ANNUAL REPORT 2023

NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL

CONTENTS

This report covers the period 1 January 2023 to 31 December 2023. Terms capitalised in this report have the meanings given to them in the NZX Market Rules.

TRIBUNAL CHAIR'S REPORT

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This year is the 20th anniversary of the NZ Markets Disciplinary Tribunal. NZX Discipline, as the Tribunal was called then, was established in May 2004 and Chaired by Mr Donald G. Trow. In his inaugural Chair's report, Mr Trow noted that the success of the Tribunal in its first two years was largely due to the commitment and willing contribution of its members. That sentiment is still true 20 years later. The Tribunal has been fortunate to include within its membership a breadth of experience and knowledge over the years. I believe the quality of its decisions, relative informality and speed of its hearing process will ensure that the Tribunal continues to be an integral part of the regulatory framework of the New Zealand capital markets.

In my following report I outline the role of the Tribunal, and the Tribunal's approach to penalty setting and activities in 2023.

Role of the NZ Markets Disciplinary Tribunal

The NZ Markets Disciplinary Tribunal (*Tribunal*) is an independent body established under the NZ Markets Disciplinary Tribunal Rules (*Tribunal Rules*). NZX Regulation Limited (*NZ RegCo*) appoints the members of the Tribunal and NZX Limited (*NZX*) makes the Tribunal Rules which set out the Tribunal's powers and functions, subject to approval by the Financial Markets Authority (*FMA*).

The Tribunal fulfills a narrow, but important, adjudicative role. The Tribunal's primary responsibility is to determine whether there has been a breach of the NZX Participant Rules, the NZX Listing Rules (*Rules*), the NZX Derivatives Market Rules, the Clearing and Settlement Rules of New Zealand Clearing Limited or the Fonterra Shareholders' Market Rules (*NZX Market Rules*) in matters referred to it by NZ RegCo. Only NZ RegCo can refer a potential breach of the NZX Market Rules to the Tribunal for consideration. If a breach is established, the Tribunal must determine what, if any, penalties should be imposed, having regard to the Tribunal Rules and Tribunal Procedures.

The Tribunal may also review decisions made by NZ RegCo in respect of a waiver or ruling in matters referred to it by the applicant, provided certain grounds are met, including where the decision was irrational given the evidence available, or the rules of procedural fairness were not observed. A third party, such as a shareholder, cannot refer a decision made by NZ RegCo to the Tribunal.

The Tribunal does not monitor or investigate market conduct. That role is performed by NZ RegCo and the FMA. The Tribunal does not make the NZX Market Rules, nor is it involved in the development of capital markets policy. The NZX Market Rules are made by NZX, subject to approval from the FMA.

Tribunal Procedures

The penalties the Tribunal may impose, if a breach of the NZX Market Rules is established, are set out in the Tribunal Rules. They include the power to impose a fine of up to $500,000. The Tribunal Procedures provide guidance to the Tribunal when assessing the appropriate financial penalty up to this maximum amount. In October 2022, key changes were made to the Tribunal Procedures including:

- introducing a two-step process to penalty setting; and
- a revised range of financial penalty for each of the three penalty bands.

All the matters referred to the Tribunal in 2023 by NZ RegCo were considered under the revised Tribunal Procedures, giving the Tribunal the opportunity to develop its approach to penalty setting and to provide guidance to the market on how they will be applied.

The scheme set out in the Tribunal Procedures for assessing penalty does not operate in a fixed or mechanical way. The Tribunal Procedures are not determinative, and the Tribunal will ultimately use its discretion in determining the appropriate penalty. The Tribunal Procedures provide a framework, which identifies some, but not all, factors relevant to penalty-setting, while allowing sufficient flexibility to ensure that the Tribunal can take account of the particular circumstances of individual matters.

The Tribunal 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

Step 2 – adjust that starting point penalty to reflect the aggravating and mitigating factors relevant to the participant who has been referred.

Step 1: Factors relating to the breach

The Tribunal 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

The Tribunal will determine the appropriate penalty band for a breach of the NZX Market Rules based on an overall assessment of the seriousness of the breach in each matter. Tribunal 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. These factors all relate to the obligation breached and the impact or potential impact of the breach. 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 one or more penalty bands. It is also possible for a matter to fall within a penalty band where only one factor exists. The Tribunal will use its discretion to weigh up all the factors present to ensure that they are appropriately balanced.

One of the key differences in the revised Tribunal Procedures is that Penalty Band 3 no longer includes as a factor that "The breach relates to a fundamental obligation". This factor has been removed so that a breach of a fundamental obligation, such as a governance breach, may not necessarily fall within Penalty Band 3 as it did previously. 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 relevant to the participant

Once the Tribunal has determined the appropriate penalty band and the starting point penalty, it must determine the final penalty by adjusting the starting point penalty to reflect any aggravating and mitigating factors relevant to the participant. The revised Tribunal Procedures 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. The Tribunal will weigh up all the relevant factors and apply an uplift or discount as appropriate, depending on the circumstances of the particular matter. Because of this adjustment, it is possible that the final financial penalty for a breach may fall outside of (above or below) the starting point penalty band initially identified by the Tribunal.

As more matters are referred to the Tribunal, more guidance will develop on the Tribunal's approach to penalty-setting and how it interprets the factors set out in the revised Tribunal Procedures. Key learnings to date include:

Factors relevant to penalty band and starting point penalty

(a) Seriousness of the breach - whether the breach is a minor, moderate or serious administrative, operational or compliance breach is not an assessment of the overall severity of the breach (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.

(b) Potential impact - the key to assessing whether the breach had the potential to cause a minor, moderate or serious impact on investors and/or the market is to consider the nature of the harm that the relevant NZX Market Rule seeks to prevent and to assess the potential for that harm to occur at the time of the breach.

(c) Financial benefit - where there is a negligible financial benefit because costs were inadvertently minimised due to a breach, such a benefit may not contribute to increasing the penalty (for example, where Director fees were not paid during a short-term vacancy). Such circumstances can be distinguished from a situation where a breach resulted in an 'ill-gotten gain', which may contribute to increasing the penalty.

(d) Duration of breach - each penalty band includes, as a factor, whether the breach was promptly addressed (Penalty Band 1), occurred for a short period (Penalty Band 2) or continued for an extended period (Penalty Band 3). When assessing the duration of a breach, the Tribunal will have regard to the nature of the breach - some NZX Market Rules 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. The Tribunal has observed that a breach may continue for a 'moderate' period (i.e. something between 'short' and 'extended').

(e) Breach continued to occur once discovered – any breach should be rectified promptly upon its discovery where possible. The Tribunal observed in one matter that a Board waited until its next scheduled Board meeting to rectify a breach when the matter could have been resolved sooner.

Mitigating or aggravating factors

(f) Compliance history - previous NZX Market Rule breaches are relevant when assessing a participant's compliance history. The nature of the previous breach will likely determine what weight this factor is given (for example, a recurring breach of the same or similar NZX Market Rules is likely to be particularly aggravating).

(g) Commercial viability - under Tribunal 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 in the revised Tribunal Procedures. This factor does not relate to the size of a participant. All participants are required to comply with the NZX Market Rules, regardless of size, and size is not, of itself, a mitigating or aggravating factor. Rather, it relates to the financial position of a participant and whether the proposed starting point penalty would adversely affect its ongoing commercial viability. A relatively high threshold is required before this factor will apply given that the penalties imposed by the Tribunal are intended to be punitive.

(h) Negligence – negligence is not specified in the list of possible aggravating factors, although as noted above that list is not exhaustive and the Tribunal may use its discretion to consider whether a breach was negligent. The Tribunal has observed that the act of breaching an NZX Market Rule may not of itself be negligent, rather some additional element is required to elevate a breach to this level.

Referrals

Seven matters were referred by NZ RegCo to the Tribunal in 2023, up from one matter referred during 2022. One appeal was also considered – the first appeal since 2018. Each of these matters is summarised on pages 14 to 38.

The penalties imposed in 2023 by the Tribunal under the revised Tribunal Procedures ranged from $25,000 to $75,000. All matters referred to the Tribunal in 2023 were considered to fall within Penalty Band 2 (which has a penalty range of $30,000 to $250,000). While several matters were found to have involved serious compliance breaches, none had caused a significant impact on investors or the market.

Five of the seven matters referred involved breaches of the Board and/or Audit Committee composition requirements under the Rules (including four which involved historical breaches of significant duration). Three of the breaches came to light following complaints received by NZ RegCo on other matters. One came to light following the anonymous provision of information to NZ RegCo. In some cases, confusion seems to have arisen between what is required under the Rules and what is recommended under the NZX Corporate Governance Code (*the Code*). The Tribunal is disappointed that these breaches occurred as it considers the long-standing composition requirements to be clear.

Two of the matters referred involved breaches of the annual reporting requirements under the Rules where Issuers failed to fully report on their compliance with the Code recommendations. These are the first referrals to the Tribunal for such a breach. While the Code recommendations are not mandatory, the requirement to explain non-compliance in an Issuer's annual report is (Rule 3.8.1). The 'comply or explain' regime has been in place since 2017. While there may have been initial tolerance to incomplete disclosure while the regime was imbedded, and the Code underwent further refinement, Issuers should be fully aware by now of the reporting requirements.

Another concerning theme arising from the matters referred to the Tribunal were inaccurate or incomplete governance disclosures in Issuers' annual reports. Robust compliance checks on an Issuer's annual report should be undertaken each year to ensure the accuracy of the information provided and that the disclosure obligations are met.

One matter referred involved a breach of the continuous disclosure requirements. The factual circumstances were complex, but the parties agreed that the relevant information was Material Information. The matter centred on when the obligation to disclose arose and whether the safe harbour exception for an incomplete proposal or negotiation applied. The matter also highlighted the need for Boards to carefully consider their continuous disclosure obligations and to record those deliberations.

Six of the seven matters referred were against Issuers, with only one matter against a Trading Participant. That matter involved unauthorised access to the Trading System by an employee who was not a Dealer or a DMA Authorised Employee and who had 'inadvertently' been given access.

NZ RegCo

NZ RegCo is responsible for monitoring and enforcing the NZX Market Rules. NZ RegCo published its Oversight Report for 2023 on 29 February 2024 – see here. The report includes information on the investigation and enforcement activity undertaken by NZ RegCo during 2023 and was provided to the Tribunal in connection with NZX's annual regulatory reporting requirements under the Tribunal Rules.

Under the Tribunal Rules, NZ RegCo has the power to issue fines of up to $10,000 for minor breaches of the NZX Market Rules. NZ RegCo issued four Infringement Notices in 2023 – see here. All four involved breaches of the Audit Committee composition requirements under the Rules. NZ RegCo has stated that compliance with the governance requirements will continue to be a focus in 2024.

Members

NZX appointed new Tribunal members Daniel Wong in April 2023 and Alan Isaac CNZM in June 2023. Sarah Miller was re-appointed to the Tribunal on 1 January 2024, following the completion of her term as an NZX Future Director.

The membership term of Pip Dunphy ended in May 2023 following her appointment to the NZ RegCo Board. The membership terms of Geoff Brown, Richard Keys and Rachael Reed KC ended in June 2023. I thank Geoff, Pip, Richard and Rachael for their service, each having brought substantial experience and expertise to the Tribunal.

The Tribunal's membership currently comprises 10 women and 10 men.

Special Division

James Ogden's report on the activities of the Special Division during 2023 can be found on page 40. This is James' last report as Special Division Chair as his term on the Tribunal ends in May 2024. James has made a significant contribution to the Tribunal over his 12-year term, having Chaired numerous Tribunal divisions often at short notice or over holiday periods. James has served as a member of the Special Division since 2013 and has been its Chair since May 2019. He will be sorely missed.

The term of Tribunal and Special Division member, Mariëtte van Ryn, also ends this year in July. Mariëtte has been a valued member, bringing both a legal and commercial focus to the Tribunal and Special Division's activities. I have particularly appreciated her knowledge of the Rules and clear decision-making.

Resourcing

As required by the Tribunal Rules, the Tribunal confirms that it believes it has adequate resources available to it to undertake its role under the Tribunal Rules and that NZX has continued to provide all the assistance which the Tribunal requires to undertake its role.

The NZX Discipline Fund accounts (which are included in the NZ RegCo Oversight Report for 2023) record an accumulated surplus of $415,166 on 31 December 2023.

I thank all the Tribunal members for their work and ongoing commitment to the Tribunal. I also acknowledge the contributions of David Lane who as Deputy Tribunal Chair has undertaken Chair activities in my stead, and the Hon Sir Terence Arnold KC for his guidance in developing the Tribunal's approach to the revised Tribunal Procedures. Finally, I would also like to acknowledge the invaluable support Rachel Batters has continued to provide me and all the Tribunal members on what has been a busy year.

Deemple Budhia | CHAIR
24 April 2024

MEMBERS

MEMBERS

Members of the Tribunal as at 31 December 2023*

LEGAL

Deemple Budhia (Chair), Hon Sir Terence Arnold KC, John Dixon KC, Rachel Dunne, Kristy McDonald ONZM KC, Daniel Wong

ISSUER

Charles Bolt, Kirsty Campbell, Nicola Greer, Alan Isaac CNZM, James Ogden, Jennifer Page, Mariëtte van Ryn

MARKET PARTICIPANT

David Lane (Deputy Chair), Matt Blackwell, Darren Manning, Rachael Newsome, Dave Roberton, Gretchen Williamson

Rachel Batters and Stephen Layburn act as Executive Counsel to the Tribunal.

Members of the Special Division as at 31 December 2023

James Ogden (Chair), Matt Blackwell, Rachael Newsome, Dave Roberton, Mariëtte van Ryn

Rachel Batters acts as Executive Counsel to the Special Division.

Note:

* Sarah Miller was re-appointed to the Tribunal on 1 January 2024.

REFERRALS

NZMDT 1/2023 NZX V HALLENSTEIN GLASSON HOLDINGS LIMITED (*HLG*)

Division: Hon Sir Terence Arnold KC (Division Chair), Jennifer Page and Mariëtte van Ryn

Statement of Case filed: 8 June 2023

Statement of Response filed: 5 July 2023[1]

Date of Determination: 21 July 2023

Rules Breached: Rules 2.6.3 and 2.13.2(c)

FACTS

Under the Rules, HLG must have an Audit Committee comprised of a majority of Independent Directors (Rule 2.13.2(c)). HLG did not have a majority of Independent Directors on its Audit Committee for four years, from December 2017 to October 2021.

Where HLG's Board decides that a Director's independence differs from the position most recently released to the market, that determination must be released promptly and without delay through MAP (Rule 2.6.3). HLG's Board determined that Mr Popplewell was an Independent Director on 29 October 2021 (previously Mr Popplewell was considered a non-Executive Director). HLG did not advise the market of Mr Popplewell's change in independence until 19 November 2021.

FINDINGS

Step 1: Factors relevant to the breach:

The Tribunal considered the applicable penalty band factors set out in the Tribunal Procedures to determine the appropriate starting point penalty.

Penalty Band 1 factors

(a) No loss - NZ RegCo did not identify any loss caused by HLG's breaches.

(b) No financial benefit and/or commercial advantage - NZ RegCo did not identify any financial benefit or commercial advantage as a result of HLG's breaches.

Penalty Band 2 factor

(c) Potential to cause a moderate impact on investors and the market - While a breach of this nature has the potential to cause a significant impact, the potential impact in this case was reduced because HLG's Audit Committee was Chaired by an Independent Director and consisted of only non-Executive Directors.

[1] HLG requested and was granted an extension of time to provide its Statement of Response.

Penalty Band 3 factors

(d) Serious compliance breach - The requirement for an Audit Committee to have a majority of Independent Directors is an important shareholder safeguard. This requirement supports an unbiased and robust audit process and ensures sufficient separation from an Issuer's management. HLG's failure to have a properly constituted Audit Committee was a serious compliance breach.

(e) Breach continued for an extended period – HLG was in breach of Rule 2.13.2(c) for four years.

Starting point penalty - After considering the relevant factors and assessing the overall seriousness of the breaches, the Tribunal considered that they fell within Penalty Band 2. This decision was finely balanced because HLG's breach of Rule 2.13.2(c) was a serious compliance breach which continued for an extended period. However, these factors were offset by there being no loss or actual impact on investors or the market, no financial benefit or commercial advantage to HLG and the potential impact was reduced because HLG's Audit Committee had an Independent Director as Chair and consisted of only non-Executive Directors. The Tribunal considered that the seriousness of HLG's compliance breach and its extended duration elevated this matter within Penalty Band 2 and that the appropriate starting point penalty was $150,000.

Step 2: Factors relevant to HLG

To determine the final level of penalty, the Tribunal adjusted the starting point penalty to reflect the aggravating and mitigating factors relevant to HLG.

Aggravating factors

(a) Breaches were unintentional, but negligent – The Tribunal considered that the breach of the long-standing requirement that an Audit Committee has a majority of Independent Directors over such an extended period highlighted a concerning and ongoing lack of awareness of the Rules by HLG.

(b) Insufficient compliance procedures - HLG had numerous opportunities to identify its error if thorough and robust compliance checks had been undertaken on its annual report each year.

(c) Recurring breach - HLG's annual reports included and repeated inaccurate information over a successive number of years.

Mitigating factors

(a) Early admission of breach - HLG admitted the breaches to NZ RegCo when they were first raised.

(b) Cooperation with investigation - NZ RegCo advised that HLG fully complied with its investigation.

(c) Committed to improving practices - HLG advised NZ RegCo that it is placing a greater focus on its governance practices to ensure compliance with the Rules.

(d) Good compliance history - NZ RegCo advised that HLG had a good compliance history.

Final penalty – Having considered all the factors, the Tribunal imposed a final penalty of $75,000. The significant reduction from the starting point penalty reflected the mitigating factors noted above. The Tribunal was satisfied that this level of penalty would deter future breaches of this Rule by Issuers.

PENALTY

HLG was ordered to pay $75,000 to the NZX Discipline Fund.

COSTS

HLG was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION

Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal considered it appropriate to publicly censure HLG as the failure to have a properly constituted Audit Committee for such a length of time had the potential to damage confidence in the market and the breaches fell within Penalty Band 2.

The Tribunal's full determination and public censure of HLG can be viewed here.

NZMDT 2/2023 NZX V 2 CHEAP CARS GROUP LIMITED (*2CC*)

Division: James Ogden (Division Chair), Nicola Greer and Daniel Wong

Statement of Case filed: 9 August 2023

Statement of Response filed: 18 August 2023

Date of Determination: 6 September 2023

Rules Breached: Rules 2.1.1(c) and 2.13.2(c)

FACTS

Under the Rules, 2CC must have at least two Directors who are Independent Directors (Rule 2.1.1(c)) and an Audit Committee comprised of a majority of Independent Directors (Rule 2.13.2(c)). An "Independent Director" is a Director who is not an Employee and who has no Disqualifying Relationship.

2CC breached Rule 2.1.1(c) by having only one Independent Director and Rule 2.13.2(c) because its Audit Committee did not have a majority of Independent Directors during the eight weeks its Director, Mr Shaw, acted as a contractor for 2CC Subsidiary, NZ Motor Finance Limited (*NZMF*), making him an "Employee".

FINDINGS

Step 1: Factors relevant to the breach:

The Tribunal considered the applicable penalty band factors set out in the Tribunal Procedures to determine the appropriate starting point penalty.

Penalty Band 1 factor

(a) No loss or harm - NZ RegCo did not identify any loss or harm to investors caused by 2CC's breaches.

Penalty Band 2 factors

(b) Potential to cause a moderate impact on investors and the market - The potential impact in this case was reduced because (1) 2CC's Board was Chaired by an Independent Director, who was also a member of its Audit Committee; (2) Mr Shaw did not have a Disqualifying Relationship; and (3) while an Employee, Mr Shaw had a limited contractual role with NZMF, reducing the likelihood of management influence.

(c) Breach of 'moderate' duration – The Tribunal considered that when having regard to (1) the eight-week duration of the breach; and (2) the breach not continuing after NZ RegCo had drawn 2CC's attention to the matter, the duration of the breach fell within Penalty Band 2. The Tribunal categorised the breach as being of 'moderate' (as opposed to 'short') duration.

Penalty Band 3 factor

(d) Serious compliance breach - The Independent Director requirements are important shareholder safeguards, intended to ensure (1) a sufficiently independent perspective to Board decision-making and to give investors' confidence that their interests will be represented; and (2) an Issuer maintains a robust audit process with sufficient separation from its management. 2CC's breaches were a serious compliance breach. 2CC should have been well aware of the Independent Director requirements given the changes in its Board during 2022 and early 2023, its previous engagement with NZ RegCo and that Mr Shaw's status as an Independent Director had only recently resumed, following the end of his role as Interim CEO.

Starting point penalty – When weighing up all the relevant factors, the Tribunal found that 2CC's breaches most appropriately fell within Penalty Band 2. When assessing the overall seriousness of the breach, the Tribunal considered that it fell at the bottom of Penalty Band 2 and was distinguishable from the HLG decision given 2CC's breaches were much shorter and the potential for harm was reduced because Mr Shaw did not have a Disqualifying Relationship and had a limited contractual role in a minor Subsidiary. The Tribunal considered that the appropriate starting point penalty was $30,000.

Step 2: Factors relevant to 2CC

To determine the final level of penalty, the Tribunal adjusted the starting point penalty to reflect the aggravating and mitigating factors relevant to 2CC.

Aggravating factors

(a) Breaches were negligent – the Tribunal considered that 2CC was negligent. In making a "quick decision" to have Mr Shaw undertake the NZMF role, 2CC did not adequately consider the implications this would have on his status as an Independent Director (particularly given he had just completed a term as Interim CEO). The Tribunal was also concerned by 2CC's statements in its 2023 Annual Report which gave the impression that 2CC had complied with the Independent Director requirements when for a time, they had not.

(b) Compliance history - While the Tribunal considered that 2CC's previous breach of Rule 2.7.1 was a relevant factor, it was not significantly aggravating given that breach appeared to have been minor and unrelated to the present breach.

Mitigating factors

(a) Cooperation with investigation - While the Tribunal considered that 2CC cooperated with NZ RegCo's investigation, it was not a significant mitigating factor given 2CC's initial responses were not "full" or "open".

(b) Committed to improving practices - 2CC advised NZ RegCo that its Board and management have been implementing improved governance and training measures.

Final penalty – The Tribunal considered that more weight should be afforded to the aggravating factors and as such the starting point penalty should be increased. The Tribunal imposed a final penalty of $40,000.

The Tribunal noted that the differential between the ultimate penalty imposed on HLG and the one imposed on 2CC could have been higher but for the lack of mitigating factors applicable to 2CC.

PENALTY

2CC was ordered to pay $40,000 to the NZX Discipline Fund.

COSTS

2CC was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION

Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal considered it appropriate to publicly censure 2CC as its breaches had the potential to damage confidence in the market and fell within Penalty Band 2.

The Tribunal's full determination and public censure of 2CC can be viewed here.

APPEAL AGAINST NZMDT 2/2023 NZX V 2CC

Appeal Division: David Lane (Appeal Division Chair), John Dixon KC and Mariëtte van Ryn

Statement of Appeal filed: 18 September 2023

Date of Appeal Determination: 3 October 2023

FACTS

2CC appealed against the penalty imposed in the 2CC decision. 2CC did not appeal against the interpretation or application of the Rules, having accepted its breach of Rules 2.1.1(c) and 2.13.2(c).

2CC sought leave to introduce new evidence - that during the 8-week period of its breaches only one Audit Committee meeting was held.

ROLE OF THE TRIBUNAL ON APPEAL

An appeal must be conducted as a review and not a rehearing (Tribunal Rule 7.6.1(a)). Subject to Tribunal Rule 7.6.1(c) (the introduction of new evidence), the Appeal Division must hear and determine the appeal based on the facts accepted by the Hearing Division. The Appeal Division may (1) affirm the determination of the Hearing Division; or (2) vary or set aside the determination where it considers that the determination resulted from either a misinterpretation or an erroneous application of the relevant NZX Market Rules (Tribunal Rule 7.8.1).

The scope of an appeal under the Tribunal Rules is intended to be relatively narrow. The role of the Appeal Division is to review the Hearing Division's determination to see whether it has erred in its interpretation of the relevant NZX Market Rules or in the way it has applied the relevant NZX Market Rules to the particular facts it has found. The Appeal Division's focus will be on identifying some material error in the Hearing Division's reasoning (if any), not considering the matter afresh, consistent with past appeal decisions. If the Hearing Division's decision is within the scope of what was available to it, the Appeal Division will be unwilling to disturb that decision in the absence of a material error, even where an Appeal Division may have reached a different outcome.

Either party can seek leave to introduce new evidence on appeal (Tribunal Rules 7.2.2(e) and 7.4.2(b)). Any such application must indicate why the evidence was not made available at the Hearing and what its relevance is to the issues on appeal. When determining whether to admit new evidence on appeal, the Appeal Division must consider (1) why the new evidence was not made available at the Hearing; and (2) whether the new evidence is credible and, if so, is relevant to the issues on appeal.

Where leave is granted for the introduction of new evidence on appeal, the Appeal Division must assess that evidence and consider whether, and if so, how, it affects the determination of the Hearing Division. If the Appeal Division considers that the new evidence would have materially affected the Hearing Division's application of the relevant NZX Market Rules to the facts, so that there is an error in the Hearing Division's analysis, it will be entitled to vary or set aside the determination.

FINDINGS

New evidence not admissible

Sometimes, after a decision is delivered but before an appeal is heard, there can be developments that impact on the issues on appeal. In those circumstances, appellate bodies are generally willing to receive updating evidence. There is a difference, however, when the new evidence a party wishes to introduce on appeal was available at the time of the original hearing and could, with reasonable diligence, have been produced at that hearing. Tribunal Rule 7.5.2(a) constrains a party's ability to introduce new evidence on appeal by requiring the Appeal Division to consider why the new evidence was not made available at the Hearing. It is important that parties put forward their best case at the Hearing and, apart from genuinely updating evidence, the introduction of new evidence on appeal will occur only in limited circumstances, such as where the evidence could not have been provided at the Hearing for some good reason or where it could not reasonably have been predicted that a particular issue would arise or be considered by the Hearing Division.

The Appeal Division considered that 2CC's evidence – that its Audit Committee met once during the eight-week period it was in breach - could have been produced by 2CC at the Hearing. There was no good reason for it not to have been produced and it should have been predictable that the potential impact of 2CC's breach would be considered by the Hearing Division. The Appeal Division declined to introduce this evidence on appeal. The Appeal Division noted that even if it was admitted, it would not have materially affected the Hearing Division's decision - the fact the Audit Committee met once during the eight-week period 2CC was in breach (1) related only to the breach of Rule 2.13.2(c); (2) was more relevant to assessing whether actual harm arose; and (3) was not unexpected.

Grounds for appeal

2CC argued that (1) its breach should have been assessed as falling within Penalty Band 1 not Penalty Band 2; and (2) the Hearing Division did not strike the appropriate balance of the aggravating and mitigating factors.

Decision

The Appeal Division affirmed the determination of the Hearing Division in the 2CC decision.

The Appeal Division did not consider that there was a material error in the Hearing Division's reasons for finding that (1) 2CC's breach fell within Penalty Band 2 (as opposed to Penalty Band 1); (2) the appropriate starting point penalty was $30,000; and (3) the appropriate ultimate penalty was $40,000. The Hearing Division constructed the penalty within the scope of the options available to it. The Appeal Division did not consider that the 2CC decision resulted from either a misinterpretation or an erroneous application of the Tribunal Rules, and by extension the Tribunal Procedures, as they relate to penalty setting.

Note - 2CC argued that Issuer size is relevant when determining seriousness and culpability for a breach. The Appeal Division noted that all Issuers are required to comply with the Rules, regardless of size. When investors trade on the NZX market they expect, rightfully, that the Rules apply to all Issuers (unless they are designated Non-Standard). The Appeal Division noted that an Issuer's size may contribute to a factor relevant in assessing penalty, but it is not, of itself, a determinative factor. 2CC also argued that no

aggravating amount should be imposed on the basis that one or both aggravating factors - "compliance history" and "negligence" – should be removed. The Appeal Division did not consider that the Hearing Division misinterpreted the Tribunal Procedures or erred by considering as aggravating factors 2CC's previous Rule breach, its negligence in failing to consider the implications Mr Shaw's role with NZMF would have on his status as an Independent Director, and the statements made in its 2023 Annual Report. Nor did the Appeal Division consider the uplift from $30,000 to $40,000 based on the Hearing Division's assessment of these aggravating factors, versus the limited mitigating factors, to have been outside of the scope of its discretion under the Tribunal Procedures or a material error given the circumstances of this case. The Appeal Division did not consider that the mitigating factors detailed in the 2CC decision were equivalent to the mitigating factors in the HLG decision as suggested by 2CC.

COSTS

2CC was ordered to pay the costs of the Tribunal and NZX in considering the appeal.

PUBLICATION

The Appeal Division's decision was publicly released – see here.

NZMDT 3/2023 NZX V PARTICIPANT A

Division: Dave Roberton (Division Chair), Rachael Newsome and Gretchen Williamson

Approved Settlement Agreement filed: 19 September 2023[2]

Date of Determination: 21 September 2023

Rules Breached: NZX Participant Rules 3.13(a), 3.13(c), 4.5.1, 4.5.2, 4.5.5, 10.7.1 and 21.7.1

FACTS

Participant A is an NZX Trading and Advising Participant. An employee of Participant A (Employee A) was given access to the Trading System despite not being a Dealer or a DMA Authorised Employee. This unauthorised access went undetected for around two months, during which time Employee A unknowingly entered a small number of orders direct to market, some of which traded. The orders that traded were in accordance with client instructions. One of the orders entered was incorrect and was detected by a Participant A Dealer and subsequently cancelled (*Error Order*). Following the Error Order, Participant A's compliance function was notified, and the unauthorised access was discovered and removed. Participant A notified NZ RegCo of the breach a month after it was discovered (*Breach Report*).

NZ RegCo found that Participant A breached NZX Participant Rules:

(a) 3.13(a) and 3.13(c) by not ensuring that Employee A was adequately supervised or fully complying with the Rules;

(b) 4.5.1, 4.5.2, 4.5.5 and 10.7.1 because Employee A had access to the Trading System despite not being a Dealer or a DMA Authorised Employee; and

(c) 21.7.1 because the Breach Report was submitted over a month after the breach was identified.

NZ RegCo and Participant A jointly submitted a Settlement Agreement for Tribunal approval under Tribunal Rule 8.1.1. Under the terms of the Settlement Agreement, Participant A admitted breaching NZX Participant Rules 3.13(a), 3.13(c), 4.5.1, 4.5.2, 4.5.5, 10.7.1 and 21.7.1, agreed to pay a financial penalty of $30,000 and to pay the costs of NZX and the Tribunal. The parties agreed that Participant A would be privately reprimanded by the Tribunal.

FINDINGS

To approve the Settlement Agreement, the Tribunal had to be satisfied that the penalties agreed by the parties were appropriate in the circumstances of this case.

Step 1: Factors relevant to the breach:

[2] The parties filed an initial Settlement Agreement on 18 August 2023. Following correspondence from the Tribunal a revised Settlement Agreement was submitted on 19 September 2023.

The Tribunal considered the applicable penalty band factors set out in the Tribunal Procedures to determine the appropriate starting point penalty.

Penalty Band 1 factors

(a) No loss - NZ RegCo identified no loss as a result of Participant A's breaches. Aside from the Error Order, the orders entered by Employee A were in accordance with client instructions. The Error Order was subsequently cancelled by NZ RegCo with no loss to the client.

(b) No impact on clients or the market - None of the orders caused a market impact, moved the market or impacted on client priority. No other Market Participant was impacted by the Error Order's cancellation.

(c) No financial benefit and/or commercial advantage - Any brokerage paid on the unauthorised orders which traded would have been obtained regardless of whether they were entered by Employee A or a Dealer as they were based on client instructions.

Penalty Band 2 factor

(d) Breach of 'moderate' duration – The Tribunal noted that (1) the eight-week duration of Employee A's unauthorised access to the Trading System; and (2) the month it took to file the Breach Report, could have warranted a finding that the duration fell within Penalty Band 3. However, given the small number of orders entered by Employee A and that the breach was promptly remedied once Participant A became aware of the issue, the Tribunal considered that the duration of the breaches fell within Penalty Band 2.

Penalty Band 3 factors

(e) Serious compliance breach - The requirement that only Dealers or DMA Authorised Persons may have direct access to the Trading System is important. Unauthorised use of the Trading System can disrupt an orderly market and impact market integrity. Trading Participants must ensure they maintain and enforce appropriate security procedures and controls. Participant A giving Employee A access to the Trading System, although 'inadvertent', was a serious compliance breach.

(f) Potential to cause a significant impact on clients and the market - The NZX Participant Rules are intended to ensure that only appropriately qualified people who have been accredited by NZX and who understand all the applicable Rules relating to trading conduct, Good Broking Practice and the relevant Guidance Notes can access the Trading System. The Tribunal considered that there was an increased potential in this case to cause market disruption because Employee A was not accredited to access the Trading System, was not receiving adequate supervision and only 'soft filters' were in place.

Starting point penalty – After weighing up all the relevant factors, the Tribunal considered that the breaches fell within Penalty Band 2. When assessing the overall seriousness of the breach, the Tribunal considered that this matter fell at the bottom of Penalty Band 2, primarily because Participant A's breaches did not cause any loss for clients and there was no actual impact on investors or the market. The Tribunal considered that the appropriate starting point penalty was $30,000.

Step 2: Factors relevant to Participant A

To determine the final level of penalty, the Tribunal adjusted the starting point penalty to reflect the aggravating and mitigating factors relevant to Participant A.

Aggravating factors

(a) Breaches were unintentional, but negligent – Participant A described Employee A being given direct market access as 'inadvertent'. While unintentional, the Tribunal was concerned that (1) the implications of Employee A's access and authorities were not adequately considered; (2) Employee A was not under full supervision as intended by Participant A; and (3) despite awareness that the Error Order had gone straight to market, further orders were subsequently entered and deleted with Employee A unaware this had happened. In these circumstances, together with the lack of procedures and controls, the Tribunal considered that Participant A was negligent.

(b) Insufficient controls and procedures – There were a number of areas where Participant A's procedures and controls were insufficient – lack of checks when granting access to the Trading System, inadequate supervision of Employee A, failing to detect the unauthorised access for two months and the month long delay in filing the Breach Report.

Mitigating factors

(a) Early admission of breach – Participant A accepted the breach at an early stage.

(b) Cooperation with investigation - NZ RegCo advised that Participant A cooperated with its investigation.

(c) Improved practices – Participant A had taken a number of detailed steps to enhance its controls for access to the Trading System and to improve staff supervision.

(d) One off-event - NZ RegCo advised that Participant A's breaches were a one-off event.

(e) Good compliance history - NZ RegCo advised that Participant A had a good compliance history.

Final penalty – Although there were factors in this case which were particularly aggravating, when weighed against the mitigating factors and that a settlement was reached, the Tribunal did not consider that an increase to the starting point penalty was warranted. The Tribunal considered that a final penalty of $30,000 was appropriate and approved the Settlement Agreement.

Note: Under Tribunal Procedure 9.2.7, the Tribunal can consider the willingness of a participant to reach a settlement when determining the final penalty.

PENALTY

Participant A was ordered to pay $30,000 to the NZX Discipline Fund.

COSTS

Participant A was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION

Under the Settlement Agreement, the parties agreed to a private reprimand of Participant A. The Tribunal was satisfied that a private reprimand was appropriate in this matter having considered the guidance set out in Tribunal Procedure 9.3. While Participant A's breaches fell within Penalty Band 2, the Tribunal noted that (1) Participant A had not repeatedly breached the NZX Participant Rules; and (2) the breaches did not harm clients or the market. The Tribunal also considered that the confidentiality of the individuals involved in the proceeding should be maintained given that the findings of breach in this case were made against Participant A and that no individual had been a party to these proceedings (and therefore had not had the opportunity to be heard). The Tribunal noted that the educational benefits for Market Participants arising from its decision could be achieved through the release of a summary of facts and findings.

NZMDT 4/2023 NZX V MILLENNIUM & COPTHORNE HOTELS NEW ZEALAND LIMITED (*MCK*) AND NZMDT 5/2023 NZX V CDL INVESTMENTS NEW ZEALAND LIMITED (*CDI*)

Division: Rachel Dunne (Division Chair), Charles Bolt and Darren Manning

Statements of Case filed: 5 October 2023

Statements of Response filed: 18 October 2023[3]

Date of Determinations: 3 November 2023

Rules Breached: Rules 2.13.2(b) and 3.8.1(b) and (d)

FACTS

MCK and CDI are related entities (CDI is a Subsidiary of MCK), with some common Directors and a shared company secretary function. NZ RegCo identified similar alleged breaches of the Rules by MCK and CDI, which were separately referred to the Tribunal. Given the similarity of the circumstances and decisions we have combined the summaries of these matters.

Following a complaint made about MCK and CDI's Audit Committee disclosures in their respective annual reports for the 2021 and 2022 financial years, NZ RegCo found that each of MCK and CDI:

(a) had only two members on its Audit Committee (not three members as required under Rule 2.13.2(b)) from February 2018 until 27 July 2020 (*Audit Committee breaches*); and

(b) did not adequately disclose or explain its non-compliance with Code recommendations 2.8, 3.1, 4.2, 5.3 and 8.1 in its annual reports for some or all of the 2017 to 2022 financial years (in breach of Rule 3.8.1(b)) and did not include an evaluation by its Board on its performance with respect to its Diversity Policy in its annual reports for the 2018 to 2022 financial years (in breach of Rule 3.8.1(d)) (*Annual Report breaches*).

FINDINGS

Step 1: Factors relevant to the breach:

The Tribunal considered the applicable penalty band factors set out in the Tribunal Procedures to determine the appropriate starting point penalty.

Penalty Band 1 factors

(a) No loss - NZ RegCo identified no loss arising from the breaches.

(b) No or minor impact on investors and the market - There appeared to be no actual impact on investors or the market as a result of the Audit Committee breaches, with both members being Independent Directors. The Tribunal considered that the Annual Report breaches had, at the least, a minor impact on investors and the market given MCK and CDI had not fully met their disclosure

[3] MCK and CDI sought and were granted an extension of time to file their Statements of Response.

obligations over six successive reporting periods and that NZ RegCo's investigation was initiated by a complaint.

(c) No financial benefit or commercial advantage – NZ RegCo provided no evidence that the Audit Committee breaches resulted in a financial benefit or commercial advantage to MCK or CDI. Any benefit to MCK and CDI arising as a result of the Annual Report breaches was negligible.

Penalty Band 2 factors

(d) Moderate compliance breach – The Audit Committee breaches were moderate compliance breaches given that while MCK and CDI's Audit Committees had only two members, both were Independent Directors and at least one member had an accounting background. The Annual Report breaches were also moderate compliance breaches. While an isolated failure by an Issuer to report against a Code recommendation would likely constitute a minor compliance breach, MCK and CDI's disclosures were incomplete over six successive reporting periods and having decided to adopt a Diversity Policy in 2018 (which is to be commended), MCK and CDI then failed to report on its performance against that policy for each year it had been in place.

(e) Potential to cause a moderate impact on investors and the market – The Rules requirement that an Audit Committee have at least three members is intended to ensure there are sufficient different perspectives to perform an Audit Committee's responsibilities. Given both members of the Audit Committees were Independent Directors and at least one member had an accounting background the potential impact of the Audit Committee breaches was lessened. The 'comply or explain' disclosure requirement is intended to ensure that (a) the information is clearly identifiable and comparable; (b) explanations for non-compliance are provided; and (c) investors can track an Issuer's progress over time. Given the absence of some of the required information over six successive reporting periods and that some of the annual reports included incorrect statements, there was a moderate potential for harm arising from the Annual Report breaches.

Penalty Band 3 factor

(f) Breaches continued for an extended period – the Audit Committee breaches continued for around 2½ years and the Annual Report breaches occurred over six successive reporting periods - the 2017 to 2022 financial years.

Starting point penalty – After weighing up the relevant factors, the Tribunal considered that the breaches fell within Penalty Band 2. While they occurred over an extended period, this factor was counter-balanced by the breaches not having caused loss, a minor impact on investors and the market, and no financial benefit or commercial advantage to MCK or CDI. The Tribunal considered that the starting point penalty for the Audit Committee breaches should be significantly below HLG (a four-year breach of the requirement to have a majority of Independent Directors on its Audit Committee), but higher than 2CC (given 2CC's Director did not have a Disqualifying Relationship, had a limited contractual role in a minor Subsidiary and the breach lasted eight weeks). The Tribunal noted that the 'comply or explain' regime had been in place since 2017 and that while there may have been initial tolerance to non-compliance while the regime was imbedded, and the Code underwent further refinement, Issuers should be fully aware by now of the reporting requirements. The Tribunal considered that the appropriate starting point penalty was $80,000 for each of MCK and CDI ($55,000 for the Audit Committee breaches and $25,000 for the Annual Report breaches).

Step 2: Factors relevant to MCK and CDI

To determine the final level of penalty, the Tribunal adjusted the starting point penalty to reflect the aggravating and mitigating factors relevant to each of MCK and CDI.

Aggravating factors

(a) Breaches were careless – while MCK and CDI had good intentions in having only Independent Directors on their respective Audit Committees, they nonetheless overlooked a key Rules requirement to have at least three members. MCK and CDI also failed to fully meet their disclosure requirements under Rules 3.8.1(b) and (d) over multiple reporting periods. The Tribunal considered that the combined level of oversight indicated a carelessness with regard to Rules compliance.

(b) Recurring breaches - The Annual Report breaches occurred over six successive reporting periods, indicating that insufficient compliance checks had been made on the annual reports each year.

Mitigating factors

(a) Early admission of breaches - MCK and CDI admitted the breaches at the earliest opportunity. The Tribunal noted that had MCK and CDI self-reported the Audit Committee breaches when they were identified and remedied in 2020, it would likely have been a significant mitigating factor.

(b) Cooperation with investigation – NZ RegCo advised that each of MCK and CDI fully cooperated with its investigation.

Note - CDI submitted that when assessing its breach of Rule 3.8.1(d), it was relevant that CDI had only four full time employees. The Tribunal noted that regardless of size, having decided to adopt a diversity policy, CDI was required to report on its performance against the policy.

MCK and CDI requested that the Tribunal consider the principal of totality when setting the penalty, given MCK and CDI are related companies and that the breaches stemmed from the same error by their shared compliance function, and apply a 20% discount. The Tribunal noted that it may consider the principal of totality when assessing penalty under the Tribunal Rules, but did not consider it appropriate in this matter, noting that MCK and CDI were separate Issuers, each responsible for compliance with the Rules. While shared functions may have led to both Issuers making the same breaches, that did not mean that the penalty to be imposed on each Issuer should be considered in aggregate and a discount applied.

Final penalty – The Tribunal considered that the mitigating factors out-weighed the aggravating factors and a discount from the starting point penalty was appropriate. The Tribunal imposed a final penalty of $50,000 ($35,000 for the Audit Committee breaches and $15,000 for the Annual Report breaches).

PENALTY

MCK and CDI were each ordered to pay $50,000 to the NZX Discipline Fund.

COSTS

MCK and CDI were each ordered to pay the costs of the Tribunal and NZX.

PUBLICATION

Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal considered it appropriate to publicly censure MCK and CDI as both the Audit Committee breaches and the Annual Report breaches had the potential to damage confidence in the market, the Annual Report breaches occurred over multiple reporting periods and the breaches fell within Penalty Band 2.

The Tribunal's full determination and public censure of MCK and CDI can be viewed here.

NZMDT 6/2023 NZX V ENPRISE GROUP LIMITED (*ENS*)

Division: Hon Sir Terence Arnold KC, Kirsty Campbell and Alan Isaac CNZM

Statement of Case filed: 17 October 2023

Statement of Response filed: 14 November 2023[4]

Date of Determination: 8 December 2023

Rule Breached: Rule 3.1.1

FACTS

ENS, through its subsidiary (*Kilimanjaro*), provides MYOB Enterprise software in Australia and New Zealand. MYOB has accredited non-exclusive "business partners", such as Kilimanjaro, who market, sell, implement, and support its products to end users. This relationship is documented in a business partner agreement (*Agreement*).

On 1 August 2022, ENS released an announcement to the market (*the Announcement*) advising that MYOB had "*purported to retrospectively reduce the margins that [Kilimanjaro] 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] 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. [ENS] has advised MYOB of its intention to formally dispute this purported decrease in fees*."

NZ RegCo submitted that the information in the Announcement was Material Information and that ENS became Aware of that Material Information no later than 27 May 2022. NZ RegCo alleged that ENS breached Rule 3.1.1 by not releasing that information to the market until 1 August 2022. ENS accepted that the Announcement contained Material Information but did not accept that it had breached Rule 3.1.1 because it considered that Kilimanjaro was in an ongoing commercial negotiation with MYOB and therefore had the benefit of the "safe harbour" provided by Rule 3.1.2(a)(ii) i.e. there was "an incomplete proposal or negotiation". ENS considered that its disclosure obligation arose on 1 August 2022, when MYOB invoiced it at the reduced margin.

The Tribunal's determination contains a detailed description of the factual circumstances in this matter.

FINDINGS

The Tribunal found that ENS breached Rule 3.1.1.

The Tribunal considered 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 margin received on MYOB Exo software (*ALF margin*) by 42.86%. At that time, Kilimanjaro believed that MYOB did not have the right to unilaterally change the Agreement and ENS's board had previously discussed that it would reject any changes to the Agreement if it did not like them. Accordingly, each aspect of the Material Information released in the

[4] ENS sought and was granted an extension of time to file its Statement of Response.

Announcement was known to ENS on the evening of 27 May 2022, although the Tribunal accepted that some time would have been needed to allow ENS to calculate the financial impact of the ALF margin reduction.

After careful consideration of the circumstances (which are set out in detail in the Tribunal's determination), the Tribunal did not accept that, following MYOB's notice of the ALF margin reduction on 27 May 2022, there was an incomplete proposal or that the parties were in negotiations with respect to that reduction of the nature contemplated by Rule 3.1.2(a)(ii), which is intended to prevent prejudice to negotiations before an agreement has been struck.

Step 1: Factors relevant to the breach:

The Tribunal considered the applicable penalty band factors set out in the Tribunal Procedures to determine the appropriate starting point penalty.

Penalty Band 1 factors

(a) No loss and no or minor impact on investors or the market – the Tribunal noted that it 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). There was no evidence presented that the delayed Announcement caused any loss or had an impact on investors or the market. The price movement in ENS shares on the day of the Announcement was negligible.

(b) No financial benefit or commercial advantage – the Tribunal was not satisfied that the breach provided a minor to moderate financial benefit or commercial advantage to ENS as submitted by NZ RegCo with regard to (1) its engagement with BNZ on a waiver of its banking covenants (ENS was already operating under a waiver issued in respect of earlier breaches of its banking covenants, the Announcement was released before the waiver was granted and ENS advised that BNZ had no issues with the timing and circumstances in which the waiver was obtained); and (2) the financial information available at the time ENS commenced a Rights Issue in late 2023 (the potential impact of the reduced ALF margin was highlighted in the Rights Issue Offer Document and ENS's 2022 financial statements contained significant cautionary remarks). The Tribunal considered 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.

Penalty Band 2 factor

(c) Potential to cause a moderate impact on investors and the market - Rule 3.1.1 aims to ensure that the market receives Material Information in a timely manner so that investors can make informed investment decisions. ENS had previously advised the market of the potential risks associated with Kilimanjaro's business, including the risk MYOB could seek to reduce margins. ENS had also notified the market of the major change in MYOB's strategy to compete with its business partners and MYOB's acquisition of several business partners. Accordingly, the Tribunal considered that the market had some knowledge of the potential risks facing ENS. The Tribunal also noted ENS's low liquidity and that trading did not occur during a period of information asymmetry. For these reasons, the Tribunal considered that there was a moderate, as opposed to significant, potential for harm arising from the delayed Announcement.

Penalty Band 3 factors

(d) Serious compliance breach – the requirement under Rule 3.1.1 to immediately disclose Material Information is 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 market.

(e) Breach continued for an extended period - having regard to the obligation to disclose Material Information promptly and without delay, the approximately nine-week delay in releasing the Announcement was extended.

Starting point penalty – after weighing up the relevant factors and assessing the overall seriousness of the breach, the Tribunal considered that the breach fell within 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 considered that the breach had the potential to cause a moderate impact on investors and the market (as opposed to a significant one). The Tribunal considered that the appropriate starting point penalty was $120,000.

Step 2: Factors relevant to ENS

To determine the final level of penalty, the Tribunal adjusted the starting point penalty to reflect the aggravating and mitigating factors relevant to ENS.

Aggravating factor

(a) Compliance history - ENS has been subject to three investigations for late annual reports, one of which was referred to the Tribunal in 2019. Previous Rule breaches are a relevant factor, but given the different obligations breached, the Tribunal did not consider ENS's late annual reports to be particularly aggravating in this case.

Note - NZ RegCo argued that ENS was negligent with regards to its continuous disclosure obligations. The Tribunal did not agree, noting that this was a complex matter and that in a developing situation, it can be difficult to determine when the obligation to disclose is triggered. ENS submitted that it carefully considered its continuous disclosure obligations, although this was not supported by the minimal board documentation provided. The Tribunal noted that Issuers should record in their board meeting minutes the reasons for any decision to disclose or not disclose information when this issue is considered. Clear and transparent records can demonstrate that a board had effective compliance procedures in place and that its conclusions at the time were reasonable in the circumstances.

Mitigating factors

(a) Adverse effect on ongoing commercial viability - Under Tribunal 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 mitigating factor does not relate to the size of an Issuer - 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 factor relates to the financial position of an Issuer and whether the proposed starting point penalty would adversely

affect its ongoing commercial viability. A relatively high threshold is required before this factor will apply given that the penalties imposed by the Tribunal are intended to be punitive.

The Tribunal noted that there remained significant uncertainty around the level of ENS's future revenue and profitability, as highlighted in ENS's 2023 financial statements and qualified audit report. The Tribunal considered that the adverse effect of the starting point penalty on ENS's ongoing commercial viability was a significant mitigating factor in this case.

(b) Cooperation with investigation - the Tribunal considered that while ENS cooperated, it was not a significantly mitigating factor given the apparent difficulty NZ RegCo had in obtaining the information necessary for its investigation. ENS said this reflected a small business operating under pressure and that it used its best endeavours to respond fully and openly.

(c) Intention to improve practices – ENS advised that it had commenced a process to review all procedures and its compliance with the Rules.

(d) One-off breach - NZ RegCo advised that ENS's breach was a one-off event and that it is not aware of any other continuous disclosure breaches by ENS.

Final Penalty - the Tribunal gave particular weight to ENS's overall conduct 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. The Tribunal considered that a significant reduction from the starting point penalty was warranted and imposed a final penalty of $60,000.

The Tribunal warned against using the penalty in this case as a comparison for other breaches of the continuous disclosure requirements given the significant reduction due to the factual circumstances and ENS's ongoing commercial viability.

PENALTY

ENS was ordered to pay $60,000 to the NZX Discipline Fund.

COSTS

Given ENS was found to have breached the Rules, the Tribunal considered that it was appropriate to order ENS pay the costs of the Tribunal and NZX. However, in recognition of the complexity of the factual circumstances, ENS's ongoing commercial viability and the educative value to the market of the decision, the Tribunal capped the award at $15,000.

PUBLICATION

Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal considered it appropriate 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 fell within Penalty Band 2.

The Tribunal's full determination and public censure of ENS can be viewed here.

NZMDT 8/2023 NZX V TRUSCREEN GROUP LIMITED (*TRU*)

Division: Mariëtte van Ryn (Division Chair), Charles Bolt and Matt Blackwell

Statement of Case filed: 24 November 2023

Statement of Response filed: 5 December 2023

Date of Determination: 15 December 2023

Rule Breached: Rule 2.13.2(b)

FACTS

TRU breached Rule 2.13.2(b) by having only two members on its Audit Committee (not three members as required) from October 2020 until August 2023. During the period it was in breach, both members of its Audit Committee were Independent Directors.

FINDINGS

Step 1: Factors relevant to the breach:

The Tribunal considered the applicable penalty band factors set out in the Tribunal Procedures to determine the appropriate starting point penalty.

Penalty Band 1 factors

(a) No loss - NZ RegCo did not identify any loss caused by the breach.

(b) No impact - the breach did not cause an impact on investors or the market.

(c) No financial benefit or commercial advantage - NZ RegCo did not identify any financial benefit or commercial advantage to TRU arising from the breach.

Penalty Band 2 factors

(d) Moderate compliance breach - while TRU's Audit Committee had only two members during the period it was in breach, TRU did comply with the other requirements of Rule 2.13.2 - both members were Independent Directors and at least one member had an accounting background. The Tribunal considered that this reduced the seriousness of the breach.

(e) Potential to cause a moderate impact on investors and the market - the potential harm here was that TRU's Audit Committee was less robust because it had two members, not three. During the breach, both members of the Audit Committee were Independent Directors and the Audit Committee Chair had significant accounting expertise. The Tribunal considered that this lessened the potential impact of the breach on investors and the market.

Penalty Band 3 factors

(f) Breach continued for an extended period - the breach continued for 2 years and 10 months.

(g) Breach continued to occur once discovered - TRU was notified by NZ RegCo of the apparent breach on 19 July 2023, but did not appoint a third member to its Audit Committee until 29 August 2023. The Tribunal considered that TRU should have acted urgently to rectify the breach, rather than wait for its next scheduled Board meeting.

Starting point penalty - After weighing up the relevant factors, the Tribunal considered that the breach fell within Penalty Band 2. While the breach occurred over an extended period, this factor was counter-balanced by no loss, impact or financial gain being identified as arising from the breach. The Tribunal considered that the appropriate starting point penalty was $55,000, noting that it had also assessed a $55,000 starting point penalty for MCK and CDI's respective breaches of Rule 2.13.2(b) in very similar circumstances.

Step 2: Factors relevant to TRU

To determine the final level of penalty, the Tribunal adjusted the starting point penalty to reflect the aggravating and mitigating factors relevant to TRU.

Aggravating factors

(a) Breach was careless – While TRU may have had good intentions with regard to its Audit Committee composition, it appeared unaware of the Rules requirement to have at least three members.

(b) Compliance history - TRU was referred to the Tribunal in 2018 for failing to have at least two Directors who were ordinarily resident in New Zealand. Given the mitigating factors in that case the Tribunal publicly censured TRU but did not impose a penalty. While the Tribunal considered TRU's previous breach was a relevant factor, it was not significantly aggravating.

Mitigating factors

(a) Adverse effect on ongoing commercial viability – TRU's 2023 financial statements recorded significant losses with its Auditor noting that material uncertainties exist that may cast significant doubt on TRU's ability to continue as a going concern. While the starting point penalty of $55,000 was not significant given the penalty range available under Penalty Band 2, the Tribunal considered that in these circumstances, a penalty at this level may well have an adverse effect on TRU's ongoing commercial viability.

(b) Early admission of breach - TRU admitted the breach when it was first brought to its attention by NZ RegCo.

(c) Cooperation with investigation - NZ RegCo advised that TRU cooperated with its investigation.

Final penalty – The Tribunal considered that having regard to the relevant factors, including the penalty having an adverse effect on TRU's ongoing commercial viability, a significant reduction from the starting point penalty was warranted. The Tribunal imposed a final penalty of $25,000.

PENALTY

TRU was ordered to pay $25,000 to the NZX Discipline Fund.

COSTS

Given TRU was found to have breached the Rules, the Tribunal considered that it was appropriate to order TRU pay the costs of the Tribunal and NZX. However, in the particular circumstances of this case, the Tribunal capped the award at $5,000.

PUBLICATION

Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal considered it appropriate to publicly censure TRU given the breach fell within Penalty Band 2.

The Tribunal's full determination and public censure of TRU can be viewed here.

SPECIAL DIVISION CHAIR'S REPORT

SPECIAL DIVISION CHAIR'S REPORT

Special Division

The Special Division is a division of the Tribunal constituted under the Tribunal Rules to regulate NZX and its Related Entities' compliance with the NZX Market Rules. As at the date of my report, NZX's Related Entities are NZX Wealth Technologies Ltd (a Depository Participant) and Smartshares Ltd (the manager of currently 40 listed exchange traded funds (*ETFs*)). The objective of the Special Division is to foster market confidence that the NZX Market Rules and the Tribunal Rules are applied to NZX and its Related Entities in an impartial and independent manner.

The FMA is responsible for ensuring that NZX meets its obligations as a licensed market operator.

Monitoring of trading activity

The Special Division is responsible for assessing trading activity in the quoted securities of NZX and its Related Entities. On behalf of the Special Division, NZ RegCo Surveillance (*NZRS*) conducts front-line monitoring of trading on the exchange in the securities of NZX and any Related Entity. NZRS refers system generated alerts from its SMARTS Surveillance software within agreed protocols and any other abnormal trading activity to the Special Division for consideration.

The Special Division considered 44 referrals from NZRS in 2023 (a list of referrals follows this report). In most cases, the Special Division did not consider that the alert raised any concerns or warranted further investigation on the basis that the activity was consistent with permissible trading. In some instances, further information was sought. Two instances resulted in regulatory action.

The Special Division continues to work with NZRS to refine its referral protocols.

Other activities

The Special Division's activities in 2023 also included:

(a) issuing an obligations letter for a breach of Rule 3.14.1 for not providing at least 5 business days' notice of a distribution (5 calendar days' notice was provided);

(b) approving a trading halt for NZX010 until the commencement of trading in the new subordinated notes (NZX020) to enable completion of an election process;

(c) investigating trading by a Market Participant which resulted in an obligations letter being issued;

(d) approving listing applications and reviewing Product Disclosure Statements for five new Smartshares Ltd managed ETFs;

(e) investigating trading by a Market Participant which resulted in a referral to the FMA;

(f) investigating the incorrect calculation of ETF NTAs by Smartshares Ltd; and

(g) investigating the non-release of an ETF NTA by Smartshares Ltd.

I would like to thank the members of the Special Division – Matt Blackwell, Rachael Newsome, Dave Roberton and Mariëtte van Ryn - for their work during 2023.

I would particularly like to thank Mariëtte van Ryn, whose term ends in July 2024, for her commitment and contribution to the Special Division over many years.

James Ogden | SPECIAL DIVISION CHAIR
24 April 2024

NZRS REFERRALS – 1 JANUARY 2023 TO 31 DECEMBER 2023

MONTH	ISSUER	DATE REFFERRED
January	BOT	4
February	OZY	8
March	NZX	1, 2, 20, 22
	EMF	22**
	APA	22**
April	NZX	5, 6
	NZC	17*
	APA	26*
May	NZX	18
	EUG	3*
	USF	16***, 19***
June	NZX	19, 23, 23, 27
	AUS	30
July	NZX	3, 10*, 12
August	NZX	22, 22
	BOT, USG	22****
	USF	31
September	NZX	1, 7, 22, 27, 28, 29, 29, 29
October	NZX	24, 26, 27
November	NZX	1
	AUE	16
December	NZX	21, 22
	ASF	19

*Sought further information from NZRS and determined no further action required.
**Sought further information from the Market Participant involved and determined no further action required.
***Sought further information from the Market Participant involved. Special Division issued an obligations letter.
****Sought further information from the Market Participant involved. Special Division referred the trading to the FMA.

DIRECTORY

NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL

https://www.nzx.com/regulation/nzmd-tribunal-regulation

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