ANNUAL REPORT 2020

NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL

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This report covers the period 1 January 2020 to 31 December 2020.

TRIBUNAL CHAIR'S REPORT

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Tēnā koutou katoa

In a tumultuous year driven by extensive lockdowns throughout the world, equities have been volatile. In such a market, regulation focuses on issuers' disclosure obligations and participants' trading conduct to ensure that our markets are informed and orderly. While the Tribunal will continue to ensure that the full circumstances of any matter referred to it are taken into account, including the ability to respond promptly to unexpected events, the ongoing conduct of issuers and participants must be focused on ensuring that the operation of the markets is fair, orderly and transparent. Even when Boards are managing considerable risk and change, continuous disclosure obligations need to be considered as part of the primary agenda.

The last year has seen the Tribunal consider referrals dealing with client account security on an online trading platform, the manner in which client funds were held on trust by a participant and an issuer's compliance with its continuous disclosure obligations. While the referrals received by the Tribunal were not numerous they all involved fundamental obligations under the NZX Market Rules.

NZ MARKETS DISCIPLINARY TRIBUNAL

The NZ Markets Disciplinary Tribunal (*Tribunal*) is an independent body established under the NZ Markets Disciplinary Tribunal Rules (*Tribunal Rules*). The Tribunal serves in an adjudicative role. It is not an inspectorate of market conduct. That role is performed by NZ RegCo (acting on behalf of NZX Limited (*NZX*)) and the Financial Markets Authority (*FMA*).

The Tribunal's principal role is to determine whether there has been a breach of the NZX Participant Rules, the NZX Listing Rules, the NZX Derivatives Market Rules, the Clearing and Settlement Rules of New Zealand Clearing Limited or the Fonterra Shareholders' Market Rules (*NZX Market Rules*) in matters referred to it by NZ RegCo. If a breach of the NZX Market Rules is established, the Tribunal must determine what, if any, penalties should be imposed. The Tribunal may also review decisions made by NZ RegCo in respect of a waiver or ruling in matters referred to it by the applicant, provided the basis for such a referral are met, for example where the decision was irrational having regard to the evidence available or where NZX did not observe the rules of procedural fairness.

NZ REGCO

In December 2020, NZX formally separated its regulatory and commercial functions, establishing a subsidiary, NZ RegCo, which is governed by a separate board and CEO. NZ RegCo is responsible for monitoring and enforcing the NZX Market Rules. NZX continues to be responsible for developing and amending the NZX Market Rules (including the Tribunal Rules) and determining the practices and policies under which NZX's markets operate. This restructure did not affect the role of the Tribunal or the Tribunal's continued independence from NZX and NZ RegCo.

NZ RegCo published its Oversight and Engagement Report on 26 February 2021. This report includes information on the investigation and enforcement activity undertaken by NZ RegCo (and its predecessor NZX Regulation) during 2020 and was provided to the Tribunal in connection with NZX's annual regulatory reporting requirements under the Tribunal Rules. The report can be found here. The Tribunal recommends reference to the report to understand NZ RegCo's role and the processes it uses to determine what enforcement action to take, including when matters will be referred to the Tribunal.

Under the Tribunal Rules, NZ RegCo has the power to issue fines of up to $10,000 for minor breaches of the NZX Market Rules. NZ RegCo issued one Infringement Notice in 2020 – see here.

REFERRALS

Three matters were referred by NZ RegCo to the Tribunal during 2020, down from ten matters referred during 2019. All three matters involved breaches that the Tribunal considered to be serious, as each breach had the potential to adversely impact on the clients and investors involved.

In a matter referred to the Tribunal against ASB Securities Limited (*ASBA*), ASBA accepted breaching the NZX Participant Rules relating to client account security after issues with its online share trading platform meant that a number of client accounts were vulnerable to unauthorised viewing or trading access over an extended period of time. While there was no evidence of financial loss to the clients or investors involved, the Tribunal was concerned that the breach had the potential to significantly impact on the affected clients. The Tribunal considered that the breach resulted from a lack of effective compliance testing by ASBA of its processes and the supervision of its staff. The Tribunal approved a settlement between NZX and ASBA under which ASBA was fined $80,000 and publicly censured by the Tribunal. This matter should be a reminder to Participants to ensure that they have proper controls in place in order to detect non-compliance with internal procedures, particularly those affecting the security of client accounts.

Tiger Brokers (NZ) Limited (*TBNZ*) was referred to the Tribunal by NZX for allegedly failing to hold client funds on trust. This is a fundamental obligation under the NZX Participant Rules and is also a requirement under the Financial Advisers Act 2008. Following extensive submissions from both TBNZ and NZX, the Tribunal found that while TBNZ had breached the NZX Participant Rules by depositing client funds in an account with a bank before that bank had been approved by NZX, the Tribunal was not satisfied that NZX had demonstrated that client assets held in that account were not being held on trust and noted the subsequent confirmation from the bank that the account was indeed a trust account. The Tribunal considers that, following this case, there is an opportunity for NZX to clarify what characteristics an account must have in order to be considered a trust account under the NZX Participant Rules (this

would be particularly helpful for accounts held in banks in overseas jurisdictions) and the form of the acknowledgement required.

TBNZ did accept breaching other NZX Participant Rules in relation to its use of the account by not complying with an NZX direction and for not maintaining total client assets equal to or exceeding its outstanding obligations. TBNZ also failed to correctly name client fund accounts held at other banks. The Tribunal was very concerned by the conduct of TBNZ in this matter and considered that TBNZ's breach of the NZX Participant Rules in its use of the account and failure to comply with NZX's direction were intentional. TBNZ was publicly censured and ordered to pay a fine of $160,000 plus costs.

In the third matter referred to the Tribunal during 2020, Air New Zealand Limited (*AIR*) accepted a breach of its continuous disclosure obligations following the release of a statement from its CEO to its staff, Airpoints™ members and selected media before it was released to the market via NZX's Market Announcement Platform (*MAP*). The CEO's statement included information regarding AIR's target of reducing labour costs by a further $150 million, which AIR accepted was Material Information. AIR had failed to observe its own Continuous Disclosure Policy when finalising the CEO's statement. The Tribunal notes that an Issuer should ensure that it adheres to its own policies in order to mitigate the risk of not disclosing Material Information as required under the NZX Listing Rules. The Tribunal approved a settlement between NZX and AIR under which AIR was fined $40,000 and publicly censured by the Tribunal. In approving the settlement, the Tribunal noted that it had taken into consideration that the breach had occurred during a period of significant uncertainty, particularly for those in the airline industry, arising from the COVID-19 pandemic. In my Chair's report last year, I noted that the Tribunal would ensure that all referrals of alleged breaches that occur during the current turmoil are considered in their full context.

Further details of these referrals and the Tribunal's decisions are set out on pages 10 to 22 of this report.

MEMBERS

As I noted in my Chair's report last year, the terms of a number of long-standing Tribunal members end in 2021 and 2022. I'm pleased to say that NZX has recently re-appointed James Ogden and Mariëtte van Ryn for a further three-year term, pending a wider review of the Tribunal's membership. The re-appointment of James and Mariëtte will assist the Tribunal to maintain its high level of experience and ensure continuity in the core membership of the Tribunal's Special Division.

The membership terms of Nick Hegan, Susan Peterson and Leonard Ward end in May and July this year, all having served 9 years as members of the Tribunal. I would like to thank Nick, Susan and Len for their contribution to the Tribunal over many years. I am particularly grateful for the generous and insightful support I have received from Nick in his role as Deputy Chair.

SPECIAL DIVISION

James Ogden has continued his excellent stewardship of the Special Division, which I'm grateful will continue following his re-appointment. James' report on the activities of the Special Division can be found on page 23 of this report.

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 NZX Discipline Fund accounts (which are included in the NZ RegCo Oversight and Engagement Report) indicate that there is an accumulated surplus of $541,731 as at 31 December 2020.

I thank all of the members of the Tribunal and our excellent Executive Counsel for their work this year.

Ngā mihi

Rachael Reed QC | CHAIR
16 April 2021

MEMBERS

MEMBERS

MEMBERS OF THE TRIBUNAL AS AT 31 DECEMBER 2020

LEGAL

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

LISTED ISSUER

Kirsty Campbell, Nicola Greer, James Ogden and Susan Peterson

MARKET PARTICIPANTS

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

MEMBERS OF THE PUBLIC

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

CLEARING PARTICIPANTS

Geoff Brown and David Lane

DERIVATIVES PARTICIPANTS

Matt 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 2020

James Ogden (Chair), Matt Blackwell, Mariëtte van Ryn and Leonard Ward

Rachel Batters acts as Executive Counsel to the Special Division.

REFERRALS

NZMDT 1/2020 NZX V ASB SECURITIES LIMITED

Division: Geoff Brown (Division Chair), Kirsty Campbell and Simon Vodanovich

Statement of Case filed: 18 March 2020

Settlement Agreement dated: 5 May 2020

Date of Determination: 26 May 2020[1]

Rules Breached: NZX Participant Rules 4.5.5, 9.1.1(c), 10.6.1(d), 10.7.1 and 10.8.1(a)

FACTS:

Under the Participant Rules, Trading Participants (such as ASBA) may allow their authorised clients to access their trading system in order to trade on NZX's markets. ASBA administers an online share trading (OST) platform, which provides its registered users with the ability to place, amend or cancel orders on NZX's markets and to view order information and account details.

Between 2004 and 2018, 576 of ASBA's OST client accounts were vulnerable to unauthorised viewing or to orders being placed by individuals who no longer had authority to access or transact on those accounts. This was caused by two systems issues within ASBA:

- *Delinking Issue*: Access by individuals to the OST platform through a trading account was not always removed when ASBA had been requested to do so by the account owner. As a result, the individuals retained the ability to view the trading account and place orders, despite the fact that the account owner had withdrawn their authority; and
- *Historic System Issue*: ASBA clients not registered for OST or de-registered from it were still able to access it via the ASB Bank online banking application, despite not having authority to do so.

ASBA was alerted to the Delinking Issue by a customer in August 2018 after the customer had inadvertently viewed the client account of her ex-husband, to which she no longer held access authority. ASBA investigated the matter and informed NZX in November 2018 that a number of OST client accounts were affected by the Delinking Issue. In the course of its subsequent investigation, ASBA also identified the Historic System Issue which had occurred because ASBA's system had allowed clients to log in to the ASB Bank online banking application and then use the single sign-on to access OST without revalidation through ASBA's Identity and Security Module. ASBA notified NZX of the Historic System Issue on 29 March 2019. The technical fault which caused the Historic System Issue had already been raised and resolved internally by ASBA on 10 November 2016.

Between 2004 and 2018, 576 OST client accounts were vulnerable to unauthorised viewing or trading because of the Delinking Issue or the Historic System Issue. Of those 576 affected accounts (a) 31 were viewed using an access code associated with an individual without authority to access the account; and (b) six had orders placed using an access code associated with an individual without authority. ASBA subsequently contacted the account holders for each account where orders had been placed and advised NZX that in each instance, the account holder confirmed that they were aware of the trading and did not have any concerns in relation to it.

[1] ASBA sought and was granted an extension of time to respond to NZX's statement of case. The Tribunal made its determination within 15 business days of receiving the settlement agreement.

FINDINGS:

The Tribunal approved a settlement agreement between NZX and ASBA under which ASBA accepted the findings by NZX that ASBA had breached Participant Rules 4.5.5, 9.1.1(c), 10.6.1(d), 10.7.1 and 10.8.1(a) by failing to a) ensure the integrity of all orders entered into the trading system; b) maintain appropriate security measures; and c) maintain the confidentiality of client information. ASBA also accepted that a penalty should be imposed by the Tribunal for these breaches.

The Tribunal noted in its determination that it considers breaches of the Participant Rules relating to client account security and the integrity of the trading system to be serious. Compliance with these Rules by participants is essential in maintaining market integrity and investor confidence.

The Tribunal considered the following factors to be aggravating in this case:

- although view or trading access only occurred in 37 cases, a significant number of client accounts were able to be accessed by unauthorised individuals and were vulnerable to activity that could have had a significant impact on clients in terms of financial loss and the violation of client privacy and account security;
- the breaches occurred over an extended period of time—over at least a 14-year period from 2004 to 2018; and
- the breaches resulted from ASBA's lack of effective systems and processes. ASBA employees did not routinely follow ASBA's own operating procedures and ASBA did not have an audit or compliance testing process to assess whether its standard operating procedures were being followed.

The Tribunal also considered the following to be mitigating factors in this case:

- ASBA did not breach the Rules intentionally;
- ASBA reported the issues to NZX when they were identified;
- ASBA resolved the issues once identified, with the result that the vulnerabilities with the affected accounts were rectified;
- ASBA cooperated with NZX's investigation, and entered into an early settlement of NZX's referral to the Tribunal;
- there was no evidence of financial loss to clients or investors; and
- ASBA did not benefit financially or obtain a commercial advantage from the breaches.

PENALTY:

ASBA was ordered to pay $80,000 to the NZX Discipline Fund.

COSTS:

ASBA was ordered to pay the costs of the Tribunal. NZX and ASBA agreed that each would meet their own costs.

PUBLICATION:

Under the terms of the settlement agreement, ASBA accepted the penalty of a public censure for its breaches of the Participant Rules. Having regard to the guidance set out in the Tribunal Procedures, the Tribunal agreed that a public censure was appropriate in this case because:

1) the breaches had the potential to cause harm to the public and to damage public confidence in the market;

2) the breaches involved a systemic failure affecting multiple client accounts; and

3) the breaches fell within Penalty Band 3 of the Tribunal Procedures, being a breach of a Participants fundamental obligation to ensure the integrity of the trading system and the security of client accounts.

The Tribunal also considered that there was an educational benefit to the market in re-enforcing the obligations in the Participant Rules to ensure client accounts are secure. The Tribunal's public censure can be viewed here.

NZMDT 2/2020 NZX V TIGER BROKERS (NZ) LIMITED

Division: Nick Hegan (Division Chair), Nicola Greer and David Lane

Statement of Case filed: 23 April 2020

Date of Determination: 10 July 2020[2]

Rules Breached: NZX Participant Rules 3.9, 8.1.1(c), 18.4.1, 18.4.2, 18.6.1(a)(i) and 18.6.1(b)

FACTS[3]:

TBNZ was an NZX Advising Firm[4], having been accredited by NZX on 18 January 2017 under its former name Top Capital Partners. As an NZX Advising Firm, TBNZ had been approved by NZX to provide investment advice and/or recommendations to its clients about securities quoted on NZX's markets and was required to comply with the Participant Rules.

February 2019

TBNZ submitted a notification through the NZX Participant Portal that it had opened a new Client Funds Account with DBS Bank (*DBS*) and provided an acknowledgment from DBS which stated that "*The Account* is designated as customer's/customers' accounts, and shall be distinguished and maintained separately from any other account in which Top Capital Partners Limited deposits its own moneys*". NZX rejected the acknowledgement on the basis that it was not satisfied that it confirmed that the account was a trust account. Persistent but not always constructive correspondence followed between the parties. In short, TBNZ submitted that the Participant Rules do not require the word 'trust' to appear in the written acknowledgment and DBS's acknowledgement that the account was a designated customer account distinguished and maintained separately from TBNZ's capital account was sufficient. NZX contended that DBS must acknowledge in writing that the account is a 'trust account'. Towards the end of February 2019, NZX also raised the issue of whether DBS was a 'Bank' as defined in the Participant Rules. Correspondence between the parties ended in February with NZX requesting that DBS provide an acknowledgement which was satisfactory to NZX and noting that once this issue was resolved, NZX would consider TBNZ's request to designate DBS as a Bank for the purposes of the Participant Rules.

June 2019

In June 2019, NZX Participant Compliance conducted TBNZ's annual on-site inspection, during which NZX sought to verify that all of TBNZ's Client Funds Accounts were correctly named and that all required Bank acknowledgements complied with the Participant Rules. TBNZ provided copies of its acknowledgments including a signed letter dated 22 February 2019 from DBS. NZX observed that some of the accounts were not correctly named and that TBNZ appeared to be including funds held at DBS as client assets.

July 2019

Following a discussion between the parties on 4 July 2019, NZX emailed TBNZ advising that balances held in a bank account that does not meet the requirements of the Rules to be categorised as a Client Funds Account (CFA) were being included in the calculation of Client Assets for the purposes of Client Funds reconciliations – specifically the account held with DBS. NZX noted that TBNZ may only hold client assets

[2] TBNZ was granted an extension of time in which to respond to NZX's statement of case. Further information from the parties was also sought by the Tribunal. The Tribunal made its determination within 15 business days of the receipt of the last information requested.

[3] This is a high level summary. Further information is available in the Tribunal's full determination.

[4] TBNZ is currently suspended following a separate issue.

in a Client Funds Account and that it did not consider that the DBS account was a Client Funds Account as "*the letter from the bank does not meet requirements and/or the institution is not a recognised Bank as defined by the Rules*". NZX noted its intention to record this as a breach in its 2019 inspection report unless TBNZ could provide evidence that showed the DBS account was not being included in the calculation of Total Client Assets. NZX also noted that "*it is our expectation that [TBNZ] cease the use of any of the accounts that do not meet the CFA requirements of the Rules immediately*".

Further correspondence between the parties followed with TBNZ stating that it disagreed with NZX's interpretation of the Participant Rules and that NZX should immediately move to approve DBS as a 'Bank'. NZX advised that in order to recognise a bank, it required a comparison of the regulatory environment and obligations that the bank is subject to against those which apply to banks in New Zealand, particularly with respect to client assets. NZX noted that it was still working on providing greater detail on the specific areas this comparison should cover, which it would provide to TBNZ in due course. In regard to the DBS acknowledgement, NZX stated that it was "*aware that you do not agree with our requirements in respect of the letter from the bank. However, we have clearly and categorically informed [TBNZ] that the letter does not meet the requirements and that the institution does not meet the criteria of a Bank. On this basis the account is not a Client Funds Account (CFA) for the purposes of the Rules...To be absolutely clear NZXR expects [TBNZ] to cease treating the accounts that we have noted as not meeting the definition of a CFA in the Rules as CFAs with immediate effect*". Further correspondence ensued, with NZX noting that it would review the matters TBNZ had raised and asking TBNZ to confirm that it had ceased using the DBS account as a Client Funds Account. Following a discussion between NZX and TBNZ, TBNZ advised NZX by email that "*I'm afraid that I cannot provide [NZX] with the confirmation you request*", that it continued having discussions with its lawyers regarding this issue and that its response was consistent with the legal advice it had received. Following receipt of this email, the Head of Market Supervision (*HoMS*) spoke with TBNZ's Managing Principal on 18 July 2019. During the call the HoMS records in a file note that he advised TBNZ that it needed to (i) comply with the directions provided by NZX; (ii) provide NZX with the information it had requested that morning on the equivalence of Singapore's banking regime so that NZX could recoginse DBS as a Bank under the Participant Rules; and (iii) ensure that the account types used by TBNZ to hold client monies are "trust accounts" of the type required under the Rules.

August 2019

On 1 August 2019, NZX advised TBNZ by email that it still appeared to be holding client money in accounts that did not meet the criteria for Client Funds Accounts. TBNZ responded with confirmation that it had (i) excluded client money held in the DBS account from its Client Assets calculation – as evidenced by its calculation for 31 July 2019 which showed Total Client Assets exceeding Outstanding Obligations; and (ii) transferred funds from the DBS account to "appropriate" Client Funds Accounts. TBNZ also provided an acknowledgment from DBS dated 31 July 2019 which included the statement that *"…The Accounts are trust accounts, and all monies deposited with us in the Account(s)* are held on trust for the benefit of customers of Tiger Brokers (NZ) Limited and the bank is not entitled to combine the Account with any other account(s), or to exercise any right of set-off or counterclaim against the money in the Account in respect of any sum owed to it on any other account(s) of Tiger Brokers (NZ) Limited, or that of any other person…*".

NZX confirmed by email on 6 August 2019 that it was satisfied with the acknowledgement but noted that DBS was not yet recognised as a Bank under the Participant Rules. TBNZ confirmed by reply that this was "understood". NZX advised that following various communications between it and TBNZ, NZX designated DBS as a Bank for the purposes of the Participant Rules on 4 October 2019. NZX noted that this recognition could not be applied retrospectively.

Shortfalls as a result of holding client assets in DBS account

NZX determined that from 22 February 2019 to 30 July 2019 (the dates on which TBNZ held client assets in the DBS account) there were 28 days during which Outstanding Obligations exceeded Total Client Assets held and that the shortfall on these days varied between $197,580.67 and $11,122,464.65. NZX noted that this amount took into account and included any Buffer TBNZ was holding in the DBS Account. TBNZ accepted that excluding client monies in the DBS account in TBNZ's calculations of Total Client Assets for the relevant period produced the shortfalls referred to by NZX.

Naming of Client Funds Accounts

NZX observed that a number of TBNZ's Client Funds Accounts were incorrectly named and that some appeared to have had their names changed since previous NZX reviews. TBNZ accepted that some of its Client Funds Accounts had not been named in accordance with Participant Rule 18.6.1(a)(i).

FINDINGS:

NZX alleged that TBNZ breached Participant Rules 18.5.1, 18.6.1(a) and 18.6.1(b) as a result of depositing client funds in the DBS account before obtaining from DBS an acknowledgement of the trust status of the account. TBNZ denied the breach, stating that the DBS account had 'trust status' at all times and that the acknowledgements provided to NZX confirmed that status for the purposes of the Participant Rules.

Were client funds in the DBS account held on trust?

NZX initially submitted that TBNZ was "*aware that the DBS Accounts were not trust accounts*". However, in its Rejoinder, NZX acknowledged that client assets held in the DBS account "*may have been held on trust as a matter of Singaporean law*", but submitted that TBNZ was still in breach of Participant Rule 18.5.1 because client funds were not being held "*in the manner contemplated by the Rules*" i.e. in a Client Funds Account. TBNZ submitted that at all times the DBS account was a trust account at law and that client assets deposited in it were held on trust.

The Tribunal noted that NZX did not specify in its submissions what characteristics an account must have to be considered a trust account under the Participant Rules or what characteristics the DBS account lacked which meant that it was not a trust account. In the absence of submissions on these points from NZX and in light of NZX's acknowledgement that funds held in the DBA account "*may have been held on trust*", the Tribunal was not satisfied that NZX had demonstrated that client assets held in the DBS account were not being held on trust. The Tribunal noted that in any event, the nature of the DBS account was confirmed by DBS in the acknowledgment provided in July 2019 confirming that the account was a trust account. DBS confirmed, at TBNZ's request, that there was no change from its perspective in the nature or status of the DBS account between February 2019 and 31 July 2019.

The Tribunal considered that Participant Rule 18.5.1 did not itself require that client assets are held in a Client Funds Account. Rather, the requirement is simply that such assets are held on trust. The fact that the DBS account was not a Client Funds Account until 4 October 2019 (when NZX designated DBS as a Bank for the purposes of the Participant Rules) was, however, relevant to whether TBNZ had breached Participant Rule 18.6.1(b), as discussed below. Accordingly, the Tribunal did not find TBNZ in breach of Participant Rule 18.5.1 based on the information provided.

Application of Participant Rule 18.6.1

Under Participant Rule 18.6.1(b), TBNZ must "*not deposit Client Funds into an account that is not a designated Client Funds Account*". The DBS account was not a Client Funds Account until NZX had designated DBS as a Bank for the purposes of the Participant Rules on 4 October 2019. Accordingly, the Tribunal found TBNZ in breach of Participant Rule 18.6.1(b) by depositing client funds in the DBS account from 22 February 2019 to 30 July 2019.

Under Participant Rule 18.6.1(a), TBNZ must "*in respect of any Client Funds Account which is not a Depository Account*" (i) obtain from the Bank holding the Client Funds Account a written acknowledgement of the trust status of the account; and (ii) supply that acknowledgement to NZX. Given the Tribunal's finding that the DBS account was not a Client Funds Account until DBS was designated as a Bank on 4 October 2019, TBNZ could not have been in breach of Participant Rule 18.6.1(a) before that date, by which stage TBNZ had obtained and supplied to NZX a written acknowledgment from DBS that the DBS account was a trust account. The fact that the DBS account was not a Client Funds Account until 4 October 2019 is also the reason that NZX alleged, and TBNZ accepted, that TBNZ had breached Participant Rules 18.4.1 and 18.4.2.

As the Tribunal found that TBNZ was not in breach of Participant Rule 18.6.1(a) (with regards to the DBS account), it was not required to determine whether the acknowledgements provided by DBS in February were sufficient. However, the Tribunal noted that to the extent that the requirements for acknowledgements may be open to interpretation or are being applied inconsistently, NZX may wish to consider mandating the form of acknowledgement required.

FINDINGS ON PENALTY:

The Tribunal was very concerned by the conduct of TBNZ in this matter. The Tribunal noted that regardless of whether TBNZ disagreed with NZX's view on the trust status of the DBS account and whether the acknowledgments provided in February 2019 were sufficient, TBNZ was aware that NZX had not designated DBS as a Bank for the purposes of the Participant Rules and therefore was aware that the DBS account was not a Client Funds Account when it deposited client funds into that account in February 2019. Even when this breach was discovered by NZX and notified to TBNZ on 5 July 2019, TBNZ failed to rectify the matter and did not move the client funds to an account that was recognised as a Client Funds Account until 30 July 2019 despite repeated requests from NZX. By knowingly breaching the Participant Rules and then failing to promptly rectify its position, even after a direction by NZX, the Tribunal considered that TBNZ had shown a wilful disregard of its obligations under the Participant Rules.

The Tribunal determined that the breach of the Participant Rules by TBNZ was serious and fell within Penalty Band 3 of the Tribunal Procedures. The Tribunal considered that there were a number of aggravating factors in this case:

- the Tribunal considered that TBNZ's breaches of the Participant Rules in relation to the DBS account and failure to comply with NZX's direction were intentional;
- the breach was not self-reported with NZX only becoming aware that TBNZ had been using the DBS account as a Client Funds Account since February 2019 during its inspection of TBNZ in June 2019;
- the breach continued to occur once discovered despite repeated requests from NZX;
- the breach occurred over an extended period of time, although the Tribunal accepted that the client funds in the DBS account were being held on trust;
- NZX considered that TBNZ had hindered its investigation, although in the absence of evidence from NZX on this point it was difficult for the Tribunal to consider this to be an aggravating factor of any weight; and
- TBNZ had previously breached the Participant Rules, although as those matters could be described as minor and differed from the circumstances of the present matter, the Tribunal did not consider this to be an aggravating factor of any weight.

The Tribunal considered that the following mitigating factors applied in this case:

- there was no demonstrated financial loss to TBNZ's clients. TBNZ submitted that its clients were not even potentially at risk given that the client funds held in the DBS account were held on trust as a matter of law and accordingly its clients' interests were at all times protected; and
- there was no financial benefit or commercial advantage to TBNZ.

TBNZ submitted that it was a relatively new Participant and that there was no suggestion similar breaches will reoccur. TBNZ did not, however, detail what steps it had taken to implement or enhance its systems and the Tribunal noted that the issues which arose with the naming of TBNZ's other Client Funds Accounts occurred despite all of the issues with the DBS account. TBNZ accepted its breach of Participant Rules 18.4.1 and 18.4.2, but submitted that this breach was "technical" because TBNZ had at all times held total client assets on trust in excess of its outstanding obligations. The Tribunal considered that this did not constitute a mitigating factor, but rather reflected the absence of an aggravating factor.

PENALTY:

TBNZ was ordered to pay $160,000 to the NZX Discipline Fund.

COSTS:

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

PUBLICATION:

Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal considered that it was appropriate in this case to publicly censure TBNZ because the breach fell within Penalty Band 3 and the Tribunal considered that TBNZ had shown a disregard for the Participant Rules. The Tribunal's public censure and its determination can be viewed here.

NZMDT 3/2020 NZX V AIR NEW ZEALAND LIMITED

Division: Hon Sir Terence Arnold QC (Division Chair), Rachel Dunne and James Ogden

Memorandum of Counsel filed: 9 December 2020

Settlement Agreement dated: 9 December 2020

Date of Determination: 16 December 2020

Rule Breached: NZX Listing Rule 3.1.1

FACTS:

From February to June 2020, AIR released a number of announcements concerning the implications of the COVID-19 pandemic on its business through MAP. These announcements contained information on reducing its costs, including an announcement on 26 May 2020 (which AIR flagged as comprising Material Information), in which AIR stated that it had made labour reductions of approximately 30% or 4,000 employees, which it expected to drive annualised savings of $350 to $400 million.

At 12.46pm on Friday 5 June 2020, the CEO of AIR sent an email to all AIR staff entitled "*Survive. Revive. Thrive. Our 800 day plan for Air New Zealand*" (*CEO's statement*) which contained the statement "*Today, we start Phase 2 to remove around $150 million additional from our wages bill as part of a suite of other changes to our cost base to put Air New Zealand in the shape to be able to meet our 800-day ambition for August 2022*". Subsequently, during the course of that afternoon, the CEO's statement was sent to New Zealand based Airpoints™ members and to selected media outlets. The CEO was also interviewed by several media outlets that afternoon regarding his statement.

At 8.30am on Monday 8 June 2020, AIR released an announcement through MAP entitled "*Air New Zealand CEO – next 800 days*" (*the Announcement*), which was flagged by AIR as comprising Material Information. The Announcement contained materially the same information as the CEO's statement, including reducing labour costs by a further $150 million.

Following the Announcement, NZX advised that AIR's share price moved from $1.64 to $1.79 (an increase of $0.15 or 9.15%), the intra-day high was $1.825 (an increase of 11.28% from market open) and that the number of trades was relatively high. NZX considered that the price rise on 8 June 2020 could be attributed, at least in part, to broader trading and price movements within the global aviation industry between 5 and 8 June 2020. NZX advised that the price increase for AIR on 8 June 2020 was not likely to have been solely as a result of the Announcement.

FINDINGS:

The Tribunal approved a settlement agreement between NZX and AIR under which AIR accepted NZX's finding that the CEO's statement included Material Information and in releasing that information to stakeholders before it was released through MAP AIR breached Listing Rule 3.1.1.

The Tribunal considers that a breach of the continuous disclosure obligations in the Listing Rules is a breach of an Issuer's fundamental obligation. Compliance with these Rules by Issuers is essential in maintaining market integrity and investor confidence.

The Tribunal considered that there were aggravating factors in this case:

- AIR did not observe its own Continuous Disclosure Policy when finalising the CEO's statement. NZX considered that had AIR's internal policy been followed, this breach would have been prevented;
- NZX had published specific guidance in respect of disclosure in light of the COVID-19 pandemic shortly before the breach occurred, so AIR was on notice of the potential materiality of a labour cost reduction. AIR had also released previous updates through MAP on reducing its labour costs; and
- NZX advised that 2,520 trades in AIR shares occurred on the afternoon of 5 June 2020 while there was information asymmetry in the market. AIR's share price rose significantly on 8 June 2020, although NZX considered that a pattern of price surges within the global aviation industry across 5 to 8 June 2020 contributed, in part, to this movement.

The Tribunal also considered that the following mitigating factors were relevant in this case:

- AIR did not itself benefit financially from the breach;
- once the issue was identified, it was promptly addressed (at 8.30am on 8 June 2020 before the market opened) so the duration of the information asymmetry was short (4 hours and 44 minutes);
- NZX considered that there was no evidence of any financial benefit or financial harm caused by asymmetrical trading on the afternoon of 5 June 2020;
- NZX advised that AIR had not previously breached Listing Rule 3.1.1 and had a good compliance history;
- AIR cooperated with NZX's investigation and entered into an early settlement of NZX's referral to the Tribunal; and
- the breach appeared to have been inadvertent, although AIR did not follow its own Continuous Disclosure Policy.

The Tribunal took into consideration in its decision to approve the settlement that the breach occurred during a period of significant uncertainty, particularly for those in the airline industry, arising from the COVID-19 pandemic. Taking the aggravating and mitigating factors into account, the Tribunal considered that while the breach fell within Penalty Band 3 of the Tribunal Procedures, a penalty at the lower end of the available range, together with a public censure, was appropriate.

PENALTY:

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

COSTS:

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

PUBLICATION:

Under the terms of the settlement agreement, AIR accepted the penalty of a public censure for its breach of the Listing Rules. Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal agreed that it was appropriate to publicly censure AIR given that the breach 1) had the potential to cause harm to the public and to damage public confidence in the market; and 2) fell within Penalty Band 3.

The Tribunal also considered that there is an educational benefit to the market in reminding Issuers of the importance of having effective continuous disclosure policies and ensuring that they are followed. The Tribunal's public censure can be viewed here.

SPECIAL DIVISION REPORT

SPECIAL DIVISION REPORT

Special Division

The Special Division is a division of the Tribunal constituted under the Tribunal Rules to regulate the listing of NZX and its Related Entities. As at the date of my report, NZX's Related Entities are NZX Wealth Technologies Ltd (a Depository Participant) and Smartshares Ltd (the manager of a number of listed exchange traded funds). The objective of the Special Division is to foster market confidence that the NZX Markets Rules and the Tribunal Rules are applied to NZX and its Related Entities in an impartial and independent manner.

The FMA is responsible for ensuring that NZX meets its obligations as a licensed market operator, including that it has sufficient technological resources to operate its licensed markets properly. Accordingly, the Special Division was not involved in the FMA's review of the significant technology incidents suffered by NZX during 2020 or the FMA's ongoing review of NZX's technology.

Monitoring of trading activity

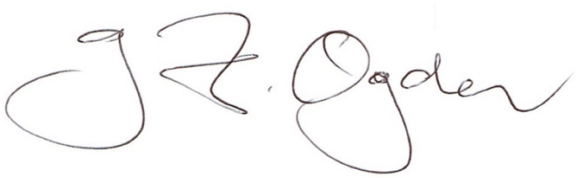
The Special Division is responsible for assessing trading activity in the quoted securities of NZX and its Related Entities. On behalf of the Special Division, NZ RegCo Market Surveillance (*NZMS*) conducts front-line monitoring of trading on the exchange in the securities of NZX and its Related Entities. NZMS refers system generated alerts from its SMARTS Surveillance software (which was upgraded in July 2020) and any other abnormal trading activity to the Special Division for consideration.

The Special Division considered an increased number of referrals from NZMS in 2020 – 111 compared to 42 referrals in 2019. The Special Division considers that this increase reflects the volatility in both the global equity markets and NZX's markets as a result of the uncertainty caused by the COVID-19 pandemic. The Special Division received 41 referrals alone in March and April 2020, during New Zealand's first COVID-19 lockdown. In the vast majority of instances, the Special Division did not consider that the alert raised any concerns or warranted further investigation on the basis that the activity was consistent with permissible trading. In some instances, the Special Division sought further information from the Participant involved or from NZMS. The Special Division referred one matter to the FMA. A summary of each referral to the Special Division in 2020 follows this report.

Other activities

The Special Division's activities in 2020 also included reviewing offer documents for the four new Core Series ETF funds offered by Smartshares during 2020 and discussions with Smartshares to ensure the accuracy of its announcements.

I would like to thank the other members of the Special Division – Matt Blackwell, Mariëtte van Ryn and Len Ward - for their dedicated work during the year.



James Ogden | SPECIAL DIVISION CHAIR
16 April 2021

NZMDT SPECIAL DIVISION MATTERS – 1 JANUARY TO 31 DECEMBER 2020

During 2020, the Special Division received 111 referrals from NZMS as outlined below.

MONTH 2020	ISSUER	DATE REFFERRED
January	NZX	24, 29*
	NZX010	23*
	LIV, USG	6*
	AGG, EMG, EUG, JPN, USA	31
February	NZX	25***, 27
	DIV	12, 19, 27
	ASR	5, 27
March	NZX	2, 3, 5, 6, 10, 11, 12, 13, 16, 17, 18, 19, 27, 30, 31
	NZX010	17, 18, 19, 27
	EMF	10, 16
	AGG, EMG, EUG, JPN, USA, ESG, NPF, OZY	17
	MDZ	10
	TNZ	19, 20
	ASF	20
	NZC	17, 27
April	NZX	8, 14, 15, 17, 20, 21, 22
	NZX010	29
	ASP	1, 9, 14, 16, 24
	ASF	1, 16
	ASD	1, 21
	MDZ	8
	DIV	14
	OZY	16
	AGG, EUG, JPN, ASR	29
May	NZX	11, 19, 21, 25
	NZX010	13, 19
	ASP	4, 19
	LIV	4
	OZY, ASR	14*, 19

MONTH 2020	ISSUER	DATE REFFERRED
May	ASD, ASF, MZY	19
	EUG, JPN, USA	29
June	NZX	5, 8, 9, 10, 15
	NZX010	5
	ASD	2
	AGG	9, 30
	ASF, ASP	9
	GBF	26
	USA	30
July	NZX	1, 6, 20
	EMF	3**
	TNZ	9
	TWF	16
	TWH	22
	LIV	27
August	NZX	12, 14, 17, 18, 19, 24, 25, 26
	NGB	4
	NZG	17
September	NZX	21
	NZG	22
	AUS	28
October	NZX	7, 14, 22
	BOT, USF	5****
	NPF	8*
	NGB	15
November	NZX	4, 11*****, 11, 11, 12, 13, 19, 25
	TWF	5
December	NZX	4, 9, 11, 11

* Sought further information from NZMS and determined no further action required.
** Sought further information from the Market Participant involved and determined no further action required.
*** This matter was referred to the FMA.
**** Sought further information from Smartshares Ltd and requested review of procedures regarding announcements.
***** This matter remains under review.

DIRECTORY

NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL

https://nzx.com/NZMDT

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