

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

**NZMDT 8/14**

**UNDER** the NZ Markets Disciplinary Tribunal Rules

**IN THE MATTER OF** alleged breach of NZX Main Board Listing Rule 9.3.1

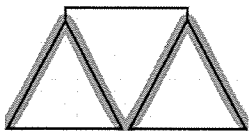
**BETWEEN** **NZX LIMITED**

**AND** **MARSDEN MARITIME HOLDINGS LIMITED**  
Respondent

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**DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL  
8 AUGUST 2014**

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NEW ZEALAND MARKETS  
DISCIPLINARY TRIBUNAL

**Rachel Batters**  
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**NZ Markets Disciplinary Tribunal**  
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1. This is a determination of a division of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising Mark Freeman (division chairman), Alison Paterson and David Kreider.
2. Capitalised terms that are not defined in this determination have the meanings given to them in the NZX Main Board Listing Rules (*the Rules*).

### **Procedural Background**

3. On 3 July 2014, NZX Limited (*NZX*) notified Marsden Maritime Holdings Limited (formerly known as Northland Port Corporation (NZ) Limited) (*MMH*) that it intended to refer a matter of interpretation to the Tribunal regarding whether Northland Regional Council (*NRC*) was an Associated Person of a Director of MMH at the time of MMH's annual meeting in October 2013.
4. NZX served a statement of case on MMH on 17 July 2014 (*SOC*). In the *SOC*, NZX alleged that a breach of Rule 9.3.1 had occurred at MMH's 2013 annual meeting because NRC, the majority shareholder of MMH, should not have voted on a resolution to increase the pool of remuneration payable to MMH Directors. The *SOC* included copies of the correspondence between NZX and MMH on this matter.
5. MMH did not file a statement of response to the *SOC* with the Tribunal.
6. On 1 August 2014, NZX advised the Tribunal that MMH had confirmed that it did not intend to file a statement of response. NZX confirmed to the Tribunal, in accordance with Tribunal Rule 6.2.8, that it did not believe an oral hearing of this matter was essential to establish all of the relevant facts and that the Tribunal should proceed to consider the matter based on the *SOC*.

### **Factual Background**

7. MMH is an Issuer with its ordinary shares Quoted on the NZX Main Board. MMH is bound by the Rules.
8. MMH held its 2013 annual meeting on 18 October 2013. One of the resolutions put to shareholders at that meeting was "to approve an increase in Directors' fees from \$182,600 to \$200,000" (*the Resolution*).
9. NRC holds approximately 53% of MMH's shares. NRC voted in favour of the Resolution.
10. At the date of MMH's 2013 annual meeting, Mr Colin Mitten was a Director of MMH and the Chairman of Northland Inc Limited (*Northland Inc*), a company wholly owned by NRC. Northland Inc is a Council Controlled Organisation and is the Northland region's economic development agency. In addition, Mr Mitten was Acting Chief Executive Officer of Northland Inc until 30 June 2013. Mr Mitten was also noted as being a member of the MMH Remuneration Committee in the MMH 2013 annual report.

### **Relevant Rules**

11. Under Rule 9.3.1, no vote in favour of a resolution under Rule 3.5.1 (Directors' remuneration) may be cast on any Securities held by any Director intended to receive the payment or benefit or by any Associated Person of any such Director.
12. A person is an Associated Person of another person under the Rules if the first person is associated with the other in terms of Rules 1.8.2 to 1.8.7.

13. Under Rule 1.8.2, a person (the "first person") is associated with another person (the "second person") if, in making a decision or exercising a power affecting an Issuer, the first person could be influenced as a consequence of an Arrangement or relationship existing between or involving them.
14. Rule 1.8.3 sets out a number of circumstances in which the first person will be associated with the second. Rule 1.8.3 does not, however, limit Rule 1.8.2. Accordingly, the first person can be associated with the second person even though the Arrangement or relationship between or involving them is not of the type specified in Rule 1.8.3.
15. Rule 1.8.3(a)(iii) provides that, without limiting Rule 1.8.2, the first person is associated with the second person if the first person is a company, and the second person is a Director of a Related Company of that company. A "Related Company" has the meaning given in section 2(3) of the Companies Act 1993 and includes a wholly-owned subsidiary.

#### **NZX's case**

16. NZX submits that NRC was an Associated Person of Mr Mitten at the time of the MMH 2013 annual meeting because Mr Mitten was both the Chairman of Northland Inc (which is wholly owned by NRC) and a Director of MMH (of which NRC is the majority shareholder). In particular, NZX submits that a "relationship" existed between NRC and Mr Mitten for the purpose of Rule 1.8.2 and that, as a consequence of this "relationship", NRC could be influenced when making a decision or exercising a power affecting MMH.
17. NZX notes that while the deeming provision in Rule 1.8.3 does not apply because NRC is not a company, it nevertheless indicates that this type of relationship is one that is intended to be caught under the definition of Associated Person.
18. Accordingly, NZX believes that NRC should have been disqualified from voting on the Resolution under Rule 9.3.1.

#### **Submissions from MMH**

19. MMH has repeatedly stated in its correspondence with NZX that, in its view, NRC was not an Associated Person of MMH or its Directors.
20. MMH made various submissions to NZX to support its view, including in brief that:
  - (a) there is no Arrangement or relationship between Mr Mitten and NRC in terms of Rule 1.8.2;
  - (b) the term "relationship" in Rule 1.8.2 requires a bond or alliance between the parties by which one is able to influence the other in a material manner;
  - (c) there is no evidence of materiality to support there being a relationship between Mr Mitten and NRC. There is no formal bond or alliance between the two which can be described as being material in nature;
  - (d) even if a connection could be established, there is no evidence that NRC could be influenced by Mr Mitten in voting on the Resolution by reason of the connection;
  - (e) Mr Mitten has no hold over, agreement, understanding or influence on NRC in its decision making; and

- (f) the deeming provision in Rule 1.8.3(a)(iii) does not apply because NRC is not a company.

### **Discussion**

21. The Tribunal must consider two issues in this matter:
- (1) What is the correct interpretation of Rule 1.8.2?
  - (2) Did MMH breach Rule 9.3.1?

### ***Interpretation of Rules***

22. "Associated Person" is broadly defined in Rule 1.8.2 and is intended to capture a wide range of different scenarios in which two parties are associated for the purposes of the Rules.
23. In the context of Rule 1.8.2, the term "relationship" must be given its ordinary meaning and in the Tribunal's view should not be read down in the manner submitted by MMH. In other words, one person does not have to be able to influence another person in order for there to be a "relationship" between or involving them within the meaning of Rule 1.8.2. The Tribunal does agree, however, that Rule 1.8.2 is only triggered (i.e. one person will only be associated with another person) if the relationship between two persons is of such a nature that one person could be influenced as a consequence of the relationship when making a decision or exercising a power affecting an Issuer. If a relationship between two persons results in them being Associated Persons but the relationship is not relevant to, or would be highly unlikely to influence how the relevant person would act in relation to the matter for which the issue of association arose, then a Ruling or waiver may be sought from NZX.
24. In the Tribunal's view, an entity (whether or not it is a company) and the Chairman of a company that is wholly owned by that entity have a sufficient connection to constitute a "relationship" for the purpose of Rule 1.8.2.
25. MMH submitted to NZX that the deeming provisions of Rule 1.8.3 are not a guide to interpreting Rule 1.8.2. MMH considers instead that they simply expand the coverage of Rule 1.8.2 and that coverage does not extend to an entity which is not a company.
26. The Tribunal considers that while the deeming provision in Rule 1.8.3(a)(iii) only applies where the first person is a company, it does nevertheless indicate that this type of relationship (whether the entity is a company or not) is one that is intended to be caught by the overarching provision of Rule 1.8.2.
27. Further, Rule 1.8.3 is not intended to provide an exhaustive list of scenarios in which association exists nor is it intended to limit the breadth of Rule 1.8.2. Rather, it provides a set of scenarios in which the first person will be associated with the second person.
28. MMH also submitted to NZX that Rule 1.8.2 requires evidence of a connection between the two parties by which one party is able to influence the other party in a material manner and evidence that the party could have been influenced.

29. The Tribunal notes that the test in Rule 1.8.2 is whether the first person *could* be influenced by the second person as a consequence of the relationship. NZX does not need to produce evidence that influence was used in relation to the particular matter.
30. The breadth of the definition of "Associated Person" is acknowledged in Footnote 1 to Rule 1.8, which provides that if there is any doubt as to whether any two or more persons are Associated Persons, Issuers should seek a Ruling from NZX under Rule 1.8.6. Accordingly, Issuers can seek a definitive view from NZX when contemplating whether parties are associated for the purposes of the Rules. In addition, a waiver could be sought permitting a person to vote on a matter where they would otherwise be disqualified as an "Associated Person" if the relationship was either not relevant to the matter being voted on or would not otherwise be likely to influence how the Associated Person exercised their votes on that matter.

### ***Application of the Rules***

31. It follows from the discussion above that, in the Tribunal's view, a relationship did exist for the purpose of Rule 1.8.2 between NRC and Mr Mitten (who was a Director of MMH and the Chairman of Northland Inc) at the time of the 2013 annual meeting.
32. MMH submitted to NZX that NZX had failed to provide any evidence that, even if a relationship did exist for the purpose of Rule 1.8.2, NRC could be influenced in making a decision or exercising a power affecting MMH as a consequence of that relationship.
33. The Tribunal notes that the test in Rule 1.8.2 is whether the first person *could* be influenced as a consequence of that relationship. This does not require proof or evidence of influence being used. The threshold in Rule 1.8.2 is not intended to be high. In the Tribunal's view, the fact that influence could exist as a consequence of a relationship between the relevant parties is sufficient. It is not necessary that the first person would be, or was, influenced in respect of the particular matter in order for them to be Associated Persons.
34. MMH submitted to NZX that there must be evidence of a connection between NRC and Mr Mitten that is material. There is no materiality threshold in Rule 1.8.2. That said, two persons will only be "associated" if one of them could be influenced as a consequence of an Arrangement or relationship between or involving them. To that extent, the relationship between the two persons must be of such a nature that one person could be influenced by the existence of the relationship.
35. Overall, the Tribunal considers that NRC was an Associated Person of a Director of MMH at the time of the 2013 annual meeting and should therefore have been disqualified from voting on the Resolution in accordance with Rule 9.3.1.
36. As indicated above, Issuers can apply for a waiver from the disqualifying provisions in Rule 9.3.1, where, for example, the relationship is immaterial to the subject matter of the relevant resolution or there is no material benefit to the Associated Person under or as a result of the relevant resolution. MMH could, therefore, have sought a waiver permitting NRC to vote on the Resolution.

### **Penalty**

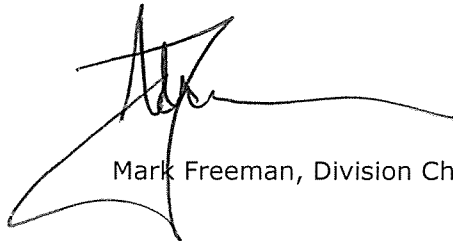
37. NZX submitted in the SOC that it does not consider a financial penalty to be appropriate in these circumstances as this matter raises an important question of interpretation.

38. The Tribunal agrees that a financial penalty is not appropriate based on the submissions from NZX that:
- (a) MMH appears to have considered, and held an honest belief, that NRC was not an Associated Person of a Director of MMH; and
  - (b) Under Rule 9.3.5, the Resolution is not impugned on the basis of the breach of Rule 9.3.1.
39. The Tribunal does consider, however, that it is appropriate to publicly censure MMH for the breach.
40. NZX has not sought any costs in relation to this matter. Accordingly, the Tribunal will not make an award of costs against MMH.

**Summary of Orders**

41. The Tribunal orders that there be a public censure (in the form of the announcement by the Tribunal attached to this decision) to the market that MMH has been found in breach of Rule 9.3.1.
42. The Tribunal recommends that this decision be released to the market in full under Tribunal Rule 6.6.

**DATED** 8 AUGUST 2014

A handwritten signature in black ink, appearing to be 'Mark Freeman', written over a large, stylized, abstract scribble that also forms part of the signature's base.

Mark Freeman, Division Chairman, NZ Markets Disciplinary Tribunal



[x] August 2014

**PUBLIC CENSURE OF MARSDEN MARITIME HOLDINGS LIMITED BY THE NZ MARKETS DISCIPLINARY TRINUBAL FOR A BREACH OF NZX MAIN BOARD LISTING RULE 9.3.1**

1. In a determination of the NZ Markets Disciplinary Tribunal (*the Tribunal*) dated 8 August 2014, the Tribunal found that Marsden Maritime Holdings Limited (*MMH*) breached NZX Main Board Listing Rule (*Rule*) 9.3.1.
2. What follows is a high level summary. The facts of this matter and the Tribunal's detailed reasoning are set out in its decision.

**Background**

3. MMH held its 2013 annual meeting on 18 October 2013. One of the resolutions put to shareholders at that meeting was "to approve an increase in Directors' fees from \$182,600 to \$200,000" (*the Resolution*).
4. Northland Regional Council (*NRC*) holds approximately 53% of MMH's shares. NRC voted in favour of the Resolution.
5. At the date of MMH's 2013 annual meeting, Mr Colin Mitten was a Director of MMH and the Chairman of Northland Inc Limited (*Northland Inc*), a company wholly owned by NRC. Northland Inc is a Council Controlled Organisation and is the Northland region's economic development agency.

**Determination**

***Interpretation of Rules***

6. "Associated Person" is broadly defined in Rule 1.8.2 and is intended to capture a wide range of different scenarios in which two parties are associated for the purposes of the Rules.
7. In the context of Rule 1.8.2, the term "relationship" must be given its ordinary meaning - one person does not have to be able to influence another person in order for there to be a "relationship" between or involving them within the meaning of Rule 1.8.2.
8. In the Tribunal's view, an entity (whether or not it is a company) and the chairperson of a company that is wholly owned by that entity have a sufficient connection to constitute a "relationship" for the purpose of Rule 1.8.2.
9. The Tribunal notes that while Rule 1.8.3(a)(iii) only applies where the first person is a company, it does nevertheless indicate that this type of relationship is one that is intended to be caught by the overarching provision of Rule 1.8.2. Rule 1.8.3 is not intended to provide an exhaustive list of scenarios in which association exists nor is it intended to limit the breadth of Rule 1.8.2. Rather, it provides a set of scenarios in which the first person will be associated with the second person.

10. The Tribunal also notes that the test in Rule 1.8.2 is whether the first person *could* be influenced by the second person as a consequence of the relationship. This test does not require influence to have been used in relation to the particular matter.
11. The breadth of the definition of "Associated Person" is acknowledged in Footnote 1 to Rule 1.8. If Issuers are in any doubt as to whether any two or more persons are Associated Persons, they should seek a Ruling from NZX under Rule 1.8.6.

#### **Application of the Rules**

12. In the Tribunal's view, a relationship did exist for the purpose of Rule 1.8.2 between NRC and Mr Mitten (who was a director of MMH and the Chairman of Northland Inc) at the time of the 2013 annual meeting.
13. Once a relationship exists, the test in Rule 1.8.2 requires that the first person *could* be influenced in making a decision or exercising a power affecting the Issuer as a consequence of that relationship. In the Tribunal's view, the fact that influence *could* exist as a consequence of a relationship between the relevant parties is sufficient. It is not necessary that the first person would be, or was, influenced in respect of the particular matter in order for them to be an Associated Person.
14. While there is no materiality threshold in Rule 1.8.2, two persons will only be "associated" if one of them could be influenced as a consequence of an Arrangement or relationship between or involving them. To that extent, the relationship between the two persons must be of such a nature that one person could be influenced by the existence of the relationship.
15. Overall, the Tribunal considers that NRC was an Associated Person of a Director of MMH at the time of the 2013 annual meeting and should therefore have been disqualified from voting on the Resolution in accordance with Rule 9.3.1.
16. The Tribunal notes that Issuers can apply for a waiver from the disqualifying provisions in Rule 9.3.1, where, for example, the relationship is immaterial to the relevant resolution or there is no material benefit to the Associated Person arising from the relevant resolution. MMH could, therefore, have sought a waiver permitting NRC to vote on the Resolution.

#### **No Financial Penalty**

17. The Tribunal considered that a financial penalty was not appropriate in this case based on the submissions from NZX that:
  - (a) MMH appears to have considered, and held an honest belief, that NRC was not an Associated Person of a Director of MMH; and
  - (b) Under Rule 9.3.5, the Resolution is not impugned on the basis of the breach of Rule 9.3.1.

#### **Orders**

18. The Tribunal ordered that MMH be publicly censured in the form of this announcement.
19. No award of costs was made against MMH.

#### **The Tribunal**

20. The Tribunal is a disciplinary body independent of NZX and its subsidiaries. The Financial Markets Authority approves its members. Under the Tribunal Rules, the Tribunal determines and imposes penalties for referrals made to it by NZX in relation to the conduct of parties regulated by the market rules.