

**IN NZ MARKETS DISCIPLINARY TRIBUNAL  
SUMMARY HEARING PROCEDURE**

**NZMDT 1/12**

**UNDER** the NZ Markets Disciplinary Tribunal Rules

**IN THE MATTER OF** breach of NZSX Listing Rules 10.5.1, 6.1.1 and  
6.2.3

**BETWEEN** **NZX LIMITED**

**AND** **INSURED GROUP LIMITED**  
Respondent

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**DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL  
21 FEBRUARY 2012**

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1. This is a determination of a division of NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising Peter Wilson (division chairman), Don Holborow and Jo Appleyard.
2. Capitalised terms that are not defined in this determination have the meanings given to them in the NZSX Listing Rules (*the Rules*).

### **Background**

3. On 27 January 2012, NZX Limited (*NZX*) served a statement of case on the respondent, Insured Group Limited (*INS*). *INS* is an NZSX listed Issuer.
4. The statement of case alleged that *INS* had breached Rules 10.5.1 (*Breach One*), 6.2.3 (*Breach Two*) and 6.1.1 (*Breach Three*).

#### *Breach One*

5. Rule 10.5.1 requires an Issuer to release its annual report to the market within three months of its financial year end. *INS*'s 2011 financial year ended on 30 June 2011. *INS* was therefore required to release its annual report by 30 September 2011.
6. The statement of case alleged that *INS* had breached Rule 10.5.1 because it did not release its annual report until 25 November 2011.
7. On 3 October 2011, *INS* announced a delay in releasing its audited financial statements due to its auditor experiencing unforeseen resourcing matters and the need to reflect a transaction with Priority One Network Group Ltd.
8. *NZX* advised the market on the same day that if *INS* did not release its annual report by 7 October 2011, its securities would be suspended from 10 October 2011 until the report's release. *INS* failed to release its annual report and trading in its securities was suspended on 10 October 2011.
9. On 2 November 2011, *NZX* wrote to *INS* seeking an explanation for the delay. *INS* replied on 11 November 2011, stating the delay was due to:
  - (a) a series of complex transactions completed in the 15 month period prior to 30 June 2011, including a reverse takeover transaction on 12 April 2010 between Australian Consolidated Insurance Limited and Lombard Group Limited, migrating its place of business from New Zealand to Australia and the disposal of four non-core business assets;
  - (b) a number of significant changes to internal staff and at Board level;
  - (c) the annual report covering a 15 month reporting period; and
  - (d) a significant transaction with Priority One post balance date which needed to be reported in the annual report in a manner consistent with the Initial Public Offering document being prepared by *INS* to facilitate its dual listing on the ASX.

*INS* also confirmed that it remained in compliance with its continuous disclosure obligations under the Rules and that its annual report would be available during the week of 14 November 2011.

10. On 22 November 2011, INS advised NZX that its annual report had not been provided to the market because the process of valuing INS's assets following its asset disposal had taken longer than anticipated. INS also asserted that its discussions with key stakeholders to satisfy its auditors that INS remained a going concern had delayed the annual reporting process. INS expected to release its annual report on or before 25 November 2011 and confirmed that it remained compliant with its continuous disclosure obligations.
11. INS advised the market on 23 November 2011 that the annual report would be released on 25 November 2011. The annual report was released on 25 November 2011, almost 2 months overdue. It contained an unqualified audit opinion on the year end financial statements, however the auditors noted that INS's financial position indicated the "*existence of a material uncertainty which may cast significant doubt about the consolidated entity's ability to continue as a going concern and therefore, the consolidated entity may be unable to realise its assets and discharge its liabilities in the normal course of business, and at the amounts stated in the financial report.*"
12. NZX lifted the trading suspension on INS securities on 25 November 2011. Trading had been suspended for seven weeks.
13. The annual report released on 25 November 2011 did not contain the information required by Rule 10.5.5(b) (being the names and holdings of the 20 largest shareholders) and Rule 10.5.5(d) (being details of shareholder spread). Following discussions with NZX, INS released this information to the market on 2 December 2011.

*Breaches Two and Three*

14. Rule 6.1.1 requires a notice of meeting to an Issuer's quoted security holders, regarding matters other than those listed in Rule 6.1.2, to be approved by NZX. Rule 6.2.3 requires a notice of meeting to security holders to contain or be accompanied by sufficient explanation to enable a reasonable person to understand the effect of the resolutions proposed in the notice of meeting.
15. On 24 October 2011, INS submitted a draft notice of annual meeting (*Notice*) to NZX for review. The Notice stated that the agenda of the meeting to be held on 30 November 2011 included items to:
  - (a) receive and consider the annual financial report of INS for the year ended 30 June 2011, together with the declaration of the Directors, the remuneration report and the auditor's report;
  - (b) consider, and if thought fit, pass as a non-binding resolution that "*...approval is given for the adoption of the Remuneration Report as contained in the Company's annual financial report for the financial year ended 30 June 2011.*"; and
  - (c) consider as separate resolutions whether Anne-Marie Syme and Santino Di Giacomo be re-elected as Directors.
16. The explanatory statement accompanying the Notice stated that the annual report was available on INS's website and that the Remuneration Report was contained in the annual financial report of INS for the year ended 30 June 2011.

17. NZX approved the Notice on 28 October 2011 on the basis that the information provided by INS was complete and accurate. NZX understood that, at the time the Notice was to be sent to shareholders, the annual report would be available on INS's website.
18. On 1 November 2011, INS released the Notice with the statement that the annual report was available on its website, when it was not.
19. On 19 November 2011, NZX received a complaint from an INS shareholder that while the Notice stated that the annual report was available on the INS website it had not yet been made available to shareholders. The complainant had unsuccessfully requested a copy from the company.
20. INS's annual report was released on 25 November 2011, three Business Days before the annual meeting was held on 30 November 2011.

*NZX's recommended penalty*

21. Breach One falls within Penalty Band 6 of Procedure 11.3.1 of the NZ Markets Disciplinary Tribunal Procedures (*Procedures*), which means that on a summary hearing the maximum fine the Tribunal can impose is \$250,000. NZX submitted that Breach One falls within the lower end of the spectrum of conduct falling within Penalty Band 6.
22. NZX submitted that the following mitigating factors were relevant when determining the appropriate penalty for Breach One:
  - (a) INS was involved in a number of complex transactions which delayed the preparation of the annual report – a matter NZX had no reason to doubt;
  - (b) A number of significant staff changes occurred internally and at Board level during the reporting period;
  - (c) INS needed to satisfy its auditors that it remained a going concern. To facilitate this, INS entered into discussions with its key stakeholders, which delayed the preparation of the annual report; and
  - (d) INS provided updates to the market and NZX advising of the reasons for the delay in releasing its annual report.
23. NZX submitted that the following aggravating factors were relevant in determining the appropriate penalty for Breach One:
  - (a) The length of time INS remained in breach - approximately 8 weeks.
  - (b) INS did not seek a waiver from the Rules;
  - (c) Holders of INS securities did not know that the audit of the financial statements had been completed until 25 November 2011;
  - (e) INS should have managed its relationship with its auditors to ensure that its obligations could be met; and

- (f) The importance of the periodic reporting rules to the integrity and good governance of the market. Any breach of these Rules brings the market into disrepute.
24. Breach Two also falls within Penalty Band 6 of the Procedures. NZX submitted that the conduct resulting in Breach Two falls at the lower end of the penalties in Band 6.
25. Breach Three falls within Penalty Band 2 of the Procedures and merits imposition of financial penalties of up to \$10,000. NZX submitted that the conduct resulting in Breach Three falls in the middle of the penalties in Band 2.
26. NZX submitted that there are mitigating factors relevant in considering the appropriate penalty for Breaches Two and Three:
- (a) the matters noted in paragraph 22 contributed to INS's failure to provide its annual report on its website at the time the Notice was distributed;
  - (b) in respect of Breach Two, the resolution to approve the Remuneration Report was a non-binding resolution; and
  - (c) in respect of Breach Three, NZX's approval was sought on the basis of information that was true and correct at the time it was submitted but that became false over time, rather than a situation where no approval was sought.
27. NZX submitted that there were also aggravating factors relevant in considering the appropriate penalty for Breaches Two and Three:
- (a) the annual report is a key document for shareholders to receive for an annual meeting. INS failed to provide its shareholders with a reasonable opportunity to examine the most critical document before that meeting; and
  - (b) INS failed to provide shareholders with appropriate information to enable them to fully consider whether to resolve to approve the Remuneration Report and the re-appointment of each of Ms Symes and Mr Giacomo. The annual report would have contained information that was relevant to shareholders' consideration as to the re-appointment of those Directors. As the annual report was only released to the market and available on INS's website three Business Days before the meeting, shareholders were unable to properly consider these resolutions before voting.
28. NZX accordingly submitted in its statement of case that the appropriate penalty for INS is a public censure, a fine of \$20,000 for Breach One, \$10,000 for Breach Two and \$5,000 for Breach Three, and an order that INS pay the costs of both NZX and the Tribunal.

***Statement of Response***

29. On 13 February 2012, INS filed a Statement of Response.

30. INS did not dispute Breach One, but sought a lesser penalty of \$10,000 on the basis that the company had already suffered reputational harm. INS submitted in mitigation that:

*"The reverse takeover and the necessary accounting/audit protocols caused significant financial information requiring merging, consolidating and rationalising in our Group. This process required three audit firms, one independent accounting firm representing our company and one representing Rothbury Group (who bought two NZ company assets) and a large allocation of resources internally to deliver the financials on this "once off occasion". Combined with the requirements of ASIC and our Australian Financial Services licencing created a logistical challenge."*

31. INS also submitted that an amount of \$5,000 was appropriate for Breach Two as the company had already suffered reputational harm and that an amount of \$2,500 was appropriate for Breach Three as it did not believe it was adequately briefed by NZX regarding the breach and subsequent non-approval of the notice.

**NZX's rejoinder**

32. On 15 February 2012, NZX filed a statement of rejoinder in which it noted:

- (a) The practice of imposing of a trading halt where periodic reporting requirements have not been complied with is clearly disclosed in footnote 2 to Rule 5.4.3. The imposition of a trading halt in these circumstances is not intended to punish the Issuer. It is a mechanism to protect shareholders by ensuring that no trading occurs until the information is available;
- (b) It had already considered the complexity of the reverse takeover transaction as a mitigating factor in determining an appropriate penalty for Breach One;
- (c) NZX does not agree that the negative publicity INS may have received in Australia is a mitigating factor; and
- (d) NZX does not agree that INS was not adequately briefed regarding Breach Three. At the time that NZX issued its letter of approval of the Notice, NZX had no reason to believe that INS's annual report would not appear on its website as stated in the Notice.

**The Rules**

33. Rule 10.5.1 provides that:

*Subject to Rule 10.5.2 each Issuer shall within three months of the end of each Issuer's financial years:*

- (a) *Deliver to NZX electronically, in the format specified by NZX from time to time; and*
- (b) *Make available to each Quoted Security holder in accordance with Rule 10.5.3, an annual report. That annual report shall be delivered to NZX before or at the same time as it is made available to Quoted Security holders in*

*accordance with Rule 10.5.3, and shall contain all information:*

- (c) required by law;*
- (d) required in a preliminary announcement by Rule 10.4.2; and*
- (e) required by Rules 10.5.4. and 10.5.7.*

*The financial statements in that annual report shall be audited and shall be accompanied by an audit report in accordance with the requirements of the Financial Reporting Act 1993.*

34. Rule 6.1.1 provides that:

*The documents listed in Rule 6.1.2 shall be subject to the approval of NZX...*

35. Rule 6.1.2 provides that:

*The documents referred to in Rule 6.1.1 are:  
...*

*(d) any notice of meeting of holders of Quoted Securities to consider any matter other than declaring a dividend, the consideration of financial statements and reports of Directors or auditors, the election of Directors, the fixing of remuneration of Directors, a change of name of the Issuer, or the appointment of or fixing remuneration of, auditors or a resolution required or permitted under the Takeovers Code;*

36. Rule 6.2.3 provides that:

*Each notice of meeting of holders of Securities shall contain or be accompanied by sufficient explanation to enable a reasonable person to understand the effect of the resolutions proposed in the notice of meeting.*

### **Decision of the Tribunal**

37. There is no dispute that INS has breached each of Rules 10.5.1, 6.1.1 and 6.2.3. The issue for the Tribunal to determine is the appropriate penalty to be imposed on INS as a result.
38. The Tribunal continues to stress the vital importance of compliance with the periodic reporting requirements by Issuers. The purpose of these rules is to ensure that relevant reliable financial information in relation to the performance and financial position of an Issuer is promptly made available to the market. It also mitigates the risks posed by information imbalance, where those "inside" the company are in possession of better information about a company's financial position than the wider market. In addition, any trading halt which arises from uncertainty surrounding an Issuer's financial position damages the market's integrity.
39. This is particularly true of INS. INS did release its preliminary announcement on 29 August 2011, within the time allowed under the Rules. However, following this release INS shareholders remained incompletely

informed as to the financial position of INS for approximately two months. During that period there was uncertainty as to whether INS's auditors would be able to issue an unqualified opinion on INS's financial statements. This heightened the need for timely advice to shareholders and in the Tribunal's view elevates the seriousness of the breach.

40. The Tribunal does not find the matters noted in mitigation by INS for its failure to provide its annual report when due to be compelling. To the contrary, the undertaking of numerous complex transactions, the migration to Australia and change in key personnel are all reasons for ensuring that shareholders and the market are fully informed of the company's position in a timely manner. The transaction with Priority One, cited as contributing to the delay, occurred after the reporting period and is only referenced at a high level in the notes to the financial statements.
41. Nor is the Tribunal swayed by arguments that delays were caused in part by the company's auditor having insufficient resources. The Tribunal was not provided with evidence to substantiate this. Further, it is the Issuer who is responsible for managing its obligations.
42. INS should have alerted the market to the difficulties it was experiencing in complying with the Rules before it found itself in breach. Further, INS could have sought a waiver of Rule 10.5.1 to give it more time to comply and to have avoided the trading halt which resulted in its shareholders being unable to trade their shares through the market for seven weeks.
43. The Tribunal has advised the market in its last decisions regarding breaches of the periodic reporting requirements (*NZMDT 08/10 NZX v Investment Research Group Ltd (IRG)* and *NZMDT 4/11 NZX v RIS Group Ltd (RIS)*) and in its 2010 Annual Report that it will substantially increase penalties to enhance deterrence.
44. In RIS, the Tribunal agreed to a settlement sum of \$60,000, \$30,000 in respect of the breach of NZAX Listing Rule 10.5.1. The Tribunal does not consider the present case to be any less serious than RIS.
45. The Tribunal considers that the \$20,000 sought by NZX would not adequately reflect the seriousness of INS's offending, particularly with regard to other recent Tribunal decisions and the Tribunal's stated intention of increasing penalties.
46. The failure by INS to release its annual report when due has in effect led to Breaches Two and Three.
47. The Tribunal takes the breach of Rule 6.2.3 very seriously. It is imperative that shareholders are presented with timely and accurate information in order to make informed decisions when asked to vote at meetings. Accordingly, Issuers are obligated under the Rules to ensure that notices contain or are accompanied by sufficient information. By not having its annual report available to shareholders, as INS had advised them in its Notice, until 3 Business Days before its meeting, INS did not meet this obligation. The annual report was critical information for shareholders, particularly given INS's financial circumstances and the number of changes occurring at the company.
48. The Tribunal considers that the \$10,000 sought by NZX does not reflect the seriousness of the breach, particularly with regard to this Rule.



49. The Tribunal agrees with NZX that given the annual report was not available at the time the Notice was distributed to shareholders, INS breached Rule 6.1.1. The terms of NZX's letter of approval were clear – approval was based on the information provided to NZX being complete and accurate. However, the Tribunal notes the correspondence between the parties in which INS advised NZX that the annual report would be released before the meeting. NZX could have made it clear to INS that it expected the annual report to be available when the Notice was released although this was a clear implication of the language which was used in the draft notice of meeting, which NZX was entitled to rely upon.
50. The Tribunal notes that INS has not responded to NZX's submissions that it be censured, and such an order is standard for breaches of this kind. Similarly, INS has made no submission opposing an award of costs (of both NZX and the Tribunal). Again, costs are routinely awarded for breaches of this kind.

### **Orders**

51. Accordingly, the Tribunal imposes the following penalties:
  - (a) a **public censure** of INS in the form of an announcement by the Tribunal to the market that INS has breached Rules 10.5.1, 6.2.3 and 6.1.1 and is censured accordingly;
  - (b) an order that INS pay to NZX, within 20 Business Days of the date of this decision, a **sum of \$50,000** by way of penalty – being \$30,000 for Breach One, \$15,000 for Breach Two and \$5,000 for Breach Three.
  - (c) an order that INS pay to NZX, within 20 Business Days of the date of an invoice from NZX, the actual **costs** and expenses incurred by the Tribunal in considering this matter; and
  - (d) An order that INS pay to NZX, within 20 Business Days of the date of an invoice from NZX, the actual costs and expenses incurred by NZX in relation to this matter.

### **Publication of this decision**

52. The Tribunal recommends that this decision be released to the market in full under Tribunal Rule 6.6.

### **Summary Hearing Procedure**

53. Under Rule 6.1.1 NZX has the discretion to refer a matter, which is not frivolous but is not sufficiently serious to require determination under the Full Hearing Procedure, to the Tribunal for hearing and determination by way of the Summary Hearing Procedure.
54. NZX advised the Tribunal that it considered this matter appropriate for the Summary Hearing Procedure because the issues involved were not complex and INS was clearly in breach of the Rules.

55. The Tribunal agrees that a Summary Hearing was appropriate for this matter.

DATED 21 FEBRUARY 2012

Peter Wilson, Division Chairman, NZ Markets Disciplinary Tribunal