



17 June 2016

**APPLICATION FOR WAIVER FROM RULE 9.2.1 OF THE NZX MAIN BOARD LISTING RULES  
SMARTSHARES LIMITED**

1. This is a decision of the Special Division of the NZ Markets Disciplinary Tribunal (*Special Division*).
2. Capitalised terms that are not defined in this decision have the meanings given to them in the NZX Main Board Listing Rules (*the Rules*).

**Background**

3. NZX Limited (*NZX*) operates a funds management business through two wholly-owned subsidiaries, Smartshares Limited (*Smartshares*) which is the manager of 23 Listed exchange traded funds (*ETFs*) and SuperLife Limited (*SuperLife*) which provides superannuation and KiwiSaver financial products. Under the Rules, SuperLife is a Related Party of Smartshares.
4. NZX is required to transition its funds management business to the Financial Markets Conduct Act 2013 (*FMCA*) by 1 December 2016. The Financial Markets Authority (*FMA*) has granted Smartshares a market services licence to manage registered schemes under the FMCA.
5. At the date that SuperLife transitions to offering its financial products under the FMCA, Smartshares and SuperLife will be amalgamated under section 222 of the Companies Act 1993 (*the Amalgamation*). Under that section, both the Smartshares Board and the SuperLife Board must resolve to cancel the shares in SuperLife for nil consideration. SuperLife will then cease to exist as a separate legal entity and Smartshares will be the surviving company. There will be no change to the current Directors of Smartshares immediately following the Amalgamation.
6. Under the Rules, Smartshares' entry into the Amalgamation will be a Material Transaction with a Related Party. While the Rules provide certain exclusions for amalgamations, they do not technically apply here because the Amalgamation is neither an amalgamation between wholly-owned subsidiaries of Smartshares, nor an amalgamation between Smartshares and its wholly-owned subsidiary.

**Waiver Sought**

7. Smartshares has applied for a waiver from the requirement under Rule 9.2.1 to obtain approval for the Amalgamation from the unitholders in each of its ETFs.
8. Smartshares submitted the following in support of the waiver:
  - a. No undue value transfer or influence: Rule 9.2.1 is designed to ensure that undue influence is not exercised by a Related Party to reach a favourable outcome or transfer of value from the Issuer to the Related Party in respect of a transaction. The Rule is also designed to ensure that security holders are given an opportunity to review transactions where the Board may have been subject to actual or perceived influence from a Related Party. In particular, the rationale for including an amalgamation as a "Material Transaction" under Rule 9.2.2(f) is to guard against an amalgamation between an Issuer and a company which is a Related Party of the Issuer or which is controlled by a Related Party of the Issuer, on terms which are not arm's length because the Related Party has been able to influence the terms of the amalgamation to its own advantage.

The policy of Rule 9.2.1 is not offended in this context, where the Amalgamation arises by virtue of NZX's decision as the parent of Smartshares and SuperLife to streamline its funds management business, and SuperLife has not influenced Smartshares' decision to enter into the Amalgamation. In addition, the Amalgamation will not result in any transfer of value from Smartshares to SuperLife, as it is a requirement of section 222 of the Companies Act that SuperLife's shares be cancelled for nil consideration.

- b. No prejudicial effect on unitholders: The Amalgamation is not material to unitholders. Compared to Issuers that are companies, Smartshares' corporate governance and financial arrangements have less effect on unitholders. In addition, the rights attaching to the ETFs, including the matters in respect of which unitholders are entitled to vote, are set out in the relevant Trust Deed for each ETF. The Amalgamation does not cause any transfer of value from the ETFs for unitholders and will not affect the net asset value of the ETFs. The governance arrangements for Smartshares are also not affected because Smartshares will be the surviving legal entity post-Amalgamation, and the current Directors will remain on the Smartshares board.

### **Decision**

- 9. On the basis that the information provided to the Special Division is full and accurate in all material respects, the Special Division grants Smartshares a waiver from Rule 9.2.1 so that unitholder approval is not required for the Amalgamation. The waiver is granted on the condition that the Directors of Smartshares certify that the Amalgamation is fair and reasonable to all of the unitholders in the ETFs.

### **Reasons**

- 10. In coming to the decision to grant the waiver, the Special Division considered the submissions from Smartshares above and agreed that in these circumstances there is no exercise of undue influence by the Related Party (SuperLife) nor a transfer of value from the Issuer (Smartshares) to a Related Party which would contravene the intent of Rule 9.2.1.

### **Publication**

- 11. This decision is confidential until the Amalgamation is Announced, following which this decision will be published in accordance with Rule 1.11.2.

DATED 17 JUNE 2016



Andrew Beck, Chairman, Special Division