IN NZ MARKETS DISCIPLINARY TRIBUNAL **NZMDT 6/2023**

UNDER	NZ Markets Disciplinary Tribunal Rules
IN THE MATTER OF	breach of NZX Listing Rules 3.1.1
BETWEEN	**NZX LIMITED** Acting by and through NZX Regulation Limited (*NZ RegCo*)
AND	**ENPRISE GROUP LIMITED** (*ENS*)

DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL
8 DECEMBER 2023

NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL

Rachel Batters
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1. This is a decision of a division of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising Hon Sir Terence Arnold KC, Kirsty Campbell and Alan Isaac.

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.

3. Enprise Group Limited (*ENS*) is an Issuer and is bound by the Rules.

Procedural background

4. On 17 October 2023, NZ RegCo filed a statement of case (*SOC*) alleging ENS had breached Rule 3.1.1, which deals with the disclosure of Material Information.

5. On 18 October 2023, Chapman Tripp, acting on behalf of ENS, requested an extension until 5:30pm on 15 November 2023 to submit a statement of response. The extension was requested to give ENS and its counsel sufficient time to consider the facts as presented by NZ RegCo, and to accommodate the planned absence of its Chair from 27 October to 4 November 2023.

6. On 19 October 2023, the Tribunal granted ENS an extension until 15 November 2023 to provide its statement of response, noting that the request from ENS for an additional 10 Business days was reasonable in the circumstances.

7. On 14 November 2023, ENS filed a statement of response in which it disputed breaching Rule 3.1.1.

8. On 17 November 2023, NZ RegCo filed a rejoinder *(Rejoinder*).

9. On 26 November 2023, ENS filed a memorandum of counsel seeking either (i) leave to submit an amended statement of response (a copy of which was provided); or (ii) an oral hearing, given it considered that the Rejoinder introduced new allegations.

10. On 30 November 2023, the Tribunal advised the parties that it accepted the amended statement of response (*SOR*) in accordance with Tribunal Rule 6.4.1 and advised NZ RegCo that if it wished to respond to the SOR, it must do so by 5:30pm 5 December 2023. NZ RegCo advised the Tribunal later that day, that it did not wish to respond to the SOR as amended.

Essential issue

11. The essential issue concerns when ENS's obligation to disclose Material Information arose – did it arise on 1 August 2022 when ENS in fact disclosed the Material Information as ENS argues, or did it arise earlier, in particular on 27 May 2022, as NZ RegCo argues? The answer to this depends on whether, prior to 1 August 2022, ENS had the benefit of the "safe harbour" provided by Rule 3.1.2(a)(ii), i.e., that the relevant information concerned "*an incomplete proposal or negotiation*".

12. Both parties have filed detailed submissions on the facts. Accordingly, to determine the matter, the Tribunal must set out the factual background in some detail.

Factual background

13. ENS has two operating divisions: (1) Kilimanjaro Consulting (wholly owned by ENS) (*Kilimanjaro*[1]); and (2) iSell Pty Limited (ENS holds 72.36%[2]). ENS also has investments in Datagate Innovation Limited (ENS holds 32.96%[3]) and Vadacom Holdings Limited (ENS holds 6.35%[4]).

14. Kilimanjaro is a solution provider for MYOB Enterprise software in Australia and New Zealand. ENS describes Kilimanjaro as "*MYOB's number one partner in Australia and New Zealand"* and as *"the leading trans-Tasman provider of solutions based on the MYOB Advanced (Acumatica)[5] and MYOB Exo[6] software platforms*". Kilimanjaro also sells and services companion products that integrate with MYOB products.[7]

15. MYOB is an Australian multinational corporation that provides tax, accounting and other business services software. MYOB was listed on the ASX before being acquired by private equity firm Kohlberg Kravis Roberts (*KKR*) in 2019. MYOB has accredited non-exclusive "business partners" (such as Kilimanjaro) who market, sell, implement, and support its products to end users.

ENS acquisition of Kilimanjaro Consulting Pty Ltd

16. At the time of its initial listing on the NZAX in December 2014[8], ENS described itself as the largest New Zealand MYOB Exo reseller and only trans-Tasman MYOB Exo reseller (through its Enprise Solutions business unit)[9].

17. On 4 September 2017, ENS advised the market that, as part of its strategy to be the leading reseller of MYOB Exo and MYOB Advanced in New Zealand and Australia, it had acquired 47.09% of Kilimanjaro Consulting Pty Ltd, the largest MYOB Exo and MYOB Advanced reseller in Australia[10]. ENS also granted a put option, subject to ENS shareholder approval, for the remaining 52.91%, which could be exercised by the owners of Kilimanjaro Consulting Pty Ltd between 1 September 2019 and 30 August 2020[11].

18. ENS shareholder approval of the put option was sought, and obtained, at a special meeting held on 28 November 2017. The explanatory notes to the Notice of Meeting stated that:

> *"The Board has identified a number of risk factors associated with the Kilimanjaro business which may affect the Company's future operating performance and financial position and the value of the Company's*

[1] For ease of reference in this determination, we refer to the Kilimanjaro Consulting division and the ENS subsidiaries within that division as "*Kilimanjaro*".
[2] ENS market announcement 31 October 2023.
[3] Page 2 of the ENS Annual Report for the year ended 30 June 2023.
[4] Ibid.
[5] MYOB Advanced is a version of the Acumatica Business Management Platform localised for Australian and New Zealand businesses. MYOB Advanced is a 100% cloud-based system aimed at more complex medium and large organisations and is a SaaS product (source: kilimanjaro-consulting.com).
[6] MYOB Exo is an on-premises system (with remote access capability), where end users, among other payments, pay an initial licence fee and a recurring annual license fee (*ALF*) (source: kilimanjaro-consulting.com).
[7] ENS Annual Report for the year ended 30 June 2023.
[8] ENS subsequently migrated to the NZX Main Board on 1 April 2019.
[9] ENS Disclosure Document 1 December 2014. The Disclosure Document noted as a risk that MYOB could revoke ENS' ability to sell MYOB Exo, although it was unlikely given ENS was one of the biggest resellers and MYOB would lose significant revenue.
[10] Kilimanjaro Consulting Pty Ltd was founded by current ENS Executive Director Ronnie Baskind in 2006.
[11] ENS Market Announcement 4 September 2017.

shares post completion of the purchase of the Put Option Shares. Those risks include:

- MYOB modifying the Partner Agreement with the Company: In the event that the Put Option is exercised and the Company increases its holding in Kilimanjaro, there is a risk that MYOB may seek to change the commercial terms comprised in the Partnership Agreement to the detriment of the Company. In particular, MYOB may seek to suppress the profit margins that the Company (and Kilimanjaro) receives in respect of the resale of MYOB products and services. Such an occurrence could negatively impact the profitability of the Enprise group of companies. The Company would seek to resist any such variations to the Partnership Agreement as far as practicable in the circumstances. The Board is in discussions with MYOB currently regarding this issue with a view to formalising a position. The Board is unable to provide any further comment on this issue at this stage until such time as those discussions are concluded."[12]

19. The put option was exercised[13] and, effective 1 January 2020, ENS acquired 100% of Kilimanjaro Consulting Pty Ltd (with ENS issuing new shares in consideration for the additional 52.91%)[14].

Relationship with MYOB

20. MYOB documents its relationship with its accredited business partners, including Kilimanjaro, in business partner agreements (*BPAs*).

21. The BPAs incorporate various rewards, commissions, and other rebates payable to the business partners, which are specified in the business partner programs (*BPP*). In respect of MYOB Exo, the BPPs include, among other things (such as the Exo base margin and Exo growth margin), a margin for the business partner based on a percentage of the annual licence fee for MYOB Exo paid by the business partner's end user (*ALF margin*).

22. Since the inception of the Kilimanjaro and MYOB relationship in 2006, the ALF margin had stayed the same[15]. ENS says that in 2007 (after the first BPA between MYOB and Kilimanjaro was signed in 2006), MYOB attempted to reduce the ALF margin in a proposed BPA circulated to its business partners. MYOB faced opposition to the variation and the proposed BPA was never signed.[16]

23. During 2017 and 2018, new BPAs were discussed (as outlined in the Notice of Meeting). ENS says that the discussions on the revised BPA between MYOB and Kilimanjaro, along with the other business partners, were protracted and took at least 12 months to complete. The negotiations culminated in the MYOB Business Partner Agreement with Kilimanjaro dated 15 November 2018 (*the Agreement*)[17].

24. The Agreement had two relevant features:

    a. that MYOB "*may change any of the terms of this Agreement (including the [BPP], the MYOB Software Price List and the Business Partner*

[12] ENS Notice of Special Meeting 3 November 2017.
[13] On 6 January 2020, ENS announced that the put option had been exercised and it now owned 100% of Kilimanjaro Australia.
[14] ENS Market Announcement 29 November 2019.
[15] Paragraph 18 of the SOC.
[16] Paragraph 8 of the SOR.
[17] The copy of the Agreement provided to the Tribunal as Annexure 12 is not signed. ENS says the Agreement was signed on 9 November 2018 (paragraph 9 of the SOR).

Payments)" by providing 30 days' prior notice of any change that was likely to materially affect Kilimanjaro's rights and obligations under the Agreement (clause 24)[18]. [redacted][19]; and

b. that MYOB would not provide services or software directly to a business partner's end users. Clause 12 of the Agreement provided that, while MYOB could communicate directly with a business partner's end users on matters such as billing, marketing, and promotions, "*for the avoidance of doubt, MYOB will not provide any Business Partner Services to the Business Partner's End Users*".

25. On 20 May 2021, MYOB notified Kilimanjaro that it was making changes to the Agreement and the BPP in accordance with clause 24, which would come into effect in 30 days, on 20 June 2021. Copies of the updated documents were attached. In particular, MYOB advised:

    a. clause 12 was amended to remove the restriction that MYOB could not provide services to a business partner's end users; and

    b. clause 21 permitted the transfer of end users to MYOB in the event of a change in control of the business partner.

    MYOB said that these amendments were to facilitate a change in its business model. Instead of MYOB only selling its products via its business partners, MYOB would now also market directly to end users – "*Through the establishment of a direct organisation, MYOB will begin to sell, service and support MYOB Advanced customers*". [redacted][20]

26. On 28 September 2021, ENS released its annual report for the year ended 30 June 2021 in which it noted that:

> "*MYOB Changes*
>
> *MYOB, under KKR ownership, has undergone major changes in both company structure and product focus...MYOB have changed their strategy in the Enterprise space from a purely channel partner model, to a combination of direct and channel. This is causing some disruption, as MYOB announced the acquisition of two of their Channel partners. The direct strategy is primarily aimed at defined segments, and some specialised verticals. An engagement desk has been put in place by MYOB to ensure fair competition and non-solicitation of our clients or employees. MYOB has reiterated the importance of partners in helping to achieve their mid-market growth ambitions and will continue to invest in building their capability. The partner channel remains a core pillar of their Go-to-Market strategy. Our Enterprise*

[18] Annexure 12 of the SOC.
[19] Paragraph 10 and Annexure A of the SOR.
[20] Annexure 14 of the SOC – email from MYOB to Kilimanjaro of 20 May 2021.

Division services the top end of the MYOB target market, which is currently a segment that MYOB does not service via their direct channel. Our investment in developing capabilities to service this market positions us very well to remain a valuable channel partner for MYOB."[21]

27. ENS says that Kilimanjaro's position at that time was that MYOB was seeking to act in breach of the Agreement, as clause 24 did not permit MYOB to unilaterally make changes to the Agreement's core provisions. Kilimanjaro, and most of the other business partners, began a process of consultation and negotiation with MYOB. During those ongoing discussions, on 17 January 2022, Kilimanjaro wrote to MYOB to emphasise its position that MYOB did not have the right to make unilateral changes to the Agreement. The letter stated that Kilimanjaro's position was that the purported changes by MYOB were of no effect and that the Agreement, unamended, remained in effect. It also stated:

> "*Changes to very material clauses, such as to permit MYOB to compete with Business Partners, as well as others which also will erode our profitability and business model, are outside the scope of Clause 24.* [redacted]"[22]

28. On 28 February 2022, ENS released is half year report for the six months ended 31 December 2021 in which it noted that:

> *"MYOB's decision in May 2021 to compete in the sector with its other channel partners like Kilimanjaro, saw MYOB acquire a number of channel partners during the period to 31 December 2021. This has to date had limited impact on Kilimanjaro and we continue to work constructively with MYOB, particularly at the upper end of the enterprise market for the MYOB Advanced ERP product…*
>
> *Kilimanjaro Consulting is targeting the top end of MYOB products target market, this is currently a market segment MYOB's direct channel does not service."*[23]

The half year report also noted that ENS's operating losses would see it breach its BNZ banking covenants and that a formal waiver of the breach was being sought from BNZ. ENS subsequently advised the market on 28 March 2022 that BNZ had granted the waiver sort and had agreed not to take further action on this occasion.

29. On 28 March 2022, representatives of Kilimanjaro met with MYOB "*to raise…concerns about its then understanding that MYOB was contemplating a new strategy involving a direct sales model and a new margin scheme (for which no details had been provided) that had been foreshadowed by MYOB staff with Mr Baskind from about 9 May 2021*"[24].

30. On 31 March 2022, NZ RegCo issued a price enquiry noting that the price of ENS shares had increased from $0.90, being the market closing price on 23 March 2022 to $1.20, being the price at 3:00 pm on 31 March 2022 (a total increase of $0.30, or 33.3%). Given this increase, NZ RegCo sought

[21] Page 4 of the ENS Annual Report for the year ended 30 June 2021.
[22] Annexure B of the SOR – letter from Kilimanjaro to MYOB of 17 January 2022.
[23] Page 2 of the ENS Half Year Report for the period ended 31 December 2021.
[24] Annexure 16 of the SOC - page 31 Kilimanjaro Statement of Claim 1 May 2023.

confirmation from ENS that it continued to comply with its continuous disclosure obligations under Rule 3.1.1. ENS confirmed that, as at 31 March 2022, it continued to comply with Rule 3.1.1.

31. On the evening of 31 March 2022, MYOB notified Kilimanjaro of a further change to the Agreement (clause 2) to take effect from 1 July 2022 - that at the end of the initial term, either party may terminate the Agreement on 90 days' written notice. This provision was to replace the provision which provided for an automatic annual renewal of the Agreement. The email from MYOB noted that the parties were "*in the middle of a consultation process*" in anticipation of rolling out a new BPA and BPP[25].

32. The material before the Tribunal indicates that MYOB's business partners were aware of the possibility of changes to the margin scheme in February 2022 and had raised this with MYOB at a meeting at the end of February[26]. In any event, by March/April 2022, Kilimanjaro was aware through discussions among business partners that MYOB might seek to "*cut*" the ALF margins in the BPAs[27].

33. Kilimanjaro's Australian solicitors, Ash Street Partners (*Ash St*), sought advice on its behalf from NSW Barrister, Mr V Misra, on whether there were limitations on the scope of the amendments that MYOB could make to the Agreement "*despite the clear wording of clause 24*" and whether MYOB could make the unilateral changes to the Agreement it had notified to clause 2 (allowing termination on notice), clause 12 (enabling MYOB to market directly to end users) and clause 21 (in the event of a change in control of Kilimanjaro, enabling the transfer of its customers to MYOB). Ash St's brief also noted Kilimanjaro's concern that MYOB may attempt to change the margin it received on sales to end users – "*Presently they receive [%] from past sales, and the concern is that MYOB may attempt to reduce that to [%] on those existing sales*"[28].

34. Mr Misra provided advice on 13 May 2022 outlining the grounds for a potential legal challenge to the amendments notified by MYOB. Mr Misra noted that the merits of any challenge could not be properly assessed until a 'breach' had occurred (i.e. MYOB sought to exercise its powers under the amended provisions or did, in fact, decrease the margin) and there was evidence of a resulting loss to Kilimanjaro. Importantly, the effect of the amendments to the Agreement and whether MYOB would, in fact, decrease margins was still unknown at that time. Mr Misra noted that further instructions were needed before he could express a proper view, as it was a factually specific question to be answered[29]. ENS says that this advice was one of many pieces of advice received by Kilimanjaro during its dispute with MYOB over the purported changes to the Agreement. [redacted][30].

35. ENS provided excerpts of its Board meeting minutes to NZ RegCo from May 2022 to July 2022[31]. An excerpt of ENS's board meeting minutes for 24 May 2022 records:

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[25] Annexure 17 of the SOC – email from MYOB to ENS of 31 March 2022.
[26] Annexure K of the SOR.
[27] Paragraph 18 of the SOR and Annexure K.
[28] Annexure 18 of the SOC. The Tribunal notes that the briefing paper is not dated, but Mr Misra's opinion notes that he was provided with the brief by email on 15 April 2022.
[29] Annexure 19 of the SOC.
[30] Paragraph 19 of the SOR.
[31] Annexure 40 of the SOC.

"*RB [Ronnie Baskind] advised that he has been advised by MYOB that a new BPA and BPP is expected to be sent to business partners on the 25th May. RB said he has not received any confirmation from MYOB as to what it contains.*

NP [Nick Paul, then ENS Non-Executive Director] asked for a summary of the new BPA and BPP to be circulated. RB said he will circulate a summary which needs to be done also for Ash St once he has received it and reviewed the documents.

LP [Lindsay Phillips, ENS Non-Executive Director] said we need to maintain our consistent approach that we formally reject the agreement if we don't like it.

Discussion was had about a lobby group being formed by the partners. RB said the lobby group seems to be a replacement for the platinum partner conferences. LP said we need to be in control of our own destiny as a public company".[32]

36. On Friday, 27 May 2022, MYOB sent a letter by registered post to Kilimanjaro headed "*Confidential: Notice of changes to your Business Partner Agreement with MYOB*"[33]. There is some doubt about whether Kilimanjaro received the letter, but in any event, its substance was repeated in two emails sent to ENS shortly after 5pm the same day, as follows:

    (1) Email of 5:12pm:

    "*Subject: New MYOB Advanced Business Partner Agreement*

    Dear Elliot, [Elliot Cooper ENS CEO]

    Over the last few months, MYOB has been conducting a review of its partner channel, with a focus on the strategic growth of its cloud business [MYOB Advanced].

    From 1 July [2022], MYOB Advanced services will no longer be covered by the existing BPA and you will need to enter into this Advanced Business Partner Agreement in order to sell and service MYOB Advanced Products. This is accompanied by a new Business Partner Program (Part A) which includes higher margins for MYOB Advanced Products, new performance criteria and new awards for our best partners. As a key strategic partner, we will have custom performance criteria tailored for you which will prevail over the new sales criteria set out in the BPP. This will be included in Schedule 2 of the BPA (which will be emailed to you separately early next week)".

    ENS was instructed to review the new Advanced Business Partner Agreement (*Advanced BPA*) and provided with a contact person to direct any questions to or to request an execution copy. The email noted that if the recipient was also a provider of MYOB Exo, it would receive a separate email from MYOB regarding those services.[34]

    Schedule 2 to the Advanced BPA was subsequently provided to ENS on the evening of Monday, 30 May 2022. MYOB noted that "*While we believe these changes are in the best interests of our continued success, we appreciate that the process has been disruptive. We have*

[32] Annexure 40 of the SOC.

[33] Annexure 20 of the SOC.

[34] Annexure 21 of the SOC - email at 5:12pm, Friday 27 May 2022 to Mr Cooper from MYOB.

appreciated your honest feedback and involvement in the process, and we look forward to helping you attain your sales and business goals".[35]

(2) Email of 5:13pm

"*Subject: Notice of Amendments to Business Partner Agreement for Exo Software*

Dear Elliot,

MYOB has been conducting a review of its business partner program aligned to our business strategy and growth aspirations. A number of partners were approached and provided feedback and we thank them for their participation.

As we have completed this consultation process, we have reversed the 90 day term on all Business Partner Agreements and returned to 12 month renewal terms to provide you with increased certainty. We have also rolled out a new Business Partner Agreement (Part A) for the whole of the Channel. In order to revise the BPP and amend the BPA, we are making the following changes pursuant to clause 24(a) of the BPA".

The email included a summary of the key changes which included (i) from 1 July 2022 the ALF margin would be reduced by 42.86% and apply to all ALF invoices; and (ii) while there was no change to the Exo base margin or Exo growth margin, new sales after 1 October 2022 would need to be "*pre-approved*" by MYOB to be eligible for those margins. MYOB advised that the amendments to the Agreement and BPP would take effect on 1 July 2022[36].

37. Although it was not stated in MYO's communications of 27 May 2022, ENS says that MYOB considered that the effect of the margin changes would amount to a net $0 impact on business partners overall, given the increase in margins for MYOB Advanced[37].

38. On 22 June 2022, MYOB emailed Kilimanjaro. MYOB General Manager – Enterprise states:

> "*I'd like to start by acknowledging our journey over the last 12 months and the many changes that have come with creating a direct channel, from acquiring some business partners, to the more recent communication about Business Partner Agreement (BPA) and Business Partner Programs (BPP) changes. I also understand that during this time, you may have felt a level of uncertainty and disruption*".

MYOB outlined why it had shifted emphasis to its cloud-based product MYOB Advanced. The email thanked MYOB "*partners that have provided constructive feedback over the last three weeks. We have listened and made additional changes, and the choice forward is now yours".*

39. MYOB advised that if a business partner did not wish to sign the new Advanced BPA, then the current Agreement would continue for another 12 months and did not require signing. However, further changes, provided with the email, would then apply to the existing Agreement and new BPP to reflect the new settings for MYOB Advanced. If a business partner decided to enter the new Advanced

[35] Annexure 23 of the SOC - email at 10:07pm, Monday 30 May 2022 to Mr Cooper from MYOB.
[36] Annexure 22 of the SOC - email at 5:13pm, Friday 27 May 2022 to Mr Cooper from MYOB.
[37] Paragraph 20 of the SOR.

BPA, additional changes to that agreement, provided with the email, would apply. MYOB noted that the existing Agreement changes would be effective 1 July 2022, and the agreement would continue until a new Advanced BPA was entered.[38]

40. An excerpt of ENS's board meeting minutes for 28 June 2022 records:

> "*RB updated the board on the BPA changes that have been proposed by MYOB…*
>
> *RB responded that regardless of our notification that we do not accept the changes he expects that other multiple partners will also object / lodge a dispute under the existing BPA based on his conversations with them…*
>
> *Discussion was had about the legal advice regarding the BPA and our current contractual arrangement with MYOB including the advice RB presented regarding the Franchise Act. LP stated that we as a board have good reason to support and continue to act on our legal advice.*"[39]

41. In an email of 30 June 2022, MYOB advised that after receiving feedback that business partners wanted more time before the changes to the Agreement and BPP took effect on 1 July 2022, it had elected to delay the effect of the variations until Monday, 1 August 2022 and that "*On that date, all changes set out in the [Agreement] and [BPP], as communicated to you, will take effect*". The email does not state that the delay is "*to allow consultation with MYOB's Business Partners*" as suggested by ENS[40].

42. ENS says that in July 2022, MYOB presented Kilimanjaro with a revised proposed BPA in which the "*proposed Exo margin reduction remained*"[41].

43. In a letter to MYOB dated 19 July 2022, Kilimanjaro states:

> "*I refer to the changes proposed by MYOB to Kilimanjaro's [BPA] and [BPP] that have been discussed at length since 2021.*
>
> *As we have not been able to resolve these issues, Kilimanjaro intends to issue a clause 40A Notice pursuant to the Competition and Consumer (Industry Codes-Franchising) Regulation 2014, pursuant to section 51AE of the Competition and Consumer Act 2010. This will commence the Code complaint handling procedure set out in Part 4 of the Regulation.*
>
> *Kilimanjaro's relationship with MYOB is one of franchisee/franchisor. As a result, each party has rights and obligations under the Regulation, including obligations to the competition regulator.*
>
> *I appreciate that initiating the complaint handling process may have far-reaching consequences for MYOB. Nevertheless, the proposed changes will have a significant impact on Kilimanjaro and therefore its board has an obligation to act in the company's best interests.*

[38] Annexure 25 of the SOC – email of 22 June 2022 to Mr Baskind from MYOB.
[39] Annexure 40 of the SOC.
[40] Paragraph 23.3 of the SOR.
[41] Paragraph 22.4 of the SOR. A copy of this revised proposed BPA was not provided to the Tribunal.

I would welcome further discussion on MYOB's proposal in the immediate future, which may obviate the need to commence the Code complaint handling procedure"[42].

44. The 19 July 2022 letter accompanies an email sent to MYOB on 20 July 2022 by Kilimanjaro which states:

> *"It is with some reservation that I must send this letter to you. I feel that I have made every effort to convey to MYOB my dissatisfaction with the proposed Business Partner Agreement, but this has fallen on deaf ears. As your largest partner, I would have hoped that there would have been some consideration given to my unhappiness.*
>
> *My conversation with [MYOB's Partner Channel Lead] on Thursday 14th July was most unsatisfactory, and his only suggestion was that I should raise a dispute if I am unhappy.*
>
> *After taking extensive legal advice over the past months, I realise that the implications of raising this dispute are far-reaching. I have therefore avoided taking this step.*
>
> *I am now in a position that I must follow my legal advice".*[43]

45. On 25 July 2022, MYOB rejected Kilimanjaro's assertion that the relationship between MYOB and Kilimanjaro was that of a franchisor/franchisee[44].

46. ENS says at the time, Kilimanjaro understood that "*MYOB was in ongoing negotiations with most of its Business Partners over its purposed margin changes. The issue was not isolated to Kilimanjaro alone*"[45]. An excerpt of ENS' board meeting minutes for 27 July 2022 records:

> [redacted][46].

The end of this excerpt has the statement "*The board discussed and concluded that with the above pressure from the large partners MYOB would continue to hold off taking the action they did on 1 August 2022*". Given the reference to 1 August 2022, this statement appears to have been added after the minutes for the 27 July 2022 meeting were recorded.

47. ENS advised NZ RegCo during its investigation that "*The board did not believe MYOB would execute the proposals in the face of the legal opposition from the large MYOB Enterprise Partners, given MYOB had already postponed enacting any changes. This was discussed in depth at every board meeting*"[47].

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[42] Annexure 27 of the SOC.
[43] Annexure 28 of the SOC.
[44] Annexure C of the SOR.
[45] Paragraph 25 of the SOR.
[46] Annexure 40 of the SOC. [redacted].
[47] Annexure 40 of the SOC – email from ENS to NZ RegCo of 31 March 2023.

Announcement on 1 August 2022

48. At 3:24pm on 1 August 2022, ENS released an announcement (*the Announcement*) to the market advising that:

> *"**Enprise disputes MYOB retrospectively decreasing margins***
>
> ***AUCKLAND, 1 August 2022 – [ENS] advises that MYOB have purported to reduce margins. ENS initiates dispute resolution process***
>
> *Kilimanjaro Consulting support the largest MYOB Exo install base of any partner in Australia or New Zealand.*
>
> *MYOB have purported to retrospectively reduce the margins that Kilimanjaro Consulting receives on existing sales of MYOB Exo software. The impact of the purported reduction of 42.86% would be approximately $935,000 per annum. This would significantly impact the support services that Kilimanjaro Consulting is able to deliver to their MYOB Exo software customers.*
>
> *The board rejects the assertion by MYOB that they are able to unilaterally alter these margins. Enprise has advised MYOB of its intention to formally dispute this purported decrease in fees".*[48]

49. ENS says that on 1 August 2022, MYOB "*took a concrete action to implement its proposed change*" to the ALF margin by invoicing Kilimanjaro at the reduced margin. ENS notes that it was the first occasion that MYOB had presented Kilimanjaro with an invoice at the reduced margin, rather than engaging in correspondence and discussions about the purported changes[49].

Alleged breach of Rule 3.1.1

50. NZ RegCo alleges that ENS became Aware of the Material Information in the Announcement no later than 27 May 2022 and breached its obligations under Rule 3.1.1 by not releasing that information to the market until 1 August 2022, 44 Business Days later.

51. ENS does not accept it breached Rule 3.1.1. Rather, ENS says that Kilimanjaro was in an ongoing commercial negotiation informed by prior experience, with other business partners also taking a similar approach[50]. ENS considers that its disclosure obligation in relation to MYOB's purported changes to the Agreement first arose on 1 August 2022, when it was invoiced at the reduced ALF margin[51].

Disclosure of Material Information

52. Rule 3.1.1[52] requires Issuers who become Aware of any Material Information:

    a. to promptly and without delay release the Material Information through MAP; and

[48] Annexure 29 of the SOC.
[49] Paragraph 27 of the SOR.
[50] Paragraph 5 of the SOR.
[51] Paragraph 41 of the SOR.
[52] At the time NZ RegCo alleges ENS breached Rule 3.1.1, the Rules dated 10 December 2020 applied. The Rules were subsequently amended on 17 June 2022 and 1 April 2023. Rules 3.1.1 and 3.1.2 remained the same.

b. not to disclose any Material Information to the public, any other stock exchange, or any other party without first releasing the Material Information through MAP.

53. "*Material Information*" is information which:

a. a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of quoted financial products of the Issuer; and

b. relates to particular financial products, a particular Issuer, or particular Issuers rather than to financial products generally or Issuers generally.[53]

54. An Issuer becomes "*Aware*" of Material Information if, and as soon as, a Director or a Senior Manager of the Issuer has, or ought reasonably to have, come into possession of the information while performing their duties.[54]

55. There are several exceptions to the requirement to release Material Information under Rule 3.1.1. These exceptions are known as the "*safe harbour*" provisions. Under Rule 3.1.2, Rule 3.1.1 does not apply when:

a. one or more of the following applies:

(i) release of the information would be a breach of law,

(ii) the information concerns an incomplete proposal or negotiation,

(iii) the information contains matters of supposition or is insufficiently definite to warrant disclosure,

(iv) the information is generated for internal management purposes, or

(v) the information is a trade secret,

b. the information is confidential and its confidentiality is maintained, and

c. a reasonable person would not expect the information to be disclosed.

56. To rely on an exception, an Issuer must be able to demonstrate that all three limbs apply – (1) the information must be confidential, and (2) of the type that a reasonable person would not expect to be disclosed, and (3) one of the factors in a. above must apply.

Incomplete proposal or negotiation

57. The Rules do not elaborate on the intended meaning of "*an incomplete proposal or negotiation*" for the purposes of Rule 3.1.2(a)(ii).

58. The NZX Continuous Disclosure Guidance Note (*Guidance Note*) provides that:

> *"Rule 3.1.2(ii) enables companies to withhold information about* ***incomplete proposals or negotiations****. In NZX's view, a proposal or negotiation can generally be considered complete when both parties sign an agreement to implement or give effect to the transaction. This will also be the case in relation to signed conditional agreements,*

[53] Section 231(1) of the FMC Act.
[54] Section 6 of the FMC Act.

which are unlikely to be "incomplete proposals" for the purposes of the exceptions within the rules.[9] Issuers should also note that a proposal or negotiation can be complete for the purposes of this section before it becomes legally binding and even if it is conditional.[10]

[9] An agreement entered into for the purpose of facilitating the negotiation of a transaction would generally not be expected to be disclosed (unless the existence of that option or arrangement was Material Information in its own right) and can be distinguished from an agreement which gives effect to a transaction.

[10] In a public censure of Rakon Limited by the NZ Markets Disciplinary Tribunal ("tribunal") released on 5 March 2014, the tribunal determined that "a proposal or negotiation can be complete for the purposes of rule 3.1(a)(iii)(B) before it becomes legally binding" and that, generally the appropriate point at which a proposal ceases to be an incomplete proposal or negotiation is "when both parties sign an agreement…."[55]

Incomplete information or upcoming events

59. The Guidance Note also addresses evolving situations, where information may develop over time:

> *"In some situations, an issuer may receive information about an event over time. The issuer may not be able to make a determination regarding the materiality of the information based on the initial or piecemeal information alone. In such cases, no disclosure obligation will be triggered. However, if an issuer requires further information in order to determine whether or not initial information is material information, the issuer must take reasonable steps to seek the additional information as soon as possible…*
>
> *If an issuer determines (or is reasonably able to determine) that it holds material information based upon initial or incomplete information alone, that information must be disclosed promptly and without delay to the market, regardless of the fact that there may be additional information to follow. They cannot simply wait until they receive all information concerning a material event before a disclosure obligation will arise.*
>
> *There may also be situations where an issuer becomes aware that a material event is going to occur but the event has not yet actually occurred. An issuer will be required to disclose the event promptly and without delay upon becoming aware that the event will occur instead of waiting until the event has occurred."*[56]

Submissions from NZ RegCo

60. NZ RegCo submits that ENS breached Rule 3.1.1 because the Announcement contained Material Information and was not released promptly and without delay.

61. NZ RegCo submits that given the potential financial impact of the reduction in the ALF margin that Kilimanjaro would receive (which ENS estimated at

[55] Section 5.1, Page 20 of the Guidance Note.
[56] Section 3.3, Page 11 of the Guidance Note.

$935,000 in the Announcement) the information in the Announcement constituted Material Information.

62. NZ RegCo considers that ENS should have treated its communications of 27 May 2022 from MYOB as Material Information and promptly released an announcement to the market at that point. The fact that ENS contested MYOB's contractual ability to reduce the ALF margin, among other things, did not mean that the information about MYOB's actions was not material. NZ RegCo says that ENS cannot rely on subsequent communications from MYOB to substantiate the claim that it was engaged in "negotiations" with MYOB. NZ RegCo submits that there was no suggestion that the changes notified on 27 May 2022 were optional, or open to further negotiation. Given the materiality of the changes, particularly the reduced ALF margin, the 27 May 2022 correspondence from MYOB triggered ENS' obligation to announce the purported changes to the Agreement promptly and without delay. Accordingly, NZ RegCo alleges that ENS breached Rule 3.1.1 by not releasing the information to the market until 1 August 2022, 44 Business Days later.

63. NZ RegCo refers to the Guidance Note commentary on incomplete information and submits that the correct approach was for ENS to treat MYOB's notice of 27 May 2022 as Material Information and promptly release an announcement at that point. Such an announcement could have described MYOB's communication varying the Agreement, and its potential financial implications, while also advising the market that ENS considered MYOB's purported variation to be invalid and that ENS would be contesting it.

Submissions from ENS

64. ENS submits that it did not breach Rule 3.1.1. It accepts that the Announcement contained Material Information but says that its obligation to disclose did not arise until 1 August 2022, when MYOB invoiced it at the reduced AFL margin.

65. ENS says that prior to 1 August 2022, its engagement with MYOB over MYOB's purported ALF margin reduction and MYOB Advanced margin increases, and in particular, MYOB's 27 May 2022 notice, did not trigger a disclosure obligation. MYOB's 27 May 2022 notice that it would unilaterally reduce the ALF margin and increase the MYOB Advanced margin, represented another instance of MYOB's "*common commercial tactics*", when, in ENS's view, based on legal advice, MYOB was not legally permitted to change the margins under the Agreement. ENS submits that while the 27 May 2022 notice purported to make changes to the Agreement, it did not involve MYOB taking "*tangible and concrete steps*" to enforce the margin changes in breach of the Agreement. The 27 May 2022 notice therefore represented the "*beginning*" of negotiations about the proposal to reduce the ALF margin and increase the MYOB Advanced margins.

66. ENS says that, until 1 August 2022, it had anticipated that MYOB, under pressure from its business partners, would abandon its idea and either revert to the status quo or propose an alternative arrangement. [redacted]

67. ENS says that it was only when MYOB took "*tangible and concrete steps*" on 1 August 2022 to enforce the new arrangements by invoicing Kilimanjaro at the reduced margin that its disclosure obligation arose. ENS says it acted promptly to release the Announcement at that time.

68. ENS considers that the Guidance Note on incomplete information cited by NZ RegCo, where an Issuer receives information about an event over time, is not relevant. Rather, MYOB and ENS were in an incomplete negotiation regarding MYOB's purported variation to the Agreement and new Advanced BPA.

NZ RegCo's submissions in response

69. NZ RegCo submits in its Rejoinder that the exception in Rule 3.1.2(a)(ii) (incomplete proposal or negotiation) does not apply. NZ RegCo argues that MYOB sought to exercise a unilateral power under the Agreement to vary payments made to Kilimanjaro. Kilimanjaro disputed MYOB's ability to take this action. NZ RegCo says that this was not an "*incomplete proposal or negotiation*", but instead an action by one party which was disputed by another and that the proposed changes were sufficiently definite and complete to prevent the grounds in Rule 3.1.2(a) applying.

70. NZ RegCo notes that if the Tribunal were to accept ENS's submission that Rule 3.1.2 applied to MYOB's communications on 27 May 2022, then there is a separate question as to why a disclosure obligation arose on 1 August 2022 (a "*convenient date*" for ENS's purposes being the date of the Announcement), when MYOB issued an invoice at the reduced ALF margin. NZ RegCo says that ENS has not explained why the issue of an invoice to Kilimanjaro would be seen as a departure from MYOB's negotiating tactics. NZ RegCo submits that the invoicing could be characterised as a continuation of the same pattern of engagement between MYOB and Kilimanjaro, and consistent with MYOB implementing its actions notified on 27 May 2022.

71. In response to NZ RegCo's submission, ENS argues that its position that its continuous disclosure obligation arose on 1 August 2022 was not merely a "*convenient date*", but rather, the very date on which MYOB took positive steps that ENS considered to be in breach of the Agreement and triggered ENS's disclosure obligations.

Tribunal Determination

72. To determine whether ENS breached Rule 3.1.1 the Tribunal must consider whether the information was "material", when ENS became "aware" of that information and at what point in time the obligation to disclose arose.

73. "Materiality" is not in dispute – both parties agree that the information in the Announcement was "Material Information" for the purpose of Rule 3.1.1. The second and third matters are inextricably linked because the obligation to disclose arises when the issuer is Aware of the Material Information. Addressing these two matters requires consideration of ENS's submission that until 1 August 2022, there was "an incomplete proposal or negotiation" within the meaning of the Rule 3.1.2(a)(ii) exception to the disclosure obligation in Rule 3.1.1. Given its importance to the analysis, the Tribunal will start with a consideration of ENS's submission that the Rule 3.1.2(a)(ii) exception applied.[57]

Did the 'incomplete proposal or negotiation' exception apply?

74. It is important to make two points at the outset. The first is that the Material Information in the Announcement was that: (i) MYOB had purported to reduce the margins Kilimanjaro received on existing sales of MYOB Exo; (ii) the impact of that purported reduction of 42.86% would be approximately $935,000 per annum and would significantly impact the services Kilimanjaro could provide its

[57] For the sake of completeness we note that ENS appears to suggest that the exception in Rule 3.1.2(a)(iii) also applied (i.e., the information at issue contained matters of supposition and was insufficiently definite to warrant disclosure). It will be apparent from what we say below, we do not agree.

MYOB Exo customers; and (iii) ENS rejected MYOB's assertion that it could unilaterally change the margin and intended to dispute it.

75. The second is that the margins on the MYOB Advanced product were not the focus of the Material Information released in the Announcement, although they were important to Kilimanjaro, given they might offset any loss incurred from a reduced ALF margin. The Tribunal notes that on the evening of 27 May 2022, MYOB sent ENS, by separate email, a new Advanced BPA for MYOB Advanced which ENS appears to have not previously seen. Schedule 2, which contained Kilimanjaro's customised sales criteria for MYOB Advanced, was not supplied until 30 May 2022[58]. Matters related to this new Advanced BPA for the MYOB Advanced product were at an initial stage and are not the subject of the alleged breach of Rule 3.1.1.

76. The exception in Rule 3.1.2(a)(ii) on which ENS relies that "*the information concerns an incomplete proposal or negotiation*" - is intended to ensure that parties are not forced to disclose information to the market at a time when it may prejudice ongoing negotiations before an agreement is struck. The exception ceases to apply once the proposal or negotiation is complete, which is generally considered to be when both parties sign an agreement to implement or give effect to a transaction or arrangement[59]. The Tribunal considers that the exception may also apply in circumstances where there is an existing agreement between parties, but both parties are negotiating a variation to that agreement, or a new agreement, which requires both parties' consent to implement.

77. ENS says that the exception in Rule 3.1.2(a)(ii) applied in this case because the information concerned an incomplete proposal from MYOB and there was an ongoing negotiation between ENS and MYOB[60].

78. With regards to ENS's submission of an "*incomplete proposal from MYOB*", ENS knew that MYOB had given notice of changes to the parties' contractual arrangements in May 2021 and that there had been on-going discussions about those proposed changes. ENS was concerned at least as early as March 2022 that MYOB was contemplating a "*new margin scheme*" and had expressed that concern to its lawyers by April 2022. Counsel's advice of 13 May 2022 addressed this matter, albeit in a preliminary way. ENS's concern crystallised on the evening of 27 May 2022, when MYOB advised that it would, among other things, be reducing the ALF margin by 42.86%. Regardless of whether ENS considered MYOB had the power to make that change under the Agreement, ENS was now Aware that MYOB was purporting, in exercise of its contractual powers, to reduce the ALF margin to a level that would have a significant impact on Kilimanjaro, as stated in the Announcement. It was no longer an "*incomplete proposal*" in terms of the Material Information.

79. As to the "*negotiation*" exception, ENS must have accepted that the negotiation exception no longer applied as at 1 August 2022 because it made the Announcement, thus acknowledging that it had an obligation to disclose then. ENS made the Announcement even though it did not accept that MYOB was contractually entitled to do what it was purporting to do. The Tribunal does not

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[58] ENS says at paragraph 21 of the SOR that "*The 27 May 2022 notification omitted the key proposed new Schedule 2 to the **EXO BPA**, which was only provided later*" [emphasis added]. This appears to be incorrect as Schedule 2 is referenced in MYOB's email of 5:12pm as forming part of a new BPP for **MYOB Advanced**. When Schedule 2 is sent to ENS on 30 May 2022, the email notes "*Further to our email on Friday outlining the new Advanced Business Partner Agreement, please see attached Schedule 2 (Special Conditions) to the Advanced BPA which is specifically crafted for your business. This will form part of the Advanced BPA*" (Annexure 23 of the SOC). In any event, the ALF margin reduction was included in MYOB's 27 May 2022 notice.

[59] As noted in *NZMDT 1/2014 NZX Limited v Rakon Limited*.

[60] Paragraph 52.1 of the SOR.

accept that the sending of the invoice materially changed matters from a disclosure perspective, as we now explain.

80. ENS says that its expectation was that MYOB, under pressure from its business partners, would abandon reducing the ALF margin and either revert to the status quo or propose an alternative arrangement based on its previous experience. [redacted] margin in the face of very strong opposition from Kilimanjaro and the other business partners. While the Tribunal acknowledges that [redacted], there appears to have been a significant change in MYOB's strategy following its acquisition by KKR, as submitted by ENS and highlighted in its annual report for the year ended 30 June 2021 (see paragraph 26 above), and MYOB's acquisition of several of its business partners in 2021 and early 2022.

81. In the lead-up to MYOB's notice of 27 May 2022, there was a lengthy consultation process which appears to have begun in May 2021 when MYOB gave notice of proposed changes to the agreements. There was clearly some uncertainty for Kilimanjaro, and the other business partners, given Kilimanjaro's meeting with MYOB on 28 March 2022 and its subsequent request for legal advice in April 2022. At this stage, ENS considered that MYOB's strategy had changed and there was speculation among the business partners that MYOB intended to "*cut*" the MYOB Exo margins. MYOB, for its part, had noted in its email to business partners on 31 March 2022 that it was in a "*consultation process in anticipation"* of rolling out new BPAs and BPPs. Kilimanjaro acknowledged in its letter of 19 July 2022 to MYOB that MYOB's changes to the Agreement and Business Partner Programme had "*been discussed at length since 2021*".

82. When MYOB's notice of the amendments to the Agreement did arrive on the evening of 27 May 2022, it was not presented as a draft for discussion, but rather changes that would take effect on 1 July 2022. MYOB advised that its consultation process was now complete and that these would be the arrangements going forward. MYOB's email does not support ENS's submission that it "*represented the beginning of negotiations*". Rather, the email initiates the start of the notice period, following which the changes would take effect.

83. While communication between the parties continued after MYOB's 27 May 2022 notification, this communication does not evidence a negotiation of the nature contemplated under Rule 3.1.2(a)(ii). MYOB's email on 30 June 2022 stated that they were delaying the effective date for the notified amendments to 1 August 2022 (and not 1 July 2022), following feedback from business partners that they wanted more time before the changes took effect, and that on 1 August 2022 all changes to the Agreement as communicated would take effect. MYOB did not state that the delay was "*to allow consultation*" as suggested by ENS[61]. Kilimanjaro raised its unhappiness with the changes to MYOB but considered that its concerns had "*fallen on deaf ears*"[62]. In a letter dated 19 July 2022, Kilimanjaro advised MYOB that as they have not been able to resolve these issues, Kilimanjaro intended to initiate a complaint under Australian franchising law. ENS's submission that negotiations are on-going at this point are not supported by the documents which have been provided to the Tribunal.

[61] Paragraph 23.3 of the SOR.
[62] Annexure 28 of the SOC - Kilimanjaro email to MYOB of 20 July 2022.

84. ENS notes that prior to 1 August 2022, MYOB had not invoiced Kilimanjaro in relation to the proposed margin changes and "*there had been no prior indication that MYOB would, in fact, take unilateral steps to implement the reduced margins*". Again, this is not supported by the documents which have been provided to the Tribunal. In particular, the email of 30 June 2022 was clear – the changes were to take effect on 1 August 2022. The Tribunal notes that ENS would not have been invoiced prior to 1 August 2022, because the changes did not take effect until 1 August 2022.

85. ENS submits that its disclosure obligation arose on 1 August 2022 when MYOB took the tangible step of invoicing Kilimanjaro at the reduced margin. In its opinion, based on legal advice, MYOB's conduct on 1 August 2022 amounted to a breach of the Agreement. The Tribunal notes that while MYOB's issue of the invoice at the reduced margin may have triggered ENS's ability to begin proceedings for a breach of contract (noting ENS's legal advice in May 2022 that a breach and evidence of loss was needed before MYOB's actions could be challenged), that does not mean ENS's disclosure obligations under the Rules did not arise sooner. It is not clear to the Tribunal why ENS considered that, at this point, the "*negotiation*" was complete, and the safe harbour no longer applied. The Announcement said that MYOB had purported to reduce the MYOB Exo margin and that ENS intended to dispute this – all matters known on 27 May 2022.

86. ENS argues that events following the Announcement support its view that, between late-May 2022 and 1 August 2022, MYOB's position on implementing changes to the margins was open to further negotiation and consultation. The Tribunal notes that while this appears to be the case with regards to the MYOB Advanced product, that is not the focus of the Material Information in this case. In any event, the Tribunal is not persuaded that the communication between MYOB and Kilimanjaro after 1 August 2022 does provide evidence of MYOB's intention to negotiate the MYOB Exo margins given MYOB's email of 21 September 2022[63]. That email makes it clear that MYOB's notification in May that the ALF margin would be reducing had not changed and that MYOB had reinforced this with its business partners. There was discussion about other matters, but they did not comprise part of the Material Information.

Tribunal finds that ENS breached Rule 3.1.1

87. The Tribunal does not accept that, following MYOB's notice of a reduction in the ALF margin under the Agreement on 27 May 2022, there was an incomplete proposal or that the parties were in negotiations with respect to that reduction for the purposes of Rule 3.1.2(a)(ii). The Tribunal does not consider that the parties were in an on-going negotiation between 27 May 2022 and 1 August 2022 of the type contemplated by Rule 3.1.2(a)(ii), which is intended to prevent prejudice to negotiations before an agreement has been struck.

88. Rather, the Tribunal considers that ENS became Aware of the Material Information on the evening of 27 May 2022, when MYOB emailed notice of changes to the Agreement to ENS's CEO and Executive Director. In that notice, MYOB purported to reduce the ALF margin by 42.86%. At that time, Kilimanjaro's "*long-held position*" was that MYOB did not have the right to unilaterally change the Agreement[64] and ENS's board had discussed just three days earlier that it would maintain its consistent approach to reject the agreement if it did not like it[65]. Accordingly, each aspect of the Material Information released in the Announcement was known to ENS on the evening of

[63] Annexure G of the SOR.
[64] Annexures A, B and E of the SOR.
[65] ENS's minutes of its board meeting on 24 May 2022 - Annexure 40 of the SOC.

27 May 2022, although the Tribunal accepts that some time would have been needed to allow ENS to calculate the financial impact of the margin reduction.

89. The Tribunal notes that the Announcement did not say that MYOB had taken tangible steps to enforce the margin reduction. The Announcement said that MYOB had purported to reduce the margins that Kilimanjaro received on MYOB Exo, which ENS intended to dispute.

90. It appears from the material before the Tribunal that ENS feels strongly that its obligation to disclose did not arise until MYOB issued an invoice on 1 August 2022 at the reduced ALF margin, because it believed that this amounted to a breach of the Agreement. ENS submits that it carefully considered its ongoing correspondence and discussions with MYOB about the purported ALF margin reduction in the context of its continuous disclosure obligations. While that may have been the case, the Tribunal has seen no evidence that ENS did, in fact, turn its mind to whether MYOB's 27 May 2022 notice required disclosure under the Rules. There is no evidence of the Board's consideration of its continuous disclosure obligations in the meeting minutes provided to NZ RegCo, which makes it difficult to assess any decision made about non-disclosure. In any event, as the Rules and Guidance Note on Continuous Disclosure make clear, the approach to disclosure is an objective one.

91. For these reasons, the Tribunal finds that ENS breached Rule 3.1.1 by not releasing the Material Information contained in the Announcement promptly and without delay. Given that the Tribunal considers ENS's disclosure obligation arose on the evening of Friday 27 May 2022, after market close, to comply with Rule 3.1.1 ENS should have released the Announcement before market open on Monday 30 May 2022.

Tribunal approach to penalty

92. The Tribunal must consider the appropriate penalty for ENS's breach of Rule 3.1.1.

93. Under the Tribunal Rules, the Tribunal can impose a fine of up to $500,000 for a breach of the Rules[66].

94. Section 9 of the Tribunal Procedures (*the Procedures*), which came into force on 17 October 2022, provides 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 v Hallenstein Glasson Holdings Limited* (*the HLG decision*), outlines the Tribunal's approach to the Procedures.

95. 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.

96. 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.

[66] Tribunal Rules 9.1.2(e) and 9.2.2(f).

Step 1: Factors relating to the breach

97. 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

98. 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.

99. 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[67]. 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.

100. The Procedures differ significantly from the previous Tribunal Procedures dated 29 February 2016 (*2016 Procedures*). One of these differences is that under the 2016 Procedures, Penalty Band 3 included the factor "The breach relates to a fundamental obligation". Previously, breaches of a "fundamental obligation", such as a breach of an Issuer's continuous disclosure obligations, 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.

Step 2: Factors relating to the respondent

101. 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). 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[68].

[67] See Appendix 1 for a copy of the table of factors which fall within each penalty range.
[68] See Appendix 2 for a copy of the non-exhaustive list of factors which are likely to lower or increase the starting point penalty.

Additional facts relevant to penalty

102. Both parties have made detailed submissions on the appropriate penalty in the event the Tribunal finds that ENS breached Rule 3.1.1, including with regard to the effect of ENS's delayed disclosure on subsequent events (in particular, BNZ's decision to waive ENS's banking covenants and ENS's capital raising in late 2022) and whether the assessed penalty may affect ENS's on-going commercial viability. Accordingly, the Tribunal sets out the following additional facts relevant to its assessment of penalty.

103. On 29 August 2022, ENS released its preliminary results for the year ended 30 June 2022. ENS noted that:

> "*Kilimanjaro Consulting had recurring revenue of $3.9 million (up 17%) and contracted revenue of $3.3 million (up 25%) out of a total revenue of $17.6 million (up 16%).*
>
> *The changes MYOB are purporting to undertake in respect of the MYOB Exo licensing will be challenging if MYOB is successful in implementing these changes. These changes are being disputed by Kilimanjaro (refer to announcement on 1 August 2022).*"

ENS also noted that the breach of its BNZ banking covenants would continue, and the board intended to seek a further waiver.

104. On 29 September 2022, ENS advised the market that BNZ had provided a waiver of the 30 June 2022 banking interest cover and leverage covenant, and a modification to the group's banking covenants until 30 June 2023.

105. ENS released its annual report for the year ended 30 June 2022 on 7 October 2022, after advising the market on 29 September 2022 that its release would be delayed. In its Directors' Report ENS noted that while Kilimanjaro had exceeded the revenue growth expectations (achieving 16% for the financial year), significant challenges with MYOB's direct entry into its market and more businesses competing for scarce resources had put pressure on its margins. ENS noted that Kilimanjaro's future strategic direction would be largely dictated by the final resolution it reached in its dispute with MYOB, as announced on 1 August 2022.

106. MYOB's notified reduction in the ALF margin was not reflected in ENS's financial statements for the year ended 30 June 2022 (*2022 financial statements*) but was covered extensively in the notes to the accounts. Note 1 – Basis of Preparation clause (i) states:

> "***Going concern assumption***
>
> *At 30 June 2022, the Group had incurred a loss of $2.193m and had net working capital deficiency of $3.371m. In addition, the Group was operating outside of its banking covenants. The Group had prepared a budget for the 2023 year that indicated a significant improvement in performance of the Kilimanjaro division, which was expected to have enabled the Group to comply with its banking covenants for the year to 30 June 2023.*
>
> *Whilst the division's year to date results are tracking behind the original 2023 budget, cost savings have been identified to mitigate the impact. However, the Group's Kilimanjaro division received notification from its key software supplier (MYOB) of a substantial adjustment to margins on MYOB Exo software transactions. The Group is disputing this as detailed in note 26. The potential impact of this is significant to*

the Division and Group's level of future profitability. There is therefore significant uncertainty in relation to the achievability of the group's current forecasts.

The Group requires significant improvement in profitability and cash flow generation within the Kilimanjaro division, despite the (disputed) reduction in MYOB Exo margin, to be able to operate in compliance with modified banking covenants (note 26). This cashflow generation is also required for capital investment within the group's other investments, including iSell Pty Limited. These conditions create significant doubt as to the ability of the Group to operate as a going concern.

In order to mitigate the risks presented for the Group, Kilimanjaro management along with the Enprise board, are currently revisiting the strategic plan of this division including diversification and a range of cost reduction measures. To satisfy the future capital investment and liquidity requirements of the Enprise Group, the board is intending a capital raise with in the next 12 months. Based on the success of previous capital raising the board is confident in its ability to raise capital in the future.

The directors consider there is a reasonable expectation the Group will have sufficient funds, in conjunction with the intended capital raise, to enable it to continue to trade for the foreseeable future and be able to continue to meet its liabilities as they fall due. Taking this into account, it is the considered view of the directors that the Group remains a going concern.

However:

- *the heightened degree of uncertainty around the level of future revenues and profitability, should the Kilimanjaro division's dispute with MYOB not result in the restoration of previous levels of margin from the MYOB Exo product; and*
- *the need to successfully complete a capital raise along with strategic and cost reduction initiatives within the Kilimanjaro division,*

indicate the existence of a material uncertainty that may cast significant doubt on the Group's ability to continue as a going concern, and therefore the Group may be unable to realise its assets and discharge its liabilities in the normal course of operations."[69]

107. The 2022 financial statements recorded the total carrying value of goodwill allocated to Kilimanjaro as $6.6m. Note 17 stated that Kilimanjaro was tested for impairment on a value in use basis, based on the 2023 financial year budget which excluded any impact of the reduction in the ALF margin (as outlined in note 26 – see below) and applied certain key assumptions. Note 17 also stated that an "*allowance has not been made within the FY2023 forecast for the disputed reduction of the MYOB Exo margin as detailed in note 26. If the MYOB Exo margin reduction was factored in, leaving all other variables held constant, this would lead to an impairment of $2,318,000 at 30 June 2022 of the Kilimanjaro Australia cash generating unit. The uncertainty around outcome of the dispute and/or the implementation of any potential mitigation strategies creates significant uncertainty as to the future levels of profitability within the cash generating unit*"[70].

[69] Page 13 of the ENS Annual Report for the year ended 30 June 2022.
[70] Page 29 of the ENS Annual Report for the year ended 30 June 2022.

108. Note 26 to the 2022 financial statements stated:

> ***(a) Waiver of banking covenants***
>
> *Enprise was in breach of their BNZ Loan covenants at year end. BNZ has provided a waiver of the 30 June 2022 banking interest cover and leverage covenant, and a modification to the group's banking covenants on 23 September 2022. These remove the leverage ratio testing requirement, and temporarily waive the interest cover ratio requirements until 30 June 2023.*
>
> ***(b) Dispute with MYOB***
>
> *MYOB invoicing to the Kilimanjaro Consulting division from 1 August 2022 has been received charging significantly more than the contractually agreed margins which Kilimanjaro Consulting has previously received in both Australia and New Zealand on existing customers using MYOB Exo Software. The impact of the reduction of 42.86% would be approximately $935,000 per annum on future revenue and would significantly impact the profitability of this division. Enprise (via Kilimanjaro) advised MYOB on 30 August 2022 that it formally disputes this decrease in margin as in it's opinion this goes against the current business partner agreement and will continue to challenge the margin change. Kilimanjaro management along with the Enprise board are currently revisiting the strategic plan of this division in light of this impact."*[71]

109. ENS's then auditor, RSM Hayes Audit (*RSM*), issued a qualified audit report noting that it did not express an opinion on the 2022 financial statements because of the significance of the matters regarding the use of the going concern assumption and the carrying value of Kilimanjaro and deferred tax assets. RSM noted that due to the significant level of uncertainty associated with forecasting the group's future cashflows as detailed in note 1(i) and given the uncertainty of the outcome of any future capital raising being sufficient to provide funding for the group's capital investment and liquidity requirements, it was unable to obtain sufficient appropriate audit evidence to form an opinion on whether the use of the going concern assumption was appropriate. RSM also noted that, as disclosed at note 17, significant uncertainties existed in relation to the assumptions made regarding the carrying value of Kilimanjaro and the level of future taxable profits expected to be available in relation to the group's deferred tax assets. RSM noted that it considered the impact of these matters to be material and pervasive to the consolidated financial statements of the group.

110. On 25 October 2022, ENS announced that it intended to raise up to $1.37million in capital via a pro-rata 1 for 10 renounceable rights issue to eligible shareholders (*Rights Issue*). ENS released an Offer Document on 1 November 2022 in which it noted that it was raising equity to, among other things, continue the growth of Kilimanjaro, provide for diversification and fund the legal defense of its position with MYOB. The Offer Document also included the following information:

> *"**Additional Disclosures***
>
> *On 1 August 2022, Enprise disclosed to the NZX that MYOB have purported to retrospectively reduce the margins that Kilimanjaro*

[71] Page 36 of the ENS annual report for the year ended 30 June 2022.

Consulting receives on existing sales of MYOB Exo software. The impact of the purported reduction of 42.86% would be approximately $935,000 per annum. This would significantly impact the support services that Kilimanjaro Consulting is able to deliver to their MYOB Exo software customers. The board rejects the assertion by MYOB that they are able to unilaterally alter these margins. Enprise has advised MYOB of its intention to formally dispute this purported decrease in fees.

Also refer to note 26(b) on page 36 of Enprise's Annual Report 2022, which is available at www.nzx.com under the ticker code "ENS"."[72]

111. On 16 December 2022, ENS advised the market that:

> *"…Kilimanjaro has filed legal proceedings in the Federal Court of Australia against MYOB.*
>
> *On 1 August 2022 [ENS] advised NZX that its subsidiary [Kilimanjaro Consulting] had disputed retrospective reduction in margins that Kilimanjaro Consulting receives on existing sales of MYOB Exo software.*
>
> *Kilimanjaro has since sought to resolve the dispute by negotiation, without success.*
>
> *Accordingly, Kilimanjaro,…has now filed legal proceedings in the Federal Court of Australia against MYOB Australia Pty Ltd (MYOB) seeking relief to maintain the benefit of the bargain they entered into with MYOB.*
>
> *As noted in the announcement of 1 August, the impact of the purported reduction of 42.86% is approximately NZ$935,000 per annum."*

112. On 1 March 2023, ENS released its half year report for the period ended 31 December 2022, in which ENS disclosed that its board had reviewed the goodwill of Kilimanjaro and due to the ongoing dispute with MYOB, MYOB indicating further MYOB Exo margin reductions in future periods and the current forecast, the board had elected to write down the goodwill value by $2.363 million.

113. ENS released its financial statements for the year ended 30 June 2023 on 2 October 2023. ENS's 2023 financial statements record at note 1(i):

> ***"Going concern assumption***
>
> *At 30 June 2023, the Group had incurred a loss of $10.752m and had net working capital deficiency of $3.904m. In addition, the Group was in breach of its banking covenants. The Group had prepared a budget for the 2024 year that indicated a significant improvement in performance of the Kilimanjaro division, which is expected to enable the Group to comply with its banking covenants for the year to 30 June 2024. However as of the date of this report, it has not yet obtained an*

[72] Page 11 of the ENS Rights Issue Offer Document 1 November 2022.

agreement from BNZ to extend its existing facilities beyond their current expiry date of 31 October 2023.

The Group requires significant improvement in profitability and cash flow generation within the Kilimanjaro division, to be able to comply with its banking covenants. This cashflow generation is also required for capital investment within the Group's other investments, including iSell Pty Limited. These conditions create significant doubt as to the ability of the Group to operate as a going concern.

In order to mitigate the risks presented to the Group, Kilimanjaro management along with the Enprise board, are currently revisiting the strategic plan of this division including diversification and a range of cost reduction measures. To satisfy the future capital investment and liquidity requirements of the Enprise Group, the board completed a capital raise in September 2023 (note 25). The board is confident that the capital raised along with the budgeted improved financial performance of Kilimanjaro will be sufficient for the Group's foreseeable cashflow requirements.

The directors consider that there is a reasonable expectation the Group will have sufficient funds, in conjunction with the intended capital raise, to enable it to continue to trade for the foreseeable future and be able to continue to meet its liabilities as they fall due. Taking this into account, it is the considered view of the directors that the Group remains a going concern.

However:
- the heightened degree of uncertainty around the level of future revenues and profitability, and

- the need to maintain or replace the debt facilities with BNZ together with strategic and cost reduction initiatives within the Kilimanjaro division, indicates the existence of a material uncertainty that may cast significant doubt on the Group's ability to continue as a going concern, and therefore the Group may be unable to realise its assets and discharge its liabilities in the normal course of operations."[73]

114. ENS's new auditor, UHY Haines Norton, issued a qualified audit report, noting:

> *"Due to the significant level of uncertainty associated with forecasting the Group's future cashflows and in determining the likely outcome of the ongoing negotiations with the Bank Of New Zealand to extend the existing debt facilities expiring at the end of October 2023, or to obtain suitable replacement financing as detailed in note 1(i), I was unable to obtain sufficient appropriate audit evidence to enable me to form an opinion as to whether the use of the going concern assumption is appropriate. Consequently, I was unable to determine whether any adjustments were necessary in respect of the consolidated statement of financial position of the Group as at 30 June 2023, the consolidated statement of comprehensive income or consolidated statement of changes in equity.*

115. Kilimanjaro has now resolved its dispute with MYOB, as announced to the market on 28 September 2023 and 2 October 2023. ENS advised that Kilimanjaro has entered into new BPAs with MYOB and that, while the new BPAs

[73] Pages 13-14 of the ENS annual report for the year ended 30 June 2023.

do not reinstate the MYOB Exo margins, ENS expects that the terms of the new BPAs and the growth in sales of the MYOB Advanced product will be sufficient to offset the forecasted lost revenue of about $935,000 announced on 1 August 2022.

NZ RegCo and ENS submissions on penalty

116. In short, NZ RegCo submits that the appropriate penalty band for ENS's breach is Penalty Band 2 and that the appropriate starting point penalty is $200,000. NZ RegCo submits that the limited observed impact of the Announcement indicates that the breach was not of the most serious nature, but that this is outweighed by the extended duration of the breach and a penalty towards the higher end of the range for Penalty Band 2 is warranted.

117. NZ RegCo submits that having regard to the mitigating and aggravating factors in this case, the greatest weight should be given to ENS's uncertain financial situation, and the starting point penalty should be substantially reduced to final penalty of $125,000.

118. ENS submits that, in the event that the Tribunal does not accept ENS's submission that it did not breach Rule 3.1.1, the $125,000 penalty proposed by NZ RegCo is disproportionate to the seriousness of ENS's conduct. ENS considers that the breach falls at the lower end of Penalty Band 2 given that ENS did not consider that its continuous disclosure obligation had been triggered in late May 2022, informed by its longstanding interactions with MYOB and an understanding of MYOB's difficult negotiation tactics. ENS submits that the appropriate starting point penalty is $80,000.

119. ENS does not consider that there are any aggravating factors in this case and that more weight should be afforded to the mitigating factors, in particular ENS's ongoing commercial viability. ENS submits that the appropriate overall penalty, in the event that a breach is found, is $40,000.

Step 1: Tribunal assessment of the starting point penalty

Penalty Band factors

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

Applicable Penalty Band 1 factors

a) No loss caused by delayed Announcement;
b) Delayed Announcement had no/minor impact on investors or the market;

121. NZ RegCo says that "*no tangible harm has been identified as a result of the breach*", but submits that this factor has limited weight given that the delayed release of Material Information *generally* has the potential to adversely impact on market integrity. ENS submits that, in addition to the breach not causing any loss, its conduct had no impact on investors or the market, noting NZ RegCo's acknowledgement that ENS is a relatively low liquidity Issuer and that ENS's share price movement following the Announcement's release was very moderate.

122. The Tribunal notes that when assessing whether the breach caused any loss or had an impact on investors and/or the market, the Tribunal must consider whether harm arose from the Announcement's delayed release, not whether harm arose from the Material Information itself (which was clearly significant to ENS's business). The Tribunal also notes that while the delayed release of

Material Information may generally have the potential to cause harm, it must consider the circumstances of the particular matter at hand.

123. The price movement in ENS shares on the day of the Announcement was negligible, with the price remaining stable until the release of ENS's preliminary results on 29 August 2022. While NZ RegCo identified an increase in trading volumes following the release of the Announcement, these volumes were relatively small (a daily average in the first week of August 2022 of 12,000 shares traded). The Tribunal notes that while ENS is generally a lightly traded Issuer, it is possible that the lack of movement in the share price following the Announcement reflected the market's existing knowledge of the risks associated with Kilimanjaro's business and earlier announcements of MYOB's change in business strategy (to compete with their business partners through a direct channel) and its acquisition of several business partners.

124. The Tribunal considers that no evidence has been presented that the delayed Announcement caused any loss or had an impact on investors or the market.

c) No financial benefit and/or commercial advantage from delayed Announcement;

125. NZ RegCo submits the breach provided a minor to moderate financial benefit and/or commercial advantage to ENS with regard to (i) its engagement with BNZ on a waiver of its banking covenants; and (ii) the financial information available at the time of the Rights Issue. NZ RegCo argues that if ENS had announced the Material Information on 27 May 2022 (i.e. before its financial year end on 30 June 2022), "*this would likely have escalated the impetus for, and timing of, the process for ENS to quantify*" its impairment of Kilimanjaro. NZ RegCo notes that it was not until ENS released its half year report on 1 March 2023, that it disclosed its board had elected to write down the goodwill value of Kilimanjaro by $2.363m. NZ RegCo says that had the impairment been finalised and clearly disclosed in the 2022 financial statements, this would have provided more definitive information to BNZ and to prospective investors considering the Rights Issue.

126. ENS submits that its conduct did not result in any financial benefit or commercial advantage to ENS. ENS notes that the delayed annual report for the period ended 30 June 2022 and qualified audit report were due to the significant uncertainty in ascertaining how the MYOB dispute might be resolved at that time. ENS considers that it adopted a conservative position in its 2022 financial statements, given that it was in an ongoing dispute with MYOB[74]. With regards to BNZ, ENS says that it commenced formal discussions on the waiver from its banking covenants on 9 September 2022, after the Announcement was released. ENS says that "*BNZ has confirmed to ENS it does not consider there to be any issues with the timing and circumstances in which ENS commenced discussions on and obtained a waiver*"[75].

127. The Tribunal is not in a position to opine on whether the 2022 financial statements should have included the impairment of Kilimanjaro's goodwill value if the Announcement had been released on or about 27 May 2022[76]. Despite the impairment not being included in the 2022 financial statements, ENS's 2022 annual report included significant warnings with respect to the impact of a

[74] Paragraph 36.1 of the SOR.
[75] Paragraph 32.2 of the SOR.
[76] The Tribunal notes that the FMA conducted an enquiry into ENS's 2022 financial statements, and in particular, information relating to the recoverable amount of Kilimanjaro and recognised deferred tax assets. The FMA issued ENS a public warning for failing to keep proper accounting records on 11 August 2023, noting that ENS did not provide it with sufficient evidence to support disclosures and assumptions made in preparing the 2022 financial statements – see here.

reduced ALF margin, including that the "*material uncertainty*" cast significant doubt on the group's ability to continue as a going concern and a qualified audit report, and note 17 included advice on what the impairment value would have been if it had been included (see paragraphs 105 to 109 above).

128. With regards to the BNZ bank waiver, ENS was already operating under a waiver issued in March 2022 in respect of earlier breaches of its banking covenants. ENS advised NZ RegCo during its investigation that its banking covenants were measured on a rolling 12-month basis every 6 months and that it was in regular communication with its BNZ manager[77]. The Announcement was released before the waiver was considered and granted by BNZ and ENS submits that BNZ has confirmed that it does not consider there to be any issues with the timing and circumstances in which ENS obtained the waiver. Based on this submission from ENS[78], the Tribunal does not consider that the delayed Announcement gave ENS a commercial advantage in its dealings with BNZ as suggested by NZ RegCo.

129. With regards to the Rights Issue, the Tribunal notes that the dispute with MYOB, and the potential impact of the reduced ALF margin, were highlighted in the Offer Document (see paragraph 110 above). While the, at that stage potential, impairment was not specifically highlighted in the Offer Document, ENS's 2022 financial statements contained significant cautionary remarks (including at notes 1(i), 17 and 26) such that we consider that shareholders of ENS who subscribed to the Rights Issue would likely have been aware of the significant uncertainty at that time and cognisant of the inherent on-going risks of Kilimanjaro's business.

130. For these reasons, the Tribunal is not satisfied that the breach provided a minor to moderate financial benefit and/or commercial advantage to ENS as submitted by NZ RegCo.

Applicable Penalty Band 2 factors

d) Delayed Announcement had potential to cause moderate impact on investors and the market;

131. RegCo submits that a breach of the continuous disclosure requirements has the potential to cause significant harm to investors and/or the market given the possibility of substantial trading, both in terms of volume and price changes, during a period of information asymmetry. NZ RegCo acknowledges that ENS is historically a relatively low liquidity Issuer, which lessens the potential impact of the delayed Announcement. However, it considers that given the nature of the harm Rule 3.1.1 is designed to prevent, combined with the length of the breach, the breach had the potential to cause a significant impact. ENS considers that any potential for harm to occur was low given ENS's trading volumes during that period and notes that any breach did not continue for an extended time (discussed further below).

132. 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. Rule 3.1.1 aims to ensure that the market is fully informed of Material Information in a timely manner so that investors can make informed investment decisions.

133. The Tribunal notes that ENS had previously advised the market of the potential risks associated with Kilimanjaro's business, including the risk MYOB could seek to change the commercial terms in the BPAs, and in particular, seek to reduce

[77] Annexure 41 of the SOC.
[78] ENS did not provide the Tribunal with a copy of this confirmation from BNZ.

profit margins (see paragraph 18 above). ENS had also notified the market of the major change in MYOB's strategy, following its acquisition by KKR, "*to compete in the sector*" with its business partners (such as Kilimanjaro) and MYOB's acquisition of several business partners. Given that this information had been released to the market well before 27 May 2022, the Tribunal considers that the market had some knowledge of the potential risks facing ENS, and in particular, Kilimanjaro.

134. As noted by NZ RegCo, the potential for harm to investors is significant if there is information asymmetry in the market. In this case, trading did not occur during a period of information asymmetry[79].

135. For these reasons, along with ENS's low liquidity, the Tribunal considers that there was a moderate, as opposed to significant, potential for harm arising from the delayed Announcement.

Applicable Penalty Band 3 factors

e) Serious compliance breach;

136. As noted in the *HLG* decision, determining whether a breach is a minor, moderate or serious administrative, operational or compliance breach is not an assessment of the overall severity of the breach and conduct of the respondent (that happens when the Tribunal considers all the relevant factors). Rather, it is an assessment of the seriousness of the administrative, operational or compliance failure having regard to the nature of the Rule breached.

137. NZ RegCo submits that a breach of Rule 3.1.1 should be categorised as a serious compliance breach given that continuous disclosure is essential for maintaining the integrity of the market. ENS acknowledges the importance of continuous disclosure for the integrity of the market, but submits that, given Kilimanjaro's continued discussions with MYOB before the Announcement, the breach is, at most, a moderate administrative, operational and/or compliance breach.

138. The requirement under Rule 3.1.1 to immediately disclose Material Information to the market is a fundamental obligation placed on Issuers under the Rules. The Rules are intended to ensure that New Zealand's listed capital markets are efficient, transparent and fair. Any failure to promptly release Material Information has the potential to have an adverse effect on the NZX Markets. Given the importance of continuous disclosure to market integrity, the Tribunal considers that the breach of Rule 3.1.1 is a serious compliance breach.

f) Continued for an extended period;

139. 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).

140. NZ RegCo submits that ENS's breach, which lasted approximately nine weeks, continued for an extended period. ENS submits that the duration of any breach was, at most, moderate.

141. The Tribunal noted in its determination in *NZMDT 2/2023 NZX v 2 Cheap Cars Group Limited* (*the 2CC decision*), that when assessing the duration of a breach, the Tribunal will have regard to the nature of the breach as some Rules

[79] Information asymmetry occurs when a person is privy to Material Information not generally available to the market (e.g. Material Information is given to an analyst before it is released to the market).

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.

142. The Tribunal's most recent decisions on continuous disclosure breaches provide some guidance for assessing the duration of ENS's breach:

    a. In *NZMDT 7/2021 NZX v QEX Logistics Limited* (*QEX*), the Tribunal considered that QEX's breaches continued for an extended period given its failure to disclosure for approximately two months, among other things, that the Ministry of Primary Industries had brought charges against the company and its Director;

    b. In *NZMDT 6/2021 NZX v Geneva Finance Limited* (*GFL*), the Tribunal considered GFL's nine Business Day delay in releasing updated earnings guidance was "*lengthy*". Similarly, in *NZMDT 5/2021 NZX v QEX,* the Tribunal considered a five Business Day delay between QEX becoming Aware and advising the market that inventory of a value which, if not recovered, would have a material adverse impact on its financial performance, had been removed from its secured China Customs bonded warehouse was "*lengthy*"; and

    c. In *NZMDT 1/2021 NZX v NZME Limited* (*NZM*), the Tribunal found NZM's approximately three-hour delay in announcing the resignation of its Chair just before its ASM was a breach of limited duration.

143. The Tribunal considers that when having regard to the nature of the breach in this case, and the obligation to disclose Material Information promptly and without delay, the approximately nine-week delay in releasing the Announcement was extended and falls within Penalty Band 3.

Starting point penalty

144. After weighing up all the factors outlined above and assessing the overall seriousness of the breach, the Tribunal considers that the breach falls within Penalty Band 2.

145. As for determining the starting point penalty within Penalty Band 2, the Tribunal considers that this matter falls within the mid-range of Penalty Band 2. While a breach of Rule 3.1.1 is a serious compliance breach, in this case there was no evidence of loss or market impact as a result of the delayed Announcement and the Tribunal considers that the breach had the potential to cause a moderate impact on investors and the market.

146. The Tribunal considers that the appropriate starting point penalty is $120,000.

Step 2: Tribunal assessment of factors relating to ENS

147. To determine the final level of penalty, the Tribunal must adjust the starting point penalty of $120,000 to reflect the aggravating and mitigating factors relevant to ENS.

148. Before setting out its assessment of the mitigating and aggravating factors relevant to this case, the Tribunal makes some initial observations.

149. NZ RegCo submits that the breach was caused by ENS's negligence or inattentiveness to its continuous disclosure obligations, which should be treated as an aggravating factor. NZ RegCo argues that rather than considering whether MYOB's notification on 27 May 2022 had potential continuous disclosure implications, ENS appeared to focus solely on its assessment of the ability to dispute MYOB's notified amendments to the Agreement.

150. ENS submits that its board exercised judgement and considered its continuous disclosure obligations. ENS's argues that this was a situation where, drawing on its previous experience with MYOB, it consciously determined that it did not need to make a disclosure while it was engaged in a negotiation process on a potential BPA change that was yet to commence.

151. The Tribunal acknowledges that this was a complex and evolving situation. The Tribunal does not consider that ENS's breach was negligent, but rather reflects the fact that in a developing situation, it can be difficult to determine when the obligation to disclose is triggered. Nor does the Tribunal consider that ENS's breach was intentional given that it did release the Announcement, albeit later than the date the Tribunal has assessed it should have been released.

152. ENS says that it carefully considered its ongoing correspondence and discussions with MYOB on the purported ALF margin reduction in the context of its continuous disclosure obligations. ENS says it had a genuinely held and reasonable view that it was in an incomplete negotiation. However, the Tribunal notes that the minimal board documentation provided during the relevant time does not support the contention that ENS's Board carefully considered its continuous disclosure obligations. The Tribunal notes that Issuers should record in their board meeting minutes the reasons for a decision to disclose or not disclose information when this issue is considered[80]. Clear and transparent records can demonstrate that a board had effective compliance procedures in place and that its conclusions were reasonable in the circumstances known to it at the relevant time.

Mitigating factors

(1) Cooperated with investigation;

153. NZ RegCo submits that, although ENS was prepared to engage in NZ RegCo's investigation, its responses were "*often cursory and in summary form*", which necessitated multiple iterations of questions and repeated requests for the same documents. NZ RegCo considers that ENS did not fully engage with the importance of the investigation or its lines of questioning. NZ RegCo argues that ENS's lack of engagement is an aggravating factor.

154. ENS says it did cooperate with NZ RegCo, but that its engagement reflects a small business operating under pressure and using its best endeavours to respond fully and openly.

155. The Tribunal notes that the factual circumstances in this matter are complex. NZ RegCo was also making inquiries on a separate issue, which may have complicated matters. The Tribunal has seen no evidence that ENS sought to deliberately withhold information or that it was intentionally obstructive (although not all of the correspondence between NZ RegCo and ENS was provided to the Tribunal). In these circumstances, the Tribunal considers that ENS cooperated, but this is not a significantly mitigating factor given the

[80] See Appendix 4, clause 8 of the Guidance Note.

apparent difficulty NZ RegCo had in obtaining the information necessary for its investigation[81].

(2) Intention to improve practices;

156. ENS advises that it is "*commencing a process to review all procedures and compliance with its regulations*"[82].

157. The Tribunal notes that this intention appears vague and urges ENS to give this priority, particularly in light of the FMA's warning on record keeping (see footnote 76 above).

158. All Issuers should have robust procedures in place to enable boards to consider and carefully determine their continuous disclosure obligations and to record those decisions.

(3) One-off breach of the continuous disclosure obligations;

159. NZ RegCo says that it is satisfied that ENS's breach was a one-off event and is not aware of any other continuous disclosure breaches by ENS.

(4) Adverse effect on ENS's ongoing commercial viability

160. 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.

161. 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 proposed starting point penalty would adversely effect its ongoing commercial viability. As NZ RegCo submits, a relatively high threshold is required before this factor will apply given that the penalties imposed by the Tribunal are intended to be punitive.

162. While the resolution of its dispute with MYOB is a positive development, there remains uncertainty around the level of ENS's future revenue and profitability. Given this, and in light of ENS's 2023 financial statements and qualified audit report, the Tribunal considers that the adverse effect of the starting point penalty ($120,000) on ENS's ongoing commercial viability is a significant mitigating factor in this case.

Aggravating factors

(1) Compliance history;

163. Previous Rule breaches are relevant when assessing an Issuer's compliance history. NZ RegCo advises that ENS has been subject to three investigations for late annual reports, one of which was referred to the Tribunal in 2019. In *NZMDT 7/2019 NZX Limited v Enprise Group Limited*, the Tribunal found that ENS breached the Rules by filing its 2019 annual report 14 Business Days late. ENS was fined $35,000 and publicly censured. However, given NZ RegCo's advice that ENS does not appear to have previously breached its continuous

[81] Annexure 42 of the SOC.
[82] Paragraph 66.2 of the SOR.

disclosure obligations, the Tribunal does not consider ENS's late annual reports to be particularly aggravating in this case.

Penalty

164. The Tribunal considers that having regard to the factors noted above, a significant reduction from the starting point penalty is warranted. The Tribunal imposes a final penalty of $60,000. In determining the final penalty, the Tribunal has given particular weight to ENS's overall conduct in circumstances where it had a genuine belief that it was in an incomplete negotiation in what were complex circumstances, and to ENS's ongoing commercial viability.

165. The Tribunal notes that using the penalty imposed in this case as a comparison to other breaches of the continuous disclosure requirements will be difficult given the significant reduction in penalty due to ENS's ongoing commercial viability. Accordingly, the penalty imposed in this matter is unlikely to act as a deterrent for other Issuers in accordance with Procedure 9.1.4.

Comment on previous Tribunal decisions

166. This is the first breach of Rule 3.1.1 considered by the Tribunal since the Procedures came into force. The Tribunal considers that its previous decisions involving breaches of the continuous disclosure requirements are of limited value as a comparison for assessing the penalty in this case given the amendments to the penalty setting provisions in the Procedures. The Tribunal also notes that having regard to an adverse effect on the ongoing commercial viability of the respondent is a new mitigating feature, introduced in the Procedures. Given the importance of this factor in determining the overall penalty for ENS, the penalties imposed in prior decisions are not directly comparable.

Public censure

167. NZ RegCo submits that a public censure of ENS is appropriate because the breach falls within Penalty Band 2 and none of the factors cited in Procedure 9.3.3 (when the name of a respondent is not likely to be published) are satisfied. ENS accepts that, if the Tribunal does find a breach of Rule 3.1.1, in accordance with the Procedures, a censure would be required.

168. The Tribunal has considered the guidance set out in Tribunal Procedure 9.3. In particular, that the name of a respondent is likely to be published when:

    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 respondent committed a breach that falls within Penalty Band 2 or Penalty Band 3 of Procedure 9.

169. The Tribunal considers that it is appropriate in this case to publicly censure ENS given that a breach of the continuous disclosure requirements has the potential to cause harm to the public and to damage public confidence in the market, and the breach falls within Penalty Band 2.

170. The Tribunal notes that its public censure of ENS will be released together with a copy of this determination in full.

Costs

171. NZ RegCo has sought an order that ENS pay the costs of NZX in bringing this proceeding and the costs of the Tribunal in considering this matter. ENS has not made any submissions on costs.

172. 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 Tribunal has found ENS in breach of the Rules, the Tribunal considers that it is appropriate to make a costs award against ENS. However, in recognition of the complexity of the factual situation, ENS's ongoing commercial viability and the educative value to the market of this decision, the Tribunal caps the award at $15,000 (excluding GST, if any).

Orders

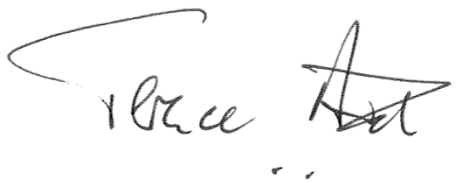
173. The Tribunal orders that ENS:

    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 $60,000 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 $15,000 (excluding GST, if any).

DATED 8 DECEMBER 2023



Hon Sir Terence Arnold KC

Appendix 1

Penalty Band	Factors
Penalty Band 1 Minor Breaches	• 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	• 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	• 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.