NZ MARKETS DISCIPLINARY TRIBUNAL

APPEAL FROM **NZMDT 2/2023**

UNDER the NZ Markets Disciplinary Tribunal Rules

IN THE MATTER OF an appeal from determination NZMDT 2/2023

BETWEEN **2 CHEAP CARS GROUP LIMITED**
Appellant

AND **NZX LIMITED**
Appeal Respondent

DETERMINATION ON APPEAL
3 OCTOBER 2023

NEW ZEALAND MARKETS
DISCIPLINARY TRIBUNAL

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1. This is a determination of an appeal division (*Appeal Division*) of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising David Lane (Appeal Division Chair), John Dixon KC and Mariëtte van Ryn.

Procedural Background

2. On 6 September 2023, a division of the Tribunal (*Hearing Division*) made a determination in the matter *NZMDT 2/2023 NZX Limited (acting by and through NZX Regulation Limited) v 2 Cheap Cars Group Limited* (*the 2CC decision*).

3. On 18 September 2023, 2CC filed a statement of appeal (*SOA*). 2CC appeals against the penalty imposed in the 2CC decision, and in particular the Hearing Division's application of Section 9 of the Procedures. 2CC does not appeal against the interpretation or application of the Rules, having already accepted its breach of Rules 2.1.1(c) and 2.13.2(c).

4. On 19 September 2023, the Tribunal Chair advised 2CC that she considered the statement of appeal was not frivolous or without merit in accordance with Tribunal Rule 7.3.2. The Tribunal Chair also advised NZ RegCo that it could submit a statement in response to appeal in accordance with Tribunal Rule 7.4.1.

5. On 26 September 2023, NZ RegCo filed a statement in response to appeal.

6. In this determination on appeal, capitalised terms that are not defined in the 2CC decision have the meanings given to them in the Rules or the Tribunal Rules, as the case may be.

Material Facts

7. 2CC does not dispute the facts as presented by NZ RegCo at the Hearing, subject to the clarification that 2CC did accept its breach of Rules 2.1.1(c) and 2.13.2(c). 2CC's acceptance of breach was acknowledged by the Hearing Division[1].

8. 2CC seeks leave to introduce one item of new evidence on appeal - that during the 8-week period of 2CC's breach only one Audit, Finance and Risk Management Committee (*Audit Committee*) meeting was held. That meeting occurred on 19 May 2023, being the last day of Mr Shaw's contractual role with NZMF[2]. The admissibility of this evidence on appeal is discussed below.

9. NZ RegCo does not seek leave to introduce any new evidence.

Role of the Tribunal on Appeal

10. Tribunal Rule 7.6.1(a) states that an appeal under Tribunal Rule 7.1.1 must be conducted as a review and not as a rehearing. 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.

11. Tribunal Rule 7.8.1 provides that the Appeal Division may:

    a. affirm the determination of the Hearing Division; or

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[1] Paragraph 42 of the 2CC decision.

[2] As noted in the 2CC decision, 2CC advised NZ RegCo that Mr Shaw's role concluded the week ended 19 May 2023. 2CC has been more definitive in its SOA by stating the contract ended on 19 May 2023 i.e. after NZ RegCo's initial correspondence regarding the breach on 18 May 2023.

b. 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 Markets Rules[3].

12. 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 Markets Rules or in the way it has applied the relevant NZX Markets 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.

13. Tribunal Rules 7.2.2(e) and 7.4.2(b) allow an Appellant and an Appeal Respondent to seek leave to introduce new evidence on appeal. 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.

14. Under Tribunal Rule 7.5.2, when determining whether to admit new evidence on appeal, the Appeal Division must consider:

a. why the new evidence was not made available at the Hearing; and

b. whether the new evidence is credible and, if so, is relevant to the issues on appeal.

15. Tribunal Rule 7.6.1(c) provides that 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 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.

New evidence

16. 2CC has sought leave to introduce new evidence under Tribunal Rule 7.2.2(e). This new evidence is that during the 8-week period of 2CC's breach only one Audit Committee meeting was held on 19 May 2023 (being the last day of Mr Shaw's contractual role with NZMF)[4]. 2CC argues that "*the lack of any such meeting or decisions*" during the period it was in breach means that "*there was no prospect for potential harm to shareholders to eventuate concerning the maintenance of a robust audit process*".

17. 2CC submits that this new evidence was not included in its SOR as it did not consider it relevant at the time, given NZ RegCo's submission that 2CC's breach fell within Penalty Band 1. 2CC says it focused its response at the Hearing on NZ RegCo's submission that the breach duration was "extended" (2CC considered that it was "short"). 2CC argues that given the Hearing Division's determination that Penalty Band 2 is applicable, and the factors noted at paragraphs 68 and 69

[3] The NZX Markets Rules include the Tribunal Rules. The Tribunal Rules give the Tribunal the power to impose penalties where it finds a breach of the Rules. Tribunal Rule 9.5.1 specifies factors which the Tribunal may take into consideration when imposing any of the penalties available to it. These factors include Section 9 of the Procedures.

[4] In the SOA, 2CC also refers to two Board meetings being held during the period it was in breach but does not seek to introduce this evidence, which it did not present at the Hearing.

of the 2CC decision, this evidence is important in providing further context to the potential impact of the breach.

18. NZ RegCo has made no submissions on the admissibility of 2CC's new evidence.

19. The Appeal Division must decide whether to allow the introduction of 2CC's evidence on appeal, having regard to Tribunal Rule 7.5.2.

Evidence could have been produced at the Hearing

20. Sometimes, after a first instance decision is delivered but before an appeal from it is heard, there will be developments that will 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.

21. 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, to the extent possible, the Tribunal Rules should be applied in a way that encourages that.

22. Apart from genuinely updating evidence, the introduction of new evidence on appeal under the Tribunal Rules should 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. An appeal is not an opportunity for a party to attempt to bolster the case it presented at first instance by introducing further evidence that it could have provided at the Hearing. To permit that would be to undermine the type of appellate process that the Tribunal Rules envisage.

23. The Appeal Division considers 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 (it was known to 2CC at the time of the Hearing). The Appeal Division does not consider that 2CC's decision to focus at the Hearing on a particular matter it disagreed with in NZ RegCo's submissions is a good reason for 2CC to not have produced this evidence. Further, it should have been predictable that the Hearing Division would assess any facts relevant to the potential impact of 2CC's breach on investors and the market (this being a factor included in the Procedures and a matter addressed by NZ RegCo in its SOC).

Evidence of limited relevance

24. The Appeal Division accepts that 2CC's new evidence is credible.

25. The Appeal Division considers, however, that whether Audit Committee meetings were held during the period 2CC was in breach is a factor more relevant to an assessment of actual harm. As noted in the HLG decision, the correct focus when determining whether a breach had the potential to cause an impact on investors and/or the market is to consider the nature of the harm the relevant Rule seeks to prevent and to assess the potential for that harm to occur. The fact that one Audit Committee meeting was held, where 2CC seems to submit that no decisions were made[5], supports a finding that no actual harm arose (a finding already made by the Hearing Division), it does not necessarily remove or mitigate the potential for harm to have occurred.

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[5] Paragraph 13 of the SOA.

26. The Appeal Division also notes that an Audit Committee meeting once during an eight-week period is not an exceptional circumstance – a Board Committee of an Issuer would typically meet once or twice every two months.

Appeal Division decision on new evidence

27. The Appeal Division considers that 2CC's evidence could have been produced 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 (for the reasons outlined above). The Appeal Division declines 2CC's application to introduce this evidence on appeal.

28. The Appeal Division also considers that one Audit Committee meeting being held, where 2CC seems to submit that no decisions were made, is more relevant to the question of whether actual harm arose.

29. Even if this evidence was admitted, the Appeal Division does not consider that it would have materially affected the Hearing Division's decision that the combination of facts set out in paragraphs 68, 69 and 70 (where it was noted that 2CC's Audit Committee was not chaired by an Independent Director and included an Executive Director) meant that 2CC's breach of both Rules 2.1.1(c) and 2.13.2(c) had the potential to cause a moderate impact on investors and the market. The Appeal Division notes that the fact the Audit Committee met once during the eight-week period 2CC was in breach (1) relates only to the breach of Rule 2.13.2(c); (2) is more relevant to assessing whether actual harm arose; and (3) is not unexpected.

Grounds for Appeal

30. 2CC appeals against the penalty imposed by the Hearing Division in the 2CC decision, in particular the Hearing Division's application of Section 9 of the Procedures. 2CC argues that:

    a. its breach should be assessed as falling within Penalty Band 1 (Minor Breaches), not Penalty Band 2 (Moderate Breaches); and

    b. the Hearing Division did not strike the appropriate balance of the aggravating and mitigating factors.

31. As noted in the 2CC decision, Section 9 of the Procedures provides guidance to the Tribunal on assessing the appropriate financial penalty for a breach of the Rules. The Procedures are not determinative, and the Tribunal will ultimately use its discretion in determining the appropriate penalty band, starting point penalty and ultimate penalty (Procedure 9.1.2). The Appeal Division's role in this appeal is to review the Hearing Division's findings as they relate to penalty. The Appeal Division will not seek to fetter the Hearing Division's discretion when fixing penalty, but rather will review whether the Hearing Division erred in its interpretation of the relevant Procedures or in the way it has applied those Procedures to the particular facts it has found.

Penalty Band

32. 2CC's main ground for appeal is the Hearing Division's determination that its breach had the potential to cause a moderate impact on investors and the market and the resulting decision to apply Penalty Band 2.

Potential impact

33. 2CC argues that regardless of whether there were any Board or Audit Committee meetings, the limited nature of Mr Shaw's role meant that it is hard to see how the breach could cause potential harm to crystallise. In support, 2CC largely repeats its submissions made during the Hearing regarding the circumstances of NZMF and 2CC, and the limited nature of Mr Shaw's role. 2CC argues that the factual matrix in this case does not support a finding that the breach had the potential to cause a moderate impact on investors or the market.

34. The Hearing Division's assessment of the potential impact of 2CC's breach is set out in paragraphs 65 to 71 of the 2CC decision.

35. The Appeal Division has considered the subsequent submissions made by 2CC, which are not new[6] and were fully canvassed in the 2CC decision. There is no indication to suggest that the Hearing Division did not fully and carefully consider the facts before concluding that there was a moderate potential for harm arising from 2CC's breach. The Appeal Division notes that the determination of the potential impact of a breach is not based on a hindsight view of what occurred, rather it is an assessment of the potential for impact to occur at the time of the breach.

36. The Appeal Division finds no error in the Hearing Division's interpretation of this factor or in the way it has applied it to the facts in this case.

Financial benefit

37. 2CC notes that at paragraphs 61 to 64 of the 2CC decision, the Hearing Division determined there was some financial benefit to 2CC in Mr Shaw undertaking the NZMF role and "removed" the Penalty Band 1 factor of no financial benefit identified by NZ RegCo. 2CC argues that this Penalty Band 1 factor should be "reinstated" on the basis that while Mr Shaw's remuneration was less than for a director, remuneration was nonetheless paid. 2CC submits that the intent of the remuneration was to reflect the amount that would be paid to a third party for the services rendered and, therefore, 2CC did not obtain a financial benefit or commercial advantage as it still ended up paying someone to fill the role. 2CC notes that its intention was not to obtain a financial benefit.

38. The Appeal Division considers it of benefit to repeat part of the 2CC decision:

> *"62. 2CC advised that as NZMF's lending operations were being run down, appointing a replacement general manager for NZMF was unnecessary given impending restructuring, and a "**heavy cost**" for the 2CC group. However, someone was needed to oversee the collection and management of the NZMF loan book. 2CC advised that its Board made the decision to have Mr Shaw undertake this role to ensure it "had a relevantly skilled person who knows the business, to do what is an important yet basic role essentially ensuring loan payments are paid on time and other tasks associated with that function". 2CC noted that Mr Shaw's "remuneration was at a lesser rate than for a directorship. **In this way, the interests of shareholders would be served by minimising cost and maintaining momentum by not introducing a new person into a redundant role**".*
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> *63. **Given 2CC's statements, it appears that there was some financial benefit to 2CC in Mr Shaw undertaking this role. Although, as Mr***

[6] Aside from 2CC's submission that there were two Board meetings during the period it was in breach, which it did not seek to introduce as new evidence.

Shaw's role was limited, the value of this benefit was likely minimal.

> *64. A breach which results in a minor financial benefit to the respondent is a factor which falls under Penalty Band 2. However, as noted in the HLG decision, the Tribunal will not apply the Procedures in a "fixed or mechanical way" but will use its discretion to consider the particular circumstances of individual cases. In this case, where there was arguably a minor financial benefit by minimising costs, as opposed to an "ill-gotten gain" arising from the breach,* ***the Tribunal does not consider that this factor should contribute to increasing the penalty.****"* [emphasis added and footnotes removed]

39. The Hearing Division determined that any benefit gained in these circumstances should not contribute to increasing the penalty and this was not included as a Penalty Band 2 factor. 2CC now argues that there was no benefit, and this should be treated as a Penalty Band 1 factor.

40. Given the submissions made by 2CC during the Hearing, the Appeal Division considers that it was reasonable for the Hearing Division to draw the conclusions it did (i.e. that there was some financial benefit, although it was likely minimal).

41. The Appeal Division notes that the Tribunal makes its own assessment of the applicable factors. It does not simply accept the submissions of NZ RegCo (as seen by its assessment of the breach duration).

2CC's submissions on penalty band and starting point penalty

42. 2CC argues that its breach falls within Penalty Band 1 because (1) the breach did not have the potential to cause a moderate impact on investors or the market (2CC submits that either this factor should be removed, or the Penalty Band 1 factor of no/minor impact should apply); and (2) the Penalty Band 1 factor of no financial benefit should be "reinstated". 2CC submits that a finding of Penalty Band 1 would be consistent with Procedure 9.2.2, which notes that in most cases the appropriate Penalty Band will be one where 2 or 3 factors are present to a greater or lesser degree, and the overall seriousness of the breach.

43. 2CC also submits that an Issuer's size must be considered when determining the overall seriousness of a breach – a large Issuer more able to recruit and maintain a larger compliance function being more culpable than a small Issuer. 2CC argues that an Issuer, such as itself, clearly cannot have the same compliance function as an entity in the NZX20 or NZX50, and this "practical reality" must be considered in determining seriousness and culpability for a breach. NZ RegCo submits that all Issuers have common obligations under the Rules, regardless of their financial standing and resources, and that matters relating to a Respondent are considered under Step 2 (Procedures 9.2.3 to 9.2.7), not when assessing the starting point penalty.

44. 2CC submits that a penalty at the lower end of Penalty Band 1 is appropriate and that the starting point should be $15,000 ($5,000 more than it submitted in the SOR to reflect the non-application of older precedents as noted in the 2CC decision).

Appeal Division findings on Penalty Band and starting point penalty

45. Procedure 9.2.2 also states that "*If only one factor within a penalty band exists in a particular case the breach may still fall within that penalty band or it may fall within the penalty band where the most factors exist. The Tribunal will in its discretion weigh the factors present, to ensure that they are appropriately*

balanced, when making an assessment of the starting point penalty band and the starting point penalty".

46. The Appeal Division does not consider that the Hearing Division erred when it found that 2CC's breach of both Rules 2.1.1(c) and 2.13.2(c) had the potential to cause a moderate impact on investors and the market or when it disregarded financial benefit as a factor. There is no indication to suggest that the Hearing Division did not fully and carefully weigh up all the relevant factors, which included that 2CC had committed a serious compliance breach that continued for eight weeks, when assessing that 2CC's breach of both Rules 2.1.1(c) and 2.13.2(c) most appropriately fell within Penalty Band 2. Nor is there anything to suggest that the Hearing Division erred in its assessment of the overall seriousness of 2CC's breach when determining that the matter fell at the bottom of Penalty Band 2 and imposed a starting point penalty of $30,000 (which the Appeal Division notes is within the penalty range of Penalty Band 1). The Hearing Division's decision with regards to penalty band and starting point penalty were within the scope of its discretion under the Procedures. The Appeal Division finds no material error in the Hearing Division's assessment.

Relevance of Issuer size when assessing the seriousness of a breach

47. 2CC argues that Issuer size is relevant when determining seriousness and culpability for a breach.

48. The Appeal Division makes the following observations:

    a. 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). This is particularly important in respect of the Rules intended to protect the interests of shareholders, such as the corporate governance requirements.

    b. If a breach of the Rules does occur, there may be circumstances when an Issuer's size is a contributing factor relevant in assessing the starting point penalty (for example, the fact that an Issuer is small and does not have a compliance function may be relevant in assessing how promptly a breach was detected and addressed). However, an Issuer's size is not, by itself, a factor which should contribute to the assessment of the seriousness of a breach given that all Issuers are required to comply with the Rules.

    c. Issuer size may also be relevant when assessing mitigating or aggravating factors (for example, a starting point penalty having an adverse effect on the ongoing commercial viability of an Issuer is likely to lower the starting point penalty (Procedure 9.2.5(i))[7]. But, again, an Issuer's size is not, by itself, a mitigating or aggravating factor.

Aggravating factors

49. 2CC argues that the two aggravating factors detailed in the 2CC decision – "compliance history" and "negligence" – should be removed.

Compliance history

50. 2CC disagrees with the categorisation of its compliance history as an aggravating factor, given its previous breach of Rule 2.7.1 in 2022 occurred because it relied on the legal advice it received.

[7] This ground was not advanced by 2CC in the Hearing. NZ RegCo submits that the starting point penalty determined by the Hearing Division in this case ($40,000) would not meet this threshold.

51. The Hearing Division stated that "*Previous Rule breaches are relevant when assessing an Issuer's compliance history*"[8]. The Appeal Division considers this statement to be correct given Procedure 9.2.4 includes overall compliance history as a factor relevant to a Respondent. The nature and circumstances of a previous breach should be considered when assessing the degree to which it is aggravating. The Hearing Division made this assessment, noting 2CC's reliance on the legal advice it received and stating that it considered the breach should not be a "*significantly aggravating factor given that breach appears to have been minor (with NZ RegCo taking an "educative approach) and is unrelated to the present breach*".

52. 2CC submits that including this as an aggravating factor suggests that Directors should second guess advice when the circumstances do not require it and "*What's more this is tantamount to holding Directors to a higher standard than in the discharge of their fiduciary and statutory duties*". The Appeal Division notes that the Directors are "not being held to a higher standard". This proceeding is against 2CC for its breach of the Rules, not its Directors - they are not one and the same.

53. 2CC submits that it will accept responsibility for breaches of the Rules "*where it is at fault...but strongly disagrees with an aggravating factor where fault is absent and due process was followed*". The Appeal Division notes that 2CC is a party to a Listing Agreement with NZX under which it has agreed to comply with the Rules. 2CC is responsible for ensuring compliance, regardless of "fault". Fault may be relevant to culpability and the seriousness of an Issuer's breach. The Hearing Division took this into account in its decision when determining that 2CC's previous breach was not significantly aggravating.

54. The Appeal Division considers that the Hearing Division was correct to have regard to 2CC's previous Rule breach because it relates to 2CC's past compliance, although little weight appears to have been given to this factor.

Negligence

55. 2CC notes that negligence is not mentioned in Procedure 9.2.6 as an aggravating factor (although accepts this list is not exhaustive) and questions the adoption of negligence as an aggravating factor at all (noting the reference in the Procedures to a breach being intentional or reckless). 2CC argues that all breaches of the Rules are likely to be negligent and the inclusion of such a factor could suggest that the existence of a breach itself is an aggravating factor.

56. As noted in the HLG decision, the Procedures provide a framework that identifies some, but not all, factors relevant to penalty-setting. The Procedures confine and structure the Tribunal's discretion, but do not eliminate it. Accordingly, it is within the Tribunal's discretion to consider whether a Respondent's conduct was negligent when assessing whether to increase the starting point penalty.

57. When making its finding of negligence in this case, the Hearing Division noted that "*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)*"[9]. The Appeal Division notes that the negligence found did not simply relate to having breached the Rules, as suggested by 2CC, but in 2CC's failure to consider the application of the Rules, particularly in circumstances where Mr Shaw had recently completed a term as Interim CEO and had only regained his Independent Director status less than two months before.

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[8] Paragraph 96 of the 2CC decision.
[9] Paragraph 92 of the 2CC decision.

58. 2CC has not addressed in its SOA the Hearing Division's concern regarding the statements made in its Annual Report (as noted at paragraph 94 of the 2CC decision), except to say that "negligence" should be removed as an aggravating factor. The Appeal Division considers these statements to have been particularly aggravating. The Hearing Division found "*...the statements made in the Annual Report (released on 29 June 2023) give the impression that 2CC had complied with the Independent Director requirements, which are intended to protect the interests of shareholders, when for a time, they had not*".

Appeal Division findings on aggravating factors

59. 2CC argues that no aggravating amount should be imposed on the basis that one or both aggravating factors are removed and after further considering the HLG decision.

60. The Appeal Division does not consider that the Hearing Division misinterpreted the 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 Annual Report. Nor does 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 the Hearing Division's discretion under the Procedures or a material error given the circumstances of this case.

Comparison to HLG decision

61. 2CC queries how HLG received a 50% discount from its starting point penalty, as outlined in the HLG decision, "*despite the combination of mitigating factors not being dissimilar to the ones in this case and the aggravating factors not being as extensive*". The Appeal Division notes that in the HLG decision, a 50% discount from the starting point penalty of $150,000 was given based on the following mitigating factors:

    (a) HLG's early admission of breach (a factor which the Appeal Division notes can attract a discount of up to 25% in criminal proceedings);

    (b) full cooperation with NZ RegCo's investigation;

    (c) steps taken to address its compliance issues; and

    (d) good compliance history before its referral to the Tribunal.

62. The Appeal Division does not consider that the mitigating factors detailed in the 2CC decision - that 2CC cooperated with NZ RegCo (although this was not considered to be a significant factor given 2CC's initial responses were not "full" or "open") and commitment to improving compliance practices - are equivalent to the mitigating factors outlined in the HLG decision. The Hearing Division noted that the differential between the penalty imposed on HLG and the one imposed on 2CC could have been higher but for the lack of mitigating factors applicable to 2CC. The Hearing Division also noted that 2CC breached both Rules 2.1.1(c) and 2.13.2(c) (HLG breached only Rule 2.13.2(c), as its Board had more than the required number of Independent Directors).

Conclusion on penalty

63. The Appeal Division has considered the points raised by 2CC in support of its argument that the appropriate penalty in this case is $15,000.

64. The Appeal Division does 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.

65. The Appeal Division does not consider that the 2CC decision resulted from either a misinterpretation or an erroneous application of the Tribunal Rules, and by extension the Procedures, as they relate to penalty setting.

Decision

66. In accordance with Tribunal Rule 7.8.1, the Appeal Division affirms the determination of the Hearing Division in the 2CC decision.

67. The Appeal Division orders that 2CC pay the costs and expenses incurred by the Appeal Division and by NZ RegCo in considering this appeal in accordance with section 10 of the Tribunal Rules.

Publication

68. 2CC does not object to the publication of the appeal decision and does not consider that a delay is required. NZ RegCo also considers that any decision made by the Tribunal on this appeal should be published and there is no reason to delay that publication.

69. The Appeal Division considers it appropriate that this decision be publicly released, together with the 2CC decision and public censure.

DATED 3 OCTOBER 2023

David Lane, Appeal Division Chair, NZ Markets Disciplinary Tribunal