ANNUAL REPORT 2018

NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL

CONTENTS

This report covers the period 1 January 2018 to 31 December 2018.

CHAIR'S REPORT

CHAIR'S REPORT

INTRODUCTION

The 2018 year for the Tribunal has been marked by an increased workload recorded in the greater number of referrals to the Tribunal. What is less clear from the number of referrals alone, is that the increasing workload has encompassed more complex cases where it is hoped the Tribunal through its decisions has been able to contribute to market education on important issues.

In last year's report I commented that continuous disclosure issues continued to be in the market's consciousness. Continuous disclosure issues again contributed to a contentious matter referred to the Tribunal. The changes to the Listing Rules and market education have also meant that continuous disclosure is front of mind for issuers. This year there has also been an increase in participant referrals. Consequently, this year has seen a spread of complex referrals including continuous disclosure, participant trading, NZX broker status and corporate governance matters.

The highly contentious and increasingly complex nature of some of the referrals the Tribunal received in 2018 has had several effects on the Tribunal's work:

1. Often the nature of the matters and pre-referral correspondence between the parties has required a longer investigatory timeframe before referral. That is a natural consequence of the complexity of some matters;

2. The breadth and complexity of some of the issues and matters in dispute has required the Tribunal to request further information from the parties to ensure it has the full facts for each determination, slowing the ability of the Tribunal to issue a timely decision. Again I consider this to reflect the complexity of the relevant matters and the diligence of the Tribunal divisions to ensure they have all of the relevant information that might impact on their decision, rather than reflecting on the quality or completeness of the submissions and evidence filed by the parties; and

3. More comprehensive decisions are required to address the issues raised.

Reflecting on the greater complexity involved in many of the referrals, I consider the timeliness of the outcome to reflect the proper consideration of the matters referred. The Tribunal's decisions continue to be issued promptly and comprehensively, with six of the eight matters considered concluded within one month of referral.

The Tribunal also notes that when matters are referred issuers and participants are often engaging legal representation earlier, acknowledging the seriousness to them of any adverse finding.

Of particular importance this year has been the first referral of a participant where NZX Regulation (*NZXR*) sought, and the Tribunal ordered, removal of a broker's NZX Adviser status. The decision was upheld on Appeal. Both the Division decision and that of the Appeal Division are detailed below.

FUNCTION OF NZ MARKETS DISCIPLINARY TRIBUNAL

By way of background, the Tribunal is an independent body established under the NZ Markets Disciplinary Tribunal Rules (*Tribunal Rules*).

The Tribunal's principal role is to determine whether there has been a breach of the NZX Market Rules[1] in matters referred to it by NZX Limited (*NZX*) and to determine what, if any, penalties should be imposed.

The Tribunal serves in an adjudicative role. It is not an inspectorate of market conduct. That role is performed by NZXR and the Financial Markets Authority.

REFERRALS

The Tribunal received seven referrals from NZXR during 2018, up from three referrals in 2017. One appeal against a decision of the Tribunal was also considered during 2018. Three of the referrals involved settlements. Details of the referrals received and the Tribunal's decisions are set out on pages 9 to 22 of this report.

NZXR issued five Infringement Notices in 2018 (see here).

NZXR REPORT

NZXR has recently published its NZX Oversight & Engagement Report 2019. The report includes information on NZXR's investigation and enforcement activity undertaken during 2018 and was provided to the Tribunal in connection with NZX's annual regulatory reporting requirements under the Tribunal Rules. The Tribunal recommends reference to the report to understand the investigation and transition of matters from identification to referral to the Tribunal, together with the other regulatory responses NZXR adopts.

MEMBERS

The Tribunal has members appointed to represent issuers, market participants, clearing participants, derivatives participants and the public, as well as a legal category.

Seven Tribunal members were appointed for additional terms (Danny Chan, Trevor Janes, Susan Peterson, James Ogden, Nick Hegan, Mariëtte van Ryn and Leonard Ward).

Ivana Erceg Floechinger resigned from the Tribunal in 2018 to undertake a different role. David Lane was appointed to the Tribunal in 2018 to fill the gap as a participant member.

[1] The NZX Participant Rules, the NZX Listing Rules, the NZX Derivatives Market Rules, the Clearing and Settlement Rules of New Zealand Clearing Limited and the Fonterra Shareholders' Market Rules.

SPECIAL DIVISION

Dame Alison Paterson continued as Chair of the Special Division in 2018 and Matthew Blackwell was appointed to the Special Division in 2018.

Dame Alison Paterson's term on the Tribunal ends this May, having served the maximum 9-year term. I would like to thank Dame Alison for her significant contribution as both a Tribunal member and Chair of the Special Division. The Special Division has a heavy workload and carries an important regulatory role. I have been grateful for the experience, care and attention Dame Alison has brought to the role.

RESOURCING

As required by the Tribunal Rules, the Tribunal confirms that it believes it has adequate resources available to it to undertake its role under the Tribunal Rules and that NZX has continued to provide all the assistance which the Tribunal requires to undertake its role.

The Tribunal is well administered and supported by our Executive Counsel. They are vital for the efficient operation of the Tribunal and I am grateful to have such an excellent level of support available to me and all Tribunal members.

DISCIPLINARY FUND

The NZX Discipline Fund accounts indicate that there is an accumulated surplus of $373,113 as at 31 December 2018.

Rachael Reed QC | CHAIR
12 April 2019

MEMBERS

MEMBERS

MEMBERS OF THE TRIBUNAL AS AT 31 DECEMBER 2018

LEGAL

Rachael Reed QC (Chair), Sir Terence Arnold QC, Deemple Budhia, Rachel Dunne and Simon Vodanovich

LISTED ISSUER

Jo Appleyard, Trevor Janes, James Ogden, Dame Alison Paterson and Susan Peterson

MARKET PARTICIPANTS

Nick Hegan (Deputy Chair), Matthew Blackwell, Geoff Brown and David Lane*

MEMBERS OF THE PUBLIC

Danny Chan, Richard Keys, Richard Leggat, Christopher Swasbrook**, Mariëtte van Ryn and Leonard Ward

CLEARING PARTICIPANTS

Geoff Brown and David Lane*

DERIVATIVES PARTICIPANTS

Matthew Blackwell and Nick Hegan

Rachel Batters and Stephen Layburn act as Executive Counsel to the Tribunal.

MEMBERS OF THE SPECIAL DIVISION AS AT 31 DECEMBER 2018

Dame Alison Paterson (Chair), Matthew Blackwell, James Ogden, Mariëtte van Ryn and Leonard Ward

Rachel Batters acts as Executive Counsel to the Special Division.

* David Lane was appointed to the Tribunal on 13 September 2018.

** Christopher Swasbrook's member category was changed to Public.

STATEMENTS OF CASE, FINDINGS AND PENALTIES

NZMDT 1/2018 NZX V TRUSCREEN LIMITED (TRU)

Division: Jo Appleyard (Division Chair), Rachel Dunne and Richard Keys

Memorandum of Counsel filed: 26 January 2018

Settlement Agreement dated: 7 February 2018

Date of Determination: 12 February 2018

Rule Breached: NZAX Listing Rule 3.2.1 (22 May 2017 version)

FACTS:

NZAX Listing Rule 3.2.1 requires Issuers to have at least two Directors who are ordinarily resident in New Zealand. Following TRU's annual general meeting held on 21 September 2017, TRU had only one Director who was ordinarily resident in New Zealand. TRU took immediate steps to find a new Director and a second New Zealand resident Director was appointed on 19 October 2017.

TRIBUNAL FINDINGS:

The Tribunal noted that Directors, for various reasons, may resign without warning. The Tribunal also recognised that the appointment process for Directors must be robust and that Boards need sufficient time to identify and select suitable candidates. However, the Tribunal also noted that if an Issuer has only the minimum number of Directors to satisfy the corporate governance requirements in the Rules it must have an adequate succession plan in place to avoid breaching the Rules in the event of an unexpected resignation. This could include making an interim appointment while a permanent appointee is being identified.

The Tribunal considered that there were a number of mitigating factors in this case, including that TRU was not aware that its second New Zealand resident Director intended to withdrawal from re-election until the AGM was held and that TRU acted promptly to appoint a replacement Director.

The Tribunal approved the Settlement Agreement between NZX and TRU under which TRU admitted breaching NZAX Listing Rule 3.2.1.

PENALTY:

The Tribunal considered that, given the mitigating factors in this case, the agreement by the parties that TRU not pay a financial penalty was appropriate.

COSTS:

TRU was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION:

Under the terms of the Settlement Agreement, TRU accepted the penalty of a public censure for its breach of NZAX Listing Rule 3.2.1 – see here.

NZMDT 2/2018 NZX V PARTICIPANT A

Division: Rachael Reed QC (Chair), Matthew Blackwell, Richard Leggat and Christopher Swasbrook

Statement of Case filed: 10 April 2018

Date of Determination: 20 June 2018

Rule Breached: NZX Participant Rules 5.8.1 and 8.1.1 (7 March 2016 version)

FACTS:

Participant A was a designated NZX Advisor[2] and an Employee of an accredited Market Participant. For a number of complex reasons, Participant A electronically copied a client's signature from a document on file and pasted it onto a scope of review letter which he presented as genuine to his employer during an internal peer review.

Participant A accepted that his conduct had breached NZX Participant Rules 5.8.1(a), 5.8.1(b)(i), 5.8.1(c), 8.1.1(a), 8.1.1(b)(i) and 8.1.1(c), and submitted that an appropriate penalty would be a fine and supervision.

FINDINGS:

The Tribunal found that Participant A had also breached NZX Participant Rules 5.8.1(b)(ii) and 8.1.1(b)(ii).

The Tribunal was not satisfied that supervision would be an appropriate penalty in the circumstances of this case, including that the conduct had occurred shortly after Participant A had already completed nine months under close supervision from his firm.

The Tribunal noted that it is a fundamental obligation of an NZX Advisor to act with honesty and integrity. Clients dealing with a Market Participant are entitled to rely on the fact that a person holding the designation has demonstrated fitness and propriety to be individually accredited as an NZX Advisor. The NZX Adviser designation must be a symbol that investors can have trust and confidence in the Adviser to act with honesty and integrity at all times.

PENALTY:

The Tribunal ordered the revocation of Participant A's NZX Advisor designation.

COSTS:

Participant A was ordered to pay the costs of the Tribunal and NZX.

[2] In the updated Participant Rules, references to NZX Advisor were changed to NZX Adviser.

PUBLICATION:

Both NZX and Participant A submitted that a private reprimand was appropriate in this case. The Tribunal agreed given the impact a public censure may have on Participant A's health and did not consider that the public interest in naming Participant A outweighed the potential detriment to him in this case. Given the penalty imposed by the Tribunal to revoke Participant A's NZX Advisor designation, the interests of investors and clients were protected without the need for a public censure. NZXR has published a Case Study based on the circumstances of this matter here.

APPEAL AGAINST TRIBUNAL DETERMINATION IN NZMDT 2/2018 NZX V PARTICIPANT A

Appeal Division: Nick Hegan (Appeal Division Chair), Sir Terence Arnold QC and Mariëtte van Ryn

Statement of Appeal filed: 2 July 2018

Date of Appeal Determination: 21 August 2018

APPEAL:

Participant A appealed against the Tribunal's determination in NZMDT 2/2018 NZX v Participant A that (a) he breached Participant Rules 5.8.1(b)(ii) and 8.1.1(b)(ii); and (b) the only appropriate penalty for the breach was to revoke his NZX Advisor designation. Participant A sought an order from the Appeal Division that the determination be set aside and replaced with a determination that for any proven breach a period of supervision and/or financial penalty should be imposed.

FINDINGS:

Role of Tribunal on Appeal

The Appeal Division first had to determine what the role of the Tribunal was on an appeal. The Appeal Division found that:

> *"By way of summary, as we see it, the position under the Tribunal Rules in relation to the scope of an appeal is as follows:*
>
> *a. Where there is no new evidence on an appeal, the task of the Appeal Division will be to review the Hearing Division's decision in order to determine whether, on the basis of the facts it has found, the Hearing Division has misinterpreted or otherwise misapplied the Rules. The focus will be on considering whether there is a material error in the Hearing Division's analysis.*
> *b. Where there is new evidence on an appeal which the Appeal Division has determined to be credible and cogent, the Appeal Division will have to determine precisely what impact it has on the facts as found by the Hearing Division.*
> *c. Once the Appeal Division has assessed the extent to which the factual findings made by the Hearing Division need to be modified to incorporate the new evidence it has accepted, it will then need to consider how the Hearing Division's application of the Rules to the facts before it is affected by the new factual scenario. The Appeal Division must consider whether, in light of the new evidence, there is an "error" in the Hearing Division's analysis.*
> *d. If the Appeal Division considers that the new factual information would have materially affected the Hearing Division's application of the Rules to the facts, so that there is an error in the Hearing Division's analysis, it will be entitled to allow the appeal, in whole or in part."*

Treatment of new evidence

Participant A submitted new evidence during the Appeal Procedure. The Appeal Division had to consider how it should address this new evidence in the context of the Tribunal Rules.

The Appeal Division found that, apart from genuinely updating evidence, the introduction of new evidence on an appeal under the Tribunal Rules should occur only in limited circumstances, such as where the evidence could not have been provided at the original hearing for some good reason or where it could not reasonably have been predicted that a particular issue would arise at the original

hearing and/or be dealt with in the Hearing Division's determination. An appeal should not be seen as an opportunity for a party to attempt to bolster the case it presented at the original hearing by adducing further evidence that it could have adduced at the original hearing. To permit that would be to undermine the type of appellate process that the Tribunal Rules envisage.

Comment on Market Participant Compliance Programmes

The Appeal Division noted that it is fundamental to the proper functioning of the market that Market Participants' compliance programmes operate effectively. Advisors who are required to participate in such programmes must do so with probity. An advisor who acts dishonestly in completing a compliance programme undermines the value of that programme and with it, compliance programmes more generally. Placing a false client signature on a document is reprehensible in itself. It is particularly serious in the context of a compliance programme. Such conduct is reasonably likely to bring at least the relevant Market Participant into disrepute, and in all probability the market more generally.

Decision of Appeal Division

Having considered the submissions of the parties, the Appeal Division was not persuaded that there was a material error in the Hearing Division's reasons for rejecting the alternative penalties available and imposing the penalty of revocation nor did it consider that any of the new evidence submitted by Participant A materially affected the Hearing Division's reasoning as to penalty.

However, given the seriousness of the penalty, the Appeal Division considered it was appropriate to stand back and look at the matter in the round, asking itself the question whether the penalty of revocation was disproportionate or unjustified when considered against the nature of the breach and the background circumstances.

The Appeal Division found that it was satisfied revocation was both proportionate and appropriate in the circumstances of this case. The Appeal Division did not consider the determination to be a misrepresentation or an erroneous application of the relevant Participant Rules, or that the new evidence provided would have materially affected the Hearing Division's application of those Rules.

COSTS:

Participant A was ordered to pay the costs of the Appeal Division and NZX.

PUBLICATION:

The Appeal Division considered that it was appropriate that its decision not be publicly released on the grounds set out in NZMDT 2/2018 NZX Ltd v Participant A. NZXR has published a Case Study based on the circumstances of this matter here.

NZMDT 3/2018 NZX V WINDFLOW TECHONOLOGY LIMITED (WTL)

Division: Susan Peterson (Division Chair), Matthew Blackwell and Mariëtte van Ryn

Statement of Case filed: 13 April 2018

Date of Determination: 11 May 2018

Rule Breached: NZAX Listing Rule 10.5.1 (22 May 2017 version)

FACTS:

NZAX Listing Rule 10.5.1 requires an Issuer to release its annual report within four months of the end of its financial year. WTL filed its 2017 annual report on 2 November 2017, two business days after it was due.

WTL had previously breached NZAX Listing Rule 10.5.1 (filing its 2016 annual report two business days late) and NZAX Listing Rule 10.4.1 (filing its 2017 preliminary full year report less than one business day late). Neither breach resulted in the suspension of WTL's securities, nor were they referred to the Tribunal.

FINDINGS:

The Tribunal noted that compliance by Issuers with the periodic reporting requirements is essential in maintaining market integrity and investor confidence.

The Tribunal has in recent years markedly increased the penalties it imposes for breaches of the periodic reporting requirements and matters involving repeated breaches of the Listing Rules.

While this was the first occasion that WTL had been referred to the Tribunal, the duration of the breach was short (two business days) and it did not result in a suspension of WTL's securities, the Tribunal was concerned that this was the third consecutive breach of the periodic reporting requirements by WTL.

PENALTY:

WTL was ordered to pay $25,000 to the NZX Discipline Fund.

COSTS:

WTL was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION:

WTL was publicly censured and the Tribunal's determination was released in full - see here.

NZMDT 4/2018 NZX V ISSUER A

Division: Trevor Janes (Division Chair), Deemple Budhia and Danny Chan

Statement of Case filed: 4 May 2018

Oral Hearing held: 7 June 2018

Date of Determination: 27 June 2018

Rule Breached: NZX Listing Rule 10.1.1 (1 October 2017 version)

FACTS:

NZX alleged that Issuer A breached Listing Rule 10.1.1 by not releasing Material Information to the market when required. Issuer A had released guidance for its financial year end, including expected sales volumes for its products, and had updated this guidance on several occasions. The actual volume sold of its products differed from the guidance provided to the market.

NZX submitted that Material Information relating to both (a) a material risk that actual sales of Issuer A's products would materially differ from its market guidance; and (b) the actual quantities of products sold following year end, was not released to the market when required.

Issuer A considered that it had complied with its continuous disclosure obligations at all times and that in the context of its business and performance, the volume of its products sold at year end in itself did not amount to Material Information and did not require immediate disclosure in accordance with Listing Rule 10.1.1.

FINDINGS:

The Tribunal considered that a reasonable person would expect material changes in the sales volumes of Issuer A's products, which were consistently highlighted in Issuer A's market announcements and which were the biggest contributor to Issuer A's revenue, to have a material effect on the price of Issuer A's shares. Accordingly, the Tribunal considered that material changes in sales volumes, compared to the market guidance it had provided, were likely to be Material Information in the context of Issuer A's business and performance.

The Tribunal did not consider that it had sufficient evidence to determine that Issuer A was aware before year end that there was a material risk of a material deviation from the guidance it had previously provided to the market, based on the limited Board documentation it had been provided.

However, the Tribunal considered that the deviation between the expected sales volumes, as expressed in Issuer A's guidance to the market, and the actual number of sales at year end was material – a 30% decrease – and also had a significant impact on Issuer A's revenue.

The Tribunal has stated in previous decisions that ultimately it is a matter for boards to exercise their own commercial judgement based on their knowledge of the Issuer and its business to determine whether information is Material Information and whether disclosure is required. However, there was no documentary evidence to demonstrate that Issuer A's Board had in fact considered its continuous disclosure obligations in respect of its actual sales volumes against its guidance to the market.

Issuer A submitted that the fact there was no notable movement in its share price following its year end announcements supported its view that its sales volumes were not Material Information. However, as previously stated by the Tribunal, evidence of actual movements in the price of an Issuer's securities

following the release of information is not determinative of whether the information was material at the time. Indeed even where there is no actual price movement in the securities when the information became available to the market, at the time the information was assessed by the Board it may well have been Material Information that had to be disclosed. The Tribunal also noted that the market had not been informed of the actual number of products sold at year end because Issuer A did not specify the number sold in its announcements.

The Tribunal considered that a reasonable person would expect that a 30% decrease in actual sales from the guidance provided to the market would be likely to materially affect Issuer A's share price in the context of its business and performance. Accordingly, the Tribunal found that Issuer A did breach Rule 10.1.1 by not disclosing to the market the actual number of products sold in its financial year.

The Tribunal was concerned about the lack of Board documentation during the relevant period and noted the comments made by NZX in its Continuous Disclosure Thematic Review in 2017 that:

"Issuers should record in their board meeting minutes the reasons for a decision to disclose or not disclose information when this issue is considered. Clear and transparent records can demonstrate that the board followed a good process in its decision making."

PENALTY:

Issuer A was ordered to pay $40,000 to the NZX Discipline Fund.

COSTS:

Issuer A was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION:

Issuer A was privately reprimanded by the Tribunal. In coming to its decision, the Tribunal considered the guidance set out in Tribunal Procedure 9.3, including that the Tribunal must use its discretion when deciding whether to impose a penalty of public censure and in doing so must have regard to the overall conduct of the respondent.

The Tribunal noted that although the relevant considerations were finely balanced, having regard to the previous decisions of the Tribunal for similar breaches and the mitigating factors in this case, including the submission from both parties that there was no measurable harm to investors, that Issuer A did provide the market with information on its actual financial and (some) sales performance at year end, and that Issuer A had not previously breached the Listing Rules, a private reprimand was appropriate in this instance. The Tribunal considered that the public interest would be better served by NZX providing guidance to the market generally. NZXR has published a Case Study based on the circumstances of this matter here.

NZMDT 5/2018 NZX V ISSUER B

Division: Simon Vodanovich (Division Chair), Mariëtte van Ryn and James Ogden

Statement of Case filed: 24 May 2018

Date of Determination: 26 July 2018

Rule Breached: NZX Listing Rule 3.3.9 (1 October 2017 version)

FACTS:

Director A was appointed as an Executive Director of Issuer B by its Board. Director A was elected by shareholders at the first annual meeting of Issuer B following his appointment by the Board and again at the annual meeting held three years later. Director A was then appointed Managing Director of Issuer B. Following this appointment, Director A did not seek re-election from shareholders for 14 years, until Issuer B brought the issue to the attention of NZXR.

FINDINGS:

The Tribunal considered that Issuer B had not breached Listing Rule 3.3.6 because Director A was re-elected at the first annual meeting of Issuer B following his appointment as a Director by Issuer B's Board.

However, the Tribunal considered that Director A's subsequent appointment as Managing Director did not provide him with immunity from the requirement to comply with Listing Rule 3.3.9 (no term of appointment of an Executive Director of an Issuer or any of its Subsidiaries shall exceed five years). As a consequence, Director A should have retired and sought re-election at each five-year interval.
The Tribunal noted that the Listing Rules did not contemplate appointment to the office of Executive Director. Other than identifying which Directors are also employees, limiting the term of such office and providing scope for one such employee/Director to be exempted from rotation every 3 years, the use of the title in the context of the Listing Rules does not denote a specific status or require a specific appointment process.

The Tribunal noted the poor drafting interaction between Listing Rule 3.3.9 and (particularly) Rule 3.3.12 (one Executive Director is exempt from the rotation requirement in Listing Rule 3.3.11 if permitted under the company's constitution). It also accepted that market practice may not be consistent. The Tribunal was mindful of these factors when it considered the appropriate penalty in this case.

In its determination, the Tribunal considered the following as mitigating factors:

1. The wording of Listing Rule 3.3.9 and its interaction with other relevant Listing Rules is less than clear;

2. The breach did not continue once discovered;

3. The Issuer cooperated with NZXR's investigation and provided all material facts;

4. The breach was unintentional and based on a bona fide misunderstanding of the Listing Rules;

5. The Issuer took prompt action to correct any harm caused as a result of the breach by having its Managing Director step down and seek re-election at its next annual meeting; and

6. The Issuer has not previously been referred to the Tribunal for a breach of the corporate governance provisions.

The Tribunal also noted the following as aggravating factors:

1. The matter was self-reported but was not done promptly as there was a considerable lapse of time whereby the relevant Rules could have been discussed with legal advisers and/or NZXR;

2. Any breach of the corporate governance provisions should be taken seriously and, in this case, the breach was re-occurring; and

3. The Issuer's conduct was careless to the point of negligence over an extended period of time.

PENALTY:

Issuer B was ordered to pay $20,000 to the NZX Discipline Fund.

COSTS:

Issuer B was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION:

Issuer B was privately reprimanded by the Tribunal. In coming to its decision, the Tribunal considered the guidance set out in Tribunal Procedure 9.3 and that the exercise of its power to publicly censure a Respondent is underpinned by the need to ensure that its process is transparent whilst also balancing the public interest in naming offenders and the detriment to the Respondent from being named. Generally, a breach that falls within Penalty Band 2 of Procedure 9, particularly a corporate governance breach, is likely to result in the name of the Respondent being published. However, in the present case, the challenges presented by the interpretation and application of the Listing Rules led the Tribunal to the conclusion that the public interest would be better served by NZX providing guidance to the market generally. NZXR has published a Case Study based on the circumstances of this matter here.

NOTE:

The NZX Listing Rules which came into effect on 1 January 2019 (with a six-month transition period) have simplified the provisions regarding director rotation – see new Listing Rule 2.7.

NZMDT 6/2018 NZX V CRAIGS INVESTMENT PARTNERS LIMITED (CRAIGS)

Division: Nick Hegan (Division Chair), Jo Appleyard and Matthew Blackwell

Memorandum of Counsel filed: 3 October 2018

Settlement Agreement dated: 3 October 2018

Date of Determination: 23 October 2018

Rules Breached: NZX Participant Rules 3.9, 4.5.2, 10.8.1(a) and 10.14.9 (7 March 2016 version)

FACTS:

Craigs provided a Direct Market Access service to a client (*the Client*) who traded as principal and submitted orders using trading algorithms. On 11 occasions between 15 May 2017 and 25 October 2017, the Client entered orders into the trading system that resulted in trades in the ordinary shares of an S&P/NZX 50 Index Issuer with no change in beneficial ownership. These trades were in breach of Participant Rule 10.14.9.

Craigs did not have adequate filters in place to prevent these trades and did not act on alerts generated by its post-trade monitoring system. Craigs' failure to prevent trading in breach of Participant Rule 10.14.9 resulted in the additional breaches of Participant Rules 3.9, 4.5.2 and 10.8.1(a).

FINDINGS:

The Tribunal noted that the trading conduct provisions of the Rules are important to the integrity of the market. The underlying policy of these Rules is to ensure that the NZX markets remain fair, orderly and transparent.

The Tribunal was concerned that Craigs did not make any effort to review or audit the efficacy of the filters it had in place, despite the post-trade alerts generated by its monitoring system. Nor did it have the appropriate filters, screens and security measures in place to ensure the accuracy of the details, the integrity and bona fides of all trading messages which were entered into the trading system, and as a result orders were entered by the Client which did not result in a change of beneficial ownership.

The Tribunal found that there were a number of aggravating factors in this case, including that Craigs was negligent having turned off intra-day monitoring and had ignored alerts arising from its end of day monitoring which should have alerted it to the ineffectiveness of its filters. The Tribunal noted, however, that there was no actual impact on investors or the market, as the trades without a change in beneficial ownership did not impact the Issuer's share price and that they were unintentional.

The Tribunal approved the Settlement Agreement between NZX and Craigs under which Craigs admitted breaching the Participant Rules.

PENALTY:

Craigs was ordered to pay $35,000 to the NZX Discipline Fund.

COSTS:

Craigs was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION:

Under the terms of the Settlement Agreement, Craigs accepted the penalty of a public censure for its breach of Rule 3.2.1 – see here.

NZMDT 7/2018 NZX V FIRST NZ CAPITAL SECURITIES LIMITED (FNZC)

Division: Sir Terence Arnold QC (Division Chair), Geoff Brown and James Ogden

Memorandum of Counsel filed: 2 August 2018

Settlement Agreement dated: 28 August 2018

Date of Determination: 31 August 2018

Rules Breached: NZX Participant Rules 8.1.1(b)(iii), 8.8.1, 10.1.1, 10.2.2(a), 10.2.2(b) and 10.12.5

(7 March 2016 version)

FACTS:

On 30 December 2016, the last trading day of 2016, NZX had an abbreviated trading day with a Pre-Close session of 12:45 p.m. to 1:00 p.m. FNZC received a client order at 11:52 a.m. to sell 698,956 Auckland International Airport Limited (*AIA*) ordinary shares (*the Order*). AIA's share price at the time the Order was received was $6.54.

FNZC accepted the Order, which included complex execution instructions, and entered several orders to complete the Order. The Order was complex because it was not a simple buy/sell order and it had volume and price restrictions, specific timeframes and limits on how the Order could be traded. FNZC was also trading as Principal in AIA on the day.

AIA ordinary shares closed at $6.25 on the day, a decline in the price of 4.4% from the time the Order was received. FNZC's trading on this day was also inconsistent with the market for AIA ordinary shares over the short and medium term. FNZC also failed to flag all relevant sales for its facilitation account as short sales.

FINDINGS:

The Tribunal noted that the trading conduct provisions of the Rules are important to the integrity of the market. The underlying policy of these Rules is to ensure that the NZX markets remain fair, orderly and transparent. Trading Participants must ensure that their trading conduct promotes and helps maintain an orderly market.

FNZC's trading in AIA on 30 December 2016 was inconsistent with recent trading in AIA's ordinary shares, impacted the market for AIA's securities with the price of AIA's ordinary shares declining 4.4% from receipt of the Order to market close on the last trading day of 2016, negatively impacted the year end valuation of AIA's ordinary shares and was not in accordance with Good Broking Practice given the potential conflict of interest in FNZC also trading as Principal.

The Tribunal approved the Settlement Agreement between NZX and FNZC under which FNZC admitted breaching the Participant Rules.

PENALTY:

FNZC was ordered to pay $45,000 to the NZX Discipline Fund.

COSTS:

FNZC was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION:

Under the terms of the Settlement Agreement, FNZC accepted the penalty of a public censure for its breach of Rule 3.2.1 – see here.

SPECIAL DIVISION CHAIR'S REPORT

SPECIAL DIVISION CHAIR'S REPORT

The Special Division is a division of the Tribunal constituted under the Tribunal Rules to regulate the listing of NZX and its Related Entities. The objective of the Special Division is to foster market confidence that the NZX Market Rules and the Tribunal Rules are applied to NZX and its Related Entities in an impartial and independent manner.

Under the Tribunal Rules, a Related Entity of NZX is any participant in an NZX Market which is a related company of NZX (as defined in the Companies Act 1993) or in which any member of the NZX Group holds a relevant interest in 50% or more of the voting securities. As at the date of my report, NZX Wealth Technologies Limited (which was accredited by the Special Division as a Depository Participant in July 2017) and Smartshares Limited (the manager of a number of exchange traded funds) are Related Entities for the purposes of the Tribunal Rules.

The Special Division has had a busy year. Our activities included:

1. acting in the place of NZX Regulation in respect of the Energy Mad Limited and PaySauce Limited reverse listing. Following completion of the various transactions on 21 December 2018, Energy Mad Limited became PaySauce Limited and ceased to be a Related Entity of NZX;

2. reviewing and approving the quotation of subordinated notes issued by NZX on the NZX Debt Market;

3. reviewing and approving various up-dates to the Product Disclosure Statement for the exchange traded funds managed by Smartshares Limited;

4. overseeing compliance by NZX Wealth Technologies Limited with its obligations under the Depository Operating Rules and Procedures; and

5. considering a number of SMARTS alerts for trading in the securities of NZX and its Related Entities as referred to it by NZX Market Surveillance. A summary of each referral to the Special Division in 2018 follows this report.

This is my last report as Chair of the Special Division, with my term on the Tribunal ending this May. I would like to thank all the members of the Special Division – Matthew Blackwell, James Ogden, Mariëtte van Ryn and Leonard Ward - for their work during my term as Chair. I want to thank James and Matthew in particular for their very prompt and expert review of the SMARTs alerts referred to the Special Division.

Dame Alison Paterson | SPECIAL DIVISION CHAIR
12 April 2019

NZMDT SPECIAL DIVISION MATTERS – 1 JANUARY TO 31 DECEMBER 2018

During 2018, the Special Division received 75 referrals from NZX Market Surveillance as outlined below.

DATE REFERRED IN 2018	ISSUER	ACTION
11 Jan	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
15 Jan	NZC, GBF	Considered the nature of the alert, sought information from the market participant involved and determined that no further action was necessary.
23 Jan	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
30 Jan	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
2 Feb	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
5 Feb	NZX	Considered the nature of the alert, sought information from the market participant involved and determined that no further action was necessary.
7 Feb	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
8 Feb	EMF	Considered the nature of the alert, sought information from the market participant involved and determined that no further action was necessary.
16 Feb	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
20 Feb	NZX, USV	Considered the nature of the alerts and determined that no further investigation was necessary.
27 Feb	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
1 March	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
7 March	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
13 March	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
14 March	APA, USF	Considered the nature of the alert and determined that no further investigation was necessary.
15 March	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
20 March	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
6 April	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
10 April	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
11 April	USG	Considered the nature of the alert and determined that no further investigation was necessary.

17 April	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
19 April	NZX	Considered the nature of the alert, sought information from the market participant involved and determined that no further action was necessary.
26 April	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
2 May	FNZ	Considered the nature of the alert and determined that no further investigation was necessary.
3 May	USS, USG	Considered the nature of the alert and determined that no further investigation was necessary.
8 May	NZX	Considered the nature of the alert, sought further information from NZXS and determined that no further investigation was necessary.
10 May	APA	Considered the nature of the alert and determined that no further investigation was necessary.
11 May	ASR, USV	Considered the nature of the alert and determined that no further investigation was necessary.
14 May	ASF, USG, APA	Considered the nature of the alert and determined that no further investigation was necessary.
22 May	EMF, USM, GBF, ASF	Considered the nature of the alert, sought information from the market participant involved and determined that no further action was necessary.
24 May	USS	Considered the nature of the alert and determined that no further investigation was necessary.
30 May	OZY	Considered the nature of the alert and determined that no further investigation was necessary.
7 June	ASF	Considered the nature of the alert and determined that no further investigation was necessary.
14 June	ASF	Considered the nature of the alert and determined that no further investigation was necessary.
18 June	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
22 June	NZX010	Considered the nature of the alert, sought further information from NZXS and determined that no further investigation was necessary.
25 June	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
28 June	NZB	Considered the nature of the alert, sought information from the market participant involved and determined that no further action was necessary.
2 July	ASF	Considered the nature of the alert and determined that no further investigation was necessary.
10 July	MAD	Considered the nature of the alert and determined that no further investigation was necessary.

18 July	ASD, ASF, ASP, ASR, MZY, OZY, APA, EMF, EUF, USF, FNZ, NPF	Considered the nature of the alert and determined that no further investigation was necessary.
16 August	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
14 September	APA	Considered the nature of the alert and determined that no further investigation was necessary.
21 September	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
12 October	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
15 October	NZX, USF	Considered the nature of the alert and determined that no further investigation was necessary.
6 December	ASR, EUF, APA	Considered the nature of the alert, sought further information from NZXS and determined that no further investigation was necessary.
7 December	NZX	Considered the nature of the alert, sought information from the market participant involved and determined that no further action was necessary.
7 December	USV	Considered the nature of the alert, sought further information from NZXS and determined that no further investigation was necessary.
19 December	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
28 December	EMF	Considered the nature of the alert, sought further information from NZXS and determined that no further investigation was necessary.

DIRECTORY

NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL

https://nzx.com/NZMDT

PO BOX 105 269

AUCKLAND 1143

RACHAEL REED QC | CHAIR

RACHEL BATTERS | EXECUTIVE COUNSEL

EMAIL rachel.batters@nzmdt.com