

IN NZ MARKETS DISCIPLINARY TRIBUNAL

NZMDT 2/2023

UNDER

NZ Markets Disciplinary Tribunal Rules

IN THE MATTER OF

breach of NZX Listing Rules 2.1.1(c) and
2.13.2(c)

BETWEEN

NZX LIMITED

Acting by and through NZX Regulation
Limited (*NZ RegCo*)

AND

2 CHEAP CARS GROUP LIMITED

(2CC)

**DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL
6 SEPTEMBER 2023**



Rachel Batters
Executive Counsel
NZ Markets Disciplinary Tribunal
Email: rachel.batters@nzmdt.com

1. This is a decision of a division of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising James Ogden (Division Chair), Nicola Greer and Daniel Wong.
2. Capitalised terms that are not defined in this decision have the meanings given to them in the NZX Listing Rules (*the Rules*) or the Tribunal Rules as the case may be.

Procedural background

3. On 9 August 2023, NZ RegCo filed a statement of case (*SOC*) alleging 2CC had breached Rules 2.1.1(c) and 2.13.2(c).
4. On 18 August 2023, 2CC filed a statement of response (*SOR*).
5. On 22 August 2023, NZ RegCo confirmed that it would not be filing a rejoinder.

Factual background

6. 2CC is Listed on the NZX Main Board and is subject to the Rules. 2CC was formerly named NZ Automotive Investments Limited¹.
7. 2CC Listed on 25 February 2021². At Listing, 2CC was owned 45.91% by entities associated with Eugene Williams, 45.91% by entities associated with David (Yusuke) Sena and 8.18% by other shareholders³. Its Directors were Charles (Francis) Bolt, Michele Kernahan, Tracy Rowsell, Mr Sena, Karl Smith (then Chair) and Mr Williams. Three Directors were categorised as Independent Directors – Bolt, Kernahan and Smith.
8. 2CC conducted its automotive group operations throughout New Zealand via two divisions: automotive retail and vehicle finance. The vehicle finance division operated under the brand “NZ Motor Finance” through 2CC’s Subsidiary, NZ Motor Finance Limited (*NZMF*).
9. On 8 April 2022, 2CC advised the market that Independent Directors Michele Kernahan and Karl Smith intended to resign. Michele Kernahan’s term ended on 8 April 2022 and Karl Smith’s on 22 April 2022. Charles Bolt was appointed interim Chair with effect from 8 April 2022.
10. On 22 April 2022, 2CC announced the appointment of a new Independent Director, Tim Cook.
11. On 1 July 2022, 2CC announced the resignation of its CEO, David Page, effective from 30 September 2022.
12. At 3:38pm on 18 July 2022, 2CC’s ordinary shares were placed in a trading halt at the request of 2CC. On 19 July 2022, 2CC announced that “*all of the non-executive directors of the Company, Charles Bolt, Tim Cook and Tracy Rowsell, as well as executive director and founder shareholder Eugene Williams, have resigned as directors*” and that “*the resignations will take effect upon the earlier*

¹ 2CC’s name change was effective from 26 June 2023.

² [2CC NZX Listing Profile](#) dated 25 February 2021.

³ Mr Sena and Mr William’s ownership interests in 2CC’s ordinary shares have changed since Listing, but in aggregate they remain the controlling shareholders in 2CC. On 28 July 2023, 2CC notified the market that entities associated with Mr Sena have agreed to purchase all the shares in 2CC held by entities associated with Mr Williams (approximately 30% of 2CC’s total shares), subject to approval under the Takeovers Code. If approved, entities associated with Mr Sena would hold approximately 76% of 2CC’s total shares.

of the appointment of sufficient new independent directors to meet the requirements of the NZX listing rules and 20 August 2022". This announcement also noted that nominations had been received from Mr Sena for the appointment of Julian Davidson, Jason Lewthwaite and Gordon Shaw as Directors, to be voted on by shareholders at 2CC's upcoming Annual Shareholders' Meeting (ASM). Trading in 2CC's ordinary shares resumed at market open on 19 July 2022.

13. On 20 July 2022, 2CC announced that Mr Lewthwaite had withdrawn his consent to be nominated as a Director. On 4 August 2022, 2CC announced that Mr Davidson had also withdrawn his consent, and that Michael Stiassny had been asked by Mr Sena to join 2CC's Board. Mr Sena advised 2CC that Mr Stiassny and Mr Shaw would join the 2CC Board from 21 August 2022, to fill the casual vacancies arising from the Director resignations announced on 19 July 2022.
14. On 5 August 2022, NZ RegCo released a memorandum to the market advising that it had *"been made the [sic] aware of the steps taken by Mr Sena in identifying and nominating Mr Shaw and Mr Stiassny"*. NZ RegCo said it was concerned about the circumstances of the resigning directors' exit and noted *"the involvement of Mr Sena in the nomination and intended appointment of Mr Shaw and Mr Stiassny"*. NZ RegCo requested 2CC provide it with information relevant to considering 2CC's continued ability to comply with its corporate governance obligations under the Rules.
15. On 10 August 2022, NZ RegCo advised the market that *"following its assessment of the information provided by the current [2CC] board, it is satisfied with [2CC]'s assessment that Michael Stiassny and Gordon Shaw would qualify as independent directors for the purposes of the NZX Listing Rules"*⁴.
16. On 12 August 2022, 2CC gave notice that its ASM would be held on 2 September 2022 and advised shareholders that:

Mr Sena has undertaken to the Existing Board that, immediately upon the resignations of Tim Cook, Tracy Rowsell, Eugene Williams and Charles Bolt from the Board becoming effective on 20 August 2022, Mr Sena will appoint Michael Stiassny and Gordon Shaw as Directors pursuant to clause 15.5 of [2CC]'s constitution with effect from 12.00 am on 21 August 2022. These appointments, albeit on a temporal basis until the date of the Annual Meeting, will be effected to ensure that NZAI complies with NZX Listing Rule 2.1 - that there must be at least three Directors and at least two Independent Directors on the Board - during the period up to the Annual Meeting. Michael Stiassny and Gordon Shaw have confirmed that they will accept that appointment.

Any Director appointed by the Board must not hold office (without re-election) past the next Annual Meeting following the Director's appointment. Accordingly, Michael Stiassny and Gordon Shaw will retire and both offer themselves for election at the Annual Meeting.

17. On 19 August 2022, 2CC provided an update to the market noting changes to its Board and management, and the position of 2CC's financier⁵ and auditor⁶. 2CC advised that with regards to NZMF, the Board had been considering whether it remained the most appropriate use of 2CC's capital. Because of this, lending by NZMF had been paused in June 2022.

⁴ [NZ RegCo update regarding 2CC Board.](#)

⁵ On 9 August 2022, 2CC announced that its bank was currently unable to give any assurance of support for 2CC's lending facilities beyond their then current expiry dates. 2CC understood this was based on the changes in its leadership and governance, as opposed to its financial position.

⁶ On 17 August 2022, 2CC announced that Grant Thornton had resigned as its external auditor.

18. On 22 August 2022, 2CC announced the appointment of Mr Stiassny and Mr Shaw as Independent Directors, effective from 21 August 2022. 2CC advised that Mr Stiassny and Mr Shaw were appointed by Mr Sena (sole Director of 2CC at that time) as permitted under 2CC's constitution and would hold office until 2CC's ASM at which time they would retire and offer themselves for election by shareholders. 2CC also announced (1) Mr Stiassny had been appointed 2CC Chair; (2) Mr Shaw would become Interim CEO; and (3) the Directors had co-opted Samantha Sharif onto the Board for a period of six months or until a new CEO is appointed, at which time Mr Shaw would "return to the Board as an Independent Director". 2CC noted that "Ms Sharif will also seek approval of her position from shareholders at [2CC's] 2022 Annual Meeting".
19. On 24 August 2022, 2CC announced that Mr Shaw's appointment as Interim CEO would be effective from 5.00pm on 26 August 2022⁷ and that following this appointment he would no longer be an Independent Director. NZ RegCo advised that this clarification was made after its engagement with 2CC⁸.
20. At 2CC's ASM on 2 September 2022, shareholders passed resolutions electing Mr Stiassny and Mr Shaw as Directors. In an announcement released on 2 September 2022, 2CC advised that the Board had reappointed Ms Sharif as an Independent Director, effective immediately following the conclusion of the ASM and on the same terms as she was originally appointed. At the ASM, Mr Stiassny advised the meeting that as Ms Sharif was a co-opted Director, "she does not stand for election"⁹.
21. On 18 November 2022, NZ RegCo released an investigation report (*Investigation Report*) in which it concluded that 2CC had breached Rule 2.7.1 by not putting Ms Sharif forward for election at the ASM. NZ RegCo noted that "If permitted by an issuer's governing document, the ability for a board to appoint directors can be an effective way to add valuable skills and also manage compliance with the board composition requirements under the Rules. However, all board-appointed directors are subject to Rule 2.7.1, requiring that they retire at the issuer's next annual meeting following their appointment. They are eligible to seek reappointment at that time". NZ RegCo acknowledged that 2CC had (1) relied on legal advice in taking the view that Ms Sharif was not required to seek election at the ASM; (2) fully cooperated with its investigation; and (3) not sought to intentionally circumvent the requirements of Rule 2.7.1. NZ RegCo decided to "pursue an educative, rather than enforcement, outcome" for 2CC's breach¹⁰.
22. On 29 November 2022, 2CC released its interim results for the half year 2023. 2CC noted that "The Board had been considering [NZMF's] strategy, and whether that remained the most appropriate use of capital. As a result, lending was paused in June, with the loan book reducing from \$6.8m at 31 March 2022 to \$5.6m at 30 September 2022. The Board is continuing to review options".
23. On 7 December 2022, 2CC announced the appointment of new CEO, Paul Millward, with his term starting on 9 January 2023 and that following a handover, Interim CEO Mr Shaw would "rejoin" the Board as an Independent Director¹¹.

⁷ NZ RegCo noted in the Investigation Report (see paragraph 21) that "Over the weekend of 20/21 August 2022, Mr Page decided to go on gardening leave for the remainder of his notice period".

⁸ Paragraph 13 of the SOC.

⁹ Page 6 of 2CC ASM Script released to the market on 2 September 2022.

¹⁰ [NZ RegCo Investigation Report 18 November 2022.](#)

¹¹ Mr Shaw had remained a Director of 2CC during his time as Interim CEO.

24. On 31 January 2023, 2CC provided an update to the market noting that Mr Shaw's appointment as Interim CEO would end on 31 January 2023, and he would "re-join" the Board as an Independent Director from 1 February 2023. Mr Shaw would also take up the role of Chair of the Audit, Risk and Remuneration Committee from that date. 2CC also advised that Ms Sharif's term as a Director would end on 1 February 2023.
25. On 4 April 2023, 2CC advised the market that its CFO, Haydn Marks, had resigned, with effect from 30 June 2023. 2CC noted that Mr Marks would remain in his role as CFO over his notice period. On 28 April 2023, 2CC provided an update to the market, noting its appointment of a new CFO, Angus Guerin, from 26 June 2023.
26. On 29 May 2023, 2CC released its full year results for the year ended 31 March 2023. 2CC noted that the Board had taken the decision to focus on the core vehicle retailing business and offer third party finance. As a result, the NZMF loan book would remain in run down mode (with no new lending since June 2022).
27. On 29 June 2023, 2CC released its Annual Report for the year ended 31 March 2023 (*Annual Report*). The Annual Report noted that:

"Samantha Sharif temporarily joined the Board for six months as an Independent Director, allowing Gordon Shaw to take the vacant Chief Executive Officer role on a temporary basis. At this time, Gordon Shaw became an Executive Director. On 9 January 2023, Paul Millward was appointed as the Company's Chief Executive Officer. On 1 February 2023, after a hand-over period with Paul, Gordon Shaw again became an Independent Director and Samantha Sharif stepped down from the Board.

As at 31 May 2023, the Board has three Directors, two of whom are Independent Directors – Michael Stiassny and Gordon Shaw and an Executive Director David Sena.

In order for a Director to be independent, the Board has determined that he or she must not be an employee of the Company or any of its subsidiaries and have no disqualifying relationships. Independence is determined by the Board in accordance with the independence requirements of the NZX Listing Rules; and having regard to the factors described in the Code"¹².

28. Mr Shaw is recorded as the Chair of 2CC's Audit, Finance and Risk Management Committee, with the Annual Report stating that "*The Audit, Finance and Risk Management Committee is comprised of a majority of Independent Directors and only Non-Executive Directors*"¹³.
29. The Annual Report also stated that "*As at 31 March 2023 Gordon David Shaw was considered by the Board to be an Independent Director*"¹⁴.

¹² Annual Report page 61.

¹³ Annual Report page 63. Mr Sena is described in the Annual Report as an Executive Director.

¹⁴ Annual Report page 76.

Mr Shaw's contract for services with NZMF

30. In May 2023, NZ RegCo received "what appeared to be a screenshot of an email from Mr Millward to all 2CC staff", with no visible date¹⁵. The text of the email included the following statement:

"Meanwhile NZMF has a General manager role which Gordan Shaw has been doing on an interim basis, after a review a standalone General Manager is cost heavy for our current business model, but we need [sic] still need to collect and manage the loan book".

31. NZ RegCo considered that this information suggested Mr Shaw may no longer be an Independent Director. In an email to the 2CC CEO of 18 May 2023, NZ RegCo noted that "If Mr Shaw is or has been acting in an executive role for NZMF, a subsidiary of [2CC], this would appear to constitute a disqualifying relationship for the purposes of the Rules, and prevent him from being an independent director. As you will appreciate, this would mean that [2CC] is, or has been, in breach of its requirement to have two independent directors at all times, and a majority of independent directors on its audit committee...". NZ RegCo asked 2CC to confirm (1) whether Mr Shaw had acted, or was acting, as an executive for NZMF; (2) whether it considered that Mr Shaw "currently meets the requirements of an independent director under the Rules, and has done so at all times since 1 February this year"; and (3) if 2CC considered that Mr Shaw was not currently an Independent Director, how it proposed to remedy this¹⁶.
32. On 22 May 2023, MinterEllisonRuddWatts (acting for 2CC) wrote to NZ RegCo providing background information and responses from 2CC. As background, 2CC noted that its Board and CEO had taken significant action to improve the business' performance and create value for shareholders. In order to ensure costs were spent most efficiently, 2CC had conducted an employee restructure consultation process, which included NZMF. In advance of that process, NZMF's general manager resigned suddenly. NZMF was no longer a core part of the 2CC group and was contributing under 1.2% of the group's total revenue. As NZMF was being run down, the Board considered that it was not in the best interests of 2CC and its shareholders to engage a temporary general manager for a role that would likely be disestablished. However, someone was needed to oversee the collection and management of the NZMF loan book. "The Board's intention was that as the role was primarily an oversight role, Mr Shaw would undertake it given he was already a director, and as this was within his skill set". In the Board's view, "Mr Shaw undertaking this role did not compromise his classification as an independent director". The role was documented as a contractor relationship and Mr Shaw was given the title "Financial Consultant" (or "GM" for internal communications), which he used in email communication.
33. In response to NZ RegCo's specific questions, 2CC stated that:
- a. Mr Shaw was not "presently acting as an executive for NZMF" and "did not perform a role as an executive";
 - b. Mr Shaw temporarily performed "additional services" overseeing the collection and management of the NZMF loan book for approximately 8 weeks, commencing on 17 March 2023 and "concluding last week" (the week ended 19 May 2023);
 - c. Mr Shaw "was not an employee of NZMF, but provided additional services in a part time capacity";

¹⁵ Paragraph 19 of the SOC.

¹⁶ Annexure 11 of the SOC.

- d. Mr Shaw's role was overseeing and coordinating the process of NZMF's collection of debts. An additional contractor was engaged to assist with the day-to-day work;
 - e. Mr Shaw's role did not extend to any other company in the 2CC group, including its main operating subsidiary, 2 Cheap Cars Limited;
 - f. 2CC considered that Mr Shaw "*currently meets the requirements*" of an Independent Director;
 - g. 2CC was comfortable that Mr Shaw did not have a "*disqualifying relationship at all relevant times due to his performance*" of this role – "*the role was temporary, on a part-time basis, had an oversight nature, and related to a small part of the [2CC] group's business, which was currently being run down*". As NZMF was being run down, the strategic decisions concerning it had already been made; and
 - h. 2CC did not consider that Mr Shaw's performance of the role "*was sufficient to influence or be perceived to influence materially his capacity to bring an independent view to decisions relating to [2CC], act in its best interests and represent shareholders generally*"¹⁷.
34. In an email to MinterEllisonRuddWatts of 24 May 2023, NZ RegCo noted that an Independent Director is defined in the Rules as "*a Director who is not an Employee of the Issuer and who has no Disqualifying Relationship*", and that an Employee is defined as including an individual who acts as a contractor for an Issuer or one of its Subsidiaries. NZ RegCo noted that it appeared "*that Mr Shaw was (for a brief period, which has since ended) an employee of [2CC] for the purposes of the Rules*" and if that was the case, Mr Shaw was incapable of being an Independent Director, regardless of 2CC's assessment of whether or not his involvement with NZMF created a Disqualifying Relationship. In light of this, NZ RegCo asked 2CC if it wished to revise its earlier response¹⁸.
35. In an email dated 31 May 2023, MinterEllisonRuddWatts advised that 2CC did not want to revise its earlier comments as these related to "*the absence of a disqualifying relationship, and not the 'Employee' aspect of the definition of an independent director...*". 2CC advised that its earlier response was to reassure NZ RegCo that the nature of Mr Shaw's role was not sufficient to have an impact on substantive independence by giving rise to a Disqualifying Relationship, and ultimately could have been performed by Mr Shaw as an extension of his Director's duties. 2CC considered that "*the difference was form over substance*".
36. In response to NZ RegCo's query on whether 2CC's Board had considered the implications on Mr Shaw's status as an Independent Director when taking up the NZMF role, 2CC advised that the Board made a "*quick decision to ensure [2CC] had a relevantly skilled person who knows the business, to do what is an important yet basic role essentially ensuring loan payments are paid on time and other tasks associated with that function. The Board acknowledges that a broader discussion should have occurred, but a quick decision was made as the Board's perspective was that it was not a disqualifying relationship as the role was limited to a very narrow and small part of the business we are running down, and had no strategic or leadership influence which should not in substance impact independence nor adversely impact shareholders*".
37. 2CC provided NZ RegCo with a copy of the contract for services between NZMF and Mr Shaw. 2CC advised that, while the contract referred to a three-month period, it could be reduced by agreement as occurred with the services period

¹⁷ Annexure 12 of the SOC.

¹⁸ Annexure 13 of the SOC.

being approximately 8 weeks. 2CC also noted that although the contract commenced on 20 March 2023, it was signed on 16 March 2023 and Mr Shaw undertook aspects of the role on 17 March 2023¹⁹.

Breach of Rules 2.1.1(c) and 2.13.2(c)

38. Under Rule 2.1.1(c), 2CC must have at least two Directors who are Independent Directors at all times.
39. Under Rule 2.13.2, 2CC must have an Audit Committee comprised of at least three Directors. Rule 2.13.2(c) requires the Audit Committee to have a majority of Independent Directors.
40. An Independent Director is a Director who is not an Employee of the Issuer and who has no Disqualifying Relationship. Employee is defined as including a contractor who contracts with that Issuer or any of its Subsidiaries.
41. NZ RegCo submits that as NZMF is a Subsidiary of 2CC, during the eight weeks Mr Shaw acted as a contractor for NZMF, he was an Employee of 2CC and therefore not an Independent Director. Accordingly, from 17 March 2023 to the week ended 19 May 2023, NZ RegCo submits that 2CC was in breach of Rule 2.1.1(c) by having only one Independent Director and Rule 2.13.2(c) because its Audit Committee did not have a majority of Independent Directors.
42. NZ RegCo submits that 2CC has not accepted or admitted to what amounts to a strict liability breach²⁰. However, in an email to NZ RegCo dated 20 July 2023 (a copy of which 2CC provided with its SOR), 2CC acknowledges the breach and notes *"while a breach did occur given the definition of "Employee" under the Rules, the policy behind that prohibition was not offended in this case"*.
43. In the SOR, 2CC stressed that it did accept the breach given that Mr Shaw's role with NZMF meant that he was an Employee. 2CC considered that NZ RegCo's initial focus was on whether there was a Disqualifying Relationship – *"presumably, because that would [be] indicative of a substantial breach, rather than one of a more technical nature"*. Therefore, 2CC's initial response had focused on why it did not consider there to be a substantive breach given Mr Shaw's limited role. 2CC submits that *"As such, a disqualifying relationship did not arise, albeit the "Employee" limb of the definition of an independent director was not satisfied"*.

Tribunal approach to penalty

44. It is clear that 2CC has breached Rules 2.1.1(c) and 2.13.2(c) (*the breach*) on the facts presented by both NZ RegCo and 2CC. The Tribunal must, accordingly, consider the appropriate penalty for the breach.
45. Under the Tribunal Rules, the Tribunal can impose a fine of up to \$500,000 for a breach of the Rules²¹.
46. Section 9 of the Tribunal Procedures (*the Procedures*), which came into force on 17 October 2022, provide guidance to the Tribunal on assessing the appropriate financial penalty for a breach of the Rules. The Tribunal's recent determination in *NZMDT 1/2023 NZX v Hallenstein Glasson Holdings Limited (the HLG decision)*, outlines the Tribunal's approach to the Procedures.

¹⁹ No reference to the contract between NZMF and Mr Shaw is made in the Annual Report.

²⁰ Paragraph 64 of the SOC.

²¹ Tribunal Rules 9.1.2(e) and 9.2.2(f).

47. As noted in the HLG decision, the Procedures are not determinative. The Tribunal will ultimately exercise its discretion to determine the appropriate penalty when considering the overall circumstances of the matter.
48. The Procedures set out a two-step process for the Tribunal to follow:
- Step 1 – identify a starting point penalty by assessing the factors relevant to the breach and the impact or potential impact of the breach; and
- Step 2 – adjust that starting point penalty to reflect all the aggravating and mitigating factors relevant to the respondent.

Step 1: Factors relating to the breach

49. The Procedures set out three starting point penalty bands, within which the Tribunal will identify a starting point penalty:

Penalty Band	Range of Financial Penalty
Penalty Band 1 – Minor Breaches	\$0 to \$40,000
Penalty Band 2 – Moderate Breaches	\$30,000 to \$250,000
Penalty Band 3 – Serious Breaches	\$200,000 to \$500,000

50. Procedure 9.2.1 states that the appropriate penalty band for a breach of the Rules will be determined based on an overall assessment of the seriousness of the breach in each case.
51. Procedure 9.2.2 sets out factors which fall within each penalty band which the Tribunal may consider when assessing the most appropriate penalty band and the starting point penalty within that band²². These factors all relate to the obligation breached and the impact or potential impact of the breach. As noted in Procedure 9.2.2, it is unlikely that all the factors within one penalty band will be present in a particular matter. In most cases, a matter will likely have a combination of factors from two or more penalty bands. It is also possible for a matter to fall within a penalty band where only one factor exists. Accordingly, the Tribunal will use its discretion to weigh up all the factors present to ensure that they are appropriately balanced.
52. The Procedures differ significantly from the previous Tribunal Procedures dated 29 February 2016 (*2016 Procedures*), where the penalty range for each of the three penalty bands started at \$0. Another key difference is that under the 2016 Procedures, Penalty Band 3 included the following factor “The breach relates to a fundamental obligation”. Previously, breaches of a “fundamental obligation”, such as corporate governance breaches, generally fell within Penalty Band 3. The “fundamental obligation” factor has been removed from the current Procedures. This means that a breach of a fundamental obligation may not necessarily fall within Penalty Band 3. The Tribunal must consider all the factors relevant to the breach when assessing the most appropriate penalty band. This broadens the Tribunal’s focus from considering the nature of the Rule breached to considering the overall seriousness of the breach and its impact or potential impact on investors and the market.

²² See Appendix 1 for a copy of the table of factors which fall within each penalty range.

Step 2: Factors relating to the respondent

53. Once the Tribunal has determined the appropriate penalty band and the starting point penalty, it must then determine the final penalty by adjusting the starting point penalty to reflect all the aggravating and mitigating factors relevant to the respondent (Procedure 9.2.3).
54. Procedures 9.2.5 and 9.2.6 set out a non-exhaustive list of factors which are likely to lower or increase (or reduce the ability to lower) the starting point penalty²³. Procedure 9.1.1 notes that the ultimate financial penalty for the breach may fall outside of (above or below) the starting point penalty band initially identified by the Tribunal.

NZ RegCo and 2CC submissions on penalty

55. NZ RegCo submits that the appropriate penalty band for the breach is Penalty Band 1 and that the appropriate starting point penalty is \$20,000. NZ RegCo notes that while governance obligations are an enforcement priority, *"no harm to investors was detected and in NZ RegCo's submission the actual potential harm involved with these breaches was reduced. In particular, from the information provided by 2CC, Mr Shaw's temporary role as an Employee was limited to a specific, small, and shrinking part of the 2CC business"*. NZ RegCo considers that the breach should be categorised as "minor" and falls within Penalty Band 1.
56. NZ RegCo submits that having regard to the mitigating and aggravating factors in this case, the starting point penalty should be increased based in particular on (1) 2CC's *"mixed compliance history"*, including a recent breach of Rule 2.7.1 (see paragraph 21); (2) 2CC *"not accepting or admitting what amounts to a strict liability breach"*; and (3) *"most materially, the negligence involved with not giving appropriate consideration to the definition of an Independent Director given the events of 2022"*. NZ RegCo submits that the starting point penalty should be increased to a final penalty of \$25,000 when also considering the mitigating factors. NZ RegCo only identified the following as a mitigating factor *"2CC cooperated with NZ RegCo throughout the investigation"*.
57. While 2CC does not dispute the penalty band adopted by NZ RegCo, it submits that the starting point penalty proposed by NZ RegCo of \$20,000 is disproportionate to the seriousness of the breach and its duration. 2CC submits that the appropriate starting point penalty is \$10,000, reflecting (a) the eight-week duration of the breach, which should be characterised as a breach for a short period of time (as opposed to an extended period of time as submitted by NZ RegCo); and (b) that the breach was "technical" in nature, reducing its seriousness, given Mr Shaw's limited, temporary role in an immaterial part of 2CC's business where there was no prospect of his substantive independence being affected.
58. 2CC submits that an aggravating penalty of \$3,500 is appropriate and disputes NZ RegCo's assertion that it has a poor compliance history. 2CC submits that the reason it breached Rule 2.7.1 was because its former lawyers provided incorrect advice and it should not, therefore, be a factor for increasing the penalty imposed. 2CC submits that a final penalty of \$13,500 is appropriate in the circumstances and given the precedents cited by NZ RegCo.

The Tribunal's assessment

59. As noted in the HLG decision, the scheme set out in the Procedures provides a framework for assessing penalty by drawing the Tribunal's attention to some, but

²³ See Appendix 2 for a copy of the non-exhaustive list of factors which are likely to lower or increase the starting point penalty.

not all, factors relevant to penalty setting. The Tribunal will not apply these factors in a rigid manner, instead using its discretion to determine the appropriate starting point penalty and ultimate penalty based on the particular circumstances of each matter.

60. Before setting out its assessment of the appropriate penalty in this case, the Tribunal makes some initial observations.

(1) Financial benefit

61. NZ RegCo submits that the breach did not result in a financial benefit and/or commercial advantage to 2CC (a Penalty Band 1 factor). To support this, NZ RegCo submits that the Independent Director requirements are protections for an Issuer's investors and that by contrast, breaches of those requirements represent potential harms to the Issuer, not benefits. The Tribunal notes that as a general statement that may be true, but the circumstances of each particular matter need to be considered.
62. 2CC advised that as NZMF's lending operations were being run down, appointing a replacement general manager for NZMF was unnecessary given impending restructuring, and a "heavy cost" for the 2CC group. However, someone was needed to oversee the collection and management of the NZMF loan book²⁴. 2CC advised that its Board made the decision to have Mr Shaw undertake this role to ensure it "had a relevantly skilled person who knows the business, to do what is an important yet basic role essentially ensuring loan payments are paid on time and other tasks associated with that function"²⁵. 2CC noted that Mr Shaw's "remuneration was at a lesser rate than for a directorship. In this way, the interests of shareholders would be served by minimising cost and maintaining momentum by not introducing a new person into a redundant role"²⁶.
63. Given 2CC's statements, it appears that there was some financial benefit to 2CC in Mr Shaw undertaking this role. Although, as Mr Shaw's role was limited, the value of this benefit was likely minimal.
64. A breach which results in a minor financial benefit to the respondent is a factor which falls under Penalty Band 2. However, as noted in the HLG decision, the Tribunal will not apply the Procedures in a "fixed or mechanical way" but will use its discretion to consider the particular circumstances of individual cases. In this case, where there was arguably a minor financial benefit by minimising costs, as opposed to an "ill-gotten gain" arising from the breach, the Tribunal does not consider that this factor should contribute to increasing the penalty.

(2) Potential impact of 2CC's breach

65. As noted in the HLG decision, the key to determining whether a breach had the potential to cause an impact on investors and the market is to look at the nature of the harm that the relevant Rule is seeking to prevent and to assess the potential for that harm to occur at the time of the breach.
66. The policy intention of Rule 2.1.1(c) is to ensure that there is sufficient independent perspective to Board decision-making and to give confidence to investors that their interests will be represented. The requirement for an Audit Committee to have a majority of Independent Directors under Rule 2.13.2(c) is intended to ensure that an Issuer maintains a robust audit process, with sufficient separation from an Issuer's management.

²⁴ Annexure 12 of the SOC – paragraphs 1.6 – 1.8 MinterEllisonRuddWatts letter of 22 May 2023.

²⁵ Annexure 13 of the SOC – MinterEllisonRuddWatts email of 31 May 2023.

²⁶ Annexure 12 of the SOC – paragraph 1.9 MinterEllisonRuddWatts letter of 22 May 2023.

67. NZ RegCo submits that, to the extent that the harms associated with governance breaches stem from a blurring of the lines between governance and management, Mr Shaw's temporary involvement in a minor part of 2CC's business limited the potential harm of the breach. The Tribunal considers that there are several additional facts relevant to the assessment of potential harm in this matter.
68. A breach of the Independent Director requirements has the potential to cause a significant impact (as noted in the HLG decision). The Tribunal considers that the following facts likely lessened the potential impact of 2CC's breach of Rule 2.1.1(c) on investors and the market:
- a. 2CC's Board was Chaired by an Independent Director (Mr Stiasny);
 - b. Mr Shaw did not have a Disqualifying Relationship (based on 2CC's submissions)²⁷. The lack of a Disqualifying Relationship is particularly important in this case, given interests associated with two individuals hold around 75% of 2CC's shares; and
 - c. while Mr Shaw was an Employee, his role was limited to overseeing the collection of NZMF's loan book and did not involve strategic or operational decision-making (the decision to stop lending and run-down NZMF's loan book had already been made by 2CC's Board)²⁸.
69. The Tribunal also considers that the following facts likely lessened the potential impact of 2CC's breach of Rule 2.13.1(c) on investors and the market:
- a. 2CC's Audit Committee had an Independent Director (Mr Stiasny), who was Chair of 2CC; and
 - b. Mr Shaw's contractual role was limited to overseeing the run-down of NZMF, with 2CC stating that "*there was no prospect for management influence to impact independence*".
70. The Tribunal notes, however, that 2CC's Audit Committee was not Chaired by an Independent Director during the period 2CC was in breach (Mr Shaw was Chair) and included an Executive Director (Mr Sena).
71. Overall, in the Tribunal's view, these facts combined mean that the breach had the potential to cause a moderate (as opposed to significant) impact on investors and the market.

(3) Duration of the breach

72. Each penalty band includes, as a factor, whether the breach was promptly addressed (Penalty Band 1), occurred for a short period of time (Penalty Band 2) or continued for an extended period of time (Penalty Band 3).
73. NZ RegCo submits that the breach, which lasted approximately eight weeks, continued for an extended period of time. 2CC submits that the breach is properly characterised as a breach of short duration.

²⁷ NZ RegCo has previously advised the market that it was satisfied with 2CC's assessment that Mr Shaw would qualify as an Independent Director (as noted above) and has not advised the Tribunal of any circumstances that would change its position.

²⁸ This is supported by statements in 2CC's announcements made during 2022 and when its full year results to 31 March 2023 were released (as noted above).

74. When assessing the duration of a breach, the Tribunal will have regard to the nature of the breach – some Rules are more time sensitive than others. For example, a breach which has resulted in the suspension of trading in an Issuer’s securities for 10 Business Days could be considered a breach which continued for an extended period given halts in trading can negatively impact investor confidence and severely disrupt the market (particularly for an Issuer with a highly liquid stock). Conversely, the provision of an administrative notice (for example a notice of the redemption of treasury stock) 10 Business Days after it was due may be considered a breach of short duration.
75. The Tribunal’s previous decisions on breaches of the Independent Director requirements provide some guidance for assessing the duration of 2CC’s breach:
- a. In *NZMDT 2/2015 NZX Limited v Pyne Gould Corporation Limited (PGC)*, PGC was in breach for five Business Days following the unexpected resignation of an Independent Director who was seriously ill. The Tribunal considered the length of this breach to be a mitigating factor;
 - b. In *NZMDT 5/2019 NZX Limited v Good Spirits Hospitality Limited (GSH)*, GSH was in breach for five weeks after actively seeking new Independent Directors before the breach occurred and rectifying the breach within four Business Days of becoming aware of a Disqualifying Relationship. The Tribunal considered GSH was in breach for a “*relatively short period*”; and
 - c. In the HLG decision, the Tribunal considered that HLG’s breach of Rule 2.13.2(c), which lasted approximately four years, had continued for an extended period of time.
76. The “*time taken to remedy the breach*” is also a relevant consideration under Procedure 9.2.1(c). In this case, the breach was remedied when Mr Shaw’s contract concluded in the week ending 19 May 2023 (although it had been expected to continue for 3 months), the same week NZ RegCo drew 2CC’s attention to the issue. This may be a coincidence, however, as 2CC did not seek credit for promptly remedying the breach once notified by NZ RegCo.
77. The Tribunal considers that when having regard to (1) the eight-week duration of the breach compared to previous similar breaches; and (2) the breach not continuing after NZ RegCo had drawn 2CC’s attention to the matter, the duration of the breach should fall within Penalty Band 2. Although, the Tribunal would categorise the breach as being of “moderate” (as opposed to “short”) duration.

Step 1: Tribunal assessment of the starting point penalty

Penalty Band factors

78. The Tribunal has considered the applicable penalty band factors relevant to the breach and outlines its assessment of these below.

Applicable Penalty Band 1 factors

- a) *No loss and no harm to investors;*

79. NZ RegCo has not identified any loss arising as a result of the breach and says that no harm to investors was detected.

Applicable Penalty Band 2 factors

- b) *Potential to cause a moderate impact on investors and the market;*

80. As noted above, the Tribunal considers that the breach had the potential to cause a moderate impact on investors and the market. While a breach of the Independent Director requirements has the potential to cause a significant impact (as noted in the HLG decision), the potential impact in this case was reduced because:
- a. 2CC's Board was Chaired by an Independent Director, who was also a member of its Audit Committee;
 - b. Mr Shaw did not have a Disqualifying Relationship (based on 2CC's submissions); and
 - c. while an Employee, Mr Shaw had a limited contractual role with NZMF, reducing the likelihood of management influence.

c) Duration of breach was moderate;

81. As noted above, the Tribunal considers that the duration of the breach falls within Penalty Band 2 and occurred for a "moderate" period of time.

Applicable Penalty Band 3 factors

a) Serious compliance breach;

82. The Independent Director requirements are important shareholder safeguards, intended to ensure:
- a. a sufficiently independent perspective to Board decision-making and to give investors' confidence that their interests will be represented; and
 - b. an Issuer maintains a robust audit process with sufficient separation from its management.
83. The obligation to have at least two Independent Directors on an Issuer's Board at all times is central to the Board composition requirements under the Rules. Where an Issuer has only the minimum number of Independent Directors (as is the case for 2CC), it must be particularly cognisant of these requirements to ensure ongoing compliance.
84. The Tribunal also notes that both limbs of the definition of Independent Director must be satisfied – no Disqualifying Relationship and not an Employee. Being an Employee without a Disqualifying Relationship does not mean the breach is "technical" as opposed to "substantive".
85. 2CC should have been well aware of the Independent Director requirements in the Rules given the changes in its Board during 2022 and early 2023, and its previous engagement with NZ RegCo. Mr Shaw's status as an Independent Director had only recently resumed, following the end of his role as Interim CEO. The Tribunal considers that 2CC's failure to comply with Rule 2.1.1(c), and as a result Rule 2.13.2(c), is a serious compliance breach. 2CC has acknowledged that the matter should have been approached differently.

Starting point penalty

86. When weighing up all the relevant factors, the Tribunal considers that 2CC's breach of both Rules 2.1.1(c) and 2.13.2(c), which it considers to be a serious compliance breach, which continued for eight weeks and had the potential to cause a moderate impact on investors and the market, is most appropriately categorised as a "moderate" breach falling within Penalty Band 2.

87. The Tribunal does not consider that 2CC's breach of both Rules 2.1.1(c) and 2.13.2(c), which are central to the Board composition requirements under the Rules, can appropriately be categorised as a "minor" breach, as submitted by NZ RegCo and supported by 2CC.
88. As for determining the starting point within Penalty Band 2, when assessing the overall seriousness of the breach, the Tribunal considers that the breach in this matter falls at the bottom of Penalty Band 2. The Tribunal considers that this matter is distinguishable from the HLG decision (where the Tribunal assessed that HLG's breach of Rule 2.13.2(c) should fall in the mid-range of Penalty Band 2) given that the breach in this case did not continue for an extended period (HLG's breach was approximately 4 years long). While 2CC has also breached Rule 2.1.1(c), the potential for harm was reduced in this case because Mr Shaw did not have a Disqualifying Relationship and had a limited contractual role in a minor Subsidiary.
89. The Tribunal considers that the appropriate starting point penalty is \$30,000.

Step 2: Tribunal assessment of factors relating to 2CC

90. To determine the final level of penalty, the Tribunal must adjust the starting point penalty to reflect the aggravating and mitigating factors relevant to 2CC.

Aggravating factors

(1) Breach was negligent;

91. The breach appears unintentional, although it is unusual for a Director to perform such a minor role (subsequently taken over by a junior credit controller).
92. The Tribunal considers that 2CC was negligent in its compliance with the Rules. In making a "quick decision" to have Mr Shaw undertake the NZMF role, 2CC did not adequately consider the implications this would have on his status as an Independent Director (particularly given he had just completed a term as Interim CEO).
93. 2CC has acknowledged that the matter should have been approached differently. The breach is disappointing given that 2CC had managed, for the most part, to comply with the Rules despite the upheaval in its Board during 2022 and appears to have had significant engagement with NZ RegCo on governance issues during this period.
94. The Tribunal is also concerned by the statements made by 2CC in the Annual Report (see paragraphs 27 to 29 above). 2CC was aware by 18 May 2023 that Mr Shaw had not been an Independent Director from 17 March 2023 until the week ended 19 May 2023. However, the statements made in the Annual Report (released on 29 June 2023) give the impression that 2CC had complied with the Independent Director requirements, which are intended to protect the interests of shareholders, when for a time, they had not. The statement at page 76 of the Annual Report "As at 31 March 2023 Gordon David Shaw was considered by the Board to be an Independent Director" clearly gives the impression that Mr Shaw was an Independent Director (despite the use of the words "was considered" i.e. before 2CC's knowledge of the breach). 2CC also framed the statement at page 61 of the Annual Report "the Board has three Directors, two of whom are Independent Directors" by reference to the date "31 May 2023". It is unclear to us why this date is of relevance, given the Annual Report is for the year ended 31 March 2023, other than the fact that by then Mr Shaw's contract with NZMF had ended and he was an Independent Director again.

(2) Compliance history;

95. NZ RegCo submits that 2CC has a poor compliance history, noting 2CC's breach of Rule 2.7.1 in 2022 (as outlined above). 2CC submits that its breach of Rule 2.7.1 is not indicative of poor compliance and occurred because its former lawyers provided incorrect legal advice²⁹.
96. Previous Rule breaches are relevant when assessing an Issuer's compliance history. The Tribunal considers that while 2CC's previous breach of Rule 2.7.1 is a relevant factor, it is not a significantly aggravating factor given that breach appears to have been minor (with NZ RegCo taking an "educative" approach) and is unrelated to the present breach.
97. The Tribunal notes that 2CC has not previously been referred to the Tribunal and NZ RegCo has not advised the Tribunal of any other relevant Rule breaches which would contribute to NZ RegCo's claims of a poor compliance history³⁰.

Factor not considered aggravating;

98. NZ RegCo submits that the starting point penalty should be increased based on, among other things, 2CC not accepting or admitting what amounts to a strict liability breach. 2CC disputes this and submits that it did accept the breach (as noted above).
99. In any event, as noted in previous Tribunal decisions and reflected in the Procedures, while an early acceptance of a breach will be considered a mitigating factor not admitting a breach is not necessarily an aggravating factor.

Mitigating factors

(1) Cooperated with investigation;

100. NZ RegCo submits that 2CC cooperated with its investigation.
101. Under Procedure 9.2.5(b), a respondent cooperating "*fully and openly*" with any investigation and providing "*all material facts*" is a mitigating factor.
102. 2CC did respond to NZ RegCo's inquiries, but the Tribunal would not describe its initial responses as "full" or "open". NZ RegCo could have been more accurate in the wording of its 18 May 2023 email. However, 2CC's first response of 22 May 2023 stated that Mr Shaw was not an "**employee**" [emphasis added] and did not specifically answer the question posed by NZ RegCo of whether Mr Shaw currently met "*the requirements of an independent director under the Rules, and has done so at all times since 1 February*" 2023. 2CC stated that Mr Shaw "*currently*" met the requirements and did not have a Disqualifying Relationship. When pressed on its responses, 2CC noted in its email of 31 May 2023 that its comments related to the absence of a Disqualifying Relationship, and not the "**Employee**" *aspect of the definition of an independent director*" [emphasis added]. Again, 2CC did not specifically answer the question of whether Mr Shaw was an Independent Director while performing his contractual role with NZMF. 2CC did acknowledge the breach in its subsequent email to NZ RegCo of 20 July 2023.

²⁹ Obtaining legal advice and then relying on that advice can be a mitigating factor in certain circumstances. In the Investigation Report, NZ RegCo took this factor into account when assessing 2CC's breach of Rule 2.7.1. It is not a relevant factor here, as 2CC did not obtain external advice before Mr Shaw took up his contractual role with NZMF.

³⁰ There appears to have been a potential breach on the weekend of 20/21 August 2022 related to the timing of Mr Stiassny and Mr Shaw's director appointments. However, the process was managed in consultation with NZ RegCo (paragraph 11 of the SOC).

103. In these circumstances, while the Tribunal does consider that 2CC cooperated with NZ RegCo's investigation, it is not a significantly mitigating factor.

(2) Committed to improving practices;

104. 2CC submits that it has taken this matter seriously and that compliance culture is important to it. 2CC has advised that its Board and management have been implementing improved governance and training measures, including 2CC's CEO and other key members of its leadership team completing training with NZ RegCo in April 2023 (before NZ RegCo's engagement with 2CC on the breach) and its CEO and CFO have undertaken further training on the Rules with MinterEllisonRuddWatts.

Penalty

105. The Tribunal notes that the aggravating factors outlined above are balanced somewhat by the mitigating factors, but not entirely. The Tribunal considers that more weight should be afforded to the aggravating factors, including 2CC's failure to consider the implications of Mr Shaw's contractual role on his status as an Independent Director, and as such the starting point penalty should be increased.
106. When considering the amount of this increase, and therefore the ultimate penalty to be imposed, the Tribunal has had regard to the overall seriousness of the breach. The Rules breached are intended to ensure sufficient independence in Board decision-making and in the audit process for the benefit of shareholders. Although Mr Shaw could not be categorised as an Independent Director during his eight-week contractual role with NZMF, he did not have a Disqualifying Relationship and the likelihood of management influence was reduced given the limited nature of his role.
107. As a consequence, the Tribunal imposes an ultimate penalty of \$40,000.
108. The Tribunal has had regard to its recent HLG decision, where it imposed a penalty of \$75,000, primarily for HLG's breach of Rule 2.13.2(c). This was reduced from a starting point penalty of \$150,000 based on discounts for several mitigating factors. The Tribunal considers HLG's breach to have been more serious because (1) 2CC's breach was eight weeks; and (2) the likelihood of management influence was reduced given Mr Shaw's limited role with NZMF. The Tribunal notes that the differential between the ultimate penalty imposed on HLG and the one imposed on 2CC could have been higher but for the lack of mitigating factors applicable to 2CC. The Tribunal also notes that 2CC breached both Rule 2.1.1(c) and Rule 2.13.2(c).

Comment on previous Tribunal decisions

109. As noted in the HLG decision, the Tribunal considers that its previous decisions involving breaches of the Independent Director requirements made before the Procedures came into force, are of limited value as a comparison for assessing penalty. In particular, the decisions made before 29 February 2016, such as the Savoy matter referred to by NZ RegCo and subsequently 2CC, were determined under significantly different penalty bands (corporate governance breaches fell within a penalty range of \$0 to \$20,000). Where NZ RegCo wishes to cite previous Tribunal decisions in its SOC, it should explain why they are relevant.

Public censure

110. NZ RegCo submits that, while it considered Penalty Band 1 applied, a public censure is the appropriate outcome in this case given (1) the importance of the corporate governance obligations breached; (2) that this matter is already

“public” (a reference to media commentary); and (3) that 2CC was “on notice” of the Independent Director requirements given the events of 2022.

111. 2CC submits that any decision made by the Tribunal on this matter should be published and there is no reason to delay publication.
112. Procedure 9.3 provides guidance on when the name of a respondent is likely to be published:
 - a. the impact of the breach has caused the public to be harmed and/or has damaged public confidence in the sector or the breach had the potential to cause harm to the public or the potential to damage public confidence in the sector; and/or
 - b. the respondent has been involved in repeated breaches and shown disregard for the Rules; and/or
 - c. the breach falls within Penalty Band 2 or Penalty Band 3.
113. Having regard to Procedure 9.3, the Tribunal considers that it is appropriate in this case to publicly censure 2CC as the breach had the potential to damage confidence in the market and falls within Penalty Band 2.
114. The Tribunal notes that its public censure of 2CC will be released together with a copy of this determination in full.

Costs

115. NZ RegCo submits that 2CC should pay the costs incurred by NZX and the Tribunal in relation to this matter. 2CC has not made a submission on costs.
116. Generally, where a respondent is found to have breached the Rules the Tribunal will award the actual costs of NZX and the Tribunal against that party. Given the circumstances of this case, the Tribunal considers it appropriate to order 2CC to pay the costs of NZX and the Tribunal in considering this matter.

Orders

117. The Tribunal orders that 2CC:
 - a. be publicly censured in the form of the announcement attached to this determination (which will include a full copy of this determination);
 - b. pay \$40,000 to the NZX Discipline Fund;
 - c. pay the costs and expenses incurred by the Tribunal in considering this matter; and
 - d. pay the costs and expenses incurred by NZX in considering this matter.

DATED 6 September 2023



James Ogden, Division Chair, NZ Markets Disciplinary Tribunal

Appendix 1

Penalty Band	Factors
Penalty Band 1 Minor Breaches	<ul style="list-style-type: none"> • The breach is a minor administrative, operational and/or compliance breach. • The breach has not caused any loss. • The breach has not had an impact on or has only had a minor impact on investors, clients, and/or the market. • The breach was promptly addressed. • The breach did not result in a financial benefit and/or commercial advantage to the Respondent.
Penalty Band 2 Moderate Breaches	<ul style="list-style-type: none"> • The breach is a moderate administrative, operational and/or compliance breach. • The breach has caused a moderate impact on investors, clients, and/ or the market. • The breach had the potential to cause a moderate impact on investors, clients, and/or the market. • The breach occurred for a short period of time. • The breach resulted in a minor to moderate financial benefit and/or commercial advantage to the Respondent.
Penalty Band 3 Serious Breaches	<ul style="list-style-type: none"> • The breach is a serious administrative, operational and/or compliance breach. • The breach has caused significant impact on investors, clients and/ or the market. • The breach had the potential to cause significant impact on investors, clients and/or the market. • The breach continued for an extended period of time. • The breach continued to occur once discovered. • The breach resulted in a significant financial benefit and/or commercial advantage to the Respondent. • The Respondent committed the breach to obtain a financial benefit and/or a commercial advantage.

Appendix 2

- 9.2.5 The following non-exhaustive factors relating to the Respondent may be considered by the Tribunal as factors that are likely to lower the starting point penalty:
- (a) The Respondent admitted the breach at an early stage, and/or self-reported the breach;
 - (b) The Respondent cooperated fully and openly with NZX or CHO (as the case may be) with any investigation surrounding the breach and provided all material facts;
 - (c) The Respondent has implemented or has undertaken to implement or enhance processes, systems, or procedures to prevent similar future breaches;
 - (d) The breach occurred even though effective compliance / administrative / operational processes were in place;
 - (e) The Respondent provided prompt redress for any harm caused as a result of the breach;
 - (f) The breach is a one-off event and does not form part of a pattern of behaviour or conduct;
 - (g) The Respondent has a good compliance history;
 - (h) where applicable, the Respondent obtained independent legal, accounting or professional advice that the conduct did not constitute a breach and reasonably relied upon that independent advice; and
 - (i) the starting point penalty having an adverse effect on the ongoing commercial viability of the Respondent.
- 9.2.6 The following non-exhaustive factors relating to the Respondent may be considered by the Tribunal as factors that are likely to increase the starting point penalty or reduce the ability to lower it:
- (a) The breach was caused intentionally by the Respondent, or through the Respondent's recklessness;
 - (b) The Respondent hindered NZX or CHO (as the case may be) with any investigation surrounding the breach and did not provide all material facts;
 - (c) The Respondent should reasonably have been aware that the breach could occur and did not implement or undertake to implement or enhance processes, systems or procedures to prevent similar future breaches;
 - (d) The Respondent was aware that its compliance / administrative / operational processes were not adequate or ineffective and failed to rectify them;
 - (e) The Respondent failed or delayed in providing redress for any harm caused as a result of the breach;
 - (f) The breach is a recurring breach, or forms part of a pattern of behaviour or conduct;
 - (g) The Respondent has a poor compliance history; and
 - (h) Where applicable, the Respondent either failed to seek independent legal, accounting or professional advice or acted contrary to legal, accounting or professional advice obtained that the conduct did constitute a breach.