

UNDER the NZ Markets Disciplinary Tribunal Rules

IN THE MATTER OF breach of NZX Listing Rule 3.6.1

BETWEEN **NZX LIMITED**

AND **COOKS GLOBAL FOODS LIMITED**

Respondent

**DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL
4 FEBRUARY 2020**



Rachel Batters
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NZ Markets Disciplinary Tribunal
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1. This is a determination of a division of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising James Ogden (Division Chair), Trevor Janes and Richard Keys.
2. Capitalised terms that are not defined in this determination have the meanings given to them in the NZX Listing Rules (*the Rules*).

Procedural Background

3. On 17 December 2019, NZX Limited (*NZX*) filed a statement of case (*SOC*) alleging that Cooks Global Foods Limited (*CGF and Company*) had breached Rule 3.6.1 by failing to deliver its annual report within four months of the end of its financial year.
4. On 19 December 2019, CGF requested a time extension from the Tribunal so that its statement of response (*SOR*) would not be due until 31 January 2020 (its *SOR* would otherwise have been due by 6 January 2020). CGF noted that its office, and that of its advisers, would be closed over the holiday period and as such, key personnel required to review the relevant evidence, collate information and draft a response would be unavailable until after the holiday period.
5. On 19 December 2019, the Tribunal advised CGF that it is required to conduct hearings under its Rules expeditiously. In recognition of the intervening holiday period however, the Division Chair granted an extension requiring CGF to submit its *SOR* by 24 January 2020.
6. On 24 January 2020, CGF filed its *SOR*.
7. On 29 January 2020, NZX notified the Tribunal that it had decided not to file a rejoinder.

Factual Background

8. CGF is an Issuer with ordinary shares Quoted on the NZX Main Board and is subject to the Rules. CGF migrated from the NZAX Market to the NZX Main Board on 24 June 2019.
9. Rule 3.6.1 requires each Issuer to deliver an annual report to NZX and each Quoted Financial Product holder within three months after the end of its financial year. However, Issuers who had migrated from the NZAX Market were given an additional month to deliver their annual reports if their financial year ended between 30 September 2018 and 30 June 2019 under the terms of a class waiver (*Class Waiver*)¹.
10. CGF's financial year end is 31 March. Accordingly, under the terms of the Class Waiver, CGF's 2019 annual report (*2019 Annual Report*) had to be delivered to NZX and its Quoted Financial Product holders by 31 July 2019.
11. At 8:37am on 1 August 2019, NZX Product Operations notified the market that CGF had not issued its 2019 Annual Report by 31 July 2019 and if CGF did not provide its 2019 Annual Report by market close on 7 August 2019, its securities would be suspended effective from market open on 8 August 2019².

¹ NZX Regulation Decision – *Class waiver and ruling for NZAX and NXT Market Migration* dated 19 November 2018.

² This was in accordance with NZX's *Trading Halts and Suspensions Guidance Note* dated 1 January 2019 which states that NZXR will usually suspend the securities of any Issuer that has not delivered its annual report within 5 business days of the due date.

12. At 10:39am on 1 August 2019, CGF released a market announcement (dated 31 July 2019) advising that it had appointed a new Chief Financial Officer (CFO) and that, due to delays caused by the transition between CFOs, its 2019 Annual Report would not be filed when due. CGF advised that it expected to release its annual audited accounts within a week and that no adjustments to its preliminary results had been identified and agreed to date, but that it believed if any adjustments were required, they would be non-cash in nature and therefore have little material impact on the Company's funding position.
13. NZX advises that on 6 August 2019 it discussed the progress of CGF's audit with CGF's Chairman, who confirmed that it was on track to release its 2019 Annual Report by market close on 7 August 2019.
14. At 4:57pm on 7 August 2019, CGF released a market announcement advising that it was finalising its annual report and expected to release it during the pre-open on 8 August 2019. CGF stated that no material adjustments to its preliminary results had been identified, with only some small adjustments made of a non-cash nature which would have no material impact on the Company's funding position. CGF also stated that it expected the audit report to be qualified.
15. At 9:47am on 8 August 2019, CGF released its 2019 Annual Report, 5 business days after it was due. As it was released before market open at 10:00am, trading in CGF's securities was not suspended. NZX advises that following the release of the 2019 Annual Report there was no change in CGF's share price.
16. NZX advise that this is the third time CGF has breached the periodic reporting requirements. CGF was referred to the Tribunal in 2009 for breaching NZAX Rule 10.5.1 by releasing its 2009 annual report approximately 69 business days late, with its securities having been suspended for approximately 62 business days. CGF also breached NZAX Rule 10.5.1 in 2015 when its annual report was two business days late. As NZX considered that this breach was caused by "a combination of unforeseen circumstances largely outside of CGF's control", it issued an Obligations Letter to CGF and took no further regulatory action.

NZ Markets Disciplinary Tribunal Determination

17. The Tribunal finds that CGF breached Rule 3.6.1 by delivering its 2019 Annual Report after the required timeframe, as modified by the Class Waiver. CGF accepts in the SOR that it breached Rule 3.6.1.
18. The Tribunal must then determine the appropriate penalty to be imposed.
19. NZX submits that the appropriate penalty is a fine of \$35,000, the payment by CGF of NZX and the Tribunal's costs and a public censure.
20. CGF submits that if a fine is to be imposed, it should be less than \$35,000 having regard to the Tribunal's recent decision in *NZMDT 7/2019 NZX v Enprise Group Limited* dated 10 January 2020 (the *ENS Decision*), where ENS was fined \$35,000 for releasing its 2019 annual report 14 business days late. CGF also submits that a public censure would serve no benefit to the market, but had the risk of causing disproportionate damage to its reputation.

Financial Penalty

21. The Tribunal considers that a breach of the periodic reporting requirements is a breach of a fundamental obligation under the Rules. Compliance by Issuers with the periodic reporting requirements is essential in maintaining market integrity and investor confidence.

22. CGF advised NZX that the primary reason its 2019 Annual Report was not released when due was the resignation of its CFO in late May 2019³, which disrupted its audit process at a crucial time when it needed to fulfill information requests from its auditors, BDO Auckland. CGF took steps to address its resourcing issues by retaining its CFO in a part time capacity (although it transpired that his availability was limited), immediately searching for a replacement CFO and contracting two additional personnel to assist (including its former CFO, although neither was able to commit significant time to the audit until July 2019). Despite these steps, CGF was not able to provide its auditors with the information required by the timeframes agreed in its original audit plan. While CGF had expected its auditor to make up for this delay, this was not possible due to its auditor's own resource constraints.
23. The Tribunal acknowledges CGF's submission that as a small Issuer it relies heavily on its CFO and that his unforeseen resignation impacted on CGF's ability to meet its obligations during the audit process. However, meeting the periodic reporting requirements is a fundamental obligation and CGF needed to ensure that it had sufficient resources available to release its annual report on time.
24. CGF also notes in its SOR that its audit was delayed due to its compliance with new IFRS accounting standards, in particular IFRS 15 (which addresses recognition of revenue from contracts with customers). CGF states that despite its requests, it did not receive a full explanation on the issues from BDO. The Tribunal considers however that, as the onus of complying with the Rules falls on CGF, CGF needed to ensure that it was aware of the issues likely to arise with the adoption of new IFRS accounting standards, particularly as the need for compliance had been noted in CGF's 2018 annual report. NZX submits in the SOC that CGF underestimated the potential issues that might be encountered during the audit process, including in regard to CGF's going concern assumption, and should have engaged with its auditors earlier in the audit cycle.
25. The Tribunal considers any breach of the periodic reporting requirements to be serious and to fall within Penalty Band 3 of Procedure 9 of the Tribunal Procedures (*the Procedures*). Under Penalty Band 3, a penalty of between \$0 and \$500,000 may be imposed.
26. To determine the appropriate level of penalty, the Tribunal must consider the overall conduct of the respondent and take into account the factors set out in the Procedures. These factors provide guidance on whether the penalty should fall at the lower or higher end of the applicable penalty band.
27. The Tribunal considered that the following aggravating factors were likely to increase the penalty in this case:
 - a. CGF was in breach for five business days; and
 - b. CGF has breached the periodic reporting requirements on two previous occasions, one of which resulted in referral to the Tribunal in 2009.
28. The Tribunal considered that the following mitigating factors were likely to reduce the penalty in this case:
 - a. no impact on the market or CGF's investors appears to have resulted from the breach (trading in CGF's securities was not suspended and CGF notified the market of any adjustments likely to be made to its preliminary results in its announcements on 1 and 7 August 2019);

³ Letter from Duncan Cotterill to NZX dated 7 October 2019.

- b. CGF appears to have taken steps to reduce the delay by contracting additional personnel and has advised that it will continue to maintain contractor support to mitigate against the risk of losing key personnel;
 - c. CGF advises that it is endeavouring to improve its going concern position and has commissioned a third party to assist it meet its IFRS 15 and 16 requirements;
 - d. no financial benefit or commercial advantage for CGF appears to have resulted from the breach; and
 - e. while not specifically addressed in the SOC, CGF appears to have cooperated fully with NZX Regulation's investigation into the breach.
29. The Tribunal notes that CGF did not advise NZX or the market in advance that it would not be releasing its 2019 Annual Report when due. While CGF did make announcements to the market on 1 and 7 August 2019, these occurred after CGF was already in breach of the Rules.

Previous Tribunal determinations

30. The Tribunal has made a number of previous decisions regarding breaches of the periodic reporting requirements, as outlined by NZX in its SOC. Following its guidance to the market and the amendments made to the Procedures in 2016, the Tribunal has in recent years markedly increased the penalties it imposes for breaches of the periodic reporting requirements and matters involving repeated breaches of the Rules⁴.
31. Given the circumstances of this case, and the emphasis on such breaches, the Tribunal considers that its two most recent decisions provide the best precedent guidance.
32. In *NZMDT 3/2018 NZX v Windflow Technology Limited (WTL)*, WTL was fined \$25,000 for releasing its 2017 annual report two business days late due to "eleventh hour audit issues". This was WTL's third consecutive breach of the periodic reporting requirements and the Tribunal considered that WTL's conduct had formed a pattern of poor compliance. The Tribunal did consider, however, that there were a number of factors which reduced the penalty that would otherwise have been imposed for a repeated breach of this nature, including the short duration of the breach, that trading in WTL's securities was not suspended and that it was WTL's first referral to the Tribunal (given the previous two breaches were also of short duration NZX had not referred them to the Tribunal). Accordingly, the Tribunal considered that WTL's breach fell at the low end of Penalty Band 3.
33. In the ENS Decision, ENS was fined \$35,000 for releasing its 2019 annual report 14 business days late due to "protracted discussions" with its auditor regarding the adoption of new IFRS accounting standards and the treatment of ENS's investments. ENS's securities were suspended from trading for eight and a half business days and, while ENS had not previously been referred to the Tribunal, this was its second breach of the periodic reporting requirements. The Tribunal noted, however, that there were a number of mitigating factors, including that ENS had (a) notified NZX in advance that its annual report would be delayed; (b) taken steps to expedite the resolution of the issues which arose

⁴ As noted above, CGF was referred to the Tribunal in 2009 for failing to release its 2009 annual report when due, which resulted in its securities being suspended for approximately 62 business days. The Tribunal noted a number of aggravating factors in that instance including the duration of the breach, the apparent lack of urgency shown by CGF to remedy the breach and its failure to keep the market updated. At that time, CGF was fined \$25,000. However, had a breach of that nature occurred now it would likely have resulted in a significantly higher penalty being imposed.

during its audit process; and (c) adopted new processes to ensure future compliance. The Tribunal also considered that the breach by ENS fell at the low end of Penalty Band 3, but was more serious than the breach by WTL.

34. Having considered the circumstances of these two previous matters, the Tribunal considers that CGF's breach is comparable in severity to the breach by ENS. While ENS's breach was longer and resulted in the suspension of its securities, ENS did self-report to NZX that its annual report would be delayed before it was in breach of the Rules and had not previously been referred to the Tribunal. The Tribunal is also concerned that the primary reason the 2019 Annual Report was not released when due was CGF's own internal resourcing issues.
35. Having regard to both the mitigating and aggravating factors in this matter and its previous decisions, the Tribunal considers that a penalty of \$35,000 is appropriate.
36. The Tribunal notes that should CGF breach the periodic reporting requirements again, the Tribunal is likely to impose a significantly higher penalty in accordance with its previous statements to the market.

Public censure

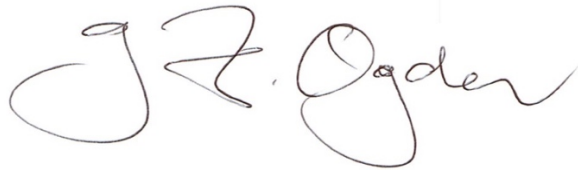
37. NZX has sought a penalty of public censure. CGF submits that given the circumstances of its breach it believes that a public censure serves no benefit to the market, but disproportionate damage to its reputation.
38. The Tribunal has considered the guidance set out in Procedure 9.3. In particular, 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.
39. The Tribunal considers that a breach of the periodic reporting requirements is a breach of a fundamental obligation under the Rules and has the potential to impact on market integrity and investor confidence. The Tribunal also notes that CGF has previously breached the periodic reporting requirements and that its breach falls within Penalty Band 3. Accordingly, a public censure in this case is appropriate and is consistent with its previous decisions.
40. The Tribunal also notes that the market is already aware that CGF breached Rule 3.6.1 by virtue of the announcement made by NZX Product Operations on 1 August 2019.

Orders

41. The Tribunal orders that CGF:
 - a. be publicly censured in the form of the announcement attached to this decision (which will include a full copy of this decision);
 - b. pay \$35,000 to the NZX Discipline Fund;

- c. pay the costs and expenses incurred by the Tribunal in considering this matter; and
- d. pay the costs and expenses incurred by NZX in considering this matter being \$3,800 (excluding GST, if any).

DATED 4 FEBRUARY 2020

A handwritten signature in black ink, appearing to read 'J. Ogden', written in a cursive style.

James Ogden, Division Chair, NZ Markets Disciplinary Tribunal