

**IN NZ MARKETS DISCIPLINARY TRIBUNAL**

**NZMDT 8/2023**

**UNDER**

NZ Markets Disciplinary Tribunal Rules

**IN THE MATTER OF**

breach of NZX Listing Rule 2.13.2(b)

**BETWEEN**

**NZX LIMITED**

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

**AND**

**TRUSCREEN GROUP LIMITED**

(*TRU*)

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**DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL  
15 DECEMBER 2023**

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Rachel Batters  
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NZ Markets Disciplinary Tribunal  
Email: [rachel.batters@nzmdt.com](mailto:rachel.batters@nzmdt.com)

1. This is a decision of a division of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising Mariëtte van Ryn (Division Chair), Charles Bolt and Matt Blackwell.
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 24 November 2023, NZ RegCo filed a statement of case (*SOC*) alleging TRU had breached Rule 2.13.2(b), which requires an Audit Committee to have at least three members.
4. On 5 November 2023, TRU advised the Tribunal that it accepted the findings of NZ RegCo and had no additional information to submit, noting it had taken action to correct the breach.
5. On 6 November 2023, NZ RegCo advised that it would not be filing a rejoinder.
6. On 7 November 2023, the Tribunal sought further information from TRU as to when its breach of Rule 2.13.2(b) had begun, as this was not clear from the SOC. This information was provided by TRU on 10 November 2023.

### **Factual background**

7. TRU is Listed on the NZX Main Board and is an Issuer of Quoted Equity Securities. TRU is subject to the Rules.
8. NZ RegCo has recently undertaken a review of Issuers' Audit Committees to ensure compliance with the Rules, particularly with regard to composition. During that review, NZ RegCo identified that for a period between 2020/2021 and 2023, TRU's Audit Committee appeared to have only two members<sup>1</sup>.

### **Audit Committee composition**

9. Under Rule 2.13.1, TRU must have an Audit Committee. Rule 2.13.2 requires the Audit Committee to:
  - a. be comprised solely of Directors of the Issuer;
  - b. have **at least three members**;
  - c. have a majority of Independent Directors; and
  - d. have at least one member with an accounting or financial background.
10. TRU's annual report for the financial year ended 31 March 2020 stated that its Audit, Finance and Risk Committee (*Audit Committee*) comprised three members – Independent Directors Christopher Horn (Audit Committee Chair), Con Hickey and Anthony Ho (TRU Board Chair)<sup>2</sup>.
11. At TRU's Annual Meeting on 10 September 2020, Mr Hickey retired from the TRU Board and Juliet Hull was elected as a non-executive Director<sup>3</sup>. Ms Hull was determined by TRU to be an Independent Director. TRU advised NZ RegCo that Ms Hull replaced Mr Hickey on the Audit Committee on 10 September 2020.

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<sup>1</sup> The reference to TRU being in breach "From 2013 to 2023" on page 2 of the SOC is an error.

<sup>2</sup> Pages 11 and 52 of the TRU Annual Report 2020 released to the market on 29 June 2020.

<sup>3</sup> TRU market announcement of 11 September 2020.

12. TRU advised the Tribunal that Mr Ho ceased to be a member of the Audit Committee on **20 October 2020**, reducing its number to two members – Independent Directors Mr Horn (Chair) and Ms Hull.
13. On Friday 26 February 2021, TRU advised the market that Ms Hull would assume an executive role as Interim CEO, after the departure of TRU's then CEO<sup>4</sup>. Ms Hull ceased to be an Independent Director because of her role as Interim CEO.
14. On 2 March 2021, TRU advised the market that Dr Dexter Cheung had been appointed as a non-executive director of TRU. The Companies Register records his appointment date as 1 March 2021. Dr Cheung was determined by TRU to be an Independent Director.
15. TRU advised NZ RegCo during its investigation that Dr Cheung replaced Ms Hull on the Audit Committee on 1 March 2021<sup>5</sup>. The Tribunal notes that TRU's annual report for the financial year ended 31 March 2021 (*the 2021 Annual Report*) records its Audit Committee as comprising two members – Independent Director Mr Horn (Chair) and Ms Hull<sup>6</sup>.
16. TRU's annual reports for the financial years ended 31 March 2022 and 31 March 2023 both stated that its Audit Committee comprised two members – Independent Directors Mr Horn (Chair) and Dr Cheung<sup>7</sup>.
17. On 19 July 2023<sup>8</sup>, NZ RegCo notified TRU that its Audit Committee appeared to have only two members in breach of the Rules and noted that its Audit Committee Charter (available on TRU's website) appeared to envisage a two-member Committee<sup>9</sup>.
18. In its response to NZ RegCo of 2 August 2023, TRU accepted that it had not complied with the Rules requirement to have three members on its Audit Committee. TRU advised that it had sought to have sufficient separation between its Board and Audit Committee, and to maintain an independent Audit Committee. It noted that when Ms Hull was appointed Interim CEO, TRU considered that it was inappropriate for her (then an Executive Director) to also sit on the Audit Committee, and to maintain an independent Audit Committee of three would have required including its Board Chair as a member (which it considered to not be best corporate governance practice). TRU advised NZ RegCo that it would appoint Ms Hull<sup>10</sup> to the Audit Committee and amend its Audit Committee Charter to remedy the breach<sup>11</sup>.
19. TRU confirmed to NZ RegCo on 7 September 2023 that Ms Hull was appointed to the Audit Committee at a board meeting on **29 August 2023**<sup>12</sup>. As a result, TRU's Audit Committee now has three members. TRU has updated the Audit

<sup>4</sup> TRU market announcement of 26 February 2021.

<sup>5</sup> Annexure 7 of the SOC – TRU email to NZ RegCo of 2 August 2023. The Tribunal notes that while there appears to be a two-day gap between Ms Hull's appointment as Interim CEO on Friday 26 February 2021 and Dr Cheung's appointment to the Audit Committee on Monday 1 March 2021 – during which time Ms Hull was no longer an Independent Director - these two days occurred over a weekend.

<sup>6</sup> Page 53 of the TRU Annual Report 2021. The 2021 Annual Report states that "*subsequent to 31 March 2021*", Ms Hull retired from the Audit Committee and Dr Cheung was appointed. This statement appears to be incorrect based on TRU's advice that Dr Cheung replaced Ms Hull on 1 March 2021.

<sup>7</sup> Page 64 of the TRU Annual Report 2022 and Page 63 of the TRU Annual Report 2023.

<sup>8</sup> Annexure 6 of the SOC.

<sup>9</sup> Annexure 5 of the SOC.

<sup>10</sup> Ms Hull ceased to be an Executive Director of TRU on 6 October 2022, following TRU's appointment of a new CEO.

<sup>11</sup> Annexure 7 of the SOC.

<sup>12</sup> Annexure 9 of the SOC.

Committee Charter available on its website, which now requires the Audit Committee to have three members<sup>13</sup>.

## Breach

20. TRU was in breach of Rule 2.13.2(b) from 20 October 2020 until 29 August 2023 because during that period its Audit Committee had only two members. TRU admitted it breached Rule 2.13.2(b)<sup>14</sup>.

## Tribunal approach to penalty

21. Under the Tribunal Rules, the Tribunal can impose a fine of up to \$500,000 for a breach of the Rules<sup>15</sup>. Section 9 of the Tribunal Procedures (*the Procedures*) provide guidance to the Tribunal on assessing the appropriate financial penalty for a breach of the Rules. The Tribunal's determination in *NZMDT 1/2023 NZX Limited v Hallenstein Glasson Holdings Limited (the HLG decision)* outlines the Tribunal's approach to the Procedures. 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.
22. 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**

23. 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
<b>Penalty Band 1 – Minor Breaches</b>	\$0 to \$40,000
<b>Penalty Band 2 – Moderate Breaches</b>	\$30,000 to \$250,000
<b>Penalty Band 3 – Serious Breaches</b>	\$200,000 to \$500,000

24. 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.
25. 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 band<sup>16</sup>. 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,

<sup>13</sup> TRU Audit and Risk Management Committee Charter – see here.

<sup>14</sup> Annexure 7 of the SOC.

<sup>15</sup> Tribunal Rules 9.1.2(e) and 9.2.2(f).

<sup>16</sup> See Appendix 1 for a copy of the table of factors which fall within each penalty range.

the Tribunal will use its discretion to weigh up all the factors present to ensure that they are appropriately balanced.

***Step 2: Factors relating to the respondent***

26. 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).
27. 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 penalty<sup>17</sup>. 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.

**Submissions on penalty**

28. In summary, NZ RegCo submits that the appropriate penalty band for TRU's breach is Penalty Band 2 and that the appropriate starting point penalty is \$60,000. NZ RegCo submits that the mitigating factors in this case outweigh the aggravating factors, and considers that a final penalty of \$30,000 is appropriate.
29. TRU has not made any submissions on penalty, but noted that it is a small company with ongoing challenging trading conditions<sup>18</sup>.

**Step 1: Tribunal assessment of the starting point penalty**

***Penalty Band factors***

30. 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) Not caused any loss;*

31. NZ RegCo has not identified any loss caused by the breach.

*b) No/minor impact on investors and the market;*

32. NZ RegCo has not identified any market impact associated with the breach.

*c) No financial benefit or commercial advantage;*

33. NZ RegCo has not identified any financial benefit or commercial advantage to TRU arising from the breach.

*Applicable Penalty Band 2 factors*

*d) Moderate compliance breach*

34. The Tribunal notes that having at least three members is an important component to ensuring a robust Audit Committee, in conjunction with the requirements that all members are Directors, there is a majority of Independent Directors and at least one member has an accounting or financial background.

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<sup>17</sup> See Appendix 2 for a copy of the non-exhaustive list of factors which are likely to lower or increase the starting point penalty.

<sup>18</sup> TRU email to the Tribunal of 5 December 2023.

35. While TRU's Audit Committee had only two members during the period it was in breach, TRU did comply with the other requirements of Rule 2.13.2 - both members were Independent Directors<sup>19</sup> and at least one member had an accounting background<sup>20</sup>. The Tribunal considers that these facts reduce the seriousness of the breach, as noted in its decisions *NZMDT 4/2023 NZX Limited v Millennium & Copthorne Hotels New Zealand Limited* and *NZMDT 5/2023 NZX Limited v CDL Investments New Zealand Limited (the MCK and CDI decisions)*.
36. The Tribunal considers that the breach was a moderate compliance breach.
- e) Potential to cause a moderate impact on investors and the market;*
37. As noted in the HLG decision, the key to whether there is potential harm 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.
38. The Rules requirement that an Audit Committee have at least three members is intended to ensure there are sufficient different perspectives to perform an Audit Committee's responsibilities. The potential harm here is that TRU's Audit Committee was less robust because it had two members, not three. During the period TRU was in breach, the members of the Audit Committee were both Independent Directors<sup>21</sup> and the Audit Committee Chair (Mr Horn) was an Independent Director with significant accounting expertise. While not alleviating TRU from its obligation under the Rules, in the Tribunal's view this combination of factors lessened the potential impact of the Audit Committee breach on investors and the market. TRU also submits that its Audit Committee meetings typically had its full board or at least three Directors in attendance<sup>22</sup>.
39. The Tribunal considers that in these circumstances, the breach had the potential to cause a moderate impact on investors and the market.

*Applicable Penalty Band 3 factors*

- f) Breach continued for an extended period of time;*
40. The breach continued for 2 years and 10 months, which the Tribunal considers to be an extended period of time<sup>23</sup>.
- g) Breach continued to occur once discovered*
41. NZ RegCo submits that TRU delayed in taking remedial action because it notified TRU of the apparent breach on 19 July 2023, but TRU did not appoint a third member to its Audit Committee until 29 August 2023<sup>24</sup>.
42. The Tribunal considers that TRU should have acted urgently to rectify the breach, rather than wait for its next scheduled Board meeting. However, the brief continuation of the breach likely had a minimal impact in this situation, given the Audit Committee had two Independent Directors and, accordingly, the Tribunal considers this factor to have limited weight.

<sup>19</sup> Noting the Tribunal's comments at footnote 5 above.

<sup>20</sup> Mr Horn is noted in TRU's annual reports as being a Fellow of the Chartered Accountants in Australia and New Zealand and was a partner of KPMG and its predecessor firms for 20 years.

<sup>21</sup> Noting the Tribunal's comments at footnote 5 above.

<sup>22</sup> Annexure 7 of the SOC, TRU email to NZ RegCo of 2 August 2023. TRU also noted in an email to the Tribunal of 10 December 2023 that Mr Ho had attended the Audit Committee meetings held on 25 June 2021 and 29 June 2022.

<sup>23</sup> This is consistent with the Tribunal's determination of a 2½ year breach of Rule 2.13.2(b) in the MCK and CDI decisions as being a breach of extended duration.

<sup>24</sup> Annexure 9 of the SOC, TRU email to NZ RegCo of 7 September 2023.

### ***Starting point penalty***

43. After weighing up the factors outlined above, the Tribunal considers that the breach falls within Penalty Band 2. While the breach occurred over an extended period, this factor was counter-balanced by no loss, impact or financial gain being identified as arising from the breach. Given that the Tribunal considers the breach to have been a moderate compliance breach with the potential to have caused a moderate impact on investors and the market, Penalty Band 2 is appropriate.
44. In the MCK and CDI decisions, the Tribunal assessed the appropriate starting point penalty to be \$55,000 for their respective breaches of Rule 2.13.2(b) in very similar circumstances (MCK and CDI's Audit Committees also had two members - both Independent Directors and at least one with an accounting background - and the duration of the breach was 2½ years). NZ RegCo submits that the appropriate starting point penalty in this case should be higher to reflect that in TRU's case, it did not 'self-identify' the breach (as MCK and CDI did) and did not act swiftly to rectify it. The Tribunal does not consider that these factors indicate that a higher starting point penalty is warranted in this case, noting that it did not consider that MCK and CDI's self-identification of breach (which was not self-reported) should lessen the penalty in those cases<sup>25</sup> and that the brief continuation of TRU's breach has limited weight.
45. The Tribunal considers that the appropriate starting point penalty is \$55,000.

### **Step 2: Tribunal assessment of factors relating to TRU**

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

#### ***Aggravating factors***

*(1) Breach was careless;*

47. NZ RegCo submits that TRU was "*negligent*" in its understanding of the Rules and that a review by TRU of its obligations under the Rules would have identified the breach.
48. TRU advised NZ RegCo that it had sought to separate the Audit Committee from the Board to focus on the matters outlined in its Audit Committee Charter. TRU noted that it did not consider it best practice for the Board Chair to also be on the Audit Committee (Mr Ho ceased to be a member of the Audit Committee on 20 October 2020). TRU also noted that following the departure of its then CEO, Ms Hull was appointed Interim CEO and TRU considered it was inappropriate for her to sit on the Audit Committee while holding this role.
49. TRU may have had good intentions with regard to its Audit Committee composition. However, TRU appears to have been unaware of the requirement in the Rules to have at least three members, given its Audit Committee Charter had stipulated two members, not three.
50. As noted in its decision on appeal of *NZMDT 2/2023 NZX Ltd v 2 Cheap Cars Group Ltd*, the act of breaching a Rule may not of itself be negligent, rather some additional element is required to elevate a breach to this level. The Tribunal considers that TRU was careless with regard to Rules compliance.

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<sup>25</sup> See paragraphs 66 of the MCK and CDI decisions.

*(2) Compliance history;*

51. TRU was referred to the Tribunal in 2018 for a breach of then NZAX Listing Rule 3.2.1 for failing to have at least two Directors who were ordinarily resident in New Zealand. There were a number of mitigating factors in that case which led the Tribunal to publicly censure TRU, but not impose a penalty (including that the Director had withdrawn suddenly from re-election at TRU's AGM, TRU self-reported the breach and promptly appointed a replacement Director within 18 Business Days).
52. Previous Rule breaches are relevant when assessing an Issuer's compliance history<sup>26</sup>. While the Tribunal considers that TRU's previous breach is a relevant factor, it is not a significantly aggravating factor given the circumstances of that breach.

**Mitigating factors**

*(1) Early admission of breach;*

53. TRU admitted the breach when it was first brought to its attention by NZ RegCo.

*(2) Full cooperation with investigation;*

54. NZ RegCo submits that, while its engagement with TRU was limited given the simple nature of the breach, TRU was "*complete and open in its responses*" (although the Tribunal notes that TRU overlooked responding to NZ RegCo's question on when Mr Ho ceased to be a member of the Audit Committee, which necessitated the Tribunal having to seek this information itself).

*(3) Adverse effect on ongoing commercial viability*

55. NZ RegCo submits that a reduction in the starting point penalty is appropriate in this case to recognise TRU's "*adverse financial position*".
56. Under Procedure 9.2.5(i) the Tribunal may consider, as a factor likely to lower the starting point penalty, the "*starting point penalty having an adverse effect on the ongoing commercial viability of the Respondent*". This is a new mitigating factor introduced when the Procedures came into force on 17 October 2022.
57. This mitigating factor does not relate to the size of an Issuer. As noted in the appeal of the 2CC decision, all Issuers are required to comply with the Rules, regardless of size, and an Issuer's size is not, of itself, a mitigating or aggravating factor. Rather, this mitigating factor relates to the financial position of an Issuer and whether the starting point penalty would adversely effect its ongoing commercial viability. A relatively high threshold is required before this factor will apply given that the penalties imposed by the Tribunal are intended to be punitive.
58. TRU released its financial statements for the year ended 31 March 2023 on 30 June 2023, in which it recorded a \$2.4million loss, with net assets of \$2.5million. TRU's 2023 financial statements record at note 1(a):

**"Going concern...there is material uncertainty in relation to the Group's ability to meet forecasts and to raise additional capital, if and when required. These factors cast significant doubt on the Groups ability to continue as a going concern. If the going concern assumption is not valid, the consequence is the Group may be unable to realise the value**

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<sup>26</sup> See NZMDT 2/2023 NZX Ltd v 2 Cheap Cars Group Limited.



*in its assets and discharge its liabilities in the normal course of business.*<sup>27</sup>

59. The audit report by TRU's auditor, RSM Hayes Audit (*RSM*), noted that the group needed to achieve forecast revenue growth, maintain its cost base and obtain additional funding (via capital raising or an alternative transaction) to finance its operations. RSM noted that these events or conditions indicated that material uncertainties exist that may cast significant doubt on TRU's ability to continue as a going concern.
60. TRU's unaudited interim financial statements for the half year ended 30 September 2023, released on 6 November 2023, recorded an operating loss of \$1.35million and net assets of \$1.2million. As at 30 September 2023, TRU had cash and cash equivalents of \$0.8million.
61. The Tribunal notes that the application of this mitigating factor is necessarily fact specific, and that a respondent's financial position may, in some circumstances, have the effect of reducing the starting point penalty.
62. While the starting point penalty of \$55,000 is not significant given the penalty range available under Penalty Band 2, the Tribunal considers that in the circumstances of this case, a penalty at this level may well have an adverse effect on TRU's ongoing commercial viability. Accordingly, the Tribunal has taken this factor into account when determining the appropriate overall penalty.

### **Penalty**

63. The Tribunal considers that having regard to the factors noted above, a significant reduction from the starting point penalty is warranted. The Tribunal imposes an ultimate penalty of \$25,000. In determining the final penalty, the Tribunal has given particular weight to (i) TRU's immediate admission of breach; (ii) cooperation with NZ RegCo and the Tribunal; and (iii) the penalty having an adverse effect on TRU's ongoing commercial viability.
64. In the MCK and CDI decisions, the Tribunal determined that an overall penalty of \$50,000 was appropriate, with \$35,000 attributable to their respective breaches of Rule 2.13.2(b). The Tribunal considers that a lower penalty is appropriate in this case given (i) that MCK and CDI also breached Rule 3.8.1 (multiple Rule breaches attract higher penalties); and (ii) the additional mitigating factor of the penalty having an adverse effect on TRU's ongoing commercial viability.
65. The Tribunal considers that the penalty of \$25,000 in this case is significant enough to act as a deterrent with respect to Audit Committee composition breaches.

### **Public censure**

66. Procedure 9.3 provides guidance on when the Tribunal may be likely to exercise its power under the Tribunal Rules to publicly censure a respondent.
67. NZ RegCo submits that none of the grounds favouring non-publication have been demonstrated in this case and that a public censure of TRU is appropriate because the breach falls within Penalty Band 2, there is educative value in naming TRU and benefit in signalling NZ RegCo's expectations regarding corporate governance. TRU made no submissions on censure.
68. Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal considers it is appropriate to publicly censure TRU given the breach fell within

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<sup>27</sup> Page 29 of the TRU Annual Report 2023.

Penalty Band 2. The Tribunal notes that its public censure of TRU will be released together with a copy of this determination.

### **Costs**

69. NZ RegCo submits that TRU should pay the costs incurred by NZX and the Tribunal in relation to this matter. TRU made no submissions on costs.
70. 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 TRU's breach of the Rules, the Tribunal considers that it is appropriate to make a costs award against TRU. However, in the particular circumstances of this case, as discussed above, the Tribunal caps the award at \$5,000 (excluding GST, if any).

### **Orders**

71. The Tribunal orders that TRU:
  - 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 \$25,000 to the NZX Discipline Fund; and
  - c. pay the costs incurred by NZX and the Tribunal in considering this matter up to a maximum amount of \$5,000 (excluding GST, if any).
72. The Tribunal encourages NZ RegCo to discuss the possibility of deferred payment terms with TRU (although acknowledges that the collection of penalties and costs under the Tribunal Rules is at the discretion of NZX).

DATED 15 DECEMBER 2023



Mariëtte van Ryn, Division Chair, NZ Markets Disciplinary Tribunal

## Appendix 1

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

## 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.