NZ MARKETS DISCIPLINARY TRIBUNAL **NZMDT 8/2019**

UNDER	NZ Markets Disciplinary Tribunal Rules
IN THE MATTER OF	breach of NZAX Rule 5.1.7
BETWEEN	**NZX LIMITED**
AND	**CHATHAM ROCK PHOSPHATE LIMITED** Respondent

DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL
10 JANUARY 2020

NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL

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1. This is a decision of a division of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising Mariëtte van Ryn (Division Chair), Jo Appleyard and Chris Swasbrook.

2. Capitalised terms that are not defined in this decision have the meanings given to them in the now repealed NZAX Listing Rules (*the Rules*).

Procedural background

3. On 12 December 2019, NZX Limited (*NZX*) filed a statement of case (*SOC*) alleging that Chatham Rock Phosphate Limited (*CRP*) had breached Rule 5.7.1(c) by failing to release multiple announcements to NZX which had been released to its Home Exchange.

4. On 19 December 2019, CRP filed a statement of response (*SOR*).

5. On 20 December 2019, NZX notified the Tribunal that it had decided not to file a rejoinder.

Factual background

6. CRP is a Canadian-incorporated company and is registered in New Zealand as an overseas company. CRP's Home Exchange is the TSX Venture Exchange (*TSXV*), a Canadian public venture capital market operated by TMX Group Inc (who also operate the Toronto Stock Exchange).

7. CRP Listed on the NZAX Market on 13 October 2006 as an Overseas Listed NZAX Issuer. Following NZX's decision to close the NZAX Market, CRP migrated to the NZX Main Board on 28 June 2019 as a NZX Foreign Exempt Issuer under the NZX Listing Rules.

8. CRP was formerly named Antipodes Gold Limited and changed its name following the Reverse Takeover of another NZAX Issuer then called Chatham Rock Phosphate Limited in February 2017 (*the Reverse Takeover*).

9. CRP is based in New Zealand and holds a mining permit covering an area of seafloor on the Chatham Rise east of Christchurch. CRP is currently sourcing the financing it needs to reapply for an environmental consent to extract marine phosphate[1] and describes itself as "not currently an operating business"[2].

NZAX Rules

10. As an Overseas Listed NZAX Issuer, CRP was deemed to have complied with the Rules so long as it remained Listed on its Home Exchange, subject to some exceptions noted in Rule 5.1.8 (including Rule 5.1.7(c)).

11. Under Rule 5.1.7(c), CRP was required to:

> *(c) give to NZX the same information and notices it is required to give to its Home Exchange at the same time as it is required to give such information and notices to its Home Exchange.*

12. The repeal of the Rules does not affect CRP's obligation to comply with the Rules during the time it was Listed on the NZAX or these disciplinary proceedings (Rule 1.5.1).

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[1] CRP announcement to NZX of 12 December 2019.

[2] Paragraph 8 of the SOR.

Announcements

13. NZX advise that during the course of carrying out transitional work relating to CRP's migration to the Main Board, it noted several announcements which had been released to TSXV, but not released to NZX.

14. NZX Regulation (*NZXR*) conducted an investigation into what announcements CRP had released to TSXV and whether they had also been released to NZX focusing on a specific time period - 24 February 2017 to 4 July 2019 (*Relevant Period*). NZXR says this period was selected because it reflects the period from the appointment of CRP's current board following the Reverse Takeover to NZXR making its enquiries to CRP[3].

15. NZX considers that during the Relevant Period, CRP released 61 announcements to TSXV which were not released to NZX as required under Rule 5.1.7(c) (*Missing Announcements*)[4]. NZX have divided the Missing Announcements into two categories:

    a. 17 announcements relating to financial statements; and

    b. 44 administrative announcements.

16. NZX advise that TSXV issuers are required to release quarterly financial statements accompanied by a quarterly management discussion and analysis document (called *MD&A*) within 60 days after the end of quarters 1 to 3 and annual financial statements and an auditor's report within 120 days after the end of each financial year. NZX identified 11 announcements of financial statements and six MD&A announcements which had been released to TSXV and not to NZX during the Relevant Period (*Financial Announcements*)[5].

17. NZX also identified 44 announcements released to TSXV and not to NZX during the Relevant Period, which it describes as strictly administrative such as certifications, request forms, administrative notices, proxy forms and material change reports (*Administrative Announcements*).

18. Canadian issuers that have issued securities under a prospectus or prospectus exemption are generally required to file their statutory documents and market announcements on the System for Electronic Document Analysis and Retrieval (*SEDAR*), the electronic filing system for the disclosure documents of issuers across Canada – see www.sedar.com.

19. CRP's Canadian legal counsel, Harper Grey, filed on SEDAR the documents necessary to meet CRP's Canadian legal requirements. In addition to making administrative filings on SEDAR, Harper Grey was also filing the announcements required by TSXV (NZX advise that announcements filed on SEDAR are automatically filed on TSXV), including the Missing Announcements. CRP advised NZXR that Harper Grey did not always notify it of documents filed on SEDAR because of their administrative nature.

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[3] NZX has not provided any information to the Tribunal on whether CRP complied with Rule 5.1.7(c) before the Relevant Period.

[4] NZX did not provide the Tribunal with a copy of each of the Missing Announcements but did provide a schedule summarising the details of each one.

[5] NZX note that of these 11 announcements of financial statements, three were transitional statements to be filed following completion of the Reverse Takeover and in its view the failure to release these statements is a technical breach and not a breach of CRP's fundamental obligations.

20. CRP advised NZXR that if an announcement was prepared by CRP and sent to Harper Grey to finalise and release on SEDAR, Harper Grey would advise CRP's CEO when it was filed so that CRP could release it to NZX soon after. CRP had released a number of announcements to NZX during the Relevant Period, including its full year financial statements for 2017, 2018 and 2019, as shown on the NZX website. CRP also appears to have initially complied with Rule 5.1.7(c), having released to NZX its quarterly financial statements and MD&A for the three months to 30 June 2017 on 30 August 2017.

Submissions from NZX

21. NZX submits that CRP's failure to release the Financial Announcements to NZX (with the exception of the three transitional announcements noted below) is analogous to a breach of an Issuer's fundamental obligations because financial reporting statements are a vital stream of information for shareholders and potential investors. NZX state that there is a risk that investors may have been harmed or that there may have been a market impact because investors did not have access to this information on the NZX.

22. In respect of the Administrative Announcements, NZX submits that the information is unlikely to have had any material effect on the share price of CRP or contain information required by NZX Product Operations for operational purposes. NZX acknowledges that the Administrative Announcements did not contain any new information and that it has not determined that there has been any identifiable harm to the markets from failing to release these to NZX.

23. NZX advise that it is satisfied that the Missing Announcements did not contain any Material Information, but notes that the Financial Announcements inherently contained highly relevant information on CRP's financial and operating performance.

24. NZX also advise that since CRP's Listing on the Main Board on 1 July 2019 up to the date of the SOC, NZXR has not detected any breaches by CRP of NZX Listing Rule 1.7.2, the equivalent to Rule 5.1.7(c).

Submissions from CRP

25. CRP accepts the breach of Rule 5.1.7(c). However, it does not accept that the information in the Missing Announcements was material or not already available to the market[6].

26. CRP submits that as the information in the Missing Announcements was not material information and only contained administrative announcements as required by the TSXV, there was no asymmetry of information between the TSXV and NZX.

27. CRP disputes that the Missing Announcements were periodic announcements. CRP considers that the quarterly financial reporting required by TSXV is not analogous to the NZX periodic reporting requirements and that the failure to release the MD&A announcements represents an administrative failure in process and not a fundamental breach of the periodic reporting requirements. CRP also notes that as it is not currently an operating business, there was nothing of any materiality to disclose each quarter.

28. CRP submits that the penalty of $35,000 and associated costs are funds that it does not currently have available and would put CRP at risk of having to exit the market.

[6] CRP also noted that six of the Missing Announcements had been sent directly to its shareholders, including its notices of meeting.

29. CRP advise that it was unable to self-report the breach as it was unaware of the breach until contacted by NZXR and had it been aware it would have corrected the error and self-reported to NZX.

30. CRP notes that it corrected its processes as soon as it became aware of the Missing Announcements (although it has not elaborated on what those processes are) and understands the obligations it has to comply with the NZX Listing Rules.

NZ Markets Disciplinary Tribunal Determination

31. The Tribunal finds that CRP breached Rule 5.1.7(c) by not releasing the Missing Announcements to NZX at the same time they were released to TSXV. CRP accepts that it breached Rule 5.1.7(c).

32. The Tribunal must then determine the appropriate penalty to be imposed on CRP for breaching the Rules.

33. NZX submits that the appropriate penalty is a fine of $35,000, the payment by CRP of NZX and the Tribunal's costs and a public censure.

34. CRP submits that the penalty imposed should be at the lower end taking into account its previously unblemished record, the circumstances of CRP and that market integrity was maintained given its announcements to NZX. CRP also states that it accepts any censure the Tribunal sees fit in the circumstances.

Reasons for the decision

35. The intention of Rule 5.1.7 was that an Overseas Listed NZAX Issuer could efficiently access the New Zealand capital market without further compliance requirements by meeting their Home Exchange's obligations. The benefit of this secondary listing was subject to the requirement that the Overseas Listed NZAX Issuer gave NZX the same information and notices it was required to give its Home Exchange, at the same time as it was required to give them to its Home Exchange. This was to ensure that investors in both exchanges were equally informed and to prevent information asymmetry between the exchanges.

36. NZX submits that CRP's breach was serious and falls within Penalty Band 3 of Procedure 9 of the Tribunal Procedures (*the Procedures*). NZX considers that CRP's failure to release the Financial Announcements to NZX (aside from the three transitional statements noted above) is analogous to a breach of an Issuer's fundamental obligations. The Tribunal disagrees with this submission. While the obligation in Rule 5.1.7(c) is an important requirement, the Tribunal does not consider this Rule to be equivalent to a failure by an Issuer to meet its periodic reporting requirements. The Tribunal notes that the Financial Announcements had been released on CRP's Home Exchange and were publicly available. In the Tribunal's view, the breach of Rule 5.1.7(c) by CRP more appropriately falls within Penalty Band 2 as a moderate compliance breach.

37. Under Penalty Band 2, a penalty in the range of $0 to $200,000 may be imposed. To determine the appropriate level of penalty within this band, 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.

Aggravating factors

38. The Tribunal considered that the following aggravating factors were likely to increase the penalty in this case:

a. CRP did not have adequate processes and systems in place to ensure compliance with Rule 5.1.7(c);

b. there were a significant number of announcements not released to NZX over a substantial period of time;

c. the breach was not self-reported and the Tribunal considers that the breach would likely have continued if not for NZXR's intervention;

d. investors were entitled to rely on the same information being released by CRP to both the NZX and TSXV at the same time; and

e. the Tribunal does not agree with the submission of CRP that the Missing Announcements were only administrative in nature, particularly its quarterly financial statements. While CRP is not currently an operating business, its on-going financial position was relevant to investors in order for them to assess whether CRP could continue with its business plan.

Mitigating factors

39. The Tribunal considered that the following mitigating factors were likely to reduce the penalty in this case:

a. the Missing Announcements were publicly available on TSXV and SEDAR;

b. NZX states that there is no evidence to suggest that the breach by CRP has caused any loss to the market (although noting that the information asymmetry may have impacted investors and the market);

c. CRP submits that its breach was inadvertent and once it had been notified of the issue by NZXR it corrected its processes to ensure future compliance;

d. NZX advise that CRP cooperated with its investigation, although CRP's initial responses indicate to the Tribunal that CRP did not understand its compliance requirements;

e. NZX advise that there is no evidence to suggest that CRP gained a financial benefit or commercial advantage from the breach; and

f. CRP has not been referred to the Tribunal before, nor has NZX advised of any previous breaches of the Rules by CRP.

Previous Tribunal decisions

40. The Tribunal has not previously considered a matter involving a breach of Rule 5.1.7(c) or its equivalent under the NZX Listing Rules.

41. NZX has compared CRP's breach to two recent decisions by the Tribunal involving breaches of the periodic reporting requirements in *NZMDT 3/2018 NZX v Windflow Technology Limited* and *NZMDT 2/2016 NZX v Pyne Gould Corporation*. These decisions are of limited applicability to the current case as neither involved consideration of a breach of Rule 5.1.7(c), with each Issuer's Home Exchange being NZX. In any event, for the reasons set out above, the Tribunal does not consider CRP to have breached a fundamental obligation and considers that CRP's breach falls within Penalty Band 2, not Penalty Band 3.

Penalty to be imposed

42. Having considered the nature of the breach and CRP's conduct, including the mitigating and aggravating factors noted above, the Tribunal considers that the breach falls at the low end of Penalty Band 2. Accordingly, the Tribunal considers that, in the circumstances of this particular case, a penalty of $25,000 is appropriate.

43. The Tribunal notes that the ability of an Issuer to pay any penalty imposed should they breach the Rules, is not of itself a reason to discount the amount which the Tribunal would otherwise consider an appropriate penalty having regard to the seriousness of the breach and the conduct of the Issuer.

44. The Tribunal also notes that under the Procedures, it has the discretion to take into account that the amount of the financial penalty is likely to deter future breaches by the respondent and to deter other parties from breaching the same or similar obligation.

Public censure

45. NZX has sought a penalty of public censure. CRP state that it will accept any censure the Tribunal sees fit in the circumstances.

46. 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.

47. While there was no measurable harm to investors in this instance, the Tribunal notes that CRP repeatedly breached the Rules (with a significant number of announcements to TSXV not released to NZX over a substantial period of time), CRP's lack of adequate processes demonstrated a disregard for the Rules and that the breach fell within Penalty Band 2.

48. Having regard to Procedure 9.3, including that the Tribunal must use its discretion when deciding whether to impose a penalty of public censure and in doing so must have regard to the overall conduct of the respondent, the Tribunal considers that a public censure in this case is appropriate.

49. The Tribunal also considers that there is an educational benefit to the market in re-enforcing the obligations that apply to an NZX Foreign Exempt Issuer under NZX Listing Rule 1.7.2 (the equivalent obligation to the now repealed Rule 5.1.7(c)).

Orders

50. The Tribunal orders that CRP:

    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 $25,000 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.

DATED 10 JANUARY 2020

Mariëtte van Ryn, Division Chair, NZ Markets Disciplinary Tribunal