

UNDER the NZ Markets Disciplinary Tribunal Rules

IN THE MATTER OF breach of NZX Listing Rule 3.6.1

BETWEEN **NZX LIMITED**

AND **ENPRISE GROUP LIMITED**

Respondent

**DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL
10 JANUARY 2020**



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

Procedural Background

3. On 11 December 2019, NZX Limited (*NZX*) filed a statement of case (*SOC*) alleging that Enprise Group Limited (*ENS*) had breached Rule 3.6.1 by failing to deliver its annual report within four months of the end of its financial year.
4. On 17 December 2019, ENS filed a statement of response (*SOR*).
5. On 19 December 2019, NZX notified the Tribunal that it had decided not to file a rejoinder.

Factual Background

6. ENS is an Issuer with ordinary shares Quoted on the NZX Main Board and is subject to the Rules. ENS migrated from the NZAX Market to the NZX Main Board on 1 April 2019.
7. Rule 3.6.1 requires each Issuer to deliver an annual report to NZX and each Quoted Financial Product holder within three months after the end of its financial year. However, Issuers who had migrated from the NZAX Market were given an additional month to deliver their annual reports if their financial year ended between 30 September 2018 and 30 June 2019 under the terms of a class waiver (*Class Waiver*)¹.
8. ENS's financial year end is 31 March. Accordingly, under the terms of the Class Waiver, ENS's 2019 annual report (*2019 Annual Report*) had to be delivered to NZX and its Quoted Financial Product holders by 31 July 2019.
9. On 29 July 2019, ENS notified NZX that there was likely to be a delay in releasing its 2019 Annual Report because it was unable to get its auditor's sign off by its due date.
10. On 1 August 2019, NZX Product Operations notified the market that ENS had not issued its 2019 Annual Report by 31 July 2019 and if ENS did not provide its 2019 Annual Report by market close on 7 August 2019, its securities would be suspended².
11. NZX advises that on 6 August 2019 it sought an up-date on progress from ENS and that on 7 August 2019 ENS advised that its auditor was working as fast as it could and that ENS expected completion by 9 August 2019.
12. On 8 August 2019, NZX Product Operations notified the market that ENS had still not provided its 2019 Annual Report and that effective pre-open the Quotation of ENS's securities had been suspended.

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

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

13. At 11.57am on 20 August 2019, ENS released its 2019 Annual Report, 14 business days after it was due. Trading in ENS ordinary shares resumed at 12:39pm on 20 August 2019. NZX advises that following the release of the 2019 Annual Report there was no change in ENS's share price and that only one trade occurred on 20 August 2019 for 8 shares valued at \$5.28 in aggregate.
14. NZX advises that ENS previously breached NZAX Rule 10.5.1 by releasing its 2016 annual report three business days late following the resignation of its then auditor in March 2016. However, that breach did not result in the suspension of ENS's securities (as it was less than 5 business days in duration) and the breach was not referred to the Tribunal by NZX³.

NZ Markets Disciplinary Tribunal Determination

15. The Tribunal finds that ENS breached Rule 3.6.1 by delivering its 2019 Annual Report after the required timeframe, as modified by the Class Waiver. ENS accepts that it breached Rule 3.6.1.
16. The Tribunal must then determine the appropriate penalty to be imposed.
17. NZX submits that the appropriate penalty is a fine of \$35,000, the payment by ENS of NZX and the Tribunal's costs and a public censure.
18. ENS submits that, as this is its first referral to the Tribunal, the proposed fine be reduced and applied at the lowest end of the penalty range.

Financial Penalty

19. The Tribunal considers that a breach of the periodic reporting requirements is a breach of a fundamental obligation under the Rules. Compliance by Issuers with the periodic reporting requirements is essential in maintaining market integrity and investor confidence.
20. The Tribunal acknowledges ENS's submission that the delay in releasing its 2019 Annual Report was due to "protracted discussions" with its auditor, Baker Tilly Staples Rodway, which arose late in the process of finalising the audit and that ENS had believed it was on target to file its 2019 Annual Report on time, up until shortly before the date it expected its auditor would sign-off on the financial statements.
21. However, as previously stated by the Tribunal, all Issuers must manage the audit process to ensure deadlines are met. As the onus of complying with the Rules falls on ENS, it needed to ensure there was sufficient time to engage with its auditors, particularly given that ENS was aware that issues were likely to arise with the adoption of new IFRS accounting standards and the treatment of ENS's investments. The auditor's Planning Report clearly set out pre-audit their requirements and areas of audit focus.
22. The Tribunal considers any breach of the periodic reporting requirements to be serious and to fall within Penalty Band 3 of Procedure 9 of the Tribunal Procedures (*the Procedures*). Under Penalty Band 3, a penalty of between \$0 and \$500,000 may be imposed.

³ NZX advises that the breach of NZAX Rule 10.5.1 in 2016 was also coupled with a failure by ENS to notify the market of a change in its auditor as required under NZAX Rule 10.7.1(d). NZX issued ENS with an Obligations Letter for its breach of NZAX Rule 10.7.1(d).

23. To determine the appropriate level of penalty, the Tribunal must consider the overall conduct of the respondent and take into account the factors set out in the Procedures. These factors provide guidance on whether the penalty should fall at the lower or higher end of the applicable penalty band.
24. The Tribunal considered that the following aggravating factors were likely to increase the penalty in this case:
 - a. trading in ENS's securities was suspended for eight and a half business days, adversely impacting on investors;
 - b. ENS was in breach for 14 business days; and
 - c. ENS has breached the periodic reporting requirements on one previous occasion in 2016 (although that breach did not result in a suspension of ENS's securities and was not referred to the Tribunal by NZX).
25. The Tribunal considered that the following mitigating factors were likely to reduce the penalty in this case:
 - a. ENS notified NZX in advance that it was unlikely to release its 2019 Annual Report when due⁴;
 - b. ENS appears to have taken steps to expedite the resolution of the issues which arose during its audit process including the ENS Chair meeting its auditors on 25 July 2019 and the engagement of a third party (BDO New Zealand) to assist ENS with outstanding audit issues;
 - c. ENS advises in its SOR that it has adopted new processes to ensure non-compliance does not occur in the future (although it has not elaborated on what those are) and will engage with its auditor earlier in future;
 - d. ENS appears to have cooperated fully with NZX Regulation's investigation into the breach;
 - e. no financial benefit or commercial advantage for ENS appears to have resulted from the breach; and
 - f. this is the first occasion ENS has been referred to the Tribunal.

Previous Tribunal determinations

26. The Tribunal has made a number of previous decisions regarding breaches of the periodic reporting requirements, as outlined by NZX in its SOC. Following its guidance to the market and the amendments made to the Procedures in 2016, the Tribunal has in recent years markedly increased the penalties it imposes for breaches of the periodic reporting requirements and matters involving repeated breaches of the Rules. Accordingly, the Tribunal considers that its most recent decisions provide the best precedent guidance.
27. In its most recent determination in *NZMDT 3/2018 NZX v Windflow Technology Limited (WTL)*, WTL was fined \$25,000 for releasing its 2017 annual report two business days late due to "eleventh hour audit issues". The Tribunal was greatly concerned that it was the third consecutive breach of the periodic reporting requirements by WTL and in the Tribunal's view WTL's conduct over the previous 24-month period formed a pattern of poor compliance with these requirements. However, the Tribunal considered that there were a number of factors in that

⁴ The Tribunal notes, however, that ENS did not provide prior notice to the market that there would be a delay and the reasons for that delay.

case which reduced the penalty that would otherwise have been imposed for a repeated breach of this nature, including the short duration of the breach, that trading in WTL's securities was not suspended and that it was WTL's first referral to the Tribunal (given the previous two breaches were also of short duration NZX had not referred them to the Tribunal). Accordingly, the Tribunal considered that the breach in this instance fell at the low end of Penalty Band 3.

28. In *NZMDT 2/2016 NZX v Pyne Gould Corporation (PGC)* (upheld on appeal) the Tribunal noted a number of serious aggravating factors, including PGC's concerning compliance history (having been referred to the Tribunal on four separate occasions), that the matter being referred involved the breach of three consecutive reporting requirements and that the duration of the breaches was particularly long resulting in trading of PGC's securities being suspended for 154 business days. Given PGC's serious and repeat offending the Tribunal considered that the breach fell at the high end of Penalty Band 3. However, after having regard to the submissions made by both parties the Tribunal imposed a penalty of \$275,000.
29. PGC had earlier been fined \$50,000 by the Tribunal in *NZMDT 16/2014 NZX v PGC* for releasing its 2014 annual report 23 business days late and having had its securities suspended for 17 business days – twice as long as ENS. It was also PGC's second referral to the Tribunal for a breach of the Rules that year.
30. The Tribunal considers that ENS's breach in this instance is more serious than the breach by WTL (given that the duration of ENS's breach was longer and resulted in the suspension of its securities and despite WTL's slightly poorer compliance history). The Tribunal also considers that ENS's breach is less serious than PGC's breach in 2014 (given the shorter duration of ENS's breach) and significantly less serious than PGC's breach in 2016 (which had a substantial impact on investors and the market).
31. Having regard to both the mitigating and aggravating factors in this matter and its previous decisions, the Tribunal considers that the breach by ENS falls at the low end of Penalty Band 3. Accordingly, having regard to all the circumstances of this case the Tribunal considers that a penalty of \$35,000 is appropriate.
32. The Tribunal notes that should ENS breach the periodic reporting requirements again, the Tribunal is likely to impose a significantly higher penalty in accordance with its previous statements to the market.

Public censure

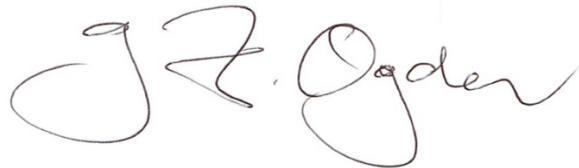
33. NZX has sought a penalty of public censure. ENS did not make submissions on this point in its SOR.
34. The Tribunal has considered the guidance set out in Procedure 9.3. In particular, that the name of a respondent is likely to be published when:
 - a. The impact of the breach has caused the public 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.

35. The Tribunal considers that the breach by ENS had the potential to damage public confidence in the market and adversely affect investors given the suspension of its securities. The Tribunal also notes that ENS has previously breached the periodic reporting requirements and that its breach falls within Penalty Band 3. Accordingly, the Tribunal considers that a public censure in this case is appropriate.
36. The Tribunal also notes that the market is already aware that ENS breached Rule 3.6.1 by virtue of the announcements made by NZX Product Operations on 1 and 8 August 2019.

Orders

37. The Tribunal orders that ENS:
 - a. be publicly censured in the form of the announcement attached to this decision (which will include a full copy of this decision);
 - b. pay \$35,000 to the NZX Discipline Fund;
 - c. pay the costs and expenses incurred by the Tribunal in considering this matter; and
 - d. pay the costs and expenses incurred by NZX in considering this matter being \$3,800 (excluding GST, if any).

DATED 10 JANUARY 2020

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

James Ogden, Division Chair, NZ Markets Disciplinary Tribunal