

20 October 2015

**APPLICATION FOR WAIVERS FROM NZX MAIN BOARD LISTING RULES  
SMARTSHARES LIMITED – NEW ZEALAND PROPERTY TRUST**

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 intends to establish a new index tracking unit trust, the New Zealand Property Trust (*the Trust*). Units in the Trust are intended to be Quoted on the NZX Main Board.
5. The Trust is a unit trust established under an establishment deed and a master trust deed (*the Trust Deeds*). The beneficial interest in the Trust is divided into units with each unit representing an equal interest in the assets of the Trust, but not conferring any interest in any specific asset of the Trust.
6. The Trust is a passive investment fund. Its objective is to track the S&P/NZX Real Estate Select Index (*the Index*) by buying and selling the securities of the Issuers that are part of the Index in proportions that match their weightings in the Index. These securities (which constitute the Trusts' assets) are then held by a custodian on behalf of the Trust's trustee.

**Application 1 - On-going Waivers and Approval**

7. Smartshares has applied, as manager of the Trust, for waivers from Rules 3.1.1(a), 3.1.1(b), 3.3.1(c) to 3.3.4, 3.3.5 to 3.3.15, 3.4, 3.5, 3.6.2(a) and 3.6.2(c), Section 4, 7.1.11, 7.3, 7.4, 7.5, 7.6.1 to 7.6.3, 7.11.1, 9.2.1, 10.3.2, 10.4.1(d), 10.4.2 and 10.6.1(a) and for approval under Rule 11.1.5.
8. Smartshares submitted that because the Rules treat units in a unit trust as Equity Securities, a number of the Rules to which a waiver is sought are either inapplicable or unnecessary.
9. Smartshares also noted that the Special Division has previously granted waivers from these Rules and approval under Rule 11.1.5 in respect of the existing funds managed by Smartshares, most recently on 17 July 2015.

**Application 1 - Decision**

10. On the basis that the information provided to the Special Division is full and accurate in all material respects, the Special Division grants Smartshares as manager of the Trust:

- a. waivers from the Rules noted in Appendix 1 subject to the conditions set out in Appendix 2; and
- b. approval under Rule 11.1.5 for the inclusion in the Trust Deed of provisions that restrict the issue, acquisition or transfer of units to allow the Trust to comply with the Portfolio Investment Entity (*PIE*) regime.

#### **Application 1 – Reasons**

- 11. In coming to the decision to grant Smartshares waivers from the Rules noted in Appendix 1, the Special Division considered:
  - a. that the Rules were drafted with company structures in mind and some of the Rules are either not applicable to the Trust or do not provide the protections to investors that they are intended to provide;
  - b. the nature of the Trust as a passively managed index tracking unit trust. The Special Division noted that the Directors of Smartshares do not exercise influence over the Trust in the same way or to the same extent as do Directors of an Issuer who is a company. Smartshares must operate the Trust in accordance with its investment objective – to buy and sell securities in order to track the Index;
  - c. the provisions of the Trust Deed and the responsibilities of the trustee, as disclosed in the offer documents, which protect the interests of the Trust’s unitholders;
  - d. that the conditions set out in Appendix 2 would ensure that where the provisions of a Rule are not applicable to the Trust, the Rule’s intent may still be achieved; and
  - e. that it has previously granted waivers from the same Rules in respect of the other passive ETFs managed by Smartshares.
- 12. In coming to the decision to grant Smartshares approval under Rule 11.1.5, the Special Division considered:
  - a. the submission from Smartshares that the majority of investors in the Trust would benefit from investing in a PIE compliant entity;
  - b. the PIE thresholds will be clearly disclosed in the offer documents;
  - c. given the passive nature of the Trust, the PIE thresholds are unlikely to be triggered; and
  - d. that it has previously granted approval under this Rule in respect of the other passive ETFs managed by Smartshares.

#### **Application 2 - Waivers for Quotation**

- 13. Smartshares has applied, as manager of the Trust, for waivers from Rules 5.2.1 and 5.2.3 in respect of the Quotation of the units in the Trust.
- 14. Rule 5.2.1 requires an Issuer applying for Quotation of a new class of security to apply through an Organising Participant, except where the application relates to rights in respect of securities that are already Quoted.
- 15. Smartshares has submitted that the requirement for an Organising Participant is aimed at:
  - a. ensuring a new Issuer has received appropriate advice and guidance from a regulated capital markets practitioner before offering securities for the first time to the public; and
  - b. encouraging adequate liquidity post listing via distribution to the institutional and retail network of the Organising Participant.

16. In support of its application for a waiver from Rule 5.2.1, Smartshares submitted that:
- a. the advice of an Organising Participant is not needed to develop and launch the Trust. Smartshares is already the manager of several Quoted ETFs and has operated such funds in New Zealand since 1996. Expert capital markets advice regarding a new listing does not therefore deliver any benefits to Smartshares that could typically be expected of an Issuer coming to market for the first time;
  - b. it does not need an Organising Participant to assist with the distribution of the units in the Trust in the traditional sense. The initial investment in the Trust will be made under an arrangement with SuperLife Superannuation Scheme (*the Scheme*), whose manager SuperLife Limited is owned by NZX, and after the initial Quotation, additional investment in the Trust will be sought in the same way as additional investment is sought in relation to the other funds managed by Smartshares. The Scheme will provide approximately \$38 million in seed capital as consideration for units, which is of a sufficient scale for the Trust to be launched without further pre-listing distribution. The distribution capability of an Organising Participant is therefore not necessary or beneficial in launching the Trust; and
  - c. to require Smartshares to appoint an Organising Participant would add little value to the process, but would require Smartshares to incur additional cost.
17. Rule 5.2.3 states that a class of securities will generally not be considered for Quotation unless the spread requirements are met, or NZX is otherwise satisfied that the Issuer will maintain a spread of security holders which is sufficient to ensure that there is a sufficiently liquid market in the class of securities.
18. Smartshares has advised the Special Division that the Trust will not meet the spread requirements because the seed funding for the Trust will come from the Scheme. The Scheme has approximately 45,000 members (although these numbers fluctuate with normal member movements and Scheme members can choose among a number of asset pools for their investment and may alter the allocation at their discretion). This results in frequent movements between asset classes (for example, shifting money out of NZ shares and into fixed interest or vice versa), which will have a corresponding impact on Trust liquidity as the Scheme will be required to trade to respond to members changing between asset pools.
19. In support of its application for a waiver from Rule 5.2.3, Smartshares submitted that:
- a. given its experience in relation to the other funds it manages, Smartshares expects that the number of new investors in the Trust, and liquidity, will increase over time. There are over 9,500 investors in Smartshares' EFTs, 25% of which hold units in more than one fund, so there is an expectation that listing a new fund will see growth from existing Smartshares' investors wanting access to other Listed funds;
  - b. unlike other listed equity instruments, liquidity in ETFs is not influenced only by demand for the ETFs themselves, but also liquidity in the underlying assets (securities of the Issuers in the index) held by the ETF. This underlying liquidity is augmented by the presence of an informal market maker, whose role is designed to give investors confidence when buying or selling units in the ETFs; and
  - c. Smartshares has increased the marketing spend for its ETFs and expects this to further develop liquidity.

### **Application 2 - Decision**

20. On the basis that the information provided to the Special Division is full and accurate in all material respects, the Special Division grants Smartshares as manager of the Trust waivers from Rules 5.2.1 and 5.2.3.

### **Application 2 – Reasons**

21. In coming to the decision to grant Smartshares waivers from Rules 5.2.1 and 5.2.3, the Special Division considered that:

- a. Smartshares has the requisite expertise in relation to ETFs such that it does not need the guidance of an Organising Participant to assist with Listing the Trust;
- b. given the Scheme will provide seed capital of approximately \$38 million in consideration for units in the Trust, the distribution capability of an Organising Participant is not necessary or beneficial in launching the Trust;
- c. it has previously granted a waiver from these Rules for the other ETFs managed by Smartshares (most recently on 17 July 2015) and that NZX Regulation has previously granted waivers from Rule 5.2.1; and
- d. given the measures Smartshares has outlined above the liquidity in the units of the Trust is likely to develop.

**Publication**

- 22. This decision is confidential until such time as the prospectus for the offer of units in the Trust is registered. Following registration this decision will be published in accordance with Rule 1.11.2.

DATED 20 OCTOBER 2015



Andrew Beck, Chairman, Special Division

## **APPENDIX 1**

Rules 3.1.1(a), 3.1.1(b), 3.3.1(c) to 3.3.4, 3.3.5 to 3.3.15, 3.4, 3.5, 3.6.2(a) and 3.6.2(c)

Section 4: Takeovers

Rules 7.1.11, 7.3, 7.4, 7.5 and 7.6.1 to 7.6.3 and 7.11.1

Rule 9.2.1

Rules 10.3.2, 10.4.1(d), 10.4.2 and 10.6.1(a)

## APPENDIX 2

The conditions of the waivers granted from the Rules noted in Appendix 1 of this decision are:

1. The nature of the Trust's business and operations do not materially change.
2. The waivers granted in this decision and these conditions are noted in the Trust's half year and annual reports.

### **Audit Committee**

3. The Trust must have an Audit Committee.
4. The Audit Committee must be comprised solely of Directors of Smartshares and Independent Directors of NZX.
5. The Audit Committee must be comprised of a majority of Directors who are either Independent Directors of Smartshares or Independent Directors of NZX.
6. Any Independent Director of NZX that sits on an Audit Committee must provide the Special Division with written certification that they accept the obligations and responsibilities of being a member of that Audit Committee imposed by the Rules in relation to the Trust.
7. At least one Smartshares Director must sit on the Audit Committee.
8. The Director(s) of Smartshares who sits on the Audit Committee must report the findings of that Committee back to the Smartshares Board.
9. The Directors of Smartshares must respond to any recommendations made to the Smartshares Board by the Audit Committee.
10. The Audit Committee has full powers to require Smartshares to provide any information relating to the Trust needed to enable it to meet the obligations of an Audit Committee.

### **Issue of baskets of Units**

11. The waiver from Rule 7.3 only applies to the issue of baskets of units in the Trust undertaken in accordance with the provisions of the Trust and terms of the Trust Deed.

### **Material Transactions with Related Party**

12. The waiver from Rule 9.2.1 only applies to:
  - a. the withdrawal of baskets undertaken in accordance with the provisions of the Trust and terms of the Trust Deed; and
  - b. the payment of Smartshares' management fee in accordance with the provisions of the Trust and terms of the Trust Deed.

### **Information provided to unitholders**

13. Smartshares must provide unitholders with, as a minimum weekly, the following information:
  - a. the extent to which the Trust has tracked the Index in its portfolio composition (and if not, by how much);
  - b. the amount of income of the Trust, which would otherwise be distributed, that has been capitalised to correct tracking discrepancies; and
  - c. the current net asset value of the Trust.

14. The waiver from Rule 10.4.2 only applies with respect to the requirement to include the information prescribed in Appendix 1 in the Trust's half-year report.
15. Smartshares must include the following information in the Trust's half-year report:
  - a. the extent to which the Trust has tracked the Index in its portfolio composition (and if not, by how much);
  - b. the level of income, which would otherwise be distributed, which has been capitalised to correct tracking discrepancies;
  - c. the current net asset value of the Trust;
  - d. a statement of financial performance;
  - e. a statement of cash flows;
  - f. statements of movement in unitholder funds;
  - g. a statement of financial position;
  - h. a statement of accounting policies adopted in the reporting period; and
  - i. any major changes in value of assets, as per Rule 10.4.1(d).