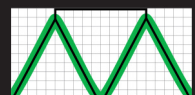


ANNUAL REPORT 2017

NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL



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CHAIR'S REPORT

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FUNCTION OF 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's principal role is to determine whether there has been a breach of the NZX Market Rules¹ 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 NZX Regulation and the Financial Markets Authority.

REFERRALS

The Tribunal received three referrals from NZX during 2017. Two referrals involved a breach by issuers of the continuous disclosure requirements in the NZX Listing Rules. The third referral involved a breach of the Derivatives Rules by a market participant. All three matters were settled by the parties.

The trend of a reduction in referrals to the Tribunal in the last two years (there were four referrals in 2016) reflects, at least in part, the adoption of the Infringement Notice regime in 2016 whereby NZX Regulation may issue fines for minor breaches without referral to the Tribunal. NZX Regulation issued three Infringement Notices in 2017 (see www.nzx.com/regulation/nzmd-tribunal-regulation/nzx-infringement-notices).

Although the number of cases the Tribunal has dealt with this year has reduced, the level of complexity of the issues to be dealt with in each decision has increased. Where it can do so in its decisions, the Tribunal is committed to educating the market on key principles and reinforcing the importance of the integrity of the markets. Any conduct in breach of the Rules that has an impact on investors or market integrity will be treated seriously. The Tribunal reminds market participants that, following the introduction of the new penalty bands in 2016, decisions of the Tribunal before that date should not be considered to be authority on the penalties likely to apply now.

CONTINUOUS DISCLOSURE

Issues of continuous disclosure have been prevalent in the Tribunal's work this year, and in the consciousness of market participants and investors. Two of the three referrals to the Tribunal in 2017 involved breaches of the continuous disclosure requirements in the NZX Listing Rules.

The requirement for issuers to disclose all Material Information to the market is a fundamental obligation under the NZX Listing Rules and essential to ensuring that New Zealand's listed capital markets are efficient, transparent and fair. Issuers must have robust procedures in place for the reporting of continuous disclosure issues to senior management and the Board, and robust procedures for the Board to consider and carefully reflect on its continuous disclosure obligations.

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.

The Tribunal also reminds issuers that determining whether information is Material Information involves an inquiry as to the hypothetical effect a reasonable person would expect the information to have on the price of the relevant securities. As noted in the NZX Guidance Note, it is not a hindsight test, but rather a forward-looking inquiry based on the information then available to the issuer. Accordingly, 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 arose to be assessed by the Board it may well have been Material Information that had to be disclosed.

In both cases referred to the Tribunal, the issuer had sought and relied on advice from its legal counsel on whether disclosure was required. However, the Tribunal noted that while obtaining and relying on legal advice may be a factor mitigating the penalty for any breach, 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.

NZX Regulation has provided several resources to assist issuers to comply with the continuous disclosure requirements, including (i) a case study on the treatment of developing information and forecasts; (ii) an investigations report on the 2017 earnings forecasts of Fletcher Building Ltd; (iii) updating its Continuous Disclosure Guidance Note; and (iv) a thematic review on continuous disclosure practices. The Tribunal welcomes the introduction of such resources to help and guide issuers on what practices and guidelines should be in place for Boards to be advised of and consider continuous disclosure in a timely way so there is no incongruity in the market.

NZX REPORT

NZX Regulation has recently published its *NZX Oversight & Engagement Report 2018*. The report includes information on NZX Regulation's investigation and enforcement activity undertaken during 2017 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 www.nzx.com/regulation/publications. 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 NZX adopts.

MEMBERS

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

In June 2017, several Tribunal members retired at the end of their third terms of appointment – David Flacks (former Chair), Shane Edmond (former Deputy Chair), Andrew Beck (former Special Division Chair), Mark Freeman, Don Holborow and David Boldt. Richard Bodman, David Kreider and Noeline Munro also resigned from the Tribunal during 2017. Kevin Baker retired from the Tribunal on 31 March 2018. I would like to thank each of the departing members for their significant contributions to the Tribunal and particularly the former Chair David Flacks.

I was appointed Chair at the Tribunal's annual general meeting in June 2017 and Nick Hegan was appointed as Deputy Chair.

Six new members were appointed to the Tribunal in 2017 – Sir Terence Arnold, Matthew Blackwell, Deemple Budhia, Rachel Dunne, Ivana Erceg Floerchinger and Simon Vodanovich.

SPECIAL DIVISION

Dame Alison Paterson was appointed as Chair of the Special Division in July 2017, following the retirement from the Tribunal of Andrew Beck. Mariëtte van Ryn and Leonard Ward were also appointed as members of the Special Division in July 2017. Matthew Blackwell was recently appointed to the Special Division, following Kevin Baker's retirement from the Tribunal.

I would like to acknowledge the contribution of Dame Alison as Chair of the Special Division and the other members of the Special Division for their work during 2017. I also acknowledge Andrew Beck, the former chair, and those members of the Division who have retired.

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.

DISCIPLINARY FUND

The NZX Discipline Fund accounts indicate that there is an accumulated surplus of \$415,905 as at 31 December 2017.

Finally, I emphasise that the Tribunal is well established and resourced to provide independent regulatory decisions on alleged breaches of the Rules. I consider that it is important for the Tribunal to be referred matters where the market may benefit from the educative value of its decisions. The Tribunal is well placed to respond promptly to referrals and deliver decisions reflecting the wealth of market experience and expert analysis of its members.

I thank those retiring and returning members of the Tribunal for their service and especially the excellent support the Tribunal receives from its executive counsel Rachel Batters.



MEMBERS

MEMBERS

MEMBERS OF THE TRIBUNAL AS AT 31 DECEMBER 2017

LEGAL

Rachael Reed QC (Chair), Deemle Budhia, Rachel Dunne and Simon Vodanovich.

LISTED ISSUER

Jo Appleyard, Kevin Baker*, Trevor Janes, James Ogden, Dame Alison Paterson, Susan Peterson and Christopher Swasbrook.

MARKET PARTICIPANTS

Nick Hegan (Deputy Chairman), Matthew Blackwell, Geoff Brown and Ivana Erceg Floechinger.

MEMBERS OF THE PUBLIC

Sir Terence Arnold, Danny Chan, Richard Keys, Richard Leggat, Mariëtte van Ryn and Leonard Ward.

CLEARING PARTICIPANTS

Geoff Brown and Ivana Erceg Floechinger

DERIVATIVES PARTICIPANTS

Matthew Blackwell and Nick Hegan

MEMBERS OF THE SPECIAL DIVISION AS AT 31 DECEMBER 2017

Dame Alison Paterson (Chair), Kevin Baker*, James Ogden, Mariëtte van Ryn and Leonard Ward **

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

* Kevin Baker retired from the Tribunal on 31 March 2018.

** Matthew Blackwell was appointed to the Special Division on 11 April 2018.

STATEMENTS OF CASE, FINDINGS AND PENALTIES

NZMDT 1/2017 NZX V ISSUER A

Division: Mark Freeman (division chair), Trevor Janes and James Ogden

Statement of Case served: 21 April 2017

Settlement Agreement filed: 14 August 2017

Date of Determination: 1 September 2017

Rule Breached: NZX Main Board Listing Rule 10.1.1

FACTS:

Issuer A published full year forecasts on several financial metrics, including EBITDA and revenue. It later affirmed those forecasts, with the last confirmation occurring early in the second half of the financial year. The issuer tracked its financial performance at a management and Board level, including its performance against its EBITDA and revenue forecasts.

Issuer A's performance in the first half of its financial year was largely in line with expectations. Due to events beyond the issuer's control, financial performance at the beginning of the second half of its financial year was significantly below expectations. However, Issuer A had an expectation, based on historical performance, until late in the financial year that it would be able to meet, or not materially deviate from, its forecasts.

Issuer A published a market update following the end of its financial year. That update stated that EBITDA for the year would be lower than previously indicated but did not provide figures or an indication of the possible materiality of the deviation from forecast.

Issuer A subsequently released its preliminary results announcement and annual report, which disclosed a material deviation between the issuer's results against forecast EBITDA and revenue. NZX Regulation observed a price movement of between 5% and 10% and that the volume of shares traded on the relevant dates were approximately four to six times higher than the average volume per day over the previous twelve months.

TRIBUNAL FINDINGS:

The Tribunal approved a settlement agreement between NZX and Issuer A under which Issuer A admitted breaching Listing Rule 10.1.1.

CASE STUDY:

NZX Regulation has published a Case Study based on the circumstances of this matter – available here <https://www.nzx.com/regulation/nzx-rules-guidance/nzx-mo-announcements/case-studies-investigation-reports>.

NZX Regulation notes in the Case Study that “One of the key issues that arose in the course of NZX Regulation’s investigation and the proceedings was that the issuer’s share price moved less than 10% following the relevant announcements. The Rules state that Material Information is “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 an issuer”. NZX Regulation reminds issuers that the Guidance Note states that this is not a hindsight test, and the absence of a material price movement will not preclude NZX Regulation investigating and, if considered appropriate, taking enforcement action.”

PENALTY:

Issuer A was ordered to pay \$52,500 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 to approve the private reprimand under the settlement agreement, the Tribunal considered the guidance set out in Tribunal Procedure 9.3. In particular, 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.

Although the relevant considerations were finely balanced, the Tribunal considered the private reprimand to be appropriate in the circumstances of this particular case having regard to the mitigating factors, including that Issuer A had undertaken regular and detailed assessment of its financial performance, had considered its disclosure obligations and sought advice, and had not been involved in repeated breaches of the Rules. Of particular relevance to this decision, was that the failure to release the information to the market when it was available did not cause any measurable harm to investors.

The Tribunal notes that given the seriousness of continuous disclosure breaches and the likely impact on the market, the guidance indicates there are likely to be few circumstances where a private reprimand will be appropriate. Indeed in this case, the Tribunal recorded that the decision to privately reprimand the issuer was specific to the circumstances of this particular case and should not be taken as creating a precedent for future breaches of the continuous disclosure obligations.

NZMDT 2/2017 NZX V VERITAS INVESTMENTS LIMITED

Division: Jo Appleyard (division chair), Danny Chan and Simon Vodanovich

Settlement Agreement filed: 3 October 2017

Date of Determination: 18 October 2017

Rule Breached: NZX Main Board Listing Rule 10.1.1

FACTS:

In September 2014, VIL acquired the Nosh Food Market business (*Nosh*). On 9 September 2016, VIL announced to the market that it had "received a committed term sheet from the ANZ Bank which it has accepted. The committed term sheet renews the Group's existing banking facilities and provides for a rescheduling of the debt obligations and a reduction in the debt repayments." Under the committed term sheet signed 8 September 2016, VIL agreed to the following undertakings:

- a. Delivery to ANZ by 15 January 2017, or earlier, of either of the following in form and substance satisfactory to ANZ:
 - i. An unconditional contract for the sale of Nosh; or
 - ii. In the event an unconditional sale of Nosh is unsuccessful, a proposal for the closure and wind down of Nosh to include a detailed review of the associated costs;
- b. Any closure and wind down of Nosh is to be completed by 31 March 2017 with satisfactory evidence of this to be provided to ANZ.

VIL did not disclose the undertakings to the market until 14 December 2016, following engagement by NZX Regulation.

TRIBUNAL FINDINGS:

The Tribunal approved a settlement agreement between NZX and VIL under which VIL accepted NZX's view that it had breached Rule 10.1.1, albeit that VIL did not hold that view at the time of the relevant conduct.

The Tribunal held that an issuer entering into a signed commitment with its bank in which it undertakes to sell or close and wind down a significant part of its business, as was the case in this instance, is information that would constitute Material Information for the purposes of Rule 10.1.1.

The Tribunal also recorded that while obtaining and relying on legal advice may be a factor in mitigating the penalty, 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.

The Tribunal considered as mitigating factors in this case that VIL:

- a. considered its continuous disclosure obligations and took legal advice on this specific issue;
- b. did not intentionally breach Rule 10.1.1, but rather exercised a bone fide judgement in the interests of VIL;
- c. co-operated with NZX Regulation's investigation;
- d. has not been referred to the Tribunal before; and
- e. reached a settlement with NZX.

The Tribunal considered as aggravating factors in this case that:

- a. there was a period of 68 business days in which the market remained uninformed of the Undertakings; and
- b. any breach of the continuous disclosure rules is likely to have an impact on market integrity.

PENALTY:

VIL was ordered to pay \$55,000 to the NZX Discipline Fund.

COSTS:

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

PUBLICATION:

VIL was publicly censured by the Tribunal – see www.nzx.com/regulation/nzmd-tribunal-regulation/tribunal-decisions. In coming to its decision to approve the public censure under the settlement agreement, the Tribunal considered the guidance set out in Tribunal Procedure 9.3. In particular, the Tribunal noted the public awareness of the events that this matter related to and the educative benefits for the broader market.

NZMDT 3/2017 NZX V TRADING PARTICIPANT A

Division: Nick Hegan (division chair), Deemle Budhia and Ivana Erceg Flerchinger

Settlement Agreement filed: 4 December 2017

Date of Determination: 22 December 2017

Rules Breached: NZX Derivatives Market Rules 4.4.1(c), 8.2.1(c), 8.3.2, 8.3.3 and 10.5.2

FACTS:

Trading Participant A self-reported a breach of the NZX Derivatives Market Rules after an employee who was not an NZX accredited Dealer executed orders in the trading system.

TRIBUNAL FINDINGS:

Under the Rules, all Trading Participants must ensure that only Dealers, DMA Dealers or DMA Authorised Persons access the Trading System. Trading Participants must also maintain and enforce appropriate security procedures and controls to prevent unauthorised use of the Trading System.

While there was no evidence of an intention by Trading Participant A to breach the Rules, the Tribunal was concerned that the employees involved did not consider whether the use was authorised and did not follow Trading Participant A's own internal policies and procedures. The Tribunal notes that it is Trading Participant A's responsibility to ensure that all employees follow procedure and comply with the Rules.

NZX Regulation has published a Case Study based on the circumstances of this matter – available here <https://www.nzx.com/regulation/nzx-regulation/publications>.

PENALTY:

Trading Participant A was ordered to pay \$20,000 to the NZX Discipline Fund.

COSTS:

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

PUBLICATION:

Trading Participant A was privately reprimanded by the Tribunal. In coming to its decision to approve the private reprimand under the settlement agreement, the Tribunal considered the guidance set out in Tribunal Procedure 9.3. The Tribunal considered a private reprimand to be appropriate in the circumstances of this particular case having regard to the mitigating factors, including that Trading Participant A had improved its procedures, had not been involved in repeated breaches of the Rules and the submission from NZX that the orders had limited market impact.

REPORT ON SPECIAL DIVISION ACTIVITIES

REPORT ON SPECIAL DIVISION ACTIVITIES

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 Markets Rules and the Tribunal Rules are applied to NZX and its Related Entities in an impartial and independent manner.

In September 2017, the Tribunal Rules were amended to clarify that 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.

ACTIVITIES

On 21 February 2017, Energy Mad Ltd (MAD) became a Related Entity of NZX. During 2017, the Special Division received several SMARTs alert referrals from NZX Market Surveillance in relation to trading in MAD shares. These arose primarily because of MAD's low share price.

As with previous years, the Special Division also considered a number of SMARTS alerts for trading in the securities of NZX and the Smartshares' funds. A summary of each referral to the Special Division in 2017 follows this report.

During 2017, the Special Division also considered, and approved, an application from NZX Wealth Technologies Ltd (a member of the NZX Group) for accreditation as a Depository Participant and Legal Title Transfer Depository Participant.

MEMBERSHIP

I was appointed to the Special Division as Chair in July 2017, following the retirement of Andrew Beck from the Tribunal.

Mariëtte van Ryn and Leonard Ward were also appointed to the Special Division in July 2017. James Ogden and Kevin Baker remained as Special Division members during 2017.

Matthew Blackwell was appointed to the Special Division in April 2018 following the retirement from the Tribunal of Kevin Baker.

I thank the Special Division members for their work in 2017.



Dame Alison Paterson | SPECIAL DIVISION CHAIR
16 April 2018

NZMDT SPECIAL DIVISION MATTERS – 1 JANUARY TO 30 DECEMBER 2017

During 2017, the Special Division received 27 referrals from NZX Surveillance as outlined below.

DATE REFERRED IN 2017	ISSUER	ACTION
24 January	EUF	Considered the nature of the alert and determined that no further investigation was necessary.
31 January	EUF	Considered the nature of the alert and determined that no further investigation was necessary.
2 February	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
3 March	FNZ, OZY, MZY	Considered the nature of the alert, sought information from the market participant involved and determined that no further action was necessary.
22 March	NZX	Considered the nature of the alert and determined that no further action was necessary.
31 May	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
21 June	NZX	Considered the nature of the alert, sought information from the market participant involved and determined that no further action was necessary.
30 June	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
10 July	MZY, EUF	Considered the nature of the alert and determined that no further investigation was necessary.
11 July	MAD	Considered the nature of the alert, sought information from the market participant involved and determined that no further action was necessary.
13 July	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
14 July	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
24 July	EUF	Considered the nature of the alert and determined that no further investigation was necessary.
14 August	EUF	Considered the nature of the alert and determined that no further investigation was necessary.
14 August	DIV	Considered the nature of the alert, sought information from the market participant involved and determined that no further action was necessary.
21 August	NZX	Considered the nature of the alert and determined that no further action was necessary.
23 August	NZX	Considered the nature of the alert, sought information from the market participant involved and determined that no further action was necessary.
23 August	EUF	Considered the nature of the alert and determined that no further action was necessary.
9 November	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
15 November	MAD	Considered the nature of the alert, sought information from the market participants involved and determined that no further action was necessary.

DATE REFERRED IN 2017	ISSUER	ACTION
29 November	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
5 December	NZX	Considered the nature of the alert and determined that no further investigation was necessary.
12 December	MAD	Considered the nature of the alert and determined that no further investigation was necessary.
19 December	NZX	Considered the nature of the alert and determined that no further investigation was necessary.

DIRECTORY

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