

30 November 2018

Investigation of potential disclosure breaches during the failure of Wynyard Group Limited

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Executive summary

Summary of findings

This report sets out the Financial Markets Authority's (FMA) conclusions following an investigation into the compliance of Wynyard Group Limited (Wynyard) with its continuous disclosure and fair dealing obligations. The investigation considered the period leading up to the company's failure in late 2016. While this report reflects the FMA's views, the investigation relating to continuous disclosure was completed jointly with NZX Regulation (NZXR).

Based on our investigation activities:

- the FMA does not consider that any individuals contravened the Financial Markets Conduct Act 2013 (FMC Act);
- the FMA has concerns regarding the quality of some of Wynyard's announcements, but it is not clear to us that we could establish a breach of the fair dealing provisions;
- the FMA does continue to have concerns that Wynyard may have contravened its continuous disclosure obligation in late September 2016.

Despite our view on the potential contravention of the continuous disclosure obligation, the FMA has decided to conclude the investigation and not to pursue enforcement action against Wynyard. Wynyard is now in liquidation and its shares no longer trade on the NZX. There is therefore no reasonable prospect of recovery for investors. Further, it is clear from our investigation activities to date that there will be uncertainty around any litigation against the company, and we do not consider an action against directors would have a reasonable prospect of success. We do not consider that we can justify taking action solely for precedent value.

It is important to note that the findings from our investigation have not been tested in court. Only a court can determine liability. This report instead records the views of the FMA on the conduct of Wynyard and its directors and senior managers.

Scope of investigation

Following the company's failure in October 2016, the FMA and NZX commenced an investigation into the conduct of Wynyard and its directors. As part of that investigation, the FMA and NZX have:

- reviewed and considered documentary evidence, including:
 - board papers;
 - minutes from meetings of the board, the Audit and Risk Committee, and the Due Diligence Committee;
 - advice received from Wynyard's external advisers;
 - relevant legal agreements; and
 - financial information and forecasts.
- reviewed and considered historical announcements made by Wynyard;

- interviewed three of the Wynyard Directors (one of whom is also Wynyard’s Chief Executive Officer), and its Chief Financial Officer;
- reviewed and considered responses from the Wynyard directors on our draft findings as presented to them.

The investigation made no assessment of the performance of directors or senior managers in the actions taken to navigate the company through a difficult period. Rather, the investigation focused only on whether the market was adequately informed throughout.

Purpose of this report

Transparency

Although we are discontinuing the investigation and have decided not to pursue enforcement action against Wynyard or any individuals, we have chosen to detail the investigation we undertook and its outcome in this report.¹ As a listed company, Wynyard raised \$176 million from investors.² We therefore consider there is a public interest in sharing our findings.

This report aims to provide transparency regarding our processes and consideration of this matter. Providing information into how we make regulatory decisions also aligns with the FMA’s role in promoting the confident and informed participation of investors in New Zealand’s capital markets.

Regulatory objectives

In our most recent [Annual Corporate Plan](#), we signalled our focus on both maintaining high standards of corporate governance in New Zealand companies, and compliance with continuous disclosure obligations by listed issuers. High standards of corporate governance are a driver of positive investor outcomes. In line with the FMA’s [strategic priorities](#), they are also an important contributor to capital market growth and integrity. In contrast to our other powers under the FMC Act, the FMA does not have a direct right of action for corporate governance failings.³ We do, however, play a role in:

- monitoring and influencing the quality of disclosure by issuers. At the core of our listed market environment is the requirement that issuers provide timely and accurate disclosure of material information. This empowers investors, both in making investment decisions and using their influence to shape governance practices. NZX is the frontline regulator of compliance with this requirement, which also forms the basis of the statutory obligation contained in the FMC Act.
- setting standards. This is both through our own [Corporate Governance Handbook](#), and engagement and discussions with NZX around the NZX Main Board/ Debt Market Listing Rules (Listing Rules) and the [NZX Corporate Governance Code](#).

In the case of Wynyard, we identified several areas where we were concerned that the company fell short of the disclosure and governance standards expected of listed issuers. In particular, in our view

¹ The Financial Markets Authority Act 2011 (FMA Act) expressly provides that the FMA may issue reports relating to the New Zealand financial markets and financial market participants.

² Wynyard raised \$176 million through: \$66.3 million IPO (July 2013) (NZX announcement “Wynyard Group (WYN) lists on New Zealand Stock Exchange” (19 July 2013)); \$35 million placement and SPP (June 2014) (NZX announcement “Notification of allotment of securities” (10 June 2014)); \$42 million placement and SPP (June 2015) (NZX announcement “Notice of allotment of securities” (6 July 2015)); and \$32.1 million rights issue (February 2016) (NZX announcement “Notification of allotment” (2 February 2016)).

³ Under the Companies Act 1993, directors owe their duties to the company. To take action the FMA would need to either exercise or take over a derivative action on behalf of shareholders through our powers under section 34 of the FMA Act. The public interest test sets a high bar for intervention using these powers.

Wynyard did not sufficiently engage with its disclosure obligations, and failed to proactively anticipate the information needs of the market.

While Wynyard had adopted formal board processes around disclosure, some of which aligned with best practice, we were concerned that the contemporaneous board minutes did not reflect the level of discussion on disclosure-related issues that we were told did occur.

We consider our regulatory objectives are best achieved through discussing these disclosure issues, and we have expanded on these observations in this report.

Emerging from this investigation we have also:

- developed some recommendations for early-stage issuers and their advisers. See page 15.
- alongside NZX, recommended an amendment to the continuous disclosure obligation. This amendment relates to the definition of awareness and is noted below.

Awareness in continuous disclosure

In a number of recent cases, the FMA considers that corporate governance shortcomings have meant that potentially market-sensitive information has not been brought to the awareness of directors or senior managers in a timely manner. Under the Listing Rules, this lack of awareness can mean that a listed issuer cannot be held to have contravened their continuous disclosure obligations.

In line with the approach in Australia, the FMA considered that there may be value in closing this gap through the addition of a constructive test for awareness. NZX was also mindful of this issue, and has amended its Listing Rules to give effect to this change.

This means the continuous disclosure obligation extends to information that a director or senior manager 'ought to have known'. In our view, this change will do no more than codify existing investor expectations of corporate governance practice. It has particular importance given the ability for listed issuers to make 'same class' offers in reliance on continuous disclosure and cleansing notices.

The [NZX Continuous Disclosure Guidance Note](#) also sets out expectations for issuers in respect of their compliance arrangements, with a view to ensuring rapid escalation of issues that may require disclosure.

Compliance with disclosure obligations

Background to the review

Wynyard was a technology company that was listed on the NZX from July 2013 until October 2016.

The company developed analytics software used for intelligence, investigations, and information security.

August 2016 announcements

Wynyard made two significant announcements to the market in August 2016.

Date	Announcement	Detail
11 August	Wynyard secures standby facility	<p>Wynyard announced that it had arranged a 'standby' \$10 million working capital facility with the Skipton Building Society, a major shareholder (Skipton Facility). The company noted that the Skipton Facility 'should it be required, will help Wynyard manage the working capital needs of the business over the next 12 months'.</p> <p>The announcement noted that Wynyard would need to satisfy conditions before drawing down on the Skipton Facility. Most notably, the board needed to 'be confident that the company can enter into transactions sufficient to repay any amount drawn down under the facility'. The board did not suggest at that time that there would be difficulty in satisfying that (or any other) condition.</p>
24 August	Wynyard FY16 Interim Results & Strategic Review Update	<p>Wynyard released a strategic update to the market (August Strategic Update), alongside its interim financial statements. In the August Strategic Update, Wynyard significantly downgraded its revenue guidance to \$27-\$30 million.</p> <p>Wynyard had previously provided guidance to the market in February 2016 that it would generate \$54-\$65 million in revenue during 2016. Wynyard had said that it also expected to receive \$14 million in revenue from a conditional contract with a Middle Eastern security agency (Contract A).⁴ Contract A had been announced to the market in early January 2016.⁵</p> <p>In downgrading its revenue guidance, the company emphasised that the reduction partly reflected a change in methodology. The forecast excluded large government contracts, including Contract A. Wynyard noted that it was 'making good progress' on these contracts but that it wanted to be 'cautious in setting market expectations'.</p>

⁴ NZX announcement "Wynyard FY15 Unaudited Preliminary Results Announcement" 23 February 2016.

⁵ NZX Announcement "Wynyard Signs \$27m Conditional Agreement" 5 January 2016.

	<p>Wynyard also updated the market on its cash position. Wynyard’s interim financial statements showed that the company had \$14.7 million in cash at 30 June 2016.</p> <p>The company noted it had implemented a number of significant cost-saving initiatives, and forecast that its ‘cash burn’ would fall to \$2.4 million per month.⁶ On this basis, Wynyard stated that it expected to be ‘cash positive at year end’.</p> <p>In adopting the going concern assumption in the interim financial statements, the directors referred to the Skipton Facility as being in place for working capital management if required.⁷</p>
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Voluntary administration

After the two August 2016 statements, the company did not make any substantive announcements to the market until it went into trading halt on 17 October 2016.⁸

After going into trading halt, two further significant announcements followed in October:

Date	Announcement	Detail
20 October	Wynyard Group Market Update	<p>Wynyard announced that due to its current working capital position, the company would need to make an initial partial drawdown on the Skipton Facility in early November 2016.</p> <p>It noted that it was investigating whether it could meet the conditions necessary to make this drawdown.</p>
25 October	Wynyard announces voluntary administration	<p>Wynyard’s directors disclosed that they did not consider it to be in the best interests of shareholders to raise further equity or debt. This included drawing down on the Skipton Facility.</p> <p>The directors therefore elected to place Wynyard into voluntary administration.</p>

FMA investigation

Market reaction

Given the information available to the board, we found no evidence that its decision to place the company in voluntary administration was unreasonable.

In our view, Wynyard’s previous disclosures nonetheless meant that these developments came as a surprise to the market. This included the decision not to draw down on the Skipton Facility. This was a particular focus of a complaint to the FMA from the New Zealand Shareholders Association.

⁶ A company’s ‘cash burn’ is the rate at which the company is using up its cash balance.

⁷ Wynyard’s Interim Financial Statements for the six months ended 30 June 2016.

⁸ NZX announcement “Wynyard Group Limited (“WYN”) – Trading Halt of Securities” 17 October 2016.

While, following the 24 August 2016 announcement, the market was aware that Wynyard was in financial difficulty, there appears to have been limited understanding that the company's issues were so acute or how significantly the position was deteriorating. This was reflected in the Wynyard share price, which remained fairly consistent following the 24 August announcement, and valued the company at \$38.5 million prior to the trading halt.⁹

Investigation process

These issues led the FMA and NZXR to initiate an investigation into Wynyard's compliance with its continuous disclosure obligations (CD Obligation).¹⁰

Given the relevant legal framework for the CD Obligation, the investigation focused on determining:

- the universe of information Wynyard was aware of during 2016, and whether any of this information could be considered 'material information';
- whether material information was released immediately upon Wynyard becoming aware of it; and
- if not, whether the material information was subject to an exception from disclosure.

As part of the review, and as stated above, the FMA and NZXR obtained and considered a wide range of information. This included:

- information from Wynyard such as board papers, management reports and minutes;
- information obtained during FMA and NZXR interviews with three of Wynyard's directors (one of whom is also Wynyard's Chief Executive Officer) and its Chief Financial Officer; and
- market information, such as Wynyard's prior disclosure announcements and trading data.

In line with our fair dealing remit, the FMA also used this information to determine whether Wynyard's disclosure announcements could be substantiated, and whether any of the company's announcements could be considered to be false or misleading.

The relevant legal framework covering both the CD Obligation and the fair dealing provisions is set out in the Appendix to this report.

Key findings

The following is a summary of our key findings.

Change in forecast cash position

After the August Strategic Update, Wynyard needed to either secure a large government contract or bring in capital from an asset sale in order to meaningfully extend its 'cash runway'.¹¹

⁹ Wynyard's share price fell from around 60c to 48c between 1 and 10 August (with the announcement of the Skipton facility). It fell further to around 28c following the announcement on 24 August and continued to fall to around 20c between August and early October. This does indicate some awareness of the level of financial difficulty Wynyard was facing. However, if the market had been aware of the information available to the Board in September, the share price may well have fallen even further than this.

¹⁰ The responsibility for overseeing compliance with the CD Obligation sits with NZXR at first instance. The FMA and NZXR nonetheless frequently elect to work together on these matters. This is particularly the case where a matter has significant market impact, or where there may be potential contraventions of financial markets legislation that extend beyond the CD Obligation.

¹¹ A measure of the amount of time a company has before its cash runs out, assuming no change in its burn rate.

In this context, we consider Wynyard's statement that it 'expected to be cash positive at year end'¹² was important in providing the market with confidence that it had a reasonable period of time in which to pursue those initiatives. The Skipton Facility appeared to be available to bridge any potential gap between the finalisation of a contract or asset sale, and cash collection. The market's expectations around the forecast cash position and the Skipton Facility would have been important to investors in valuing Wynyard.

Wynyard's statement about its cash position was based in part on an internal cash flow forecast that Wynyard would have \$0.2 million in cash on hand at 31 December 2016.¹³ Prior to Wynyard's 30 September 2016 board meeting, management revised its internal cash flow forecast (Revised Forecast) and provided that forecast to the board. The Revised Forecast noted that there had been delays to several items in Wynyard's revenue pipeline. There had also been no meaningful progress on other options, such as Contract A or asset sales. The Revised Forecast showed Wynyard's forecast cash position for the rest of 2016 had worsened by a total of \$3.2 million; of that deterioration \$2.2 million represented revenue deferral to 2017, as a result of delays in the timing of transactions.¹⁴

Material information

In our view, when taken in context, the worsening in Wynyard's forecast cash position contained in the Revised Forecast, and the flow on effects from that worsening position, was 'material information': it was likely to have had a material effect on the price of Wynyard's shares if it were generally available to the market. Management and the board were, obviously, aware of the deterioration in Wynyard's cash flow forecast. In our view, the information did not fall within one of the exceptions to disclosure. As a result, when Wynyard elected not to release this information after the 30 September board meeting, we consider that it may have failed to comply with its CD Obligation.

While the Wynyard directors are of the view that a \$3.2 million deterioration was not large in absolute terms, in our view that level of deterioration was of high significance when looked at in the context of both Wynyard's financial position and the information the company had previously released to the market:

- there was now a substantial risk that Wynyard would not be cash positive at the end of 2016 in the manner previously disclosed to the market. The Revised Forecast indicated that, absent new funding, Wynyard's cash position at year end would be negative \$3 million.¹⁵ In August the 'inherent risk rating' for 'cash position' was shown as 'high'.¹⁶ By the 30 September board meeting this had been upgraded to 'extreme'.¹⁷ This reclassification of risk rating was significant, since the availability of cash was critical to support the business as a going concern. In our view it was material information that the market should have been provided with.
- the Revised Forecast appeared to alter the company's view of the Skipton Facility. In the August Strategic Update, Wynyard referred to the Skipton Facility as being available 'if required'.¹⁸ At that point it had been the view of the board that Wynyard would not need to draw down on the Skipton

¹² NZX announcement "Wynyard FY16 Interim Results & Strategic Review Update" 24 August 2016.

¹³ September Board Papers at 18.

¹⁴ September Board Papers at 18.

¹⁵ September Board Papers at 18. This is not clearly set out in the documents, however, a decrease in \$3.2 million in 2016, not taking account of any borrowing under the Skipton loan, would mean a negative \$3 million cash position.

¹⁶ August Board Papers at 120.

¹⁷ September Board Papers at 75.

¹⁸ NZX announcement "Wynyard FY16 Interim Results & Strategic Review Update" 24 August 2016.

Facility until the middle of 2017, if at all.¹⁹ By the 30 September board meeting this view had changed. It was noted at the 30 September board meeting that it was now likely the company would need to draw down \$2 million in November from the Skipton Facility and a further \$2 million in December in order to remain a going concern.²⁰

- If Wynyard needed to begin drawing down on the Skipton Facility in November, the timeframe the company had to secure a large government contract or sell assets had shortened significantly. By 30 September 2016, imminently securing Contract A became an important variable in determining the future viability of Wynyard.²¹ However, the market was unaware of this information, with Contract A having been removed from revenue guidance in August 2016.²²

The board advised the FMA that it robustly discussed and considered, in the presence of its advisors, whether it was in possession of material information that needed to be disclosed to the market. It was the view of the board that it was not in possession of any material information and that relatively minor movements in its forecast cash position did not need to be disclosed.

However, in our view, had the board considered that information in the context of its impact on Wynyard's overall position, it should have recognised that the worsening in Wynyard's forecast cash position contained in the Revised Forecast and the flow on effects that had for the position of the company was material information. During our investigation, we nonetheless found no evidence that either Wynyard or any individuals had made this inference.²³

Trading halt

At the board meeting on 17 October there was a much clearer recognition by the board of the depth of the issues around Wynyard's cash position.²⁴ This recognition led the board to make the decision to enter into a trading halt. There had been no further worsening of the company's financial position: the 17 October board papers note that there had been 'no significant change' to the Revised Forecast.²⁵ Instead, it appears that it was the need to draw down on the Skipton Facility, and the associated need to be sure that the Skipton Facility conditions (especially the repayment conditions) could be met, as well as external corporate finance and legal advice, that brought home to the board the significance of the information Wynyard already held.

In particular, discussions after the 17 October trading halt made clear to the board that the worsening in Wynyard's forecast cash position had significantly shortened the company's cash runway.²⁶ In line with the terms of the Skipton Facility, the company needed almost immediate certainty that it could repay any drawdown. We found limited evidence that the board had proactively considered whether it could satisfy this requirement prior to mid-October. By mid-October (and arguably for some period before that) Contract A appeared to be the only option that could have provided this certainty.

Having spent more than 10 months waiting on Contract A, the CEO travelled to the Middle East with one week to finalise the agreement.²⁷ By the time the CEO returned to New Zealand it was clear that the directors could not have sufficient confidence around Contract A to draw down on the Skipton

¹⁹ FNZC August Board Update forecast at 7. This shows the Skipton loan first being drawn down in March 2017.

²⁰ Minutes of the Board (30 September 2016) at [5].

²¹ Minutes of the Board (30 September 2016) at [5].

²² NZX announcement "Wynyard FY16 Interim Results & Strategic Review Update" 24 August 2016.

²³ For completeness, we note that a failure to recognise the importance of information is not a defence under the CD Obligation.

²⁴ Minutes of the Board (17 October 2016) at [1] and [4].

²⁵ October Board Papers at 4.

²⁶ Minutes of the Board (22 October 2016) at [2] – [4].

²⁷ Minutes of the Board (22 October 2016) at [1].

Facility. While institutional shareholders were approached, there was insufficient market interest to support an emergency capital raise. Other options such as asset sales had either stalled or remained nascent, and would take months to progress. It was this information that would result in the board electing to place Wynyard into voluntary administration.

Liability of individuals

We have considered whether there was a potential contravention by the directors relating to the failure to update the market on Wynyard's cash position following receipt of the Revised Forecast.

As is noted in the Appendix, establishing accessory liability for contraventions of the CD Obligation would at least require actual knowledge that the relevant information was material information (i.e. price sensitive) and was not generally available to the market.

As we have noted, based on our review, we consider it would be a challenge to establish this to the required evidential standard. As a result, we do not consider an action against individuals would have a reasonable prospect of success.

The fact that the directors did not recognise the importance of this information raises concerns for us from a corporate governance perspective. That issue is discussed further in this report. The fact that a reasonable director may have done so is nonetheless not a basis for accessory liability.

Fair dealing

We similarly consider that any action under the fair dealing obligations would be unlikely to succeed.

Approach to disclosure

The CD Obligation was a standing agenda item at board meetings and Wynyard received ongoing professional advice. These processes align with best practice.

Formal processes and external advice are, however, an adjunct to substantive board discussion, not a substitute. During our investigation, we developed concerns about the Wynyard board's level of detailed and considered engagement with the company's disclosure obligations. In particular, we did not see evidence in the board's contemporaneous minutes of Wynyard sufficiently turning its mind to the market's expectations, and to the types of information investors would consider to be material in their investment decisions. While this exercise can be challenging at times, it is an inescapable element of the CD Obligation. We were informed that discussions on the CD Obligation took place at board meetings but the FMA has not been able to find support for this in the documentary evidence available. While minutes were kept of Wynyard board meetings, as discussed further below, they did not contain the level of detail necessary to demonstrate compliance. Wynyard has said that the style of the minutes/level of detail recorded reflected the advice of external advisors. Whether or not this is so, the FMA's view is that contemporaneous records need to reflect discussions on important matters such as CD Obligations; failure to do so opens up risk that boards will not be able to demonstrate compliance. It also has the potential to undermine market confidence in the quality of board discussions; there is a risk that not accurately recording board discussions can be seen as providing directors with the opportunity to rewrite history to suit their purposes at a later point. To be clear, the FMA is not saying that occurred here; but the market could certainly have that perspective if such a practice were to generally prevail.

The need for a board to engage with its disclosure obligations is not important simply to minimise legal risk. It is also essential, from a commercial perspective, to ensure that the directors fully understand a company's risk profile and outlook.

In addition, the way in which a board approaches CD Obligations will need to reflect the nature of the enterprise. Wynyard was not a mature company with an established business record in developed markets. Rather it was a complex early stage company selling unique products into new markets with which the directors had had little experience. Accordingly, Wynyard's approach to its CD Obligation needed to reflect this context – on an ongoing basis – and share information with the market that could materially affect the market's view of the company.

Announcements did not provide sufficient context

Wynyard was originally part of the Jade Software Corporation. It was separated out and listed via IPO in July 2013.²⁸ The offer document made it clear that the company was high risk, high growth; principal risks included that:²⁹

- Wynyard did not expect to be profitable in the near future.
- Wynyard had a limited operating history, which made future operating results difficult to predict.
- failure to manage growth effectively could adversely impact the company.

Against that backdrop, the market was certainly on notice as to the sort of risk and uncertainty that would attend investment in Wynyard.

But that also put a premium on up-to-date, material information being shared with the market as soon as it became available.

During its tenure as a listed company Wynyard released a large number of market announcements. These were typically positive in tone, focusing on contract wins and the company's revenue pipeline. Many announcements contained no financial information.³⁰ At times we consider Wynyard's approach made it difficult for investors to fully understand the business and its trajectory. Clear disclosure was of particular importance to Wynyard's shareholders (and potential other investors), as it developed products and operated in markets largely unfamiliar to investors.

Despite the fact that Wynyard was a loss-making company priced primarily off a revenue multiple, the company provided limited information about the composition of its revenue guidance. The lack of clarity and context provided in these disclosures may have led to Wynyard's risk profile being underestimated by the market. In particular, while Wynyard did make statements about its move towards larger contracts, we do not consider the company clearly spelt out its reliance on a small number of very large government contracts in the Middle East and Asia.³¹

²⁸ NZX announcement "Wynyard Group (WYN) lists on New Zealand Stock Exchange" (19 July 2013).

²⁹ Wynyard Group Prospectus (6 June 2013) at 8 – 9.

³⁰ For example, NZX announcement "Wynyard signs \$27m conditional agreement" (5 January 2016), NZX announcement "Wynyard signs \$2.8m agreement with state policing agency" (10 February 2016), and NZX announcement "Wynyard Lands \$3.3m Deal for ACTA Announcement" (3 March 2016).

³¹ Three contracts (including Contract A) made up more than 50% of Wynyard's internal 'revenue outlook' for 2016 (March Board Revenue Outlook (2 March 2016)). They were significantly larger than the expected profile for large government contracts disclosed by Wynyard in February 2016 (NZX announcement "Wynyard Group Capital Raise Update: 1 for 4 Rights Offer (24 February 2016)). Wynyard made several references to its reliance on large government contracts in 'EMEA' (For example, NZX announcement "Wynyard FY15 Unaudited Preliminary Results Announcement" (23 February 2016)). We consider this may have had the effect of obscuring

Limited evidence of substantive board discussions

In our view, as Wynyard fell into financial difficulty, the issues around Wynyard's approach to disclosure heightened. By the second half of 2016 the information needs of the market had changed. The company had a high cost structure, cash burn of several million dollars a month and less than \$15 million in cash on hand.³² In this environment the company's statements about cash runway and cash position assumed far greater importance.

Based on the contemporaneous evidence available, we do not believe Wynyard fully appreciated or engaged with these changes. The company continued to include limited context in its market announcements. The tenor of announcements remained positive.³³ This approach made it difficult for the company to appropriately manage market expectations. In making the statement that it expected to be 'cash positive at year end' in the August Strategic Update, for example, Wynyard decided not to describe the level of uncertainty associated with this statement.³⁴ The company similarly elected not to disclose the possibility that it would draw down on the Skipton Facility in 2016.

In terms of the contemporaneous evidence available, during the course of our investigation activities we found limited evidence of substantive board discussions relating to the CD Obligation. This is of particular relevance because the CD Obligation requires an issuer to assess whether or not particular information is price sensitive. Despite the significant pressure on the company, a number of board minutes during the second half of 2016 contained the following stock statement: 'The board and management discussed the Company's continuous disclosure obligations and noted that they had not been made aware of any material information that required disclosure, or any matters or information that would require the Company to make disclosure, under the NZX continuous disclosure requirements'.³⁵ Bearing in mind the serious challenges that were continually confronting the company during this period, and the obvious potential for a poor outcome for current (and potential) investors in Wynyard, it was imperative that the board be discussing, and can be shown to have discussed, its CD Obligations in an upfront, detailed and considered way. It should not be for the market to have to accept a generic statement of discussions having occurred with no record of the terms of that discussion. The discipline of recording the discussion is an important piece of assurance that discussion occurred and was comprehensive.

Where the board's contemporaneous records do detail discussions that took place, they primarily focused on the most obvious triggers for the CD Obligation. For example: whether there was a need to update the company's revenue guidance, or whether any of the various initiatives being considered to extend Wynyard's cash runway (such as asset sales) had progressed to a point where disclosure might be required.³⁶ In our view, this approach did not fully account for the need to consider information in context, and contributed to the potential continuous disclosure contravention discussed on pages 9 and 10:

the fact that the vast majority of its large contracts were in the Middle East and Asia. To be clear, we are not saying this was deliberately designed to mislead.

³² NZX announcement "Wynyard FY16 Interim Results & Strategic Review Update" (24 August 2016) and FY16 Interim Results Investor Presentation.

³³ For example, NZX announcement "Wynyard FY16 Interim Results & Strategic Review Update" (24 August 2016) and NZX announcement "Wynyard secures standby facility" (11 August 2016).

³⁴ NZX announcement "Wynyard FY16 Interim Results & Strategic Review Update" (24 August 2016).

³⁵ Minutes of the Board (26 July 2016) at [6]; Minutes of the Board (9 August 2016) at [4]; Minutes of the Board (23 August 2016) at [5]; and Minutes of the Board (30 September 2016) at [8].

³⁶ For example, Minutes of the Board (10 August 2016) at [1] in relation to the Skipton Facility; and Minutes of the Board (23 August 2016) at [2] in relation to the Financial Statements announcement.

- Outside its revenue guidance, Wynyard had released other information that had shaped market expectations, including its comments around its forecast cash position
- Wynyard's difficult financial position had significantly lowered the threshold for materiality: incremental changes could now have strategic importance, particularly when considered collectively
- The company does not appear to have proactively anticipated the risk that it would not be able to draw down on the Skipton Facility.³⁷

In making these observations, we do note that the company and the board was going through significant transition. The composition of the board had changed over the course of 2016, with a number of directors leaving, and others joining in this period. A new chairman was elected May 2016. In addition, on the management side, a new CFO was appointed in mid-2016 and there was significant staff retrenchment underway.

The new board identified that things needed to change, in terms of how directors interacted with management, restructuring the business to ensure its viability and introducing sharper financial and cash flow management disciplines into the business. The board had informed the market of the steps it proposed to take and had begun implementing many of them.

The board also expressly stated in announcing its interim results in August 2016 that it had exercised 'significant judgment' as to forecast sales and associated cash flows and acknowledged the existence of 'material uncertainties in relation to the Group's ability to continue as a going concern'.³⁸

Nonetheless, bearing in mind the critical importance of cash to the survival of the business, the market should, in our view, have been informed of the Revised Forecast so that it could evaluate the likelihood of the company being a going concern. In addition, in light of the obvious risk that the business might fail, the board should have been careful to undertake the discipline of documenting its discussions on the CD Obligation to ensure that all relevant matters were considered, and to provide assurance to its regulators and the market that the CD Obligation was well understood and at the forefront of the board's thinking.

³⁷ Wynyard tested whether it could comply with the financial covenants within the Skipton Facility. This testing did not appear to consider whether the board had the necessary confidence it could enter transactions sufficient to repay any draw down.

³⁸ Wynyard Group Limited Interim Financial Statements for the six months ended 30 June 2016 at Notes to the Financial Statements.

Recommendations for early stage issuers

Our investigation activities on the Wynyard matter have led us to develop some recommendations for early stage issuers and their advisers. To be clear, in making these observations we have drawn not only on what we observed in the Wynyard matter, but also broader concerns and considerations that our investigation activities raised.

- The board must at all times remain conscious of the need to apply an enquiring mind to information received from management. We expect the boards of all issuers to empower themselves by seeking both appropriate breadth of management views and independent advice. This is of particular relevance to early stage issuers, who often have limited track records and high-growth aspirations. The board may not have had time to establish a cohesive culture or the opportunity to observe the issuer through multiple reporting cycles.
- The board should ensure that the minutes of board meetings accurately and adequately reflect the discussion and debate that has occurred.
- Early stage issuers should provide appropriate context around any guidance they release. The performance of these issuers is inherently uncertain. There are typically a range of potential scenarios that sit behind any guidance. Consistent with the [NZX Continuous Disclosure Guidance Note](#), it is important to ensure proper emphasis is given to this range of outcomes
- Loss-making issuers need to manage their cash runway proactively, rather than reactively. Waiting until you are under cash flow pressure before either seeking to raise capital or change strategy adds material risk. If an early-stage issuer's cash runway does narrow, the information needs of the market are likely to change. In addition to information relating to revenue, information around cash runway and the options available to the company to extend that runway will assume greater importance. In these circumstances there is a heightened need to engage with the views of investors and proactively manage expectations in order to avoid market surprises.

Appendix

Wynyard's disclosure obligations

Continuous disclosure

As a listed issuer, Wynyard was subject to the CD Obligation.

The CD Obligation is contained in section 10 of the Listing Rules. Section 10.1.1(a) of the Listing Rules provides that every issuer shall, once the issuer becomes aware of any material information, immediately disclose that material information to NZX, provided that this Rule shall not apply when:

- a reasonable person would not expect the information to be disclosed; and
- the information is confidential and its confidentiality is maintained; and
- one or more of the circumstances specified in section 10.1.1(a)(iii) applies.

This CD Obligation promotes equal and timely access to information by investors, and is integral to the process of fair and efficient price discovery.

Failure to comply with the CD obligation may also result in a contravention of the FMC Act.

NZXR is responsible for monitoring potential contraventions of the CD Obligation in the Listing Rules, while the FMA plays the same role in relation to the FMC Act.

The following definitions are relevant to the CD Obligation:

- 'Material Information', in relation to an issuer, means information that a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of quoted securities of the issuer, and that relates to particular securities, a particular issuer, or particular issuers rather than to securities generally or issuers generally.
- An issuer is 'aware' of material information when a director or executive officer of the issuer has come into possession of the information in the course of the performance of his or her duties as a director or executive officer.
- The concept of 'information' does not imply a requirement that an item exists in a discrete form, such as a board paper. Information also extends beyond pure matters of fact and includes matters of opinion and intention.

Under both the Listing Rules and the FMC Act, liability for compliance with the CD Obligation falls solely on the issuer.

While NZXR cannot take action against directors or senior managers for an issuer's failure to comply with its CD Obligation, the FMA does have the ability to pursue action against individuals who have been involved in a contravention of a civil liability provision as accessories under the FMC Act. A person is involved in a contravention if he or she aids, abets, counsels, procures, induces or conspires to effect the contravention, or if he or she is in any way knowingly concerned in, or party to, the contravention. The accessory liability regime can extend to directors and employees of the issuer.

In the case of a contravention of the CD Obligation, it is likely that a claimant would need to prove, at least, that the alleged accessory had actual knowledge that the relevant information was material information (i.e. price sensitive) and was not generally available to the market.

Fair dealing

Wynyard was also subject to the 'fair dealing' provisions in part 2 of the FMC Act. These provisions are concerned with misleading or deceptive conduct, and false, misleading or unsubstantiated representations. They apply to any dealing in financial products or the supply of financial services.