

ANNUAL REPORT 2009/2010

---

# NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL

---

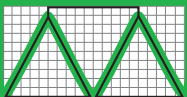


---

# CONTENTS

---

04	CHAIRMAN'S REPORT
14	MEMBERS
18	STATEMENTS OF CASE, FINDINGS AND PENALTIES
34	NZX REGULATION ANNUAL REPORT TO NZMDT
42	REPORT ON SPECIAL DIVISION ACTIVITIES
44	DIRECTORY



---

# CHAIRMAN'S REPORT

---

# CHAIRMAN'S REPORT

## FUNCTION OF NZ MARKETS DISCIPLINARY TRIBUNAL

The NZ Markets Disciplinary Tribunal (*the Tribunal*) is an independent regulatory body established under the NZ Markets Disciplinary Tribunal Rules (*NZMDT Rules*).

The Tribunal's principal role is to determine whether there has been a breach of the NZX Conduct Rules<sup>1</sup> and the NZX Futures and Options Rules in matters referred to it by NZX Limited (*NZX*). In the event the Tribunal finds a breach, its secondary role is to assess and impose penalties.

Pursuant to Rule 3.2 to the NZMDT Rules there is a Special Division of the Tribunal. The role of the Special Division is to administer the NZX Conduct Rules as they apply to NZX as a listed company and the five listed funds managed by Smartshares Limited, a subsidiary of NZX. A separate report of Special Division activities can be found at page 42.

## REPORTING PERIOD

This report covers the period 1 January 2009 to 31 December 2009.

## TRIBUNAL OBSERVATION ON MARKET BEHAVIOUR DURING THE REPORTING PERIOD

In the reporting period the Tribunal considered four cases concerning breach of periodic reporting requirements. This is a significant increase in number. In previous years NZX Regulation (*NZXR*) has identified other such breaches<sup>2</sup>, but hitherto no more than two instances have been referred to the Tribunal annually<sup>3</sup>.

The Tribunal makes the following observations:

1. In all instances referred to the Tribunal this year there were significant delays in the provision of the report to NZX and shareholders. In two instances<sup>4</sup> the breaches remained unremedied at the time of the Tribunal's determination (and remain unremedied to date). The Tribunal is concerned that listed issuers remain in breach of fundamental listing rules for extended periods of time. It has communicated to NZX that it considers that NZX should consider exercising its discretion to cancel the listing of those issuers that do not comply with the Tribunal's remedial orders. The Tribunal also considers that NZX should consider exercising that discretion in respect of those issuers that make no attempts to remedy long standing breaches of NZX's Conduct Rules, whether or not those breaches are brought before the Tribunal.

2. The Tribunal is also concerned that in two of the cases<sup>5</sup> referred to it the issuer had not adequately informed itself of its obligations as a listed company or put in place adequate systems and procedures to enable it to comply with those obligations. It is incumbent on directors of listed companies to understand the listing rules that they have agreed, on behalf of the listed entity, to comply with. Likewise, to exercise their governance of the listed entity in a manner that ensures compliance, regardless of adverse circumstances, and to ensure that the company has in place appropriate systems and procedures to ensure compliance.
3. In all of the cases the issuer concerned pointed to the actions or inactions of a third party as factors causing, or contributing, to the breach. While the board of a listed issuer may utilise employees, external accountants and auditors, the maintenance and availability of accounting and business records remains the responsibility of the directors. Listed companies must have in place systems and procedures enabling compliance notwithstanding any unexpected circumstances encountered by that issuer or default by these parties.
4. The Tribunal considers that issuers can mitigate breaches of the periodic reporting rules by continuing to communicate with the market during the period of non-compliance, particularly as to the circumstances that give rise to the breach and when the issuer expects that the breach will be remedied. Issuers must ensure that all material information continues to be released during the period of the breach.

<sup>1</sup> The NZX Conduct Rules comprise (1) the NZX Participant Rules, which govern the conduct of market participants in NZX's three markets (a) the NZSX Market, (b) the NZDX Market and (c) the NZAX Market (NZX Markets) and (2) the NZX Listing Rules governing the conduct of issuers whose securities are listed on NZX's Markets.

<sup>2</sup> 31 breaches of the periodic disclosure requirements were identified in the May 04-April 06 NZXR report included as part of the Tribunal's annual report, 8 breaches of the periodic disclosure requirements were identified in the May 06 -April 07 NZXR report included as part of the Tribunal's annual report, 4 breaches of the periodic disclosure requirements were identified in the May 07 - April 08 NZXR report included as part of the Tribunal's annual report, 6 breaches of the periodic disclosure requirements were identified in the April 08-Dec 08 NZXR report included as part of the Tribunal's annual report, 8 breaches of the periodic disclosure requirements were identified in the May 06 -April 07 NZXR report included as part of the Tribunal's annual report.

<sup>3</sup> NZXD 04/05 NZX v Pure New Zealand Limited, NZXD05/07 Special Division v Smartshares Limited: smartOZZY, NZXD 02/2008 NZX v Dominion Finance (Holdings) Ltd, NZXD 04/2008 NZX v Pacific Finance Group Ltd

<sup>4</sup> NZMDT 05/2009 NZX v SunSeeker Energy (Australasia) Ltd and NZMDT 06/2009 NZX v Plus SMS (Holdings) Limited

<sup>5</sup> Idem

## WIDER MARKET CONTEXT

The Capital Markets Development Taskforce (Taskforce) reported its findings in December 2009. The Taskforce was an industry-led body established to produce a blueprint and plan to develop New Zealand's capital markets. The Taskforce looked at the current state of New Zealand's capital markets, the international context, future risks and opportunities, and key changes necessary to deliver the best possible financial system for New Zealand.

The Taskforce examined the structure, mandate, ownership and placement of existing regulatory institutions, including the Tribunal. Relevant to the Tribunal, the Taskforce recommended that:

*"[Government] review and clarify roles and scope of regulatory agencies to reduce duplication and conflicts of interest, build capability and scale around centres of excellence, and ensure that the focus of regulatory agencies is on facilitating capital market activity. This is likely to mean:*

- *consider[ing] consolidating parts of the Companies Office, Securities Commission and NZX Disciplinary Tribunal into a new market conduct regulator.*
- *some front-line market monitoring activity remains with NZX, with protocols around referrals to the regulator and ability of regulator to initiate investigations."*

The Government's response to the Taskforce's action plan records its agreement with this recommendation and notes that changes will be made as part of the review and amendment of the Securities Act 1978, which is currently being undertaken by the Ministry of Economic Development.

Tribunal members view this recommendation, and the Government's response, favourably overall. Notwithstanding that the Tribunal is satisfied with NZX's present performance of its regulatory function, the measures proposed should

enhance independence, remove (or better manage) conflicts of interest and obviate duplication. It wastes the resources of both the regulator and the regulated for more than one regulator to have jurisdiction in respect of the same subject matter, as is currently the case.

In implementing changes to the existing regulatory bodies and structures, the Tribunal makes the following specific observations with respect to disciplinary bodies.

First, a disciplinary body can only determine matters brought before it. The Tribunal relies on NZX to detect conduct that breaches NZX's Conduct Rules, and to bring a case before the Tribunal concerning that conduct. It is important that the market have confidence that conduct falling foul of NZX's Conduct Rules is being detected and appropriately referred to a disciplinary body.

In the first six months of 2009 the Tribunal received a single referral, and that concerned conduct in 2008. Upon inquiry, NZX advised the Tribunal that it was continuing to detect and respond to conduct that fell short of NZX's standards. NZX noted that it exercises discretion in determining whether to refer breaches to the Tribunal and, whilst a number of breaches had been detected by NZX during January to June 2009, not all of these merited referral to the Tribunal because they were not serious enough, and in respect of others, referral had been made to the Securities Commission instead. Further information as to the breaches detected by NZX, including those referred to the Securities Commission, are contained in its report to the Tribunal found at page 34.

The Tribunal can, however, state that referrals to it by NZX since late 2009, following the appointment of a new Head of Market Supervision, have been of the nature and level that it would expect to see.

Secondly, as noted above, there is currently duplication and overlap in the roles of the various regulatory bodies. The Tribunal considers that only one body should take action in respect of the same factual matters. Therefore referral to another regulator, particularly where that regulator has enhanced powers and remedies, may be appropriate. However, the market would have more confidence if it were aware that detection of these breaches, and referral, was occurring. The Tribunal notes that currently:

- a) regulatory action before the Tribunal is reported after the Tribunal has made its determination. The Tribunal's policy is to recommend to NZX that its determinations be published to the market in full under NZMDT Rule 6.6.2. This has occurred in all matters during this reporting period; and
- b) as to regulatory matters referred by NZX to the Commission, the Memorandum of Understanding between NZX and the Commission provides that NZX will, in general, make no public comment about regulatory or enforcement matters at the time of referral to the Securities Commission.

Thirdly, the Tribunal believes implementation of the Taskforce recommendation should be effected to provide an even greater degree of public assurance that appropriate levels of self-reporting and market surveillance and investigation is occurring.

<sup>6</sup> Indeed it has never sat since inception.

However, the Tribunal concurs with the Taskforce, that some regulatory functions should remain with NZX. In the Tribunal's view NZX remains best placed, through its existing administration, waiver and ruling, surveillance and inspection functions, and daily interactions with market participants, to detect most breaches of its Conduct Rules and determine which of these breaches are appropriate for enforcement action (as opposed to the implementation of other corrective measures). The Tribunal notes that oversight of these matters is currently within the jurisdiction of the Commission, which reports on the performance of NZX and the Tribunal annually.

Finally, in implementing this recommendation it is hoped that the separation of "prosecutor/investigator" and "adjudicator" be maintained to ensure independence between the investigative and prosecutorial functions on the one hand and the adjudicatory function on the other. To combine these functions would create new conflicts. In the Tribunal's experience the gravity and immediacy of the matters it handles are more appropriately handled by a body with similar composition and mandate to the Tribunal, rather than a necessarily slower and more costly judicial system.

## RESOURCING

NZMDT Rule 14.1.2(d) requires that the Chairman confirm whether or not adequate resources have been made available by NZX to the Tribunal for it to undertake its role under the NZMDT Rules. I so confirm. I note in particular that NZX has ensured the provision of adequate funding to enable improvements in the operational processes of the Tribunal.

The need to refresh the number of issuer appointees on the Tribunal was raised in my last report. As at the end of the reporting period there were three, one of whom (who had been appointed only in September 2009) then had to resign upon his appointment to the Securities Commission in January 2010. In accordance with previous practice the Tribunal has identified appropriate new appointees, and has asked NZX to confer with the Securities Commission on appointment.

## APPEALS PANEL

During the reporting period there have been no hearings by the Appeals Panel<sup>6</sup>. Mr Euan Abernethy, the Chairman of the Appeals Panel, confirms that it has adequate resources to undertake its role under the New Zealand Markets Disciplinary Tribunal Rules.



## POLICY

In my last report I noted that the Tribunal's focus during the 2009-2010 year would be on policy more broadly. In particular, I noted that the Tribunal would seek to gain a better understanding of its equivalent bodies in overseas jurisdictions, and commensurate disciplinary tribunals in New Zealand, and would consider improvements that could be made to the scope and execution of its jurisdiction – which could then be advanced to NZX as potential rule changes.

NZX however has advised the Tribunal that it considers that policy formulation and input into policy formulation is not part of the mandate of the Tribunal. That is not the view of the Tribunal, which is a body established under the NZMDT Rules with the specific purpose of being independent of NZX, and with the express power to "suggest to NZX and consult with NZX on the amendment of [the] Rules".

As it happens, this debate, and the need for the Tribunal to undertake this work, has been overtaken by the work of the Taskforce, as described above.

## EMERGING POLICY IN NZMDT DETERMINATIONS

As with the last reporting period, the Tribunal's hearing policy continues to develop. Over this reporting period there were a number of cases that enabled the Tribunal to settle its policy on a number of procedural matters.

All parties and persons appearing before the Tribunal should familiarise themselves with the Tribunal's publication *User Guide to the NZ Markets Disciplinary Tribunal Rules: A practice note prepared by the Tribunal for parties appearing before the Tribunal (the User Guide)*. This User Guide is provided by NZX to Respondents in conjunction with NZX's Statement of Case, and can be found together with the NZMDT Rules and Procedures, on the NZX website at: <http://www.nzx.com/market-supervision/nz-markets-disciplinary-tribunal/>.

For many people their first encounter with the NZMDT Rules and the Tribunal is when they are served with a Statement of Case by NZX. The Tribunal acknowledges that the NZMDT Rules are complex, and the timeframes imposed by these rules to respond to the allegations made by NZX in its Statement of Case, tight.

The User Guide was prepared by the Tribunal during this reporting period to assist parties, in particular Respondents, to understand the procedures and timeframes set out in the NZMDT Rules and the NZ Markets Disciplinary Tribunal Rules Procedures ("Procedures") that apply once a Statement of Case is served, and the Tribunal's policy on issues that might arise in the conduct of a case. It will continue to be updated by the Tribunal to reflect its policy on issues as those issues are considered by it.

Summarised below are some of the Tribunal's key policy positions, which have emerged from the Tribunal's determinations over the reporting period:

1. *Oral Hearings:* An oral hearing can only be requested as part of a compliant Statement of Case or Statement of Response. The NZMDT Rules provide that an oral hearing is only required where **it is essential to establish the facts of the case**. Neither NZX nor a Respondent can reserve its case or defence for an oral hearing where that case is not fully articulated in its pleadings. A party that has failed to articulate, in its Statement of Case or Statement of Response, the facts it considers relevant to its case, is unlikely to be permitted an oral hearing.
2. *Extensions of Time:* Where an application for further time to file a Statement of Response is being made to the Tribunal, the Tribunal expects to receive substantive grounds in support of the application by the Respondent.

The amendments made to the Tribunal Rules in January 2009 have substantially extended the time available for Respondents to formulate their response to NZX's Statement of Case. Extensions will therefore be exceptional. Examples of grounds in support of an extension might include the unavailability of key personnel essential for the Respondent to formulate its response or that the Respondent and NZX are in settlement discussions with a view to lodging a Settlement Agreement with the Tribunal (in which case this application should be supported by NZX).

Where an extension to negotiate a settlement is granted by the Tribunal, but no settlement is forthcoming at the expiry of that extension, the Tribunal is likely to proceed to hear the matter. Multiple extensions to negotiate settlement terms are unlikely to be considered favourably by the Tribunal.

Similarly, where a Respondent has been provided an extension to file a Statement of Response (in the absence of settlement negotiations) it is only in exceptional circumstances that further extensions of time will be granted. The Rules are intended to provide an expeditious process for consideration of breaches of the Conduct Rules. The Tribunal will endeavour to bring matters to a hearing as quickly as possible.

3. *Rejoinders by the Respondent:* The NZMDT Rules do not afford a Respondent the right to respond to an NZX rejoinder filed under Rule 6.2.7 as a matter of course. The Tribunal will exercise its discretion in each case to determine whether there are grounds for it to grant leave to allow an amended pleading to be filed by the Respondent. This discretion will usually only be exercised where the Respondent has demonstrated that exceptional circumstances exist.

The NZMDT Rules impose strict time frames (five business days) upon the Tribunal to issue its determination following receipt of the Statement of Case and Statement of Response. At the time it receives these documents the Tribunal does not know whether a rejoinder will be filed by NZX. Accordingly, it proceeds to consider the matter immediately upon receipt of the Statement of Case and Statement of Response. Whilst the receipt of a rejoinder resets time frames the Tribunal notes that its own independent analysis conducted prior to its receipt of a rejoinder may have led it to have considered all matters raised by NZX in its rejoinder. Accordingly, in circumstances where an NZX rejoinder does not raise any matters not already considered by the Tribunal, the Tribunal will be reluctant to grant a Respondent leave to file an amended Statement of Response.

Furthermore, given the time frames imposed upon the Tribunal to make its determination, it is in the interests of the parties to make application for leave to file a rejoinder to NZX's rejoinder as soon as possible. The Tribunal will act expeditiously to hear matters before it and once a determination is reached will not be in a position to grant leave under the rules.

4. *Settlement Agreements:* In the Tribunal's view it is open to the parties to agree settlement terms that deal with subsequent compliance matters that may have arisen since a Statement of Case was served. This is a commercially pragmatic response to avoid further disciplinary proceedings whilst addressing NZX's concerns with a Respondent's conduct. However, it must be transparent that this is what is occurring. The Tribunal will not approve terms of settlement that impose a penalty that is disproportionate to the conduct that is pleaded in the Statement of Case unless the terms of settlement make it explicit that the settlement is also intended to deal with the subsequent conduct **and** the Tribunal receives an undertaking that NZX will not take further disciplinary action in respect of that subsequent conduct.
5. *Compliance with Tribunal's interlocutory orders:* Where the Tribunal has sought further submissions or evidence from a party, those submissions or that evidence must be provided to the Tribunal by the date ordered by the Tribunal in its minute. If a Respondent or NZX fails to comply with the timeframes for filing materials with Tribunal, and has not otherwise sought

extensions of time for their provision, the Tribunal will proceed to make its determination on the materials before it. The Rules are intended to provide an expeditious process for consideration of breaches of the Conduct Rules. The Tribunal accordingly proceeds to determine matters on the evidence and materials before it on the expiry of dates provided in its interlocutory orders. Materials provided out of time are not considered.

## DIVISIONS

The Tribunal sits in Divisions of three. The Tribunal Chairman normally only chairs Divisions hearing cases under the Full Hearing Procedure. All matters heard in the 2009 reporting period were heard under the Summary Hearing Procedure.

I express my appreciation to all members of the Tribunal who have sat in 2009, and to the Chairs of those Divisions in particular.

## CONDUCT OF THE TRIBUNAL

The Tribunal is fortunate to have a skilled, able and diligent membership. Matters have been dealt with by the Tribunal with appropriate dispatch and, for what it is worth, the Appeals Panel is yet to convene.

I wish, in particular, to acknowledge the support the Tribunal and I have received from the Deputy Chairman, Mr William Stevens, and the Chairman of the Special Division, Mr Peter Wilson.

We are also very fortunate to have two very able, part-time staff members, Executive Counsel, Ms Elaine Campbell, and Special Division Counsel, Ms Rachel Batters. They have ensured the completion of all Tribunal work with skill and dispatch, and I express the Tribunal's appreciation to them both.



J Stephen Kós QC | CHAIRMAN



---

# MEMBERS

---

# MEMBERS

## MEMBERS OF THE TRIBUNAL AS AT 31 DECEMBER 2009

---

### LEGAL

Stephen Kós QC (Chairman), Andrew Beck, David Boldt, David Flacks, Mark Freeman, Victoria Heine, Don Holborrow, Derek Johnston, Laurie Mayne, Simon McArley and Tim Williams.

### LISTED ISSUER

Peter Wilson (Special Division Chairman), Falcon Clouston<sup>1</sup> and Mark Verbiest<sup>2</sup>.

### MARKET PARTICIPANTS

William Stevens (Deputy Chairman), Shane Edmond, Michael Jeffs, and Campbell Stuart.

### MEMBERS OF THE PUBLIC

Phillip Meyer, Stephen Moir, Patsy Reddy<sup>3</sup> and Paul Ridley-Smith.

<sup>1</sup> Falcon Clouston's membership status was changed from member of the public to listed issuer in September 2009

<sup>2</sup> Mark Verbiest was appointed to the Tribunal in September 2009 and resigned as a member in January 2010 following his appointment to the Securities Commission.

<sup>3</sup> Patsy Reddy's membership status was changed from listed issuer to member of the public in September 2009

### MEMBERS OF THE SPECIAL DIVISION AS AT 31 DECEMBER 2009

---

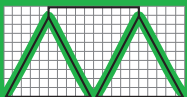
Peter Wilson (Chairman), Andrew Beck, Michael Jeffs and Paul Ridley-Smith.  
Rachel Batters acts as Counsel to the Special Division.

### MEMBERS OF THE APPEALS PANEL AS AT 31 DECEMBER 2009

---

Euan Abernethy (Chairman), Brian Allison, Peter Clapshaw, John Rattray,  
Bill Thurston and John Upton QC.





---

# STATEMENTS OF CASE, FINDINGS AND PENALTIES

---

---

THIS SECTION OF THE REPORT ADDRESSES THOSE MATTERS REQUIRED BY RULE 14.1.2(A)-(C) WHICH PROVIDES:

“14.1.2 The Tribunal shall create and provide an annual regulatory report to the public by the end of April of the following year using as a minimum the information from the report in respect of each year provided to the Tribunal by NZX above, and that collated by itself below:

- a) number of statements of case issued by NZX and the type of matters addressed in those statements of case;
  - b) the findings of the Tribunal and the Appeal Panel in respect of each statement of case issued by NZX, provided such disclosures are consistent with any decision on publication made by the Tribunal;
  - c) any penalties imposed by the Tribunal and the Appeal Panel;”
-

## NZMDT 01/2009 NZX V MCDOUALL STUART

---

*Division:* Stevens (Chair), Flacks and Ridley-Smith.

*Statement of Case served:* 21 January 2009

---

### ALLEGATIONS IN STATEMENT OF CASE AND TRIBUNAL FINDINGS:

The Statement of Case alleged that McDouall Stuart, on 23 occasions between 8 April 2008 and 6 January 2009, breached NZX Participant Rule 14.7.1(e), by permitting a nominated Client Funds Account to become overdrawn.

McDouall Stuart self-reported each breach to NZX Regulation in the manner prescribed by *Practice Note 09/05 Client Funds Overdraft Reporting* and each of these overdrafts was remedied within 24 hours.

While a Client Fund Account in credit cannot be used to offset a deficit in another Client Funds Account, McDouall Stuart at all times (on an aggregate basis), held sufficient funds to cover its client obligations. A number of the instances where the account was overdrawn related to timing differences in foreign currency accounts or bank errors. The high number of overdrafts was attributable to the large number of client funds accounts operated by McDouall Stuart as a result of its purchase of another broking business and associated timing delays in transfers between these accounts.

McDouall Stuart accepted that it did not make sufficient changes to its banking and accounting processes following two separate warnings from NZX Regulation during 2008. McDouall Stuart subsequently closed a number of Client Funds Accounts.

***The Tribunal approved a settlement agreement between the parties under which McDouall Stuart admitted breaching Participant Rule 14.7.1(e) as described above.***

---

### PENALTIES IMPOSED BY TRIBUNAL:

Under the terms of the Settlement Agreement approved by the Tribunal McDouall Stuart was required to:

- a) Pay NZX a sum of \$12,500. These moneys are required by the NZMDT Rules to be directed to the NZ Disciplinary Tribunal Fund; and
  - b) Make changes to its operational structure, to ensure that its operational controls were enhanced.
- 

### COSTS:

McDouall Stuart was required to pay all the Tribunal's costs as a term of the Settlement Agreement.

---

### PUBLICATION:

A public statement in the form attached to the Settlement Agreement and approved by the Tribunal was published. This public statement named McDouall Stuart and was released to the market.

---

## NZMDT 02/2009 NZX V A RESPONDENT

---

*Division:* Meyer (Chair), Beck, Edmond.

*Statement of Case served:* 13 October 2009

---

### ALLEGATIONS IN STATEMENT OF CASE AND TRIBUNAL FINDINGS:

The Statement of Case related to four breaches of NZX Participant Rule D10.1.1(g) in respect of three Crossings undertaken by the Market Participant, involving two Securities.

NZX Participant Rule D10.1.1(g) provides that for all Securities quoted on the NZSX market or NZAX market that *"all Crossings or negotiated deals under NZX Participant Rule D10.1.1(h) executed during a Normal Trading Session must be reported immediately through the Trading System on the same Trading Day, providing details of price and quantity involved."*

Here, during the course of a Trading Day, the Market Participant allegedly breached NZX Participant Rule D10.1.1(g) twice, in that it delayed reporting two Crossings in a security ("Security A") in the following manner:

- a) The Market Participant, as buyer, offered a price and quantity for Security A to their client ("Client A"), which was accepted. The Market Participant reported this Crossing through the Trading System approximately 15 minutes after Client A had accepted the price and quantity.
- b) The Market Participant, as seller of Security A, then offered a price and quantity to another client. This offer of Security A was accepted and this Crossing was reported through the Trading System 38 minutes after the offer was accepted.

The Market Participant also allegedly breached NZX Participant Rule D10.1.1(g) twice in respect of a second security, ("Security B"), in that during the course of a trading day, it delayed reporting a Crossing in a Security B in the following manner:

- a) The Market Participant, as a seller, offered a price and quantity for Security B to Client B, which was accepted. This Crossing was reported through the Trading System 37 minutes after Client B had accepted the price and quantity.
- b) In the same transaction, the Market Participant reported this Crossing through the Trading System at a price, which was not consistent with the price that was accepted by Client B when the trade actually occurred.

***NZMDT approved a settlement agreement between the parties under which the Market Participant admitting breaching NZX Participant Rule D10.1.1(g) on four occasions, as described above.***

---

---

#### PENALTIES IMPOSED BY TRIBUNAL:

Under the terms of the Settlement Agreement approved by the Tribunal the Market Participant was required to pay NZX a sum of \$12,000, by way of penalty for these breaches. These moneys are required by the NZMDT Rules to be directed to the NZMDT Discipline Fund.

---

#### COSTS:

The Market Participant, was required, as a term of the Settlement Agreement to bear all of the costs and expenses of the Tribunal in considering this matter.

---

#### PUBLICATION:

A public statement, in the form attached to the Settlement Agreement, was published. This public statement did not name the Market Participant. The Tribunal's *Policy Guideline on the Naming of Respondents* states that it is not likely that the name of the Respondent will be published when the penalty for the Respondent falls within Penalty Bands 1, 2 or 3 of Procedure 11 (Penalty Band Guidance Procedure) of the *NZ Markets Disciplinary Tribunal Procedures* for breaches of the NZX Participant Rules, and where the breach can be considered to be of minor importance and not systemic. In this case the Tribunal considered that the conduct of the Market Participant fell within Penalty Band 2 of the Penalty Band Guidance Procedure to the NZMDT Rules. Whilst the breaches were not self-reported NZX had advised the Tribunal that the Market Participant co-operated fully with NZX's investigation. The Tribunal considered that not naming the Market Participant was appropriate given the Penalty Band into which the conduct falls and because of the participant's co-operation with NZX. The Tribunal was of the view that the non-publication of the Market Participant's identity, fell within the Tribunal's existing policies. Accordingly it approved, as part of the Settlement Agreement, the form of public statement, which described the offending and the penalties imposed, but did not name the Market Participant concerned.

---

## NZMDT 03/2009 NZX V COOKS FOOD GROUP (CFG)

---

*Division:* Williams (Chair), Moir and Verbiest.

*Statement of Case served:* 13 November 2009

---

### ALLEGATIONS IN STATEMENT OF CASE AND TRIBUNAL FINDINGS:

The Statement of Case alleged that CFG had breached NZAX Listing Rule 10.5.1 by failing to make available its annual report within four months of the end of its financial year, being 31 March 2008, both electronically to NZX and to each Quoted Security holder, as is required by that rule.

It was alleged that this breach continued un-remedied during the period 1 August 2009 through to 6 November 2009.

CFG admitted that it did not provide its annual report within the time frames required by NZAX Listing Rule 10.5.1. It made a plea in mitigation of its breach.

***The Tribunal found that CFG breached NZAX Listing Rule 10.5.1. This breach arose when CFG failed to file its 2009 Annual Report by 31 July 2009, as required by NZAX Listing Rule 10.5.1, and continued until 6 November 2009 when the 2009 Annual Report was made available, both electronically to NZX and to each Quoted Security holder.***

***The Tribunal found that CFG showed a lack of urgency in remedying its breach. Specifically, the Tribunal noted that in excess of five months elapsed following CFG's receipt of written notice from its outgoing auditor until the time the 2009 Annual Report was filed. This was particularly culpable given there were material differences in CFG's financial position as disclosed to the market in its preliminary announcement on 16 June 2009 and that disclosed in the audited financial statements on 6 November 2009. The purpose of NZAX Listing Rule 10.5.1 is to ensure that relevant reliable financial information in relation to the financial performance and the financial position of a listed issuer is available promptly to the market following completion of its financial year. In this case this was not achieved.***

***While CFG's auditors resignation on 3 June 2009, was a delaying factor beyond CFG's control, the Tribunal found that CFG failed to expedite the preparation of the audited financial statements to the standard required; CFG did not act quickly enough in replacing its auditor when it resigned, its' records were not readily available to complete the audit, directors were not available to execute the completed accounts and work that could have been undertaken to finalise the annual report simultaneously with the preparation of the audited financial statements was not undertaken at that time.***

***The Tribunal found that the prolonged trading halt in place on CFG's securities, which was in place due to uncertainty surrounding its financial position, damaged the market's integrity - the primary purpose of an exchange is to provide facilities for investors in listed companies to trade their securities. It follows a prolonged trading halt undermines the fundamental purpose of an exchange and denies shareholders in listed companies a benefit that investing in a listed company otherwise provides.***

***The Tribunal considered that CFG's breach was aggravated by the fact that it did not communicate with the market following its advice that the report would be available the week commencing 17 August 2009. This initial estimate proved to be grossly inaccurate. The Tribunal considered that CFG must have known prior to filing its 2009 Annual Report of the gross differences between its reported financial position in its preliminary announcement and the position reported in the audited financial statements, and these should have been disclosed to the market earlier.***

---

#### PENALTIES IMPOSED BY TRIBUNAL:

The penalties imposed by Tribunal were:

- a) An order to pay to NZX, within 20 Business Days of the date of its determination, a sum of \$25,000 (twenty five thousand dollars) by way of penalty. These moneys are required by the NZMDT Rules to be directed to the NZ Disciplinary Tribunal Fund; and
- b) A public censure of CFG in the form of an announcement by the Tribunal to the market that the Tribunal had found CFG to be in breach of NZAX Listing Rule 10.5.1 and is accordingly censured by the Tribunal for this breach and its lack of diligence in rectifying the default.

---

#### COSTS:

The full costs and expenses of the Tribunal in considering the matter were awarded.

---

#### PUBLICATION:

The Tribunal's determination was published in full and a public censure of CFG was published.

---



## NZMDT 04/2009 NZX v PROPERTYFINANCE GROUP LIMITED (PFG)

---

*Division:* Reddy (Chair), Holborow and Ridley-Smith.

*Statement of Case served:* 8 December 2009

---

### ALLEGATIONS IN STATEMENT OF CASE AND TRIBUNAL FINDINGS:

The Statement of Case alleged that PFG had breached:

- a) NZAX Listing Rule 10.4.1 by failing to file its preliminary announcement within 75 days of the end of its financial year, as required by that rule; and
- b) NZAX Listing Rule 10.5.1 by failing to make available its annual report within four months of the end of the Respondent's financial year both electronically to NZX and to each Quoted Security holder, as is required by that rule.

PFG admitted the breaches and entered a plea in mitigation.

***The Tribunal found that PFG acted in breach of NZAX Listing Rules 10.4.1 and 10.5.1.***

***The breach of NZAX Listing Rule 10.4.1 arose when PFG failed to file its preliminary results by 12 June 2009, as required by NZAX Listing Rule 10.4.1 and continued until 29 July 2009 when the preliminary results were released to NZX.***

***The breach of NZAX Listing Rule 10.5.1 arose when PFG failed to file its 2009 Annual Report by 31 July 2009 as required by NZAX Listing Rule 10.5.1 and continued until 15 October 2009 when the 2009 Annual Report was made available, both electronically to NZX and to each Quoted Security holder.***

***The Tribunal found there were significant factors, which, in the Tribunal's view, mitigated these breaches by PFG. The Tribunal found that the PFG's breaches were largely attributable to the actions, or inactions, of the two trustees with whom PFG was dealing. To that extent the Tribunal considered that the initial breaches of both rules were largely outside PFG's control.***

***However, the Tribunal also found that PFG showed a lack of urgency in remedying its breaches. Whilst the Tribunal acknowledged that there were delays in respect to the scheduling of the Special Meeting of PFSL debenture holders, which delays were not attributable to PFG, it nevertheless took PFG three and a half months following that Special Meeting for the 2009 Annual Report to be filed. This was six and a half months after the end of the relevant financial year. In the Tribunal's view this report could have been completed more expeditiously once the results of the PFSL Special Meeting were known.***

***The Tribunal also noted that it was a substantial mitigating factor that PFG communicated with NZX and the market both in advance of its failure to file the preliminary results and annual report by their respective due dates and following these failures. As was noted by the Tribunal in NZMDT 03/2009 NZX v CFG the Tribunal expects issuers to be in communication with both security holders and***

***NZX during the period of breach to ensure that both NZX and security holders are fully informed as to when annual reports can be expected, and to otherwise appraise the market of other material information as it becomes known to the issuer. Here PFG did this and the Tribunal considered this a substantial mitigating factor.***

***The Tribunal determined that the purpose of NZAX Listing Rule 10.5.1 is to ensure that relevant reliable financial information in relation to the financial performance and the financial position of a listed issuer is available promptly to the market following completion of its financial year. Whilst the Tribunal accepted PFG's submission that the delay in filing both the preliminary results and the annual report was to ensure that the information filed by it was reliable, the purpose of NZAX Listing Rule 10.5.1 was not achieved, as the information was not provided promptly as is required by the rules.***

***PFG breached NZAX Listing Rule 10.5.1 in 2008 [see NZXD04/2008 NZX v PFG]. The Tribunal was of the view that the most relevant precedent was this 2008 PFG case. However, in imposing a penalty the Tribunal had to consider this past record of non-compliance by PFG and therefore a higher penalty than was imposed in that case was appropriate.***

---

#### PENALTIES IMPOSED BY TRIBUNAL:

The penalties imposed by Tribunal were:

- a) An order to pay to NZX, within 20 Business Days of the date of its determination, a sum of \$12,500 (twelve and a half thousand dollars) by way of penalty. These moneys are required by the NZMDT Rules to be directed to the NZ Disciplinary Tribunal Fund; and
- b) A public censure of PFG in the form of an announcement by the Tribunal to the market that the Tribunal had found PFG to be in breach of NZAX Listing Rule 10.4.1 and 10.5.1 and is accordingly censured by the Tribunal for these breaches.

---

#### COSTS:

The full costs and expenses of the Tribunal in considering the matter were awarded.

---

#### PUBLICATION:

The Tribunal's determination was published in full and a public censure of PFG was published.

---

## NZX 05/2008 NZX v SUNSEEKER ENERGY (AUSTRALASIA) LIMITED

---

*Division:* Wilson (Chair), Jeffs and Mayne.

*Statement of Case served:* 30 December 2009

---

### ALLEGATIONS IN STATEMENT OF CASE AND TRIBUNAL FINDINGS:

The Statement of Case alleged that SSE had breached:

- a) NZAX Listing Rule 10.4.1 by failing to file its preliminary announcement within 75 days of the end of its financial year, as required by that rule; and
- b) NZAX Listing Rule 10.5.1 by failing to make available its annual report within four months of the end of the Respondent's financial year both electronically to NZX and to each Quoted Security holder, as is required by that rule.

SSE admitted the breaches and entered a plea in mitigation.

***The Tribunal found that SSE acted in breach of NZAX Listing Rules 10.4.1 and 10.5.1.***

***The breach of NZAX Listing Rule 10.4.1 arose when SSE failed to file its preliminary results by 14 September 2009, as required by NZAX Listing Rule 10.4.1 and continues as at the date of this NZ Markets Disciplinary Tribunal Annual Report.***

***The breach of NZAX Listing Rule 10.5.1 arose when SSE failed to file its 2009 Annual Report by 31 October 2009 as required by NZAX Listing Rule 10.5.1 and continues at the date of this NZ Markets Disciplinary Tribunal Annual Report.***

***The Tribunal found that SSE showed a lack of urgency in remedying its breaches of NZAX Listing Rule 10.4.1 and 10.5.1. The Tribunal found that the fact that SSE had been in breach of NZAX Listing Rule 10.4.1 for approximately 4 months and NZAX Listing Rule 10.5.1 for approximately 3 months at the time of the Tribunal's determination, and had no plans to remedy its non-compliance, demonstrated a disregard for the NZAX Listing Rules.***

***The Tribunal also found that SSE had not taken steps to mitigate its breach. It was of the view that SSE's financial position did not mitigate its breach, particularly in circumstances when this position had not been communicated to NZX or the market. The Tribunal's determination noted that it was a serious aggravating factor that SSE did not communicate with the market after it failed to file the 2009 Annual Report, and had not made any market announcements since filing its 2008 full year preliminary result on 19 September 2008. Neither NZX nor the market had been provided with any update as to when the reports would be available or been provided with any updates on SSE's business plans or financial position. As noted by the Tribunal in NZMDT 03/2009 NZX v CFG, the Tribunal expects issuers to be in communication with both security holders and NZX during the period of breach to ensure that both NZX and security holders are fully informed as to when late reports can be expected, and of the issuer's intent to otherwise appraise the market of other material information as it becomes known to the issuer. In this case, SSE advised NZX in October 2009 that it was to***

***exist as a shell company as the majority shareholder had determined that it would not provide funding. As at the date of the NZMDT determination SSE had still not appraised the market of this material development, which was a substantial change in position from SSE's last market announcement in September 2008. Nor had SSE appraised the market of its insolvency, which was advised to NZX in the course of responding to NZX's Statement of Case.***

***The Tribunal determined that the purpose of NZAX Listing Rule 10.5.1 is to ensure that relevant reliable financial information in relation to the financial performance and the financial position of a listed issuer is available promptly to the market following completion of its financial year. In this case the Tribunal found that this objective had not been met. In particular, there was evidence before the Tribunal that SSE is insolvent. SSE had not released this information to the market and the Tribunal considered this a serious aggravating factor.***

---

#### PENALTIES IMPOSED BY TRIBUNAL:

The penalties imposed by Tribunal were:

- a) An order to pay to NZX, within 20 Business Days of the date of its determination, a sum of \$40,000 (forty thousand dollars) by way of penalty. These moneys are required by the NZMDT Rules to be directed to the NZ Disciplinary Tribunal Fund; and
- b) A public censure of SSE in the form of an announcement by the Tribunal to the market that the Tribunal had found SSE to be in breach of NZAX Listing Rule 10.4.1 and 10.5.1 and is accordingly censured by the Tribunal for these breaches; and
- c) An order that SSE remedy its breaches of NZAX Listing Rules 10.4.1 and 10.5.1 by filing the documents required by those Rules within 20 Business Days of the Tribunal's determination<sup>4</sup>.

---

#### COSTS:

The full costs and expenses of the Tribunal in considering the matter were awarded. The Tribunal also ordered that SSE pay, within 20 Business Days of the date of an invoice from NZX, NZX's actual costs and expenses incurred by NZX in relation to this matter.

---

#### PUBLICATION:

The Tribunal's determination was published in full and a public censure of SSE was published.

---

<sup>4</sup> The Tribunal noted in its determination that it was of the view that if its remedial order is not complied with, NZX should consider exercising its discretion under the NZAX Listing Rules to cancel SSE's listing.

## NZXD 06/2008 NZX v PLUS SMS (HOLDINGS) LIMITED (PLS)

---

Division: McArley (Chair), Boldt and Clouston.

Statement of Case served: 31 December 2009

---

### ALLEGATIONS IN STATEMENT OF CASE AND TRIBUNAL FINDINGS:

The Statement of Case alleged that PLS had breached:

- a) NZAX Listing Rule 10.4.1 by failing to file its preliminary announcement within 75 days of the end of its financial year, as required by that rule; and
- b) NZAX Listing Rule 10.5.1 by failing to make available its annual report within four months of the end of the Respondent's financial year both electronically to NZX and to each Quoted Security holder, as is required by that rule.

PLS admitted the breaches and entered a plea in mitigation.

***The Tribunal found that PLS acted in breach of NZAX Listing Rules 10.4.1 and 10.5.1.***

***The breach of NZAX Listing Rule 10.4.1 arose when PLS failed to file its preliminary results by 14 June 2009, as required by NZAX Listing Rule 10.4.1 and continues as at the date of this NZ Markets Disciplinary Tribunal Annual Report.***

***The breach of NZAX Listing Rule 10.5.1 arose when PLS failed to file its 2009 Annual Report by 31 July 2009 as required by NZAX Listing Rule 10.5.1 and continues at the date of this NZ Markets Disciplinary Tribunal Annual Report.***

***The Tribunal noted that it is incumbent on directors of listed companies to understand the listing rules that they have agreed, on behalf of the listed entity, to comply with. In this case, PLS's offending was aggravated by the fact that its underlying difficulties arose in late 2008, and that whilst it initially advised the market of the problems it was encountering (in its March 2009 Board report) thereafter it neither continued to inform the market of the on-going nature of these problems and the impact that the departures of key personnel had on its ability to comply with the rules nor sought a waiver of the requirement that the documents should be filed. At the time of the Tribunal's determination PLS had been in breach of NZAX Listing Rule 10.4.1 for approximately 7 months and NZAX Listing Rule 10.5.1 for approximately 6 months. The Tribunal determined that PLS's conduct – and in particular its failure to inform the market even that it would be unable to file either of the documents in question – demonstrated an indifference towards the vital importance of compliance with its disclosure obligations.***

***PLS argued that its breach was caused by the actions and/or omissions of its former CEO and CFO. Even assuming that these actions did make it impossible for PLS to comply with its obligations under the NZAX Listing Rules (and a well governed listed company should have in place systems and procedures that would enable it to comply with its obligations notwithstanding the unexpected***

*circumstances it encountered), the Tribunal found that there was no reason why PLS could not have kept the market informed regarding its difficulties. Further, if it was impossible for PLS to comply with NZAX Listing Rules 10.4.1 and 10.5.1 it was open to PLS to apply for a waiver from those rules prior to PLS breaching them. In the Tribunal's opinion if PLS were able to demonstrate in a waiver application that compliance with NZAX Listing Rules 10.4.1 and 10.5.1 was impossible, or indeed very difficult, there was a very high likelihood that a waiver would have been granted. If not by NZX at first instance, then on review by the Tribunal.*

*The Tribunal noted that these employees, on whose conduct PLS relies to explain its breaches of the Rules and why its breaches persist to this day, were dismissed 16 months ago. PLS did not have in place systems and procedures that would have enabled it to comply with its obligations notwithstanding the unexpected circumstances encountered. PLS's board was seemingly unaware of the working arrangements of the CFO and the impact those arrangements had on PLS's ability to meet its obligations. In the Tribunal's view PLS lacked appropriate governance arrangements to ensure that the conduct that gave rise to the breach such as holding company records at personal residences, did not occur. While the board of a listed issuer may utilise employees, external accountants and auditors, the maintenance and availability of accounting and business records remains the responsibility of the directors. The Tribunal viewed this failure of governance as a serious aggravating factor.*

*Further, as noted above, PLS pleaded that it was unaware of its ability to seek a waiver as a mitigation of its breach. Rather than mitigating its breach, in the Tribunal's view this was an aggravating factor. As already noted by the Tribunal it is incumbent upon directors to ensure that they are familiar with all relevant rules. For professional directors of a listed company, ignorance of the NZAX Listing Rules is unacceptable.*

*The Tribunal found that PLS had not taken adequate steps to mitigate its breach. In particular PLS failed throughout the period of its breach to adequately communicate with either of NZX or the market. In the Tribunal's view this was also a serious aggravating factor.*

*The purpose of the NZAX Listing Rule 10.5.1 is to ensure that relevant reliable financial information in relation to the financial performance and the financial position of a listed issuer is available promptly to the market following completion of its financial year. The Tribunal found that here this objective has not been met.*

*The Tribunal also noted with concern that PLS's submissions suggest that it may have informed its shareholders of the problems it was experiencing, without passing the same information to the market. The Tribunal believed that this required further investigation by NZX as to compliance by PLS with NZAX Listing Rules 10.1.1 (b) and 10.7.2.*

---

---

#### PENALTIES IMPOSED BY TRIBUNAL:

The penalties imposed by Tribunal were:

- a) An order to pay to NZX, within 20 Business Days of the date of its determination, a sum of \$50,000 (fifty thousand dollars) by way of penalty. These moneys are required by the NZMDT Rules to be directed to the NZ Disciplinary Tribunal Fund; and
  - b) A public censure of PLS in the form of an announcement by the Tribunal to the market that the Tribunal had found SSE to be in breach of NZAX Listing Rule 10.4.1 and 10.5.1 and is accordingly censured by the Tribunal for these breaches; and
  - c) An order that PLS remedy its breaches of NZAX Listing Rules 10.4.1 and 10.5.1 by filing the documents required by those Rules within 20 Business Days of the Tribunal's determination<sup>5</sup>.
- 

#### COSTS:

The full costs and expenses of the Tribunal in considering the matter were awarded. The Tribunal also ordered that PLS pay, within 20 Business Days of the date of an invoice from NZX, NZX's actual costs and expenses incurred by NZX in relation to this matter.

---

#### PUBLICATION:

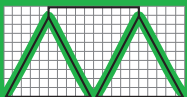
The Tribunal's determination was published in full and a public censure of PLS was published.

---

<sup>5</sup> The Tribunal noted in its determination that it was of the view that if its remedial order is not complied with, NZX should consider exercising its discretion under the NZAX Listing Rules to cancel PLS's listing.







---

NZX REGULATION ANNUAL REPORT  
TO NEW ZEALAND MARKETS  
DISCIPLINARY TRIBUNAL

---

---

THIS SECTION OF THE REPORT ADDRESSES THOSE MATTERS REQUIRED BY NZMDT RULE 14.1.1 (A) - (C) WHICH PROVIDES:

“14.1.1 Following the end of each calendar year NZX shall collate the following information for that year and provide to the Tribunal as a report by the end of the following year:

- a) breaches of the Conduct Rules, Futures and Options Rules or any other rules or regulations of NZX from time to time identified by NZX;
  - b) complaints received by NZX in respect of Market Participants, Issuers and Futures and Options Participants; and
  - c) the use of the proceeds of the Disciplinary Fund.”
-

## 1. MARKET PARTICIPANTS AND FUTURES AND OPTIONS PARTICIPANTS

### A. SUMMARY OF BREACHES OF THE NZX PARTICIPANT RULES IDENTIFIED BY NZX FROM TIME TO TIME

#### *i) Significant Breaches of the NZX Participant Rules*

There were two cases representing significant breaches of the NZX Participant Rules referred to the Tribunal during the the period 1 January 2009 to 31 December 2009 (the "Period"). These cases are described in this report in the section entitled "Statement of Case, Findings and Penalties".

#### *ii) Breaches Currently Being Investigated*

In addition, NZXR is currently in the process of referring two separate matters involving an NZX Market Participant to the Tribunal for suspected breaches of the NZX Participant Rules during the Period.

#### *iii) Other Breaches of the NZX Participant Rules*

In addition to the above cases, there were also a number of other minor, inadvertent or technical breaches of the NZX Participant Rules, which were not considered sufficiently serious to warrant referral to the Tribunal.

Of these, various breaches were identified during NZX's on-site inspections and Capital and Prudential Inspections (introduced in 2009 as a form of desk based inspection). These breaches were subsequently highlighted to the relevant Market Participant as part of the NZX Regulation inspection report which contains action points for Market Participants to resolve, or implement within specified timeframes. In some cases, alternative action was taken including issuing warnings to the relevant Market Participant.

Additionally, numerous trading breaches have occurred. During the Period, a total of nine breaches of Participant Rule D10.1 (Crossing outside the quotations) were identified. These were all minor transgressions that resulted in an automatic fine by NZX. In the same period, a significant number of breaches relating to late settlement of trades occurred. These also resulted in an automatic fine by NZX.

As in the period reviewed in NZMDT's 2008 Annual Report, there were a number of breaches of Participant Rule 15.9.1 (Daily Liquid Capital reports not submitted on time). These were all minor, inadvertent, or technical in nature. These were resolved following correspondence with the relevant Market Participant if previous authorisation was not obtained prior to the breach.

A total of 30 breaches of Participant Rule 14.7.1(3) (Client Funds Account overdrawn) occurred. These were largely self-reported by the Market Participant, and a significant number of these were either as a result of time differences for international clients, or a result of bank errors for which the Market Participant ultimately received good value. Another significant reason for these breaches was errors in processing bank transactions by the Market Participant's employees. All of the breaches were followed up by communication with the relevant Market Participant, including, where appropriate, putting the relevant Market Participant on notice and advising them that, in the absence of extraordinary circumstances as determined by NZX at its sole discretion, any future overdraw of the firm's Client Funds Accounts would be referred to the Tribunal. NZXR made one referral to the Tribunal in relation to Rule 14.7.1(3), as noted in Section 1.

There were also 14 breaches of Participant Rule 14.4.2 (Client Assets need to exceed Outstanding Obligations). The majority of these were self-reported by the relevant Market Participant and positions were corrected within the day. All of these were followed up by communication with the relevant Market Participant. The majority of these breaches were caused by timing issues with international cash transfers.

#### B. SUMMARY OF COMPLAINTS RECEIVED BY NZX IN RESPECT OF MARKET PARTICIPANTS

NZX received a total of ten written complaints from members of the public in respect of Market Participants during the Period.

Of these complaints:

- One was closed due to the failure by the complainant to provide sufficient information for investigation of the complaint;
- Four did not appear to involve breaches of the NZX Participant Rules, and resulted in the closure of the matter;
- Four involved allegations of which there was insufficient evidence on which the matter could be brought before the Tribunal; and
- One is currently in the process of being referred to the Tribunal.

#### C. SUMMARY OF BREACHES OF THE NZX FUTURES & OPTIONS RULES IDENTIFIED BY NZX FROM TIME TO TIME

During the Period, there were a number of minor, inadvertent, or technical breaches of the NZX Futures & Options Rules, which were not considered sufficiently serious to warrant referral to the Tribunal.

The majority of these breaches were identified during NZX's on-site inspections and Capital and Prudential Inspections of Futures and Options Participants. These breaches were subsequently highlighted to the relevant Participant as part of the NZXR inspection report which contained action points for that Participant to resolve, or implement within specified timeframes. In some cases, alternative action was taken including issuing warnings to and completing further spot onsite inspections of the relevant Participant.

#### D. SUMMARY OF COMPLAINTS RECEIVED BY NZX IN RESPECT OF FUTURES & OPTIONS PARTICIPANT

During the Period, NZX received no written complaints in respect of any Futures & Options Participants.

#### E. PUBLICATIONS BY NZX COMPLIANCE

In addition to the routine on-site inspections of Market Participants, NZXR's Participant Compliance Team issues Compliance Briefing memoranda to Market Participants, highlighting both issues that have been identified during the NZX Compliance on-site inspections and addressing issues that have developed throughout the year. One Compliance Briefing has been issued since the last report.

## 2. LISTED ISSUERS

### A. SUMMARY OF BREACHES OF THE LISTING RULES IDENTIFIED BY NZXR FROM TIME TO TIME

#### *i) Significant Breaches of the NZX Listing Rules*

There were four significant breaches of the NZX Listing Rules referred to the Tribunal during the Period. These are described in are described in this report in the section entitled "Statement of Case, Findings and Penalties". All of these breaches related to the failure by Issuers to comply with the periodic reporting requirements of the NZX Listing Rules.

#### *ii) Referrals to the Securities Commission*

In accordance with the Memorandum of Understanding between NZX and the Securities Commission and sections 36ZD and 36ZL of the Securities Markets Act 1988, NZXR referred 11 matters during the Period in respect of NZX Listed Issuers to the Securities Commission.

Of these referrals:

- Three related to the failure by an Issuer to comply with the periodic reporting requirements of the Rules and, in the case of one of the above Issuers, a referral was also made in respect of one of these Issuer's compliance with section 19B (Continuous Disclosure) of the Securities Markets Act 1988 and its shareholders compliance with section 23 of the Securities Markets Act 1988. The Securities Commission has stated that no further action will be taken in respect of one of the above mentioned referrals. NZX is yet to receive an update in respect of the other two referrals;
- Three related to concerns with the Issuer's compliance with section 19B (Continuous Disclosure) of the Securities Markets Act 1988;
- Two related to an Issuers' Substantial Security Holders' disclosure;

- Two related to the compliance of Issuers' directors or officers with section 19T of the Securities Markets Act 1988. The Commission has indicated that it will not take any further action in respect of both of these referrals;
- One related to the presentation of an Issuer's financial statements and certain statements contained therein.

#### *iii) Other Breaches of the NZX Listing Rules*

In addition to the above breaches, NZXR identified 20 breaches of the NZX Listing Rules which were not considered sufficiently serious to warrant referral to the Tribunal.

Of these breaches:

- Ten were in respect of failures to include information in the annual, or half yearly, report in respect of the Net Tangible Assets per security of the Issuer. As was the case during the 2008 reporting cycle, these breaches arose as a result of Issuers using a pre July 2006 NZX Listing Rule amendment version of Appendix 1, which did not include the requirement for Net Tangible Asset information;
- Six were in relation to the minor late provision of annual and half year reports and preliminary announcements to NZX;
- Two were in respect of failures to provide preliminary announcements where waivers from this requirement was sought but declined by NZX, one of which related to an Issuer who had been listed for only four Business Days and who had, during its offer period, issued a prospectus, including financial statements for its operating parent entity;
- One related to a failure by an Issuer to comply with the conditions of a waiver provided by failing to disclose details of the transaction the subject of the waiver to the market. This failure to abide by the conditions of the waiver in effect resulted in a technical breach of the NZX Listing Rules; and

- One was in respect of a failure by an Issuer to advise the market of the extension to the offer period within the requisite timeframe required by the NZX Listing Rules.

#### B. SUMMARY OF COMPLAINTS RECEIVED BY NZX IN RESPECT OF ISSUERS

NZX received a total of 23 complaints in respect of NZX Listed Issuers during the Period.

Of these complaints:

- 15 were determined not to be breaches of the NZX Listing Rules, of these:
  - a) two were in respect of the inability of overseas shareholders to participate in an Issuer's capital raising;
  - b) two were in respect of the offer by Issuers to 'experienced investors' to participate in placements undertaken by Issuers in unison with other capital raisings, and the complainant's belief that they fell within that criteria;
  - c) three were in respect of the technical operation of Issuer's corporate actions or trading requirements, including the timing between quotation of rights and the effect of share consolidations; and
  - d) eight can be described as relating to a misinterpretation of the requirements of the NZX Listing Rules, and the obligations on Issuers imposed therein.
- Two were of in respect of the operation of the NZX Listing Rules in the context of Capital Raisings, specifically expressing a view that the NZX Listing Rules should not provide for the raising of capital by way of non-pro rata share purchase plans;
- Two were outside of NZXR's regulatory jurisdiction, one of which related to the transactions between receivers of an Issuer and associates of that receiver;
- One was in respect of a waiver granted by NZXR to an Issuer and the belief that the information provided to NZX was misleading or less than fulsome;
- One related to possible breaches by a Listed Issuer whom NZXR had already instigated proceedings with the Tribunal and referred to the Securities Commission; and

- One was in respect of the price at which an Issuer's securities were trading.

#### C. PUBLICATIONS BY NZX REGULATION

NZXR has not published any Guidance Notes during the Period. NZX did, however, undertake consultation on an IPO Guidance Note and has two further Guidance Notes that it anticipates to release to interested parties in the first quarter of 2010.

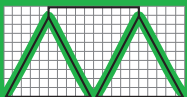
On 3 April 2009, changes to NZX's Listing Rules were made to facilitate the swift raising, and preservation, of capital following ongoing consultation with the Securities Commission and feedback received from various interested parties.

Additionally, NZXR has, during the Period, also released seven Consultation Memoranda relating to the introduction of new Rules and Procedures relating to the introduction of a new clearing and settlement system, including the introduction of a central-counter party model, and the amendments required to NZX's existing NZX Listing Rules, NZX Participant Rules and the NZMDT Rules to effect this. NZXR is currently in discussions with the Reserve Bank of New Zealand, the Securities Commission and the Ministry of Economic Development regarding the proposed amendments and new Rule sets following consultation with various interested parties.

## 4. DISCIPLINARY FUND ACCOUNTS

	4 MONTHS TO 30 APRIL 08	8 MONTHS TO 31 DECEMBER 08	12 MONTHS TO 31 DECEMBER 09
<b>Fines and Costs</b>	<b>13,000</b>	<b>230,629</b>	<b>411,237</b>
<b>Expenses of NZ Markets Disciplinary Tribunal</b>			
Appeal Member Costs			
Executive Counsel Costs		60,087	109,112
NZ Markets Disciplinary Tribunal Member Costs	14,248	105,282	44,171
Legal Advisory			
Rules Review	44,752	1,360	595
Disbursements		3,717	11,234
<b>Total Expenses</b>	<b>59,000</b>	<b>170,446</b>	<b>165,112</b>
Surplus (Deficit) for the period	-46,000	60,183	246,125
<b>Accumulated Surplus (Deficit)</b>	<b>236,054</b>	<b>296,237</b>	<b>542,362</b>





---

# REPORT ON SPECIAL DIVISION ACTIVITIES

---

---

The Special Division considered eight matters during the year of which three were at the request of NZX Limited, four related to Smartshares Limited and one relating to a complaint by a member of the public.

The complaint from a member of the public related to a NZSX issuer and was determined as being outside the Division's jurisdiction.

In all cases the Division has been able to respond promptly. There have been no changes to personnel or administrative arrangements.



PETER WILSON | CHAIRMAN

## NZMDT SPECIAL DIVISION MATTERS | 1 JANUARY TO 31 DECEMBER 2009

Date Received	Issuer	Matter	Summary of Matter
30/01/09	Smartshares Ltd	Review of SMARTS surveillance system alert	The Special Division investigated the circumstances of a SMARTS alert regarding trading in units of the smartTENZ fund.
30/01/09	NZX Ltd	Review of SMARTS surveillance system alert	The Special Division investigated the circumstances of a SMARTS alert regarding trading in NZX ordinary shares.
30/03/09	Smartshares Ltd	Review of a complaint received from a unitholder in the NZX Midcap Index Fund	The Special Division investigated the complaint regarding proposed amendments to the trust deed of the smartMIDZ fund.
15/04/09	NZX Ltd	Approval of Short Form Prospectus and Investment Statement under NZSX Listing Rule 6.1	The Special Division reviewed and approved the combined Short Form Prospectus and Investment Statement for a pro rata renounceable rights issue.
21/04/09	NZX Ltd	Approval of waiver under NZSX Listing Rule 7.6.4	The Special Division reviewed and approved an application for waiver from Rule 7.6.4 in respect of the NZX Ltd CEO Share Scheme.
01/05/09	01/05/09	Review of a complaint received from a member of the public regarding his investment in an NZSX Issuer	The Special Division considered the complaint and determined that it was outside its jurisdiction.
19/05/09	Smartshares Ltd	Review of SMARTS surveillance system alert	The Special Division investigated the circumstances of a SMARTS alert regarding trading in units of the smartTENZ fund.
14/09/09	Smartshares Ltd	Approval of Prospectuses under NZSX Listing Rule 6.1	The Special Division reviewed and approved the renewal of the Prospectuses for each of the five funds managed by Smartshares Ltd.

---

# DIRECTORY

---

**ELAINE CAMPBELL** | EXECUTIVE COUNSEL

PO Box 15336 | Mirimar | Wellington 6234

Telephone: +64 275 709710

Email: [elaine.campbell@nzmdt.com](mailto:elaine.campbell@nzmdt.com)