

16 October 2015

**APPLICATION FOR WAIVERS FROM 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. Smartshares Limited (*Smartshares*) is the manager of several exchange traded funds (*ETFs*) with securities Quoted on the NZX Main Board. Smartshares is a wholly owned subsidiary of NZX Limited (*NZX*) and accordingly, its listing is regulated by the Special Division.
4. Smartshares is currently preparing an application for a market services licence to be a manager of registered schemes under the Financial Markets Conduct Act 2013. In preparation for that application, Smartshares intends to appoint two directors who are both independent of NZX and Smartshares (*Proposed Directors*).
5. The Proposed Directors are also intended to be appointed as directors of SuperLife Limited (*SuperLife*), another wholly owned subsidiary of NZX.
6. While Smartshares intends to amalgamate with SuperLife on the effective date of the market services licence (which, if granted, is likely to be in H1 2016), the appointment of the Proposed Directors as directors of both Smartshares and SuperLife before any amalgamation means that they will not technically be Independent Directors under the Rules.
7. A person is not an Independent Director if they have a Disqualifying Relationship, which is deemed to include where the person is an Associated Person of the Substantial Product Holder. In this case, NZX is the Substantial Product Holder of Smartshares, so the directors will not be Independent Directors if they are Associated Persons of NZX.
8. Under Rule 1.8.3, a director will be an Associated Person of NZX if they are a director of a Related Company of NZX. The Proposed Directors will, on this basis, be Associated Persons of NZX by virtue of being directors of Smartshares and by virtue of being directors of SuperLife, because both are Related Companies of NZX. In the case of the association through Smartshares, this does not lead to a Disqualifying Relationship because the Rules have an exception that states that where a director is an Associated Person of a Substantial Product Holder solely as a consequence of being a director of the issuer (Smartshares), that is not a Disqualifying Relationship. However, there is no such exception in relation to the directorship of SuperLife.
9. Consequently, under the Rules, neither of the Proposed Directors will be Independent Directors.

## Waiver Sought

10. Smartshares has applied for waivers from Rules 3.3.1(c) to 3.3.3 and 3.6.2(c) relating to the requirements for Smartshares to have at least two Independent Directors and for the Audit Committee's composition to include at least two Independent Directors, to the extent that the Proposed Directors are deemed to have a Disqualifying Relationship because they are also directors of SuperLife.
11. Smartshares submitted the following in support of the waivers from Rules 3.3.1(c) and 3.6.2(c):
  - a. **Not relevant for a managed fund Issuer:** The general rationale for governance requirements in the Rules, including the requirements in relation to Independent Directors, is to ensure good governance of Issuers. This is important in the context of Issuers that have their own shares quoted, because holders of those shares will be affected by the financial performance of the Issuer, and that financial performance will, in turn, be affected by the governance of the Issuer. In the case of Smartshares, its own shares are not Quoted. Instead, it is an Issuer because it is the manager of a fund that has units Quoted. In contrast to shareholders, holders of units in a managed fund are largely unaffected by the financial performance of the Issuer. They do not share in the profits of the Issuer or make any gains as a result of positive market perceptions of the Issuer's shares (or losses as a result of negative market perceptions of the shares). Instead, they are affected by the investment policies of the managed fund itself and, in some cases, the skill of the investment manager, both of which are largely independent of the governance of the Issuer.
  - b. **Independence from group:** The requirements for Independent Directors are designed to boost the governance of Issuers by requiring some directors that have a different perspective to intra-group appointees and have judgement that is unclouded by the group's interests. In this case, although the two new directors will not technically be Independent Directors, they are appointed from outside the NZX group and will therefore achieve the relevant policy objectives. Smartshares and SuperLife have very similar businesses, which is why an appointment of the same directors to each makes sense. If the group was established today, it is likely that only one subsidiary would be established in the place of Smartshares and SuperLife, and there would be no issue with the independence of the directors (noting Smartshares' intention to amalgamate with SuperLife on the effective date of the market services licence). Smartshares and SuperLife are separate entities because SuperLife has only recently been acquired by NZX, but the substantive position is the same.

Consequently, we believe that the appointment of these two directors will address the policy objectives of Rules 3.3.1(c) and 3.6.2(c) (to the extent they are relevant) despite not technically meeting their requirements.

12. In support of waivers from Rules 3.3.2 and 3.3.3, Smartshares submitted that those Rules require the Board of Smartshares to make determinations and announcements in relation to the identity of its Independent Directors. As Smartshares will not technically have Independent Directors if the waiver to Rule 3.3.1(c) is granted, it will be unable to comply with the requirements of those Rules.

## Decision

13. On the basis that the information provided to the Special Division is full and accurate in all material respects, the Special Division grants Smartshares waivers from Rules 3.3.1(c) to 3.3.3 and 3.6.2(c) relating to the requirements for Smartshares to have at least two Independent Directors and for the Audit Committee's composition to include at least two Independent Directors, to the extent that the Proposed Directors are deemed to have a Disqualifying Relationship because they are also directors of SuperLife. The waivers are granted on the condition that Smartshares must notify the market of which Directors it has appointed in reliance on the waivers from Rules 3.3.1(c) and 3.6.2(c) following their appointment.

**Reasons**

14. In coming to the decision to grant the waivers, the Special Division considered the submissions from Smartshares above and agreed that in these circumstances the intent of Rules 3.3.1(c) and 3.6.2(c) will still be achieved with the appointment of the Proposed Directors and the intent of Rules 3.3.2 and 3.3.3 will still be achieved by the condition to the waivers.

**Publication**

15. This decision is confidential until such time as the Proposed Directors are appointed to the Board of Smartshares, following which this decision will be published in accordance with Rule 1.11.2.

DATED 16 OCTOBER 2015

A handwritten signature in black ink, appearing to read 'Andrew Beck', is written over a light blue rectangular background.

Andrew Beck, Chairman, Special Division