhen, Yongxing County, Hunan, P.R.China
Nonfemet Commodities & Futures Agency Co., Ltd	18/F China Nonfemet Bldg, 6013 Shennan Road, Shenzhen, P.R.China

Annexure B

Board Resolution Establishing the Contracts Committee

Resolved:

- (1) Pursuant to section 198D of the Corporations Act and Rule 8 of the Company's Constitution the Board delegates its powers in connection with any proposed contract with Shenzen Zhongjin Lingnan Nonfemet Co. Ltd (ZL) and its Associates to a Contracts Committee comprising:
 - (a) the Company's Chief Executive Officer, for the time being;
 - (b) those non-Executive Directors who are independent of ZL and its Associates (currently Patrick O'Connor and Peter Harley); and
 - (c) the Company's General Counsel.
- (2) The Company's General Counsel is to provide support and advice to the Contracts Committee and to participate in the discussion on any Relevant Contract before the Contract's Committee, but has no vote on any resolution considered by the Contract's Committee.
- (3) The Contracts Committee shall, at all times, conduct its business in accordance with the document annexed to this resolution and entitled "Conflict of Interest Protocol".
- (4) The Chairman of the Contracts Committee shall be one of the independent non-Executive Directors.
- (5) The Contracts Committee's meetings and proceedings are to the greatest extent practical governed by the same rules which regulate the meetings and proceedings of the Board.
- (6) The Contracts Committee may resolve to execute any Relevant Contract (as defined in the Conflict of Interest Protocol).

Annexure C

Arm's-length Terms

1. In applying the test whether a public company and a related party are dealing on *arm's-length terms* the terms of the transaction must be assessed against objective standards what the parties themselves thought about the reasonableness of the terms is relevant as an explanation of the transaction but is not decisive as to whether the terms were reasonable for the purposes of the section.¹
2. The standard against which the terms of the transaction in question are measured are the terms that would reasonably be achieved by the hypothetical public company in the following circumstances:²
 - (a) The company is unrelated to the other party to the transaction in anyway;
 - (b) The company is free from any undue influence or pressure;
 - (c) The persons making decisions on behalf of the company are persons who are sufficiently:
 - *knowledgeable* about the circumstances of the transaction;
 - *experienced* in business; and
 - *well advised* to be able to form a sound judgement as to what is in the company's interests; and
 - (d) The company's only concern is to achieve the *best available commercial result* for itself in all of the circumstances:
 - What is the *best available commercial result* is a matter of judgment;
 - Expert evidence may be relevant as to what would be within the range of reasonable outcomes of the transaction;
 - However, the court will not blind itself to common sense and obvious commercial prudence.
3. Examples of transactions not considered to be reasonable in the circumstances if the public company and the related party were dealing at arms length include:
 - (a) a transaction that was effected without any form of legal documentation:

one would not consider it "reasonable" [within section 210 of the Corporations Act] for the transaction to involve a purchase of shares in the parent HIH, to be paid for by its wholly owned subsidiary HIHC, without any legal documentation whatsoever nor any prospect of security³; and

¹ ASIC v Australia Investors Forum & Others (No 2) (2005) 53 ACSR 30 (AIF).

² This paragraph is substantially drawn from comments made in the AIF case and in The Duke Group Limited (in liq) v Pilmer and Ors (1999) 17 ACLC 1 (Directors must exercise business judgment, not disregard their own knowledge and not just accept and act upon expert advice without question.)

³ ASIC v Adler (No3) (2002) 20 ACLC 576.

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- (b) a management fee which was “manifestly improvident” and would not have been made if the parties had been dealing at arm’s-length. The court⁴ held that a reasonable party dealing at arm’s-length for the provision of management or other services at a substantial fee would as a matter of *ordinary commercial prudence*, have insisted on:
- a written contract setting out the services to be provided and upon what terms;
 - payment as and when services were provided rather than payment of the whole of the fee a year in advance; and
 - an invoice properly particularising the services provided for which a charge was being made.

⁴ AIF