

**IN NZ MARKETS DISCIPLINARY TRIBUNAL  
SUMMARY HEARING PROCEDURE**

**NZMDT 3/2013**

**UNDER** the NZ Markets Disciplinary Tribunal Rules

**IN THE MATTER OF** breach of NZAX Listing Rule 10.5.1

**BETWEEN** **NZX LIMITED**

**AND** **RIS GROUP LIMITED**  
Respondent

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**DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL  
1 MARCH 2013**

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1. This is a determination of a division of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising Peter Wilson (division chairman), Jo Appleyard and Tim Williams.
2. Capitalised terms that are not defined in this determination have the meanings given to them in the NZAX Listing Rules (*the Rules*).

### **Background**

3. RIS Group Limited (*RIS*) is an Issuer Listed on the NZAX and is bound by the Rules.
4. On 16 January 2013, NZX Limited (*NZX*) notified RIS that it intended to file a statement of case against it alleging a breach of Rule 10.5.1.
5. On 4 February 2013, NZX served a statement of case on RIS in which it alleged that RIS had breached Rule 10.5.1 because it did not release its annual report to the market within four months of its financial year end.
6. On 18 February 2013, RIS filed a statement of response.
7. On 22 February 2013, NZX filed a statement of rejoinder.

### **Statement of Case**

8. The statement of case set out the following material facts:
  - a. Rule 10.5.1 requires an Issuer to release its annual report to the market within four months of its financial year end. RIS's 2012 financial year ended on 30 June 2012. RIS was therefore required to release its annual report by 31 October 2012.
  - b. On 8 October 2012, RIS advised NZX that its annual report would be delayed and requested a waiver from Rule 10.5.1 to allow RIS until 30 December 2012 to provide its annual report. RIS advised that the settlement of the sale of its main operating subsidiary in Australia had been delayed.
  - c. Between 10 October 2012 and 5 November 2012, NZX and RIS were in discussions regarding the waiver application.
  - d. On 1 November 2012, NZX announced that RIS's annual report was overdue and that if it was not released by 7 November 2012, trading in RIS' ordinary shares would be suspended from 8 November 2012 in accordance with the policy set out in Footnote 2 to Rule 5.4.3.
  - e. On 5 November 2012, NZX announced that it had declined the waiver sought by RIS from Rule 10.5.1.
  - f. RIS' annual report was not released by 7 November 2012 and NZX suspended trading in RIS' ordinary shares on 8 November 2012.
  - g. On 30 November 2012, RIS released its annual report to the market. On 4 December 2012, RIS re-released its annual report as BDO Auckland had modified its audit opinion and RIS needed to include information about Trading Halts during the year ended 30 June 2012.

- h. Following the release of the annual report, trading in RIS' ordinary shares resumed on 5 December 2012.

*NZX's recommended penalty*

- 9. A breach of the periodic reporting requirements falls within Penalty Band 6 of Procedure 11.3.1 of the Tribunal Procedures (*the Procedures*), which means that on a summary hearing the maximum fine the Tribunal can impose is \$250,000.
- 10. NZX submitted that the breach by RIS falls within the middle range of conduct falling within Penalty Band 6.
- 11. NZX submitted that the following mitigating factors are relevant when determining the appropriate penalty:
  - a. RIS contacted NZX on 8 October 2012, self-reporting that the annual report would not be released by 31 October 2012; and
  - b. RIS sought a waiver from Rule 10.5.1.
- 12. NZX submitted that the following aggravating factors are relevant in determining the appropriate penalty:
  - a. The annual report was approximately four and a half weeks late;
  - b. In the waiver application, RIS submitted that it had limited resources to complete the audit required by Rule 10.5.1. A Listed Issuer is required to comply with its obligations under the Rules and should ensure it has sufficient resources to do so;
  - c. While RIS advised the market on 29 October 2012 of the delay, this was only two Business Days before the annual report was due for release and was therefore insufficient notice;
  - d. RIS has already been the subject of disciplinary action by the Tribunal when its 2011 annual report was released approximately two and a half months late; and
  - e. The purpose of Rule 10.5.1 is to ensure that relevant, reliable information on the performance and financial position of a Listed Issuer is available promptly at the end of each financial year. RIS failed to do this.
- 13. NZX submitted that the appropriate penalty is a public censure of RIS, a fine of \$40,000, and an order that RIS pay the costs of both NZX and the Tribunal.
- 14. NZX noted that its costs incurred so far were \$3,200 (excluding GST).

***Statement of Response***

- 15. On 18 February 2013, RIS filed a statement of response. RIS acknowledged that it had not strictly complied with the requirements of the Rules and did not dispute the material facts outlined in the statement of case.

16. However, RIS submitted in mitigation that:
- a. It was unable to release its annual report when due because there were delays in completing the major transaction being undertaken during September to December 2012 (*the USG Transaction*). The USG Transaction involved a significant operational, management and financial restructure of the entire RIS group of companies and took up much of the human resource at RIS' disposal.
  - b. RIS wanted to have the USG Transaction completed before the release of its annual report so that it could properly report it as a subsequent event given its significance and importance to RIS.
  - c. It did not have adequate resources to satisfy its obligations in respect of both the USG Transaction and the release of the annual report due to the delay in receiving the cash component of the USG Transaction.
  - d. RIS was in contact with NZX throughout October 2012 and advised NZX of the delay in releasing its annual report.
  - e. The RIS Board regrets the developments that have transpired in respect of its failure to comply with the Rules. The RIS Board are embarrassed and disappointed that their miscalculation of timing and allocation of resource in respect of the USG Transaction and the preparation of the annual report led to the market being uninformed for 4.5 weeks and for the detrimental impact that such non-compliance may have on the integrity of the market.
  - f. The RIS Board has implemented a new protocol to manage compliance with its obligations under the Rules. This protocol involves ensuring that:
    - (i) all deadlines are properly scheduled;
    - (ii) adequate financial and human resource are allocated to ensuring compliance with its regulatory obligations; and
    - (iii) compliance with regulatory obligations are given absolute paramount importance and priority over all other matters.
17. The RIS Board acknowledged that the proposed sanctions and penalties sought by NZX were not unreasonable, but needed to be considered in light of the financial circumstances of RIS. In the context of RIS, the imposition of a \$40,000 penalty is a significant sum, particularly as RIS has limited cash reserves. The Board considers the penalty sought of \$40,000 is too significant a percentage of its entire cash reserves and jeopardises the on-going viability of RIS as a going concern. RIS submitted that what cash reserves it had were needed to investigate and implement business initiatives. RIS sought a reduced penalty of \$15,000, to be paid in equal instalments during each of March, May and July 2013.

***NZX's rejoinder***

18. On 22 February 2013, NZX filed a statement of rejoinder in which it noted:

- a. NZX accepts that RIS approached it seeking an extension of time by which RIS had to publish the annual report and this was considered as a mitigating factor in its statement of case.
- b. It was pleased to see that the RIS Board has implemented a new protocol to manage compliance with its obligations under the Rules. However, NZX would have expected that RIS would have implemented this type of protocol following the disciplinary proceedings in 2011 and so avoided a further breach of Rule 10.5.1.
- c. It is not the intention of NZX to propose penalties that impact on RIS's financial viability. However, having regard to the maximum penalties that could be imposed, the Tribunal's stated intention of increasing penalties for periodic reporting breaches, relevant precedents (including the previous disciplinary action taken by NZX in respect of RIS) and RIS's financial position, NZX does not regard a penalty of \$15,000 as being sufficient for the breach of Rule 10.5.1. NZX remains of the view that the penalties sought in the statement of case are appropriate. However, NZX would discuss a payment plan with RIS to assist RIS with managing its cash flow.

### **Rule 10.5.1**

19. Rule 10.5.1 provides that:

*"Subject to Rule 10.5.2 each NZAX Issuer shall within four months of the end of each Issuer's financial years:*

- (a) Deliver to NZX electronically, in the format specified by NZX from time to time; and*
- (b) Make available to each Quoted Security holder in accordance with Rule 10.5.3,*

*an annual report. That annual report shall be delivered to NZX before, or at the same time as, it is made available to Quoted Security holders in accordance with Rule 10.5.3, and shall contain all information:*

- (c) required by law;*
- (d) required in a preliminary announcement by Rule 10.4.2; and*
- (e) required by Rules 10.5.5 and 10.5.7.*

*The financial statements in that annual report shall be audited and shall be accompanied by an audit report in accordance with the requirements of the Financial Reporting Act 1993."*

### **Decision of the Tribunal**

- 20. There is no dispute that RIS has breached Rule 10.5.1. The issue for the Tribunal to determine is the appropriate penalty to be imposed on RIS as a result.
- 21. An Issuer's compliance with the periodic reporting requirements in the Rules is fundamental. Information in relation to the performance and financial position of an Issuer must be promptly made available to the market. Any breach of these Rules brings the market into disrepute. The Tribunal has increased the penalties it imposes for such breaches in past cases in the hope it would act as a deterrent.

22. The Tribunal is dismayed to find RIS in breach of Rule 10.5.1 for the second consecutive year. It is reprehensible that RIS has again failed to release its annual report when due.
23. In *NZMDT 4/2011 NZX v RIS Group Ltd*, the Tribunal agreed to a settlement between RIS and NZX which included a penalty of \$30,000 for the breach of Rule 10.5.1 when RIS failed to release its 2011 annual report when due. There were a number of aggravating factors which contributed to the penalty including that RIS had breached both Rules 10.4.1 and 10.5.1, it remained in breach of Rule 10.5.1 when the matter was referred to the Tribunal, the duration of the breach was some two and a half months and it had failed to keep the market informed. The Tribunal notes that when the settlement was agreed between RIS and NZX, RIS provided assurances to NZX that it had implemented changes to its financial arrangements to mitigate the risk of further or similar breaches of the periodic reporting requirements. The Tribunal also noted in its decision that it was mindful that it was the first such offence for RIS and that as an NZAX Issuer of limited financial resources the penalty agreed in the settlement represented a significant sum.
24. RIS has perhaps learned some lessons from that earlier episode in the manner in which it has conducted itself this time – advising NZX that it was likely to breach the Rule ahead of time, seeking a waiver and advising the market.
25. However, the fact remains that RIS shareholders were again uninformed as to the financial position of RIS and unable to trade their securities through the NZAX for nearly a month.
26. There is no merit in raising as a mitigating factor that the Listed Issuer has insufficient internal resources to attend to the timely preparation of financial statements under the Rules. Listed Issuers need to plan for, and ensure they have sufficient resources to meet, their obligations under the Rules.
27. The Tribunal also considers it inappropriate to delay producing the prescribed financial statements beyond the deadline in the Rules because of a desire to record transactions which have not been completed during the reporting period in a post balance date note. The effect of such transactions can be reported to the market when they are completed, with commentary that explains the impact on the financial statements if such information is material. Such announcements could, if needed, include all information contained in the desired note. Changes to Listed Issuer's businesses are continual and a line must be drawn at some point. Realistic assessments should be made when nearing the reporting cut off as to whether a transaction can be completed in time to be included as a note without substantially extending the timeframes.
28. Accordingly, the Tribunal considers that the higher penalty of \$40,000 sought by NZX is appropriate in this case.
29. The Tribunal notes that RIS has not responded to NZX's submissions that it be censured, and such an order is standard for breaches of this kind. Similarly, RIS has made no submission opposing an award of costs (of both NZX and the Tribunal). Again, costs are routinely awarded for breaches of this kind.

## **Orders**

30. The Tribunal imposes the following penalties:
  - (a) a **public censure** of RIS by the Tribunal in the form of the announcement attached to this decision;
  - (b) an order that RIS pay NZX **\$40,000** by way of penalty by 31 May 2013;
  - (a) an order that RIS pay NZX the costs and expenses incurred by the Tribunal in considering this matter by 31 May 2013; and
  - (b) an order that RIS pay NZX the costs and expenses incurred by NZX in relation to this matter by 31 May 2013.
31. The collection of financial penalties imposed on Issuers under the Tribunal Rules is a matter for NZX. However, given the financial circumstances of RIS, the Tribunal suggests NZX consider a payment plan to assist RIS with managing its cash flow.

## **Publication of this decision**

32. The Tribunal recommends that this decision be released to the market in full under Tribunal Rule 6.6.

## **Summary Hearing Procedure**

33. Under Tribunal Rule 6.1.1, NZX has the discretion to refer a matter, which is not frivolous but is not sufficiently serious to require determination under the Full Hearing Procedure, to the Tribunal for hearing and determination by way of the Summary Hearing Procedure.
34. NZX advised the Tribunal that it considered this matter appropriate for the Summary Hearing Procedure because the issues involved were not complex and RIS was clearly in breach of the Rules.
35. The Tribunal agrees that a Summary Hearing was appropriate for this matter.

DATED 1 MARCH 2013

Peter Wilson, Division Chairman, NZ Markets Disciplinary Tribunal



[x] March 2013

## **ANNOUNCEMENT OF NZ MARKETS DISCIPLINARY TRIBUNAL**

### **PUBLIC CENSURE OF RIS GROUP LIMITED (RIS) BY THE NZ MARKETS DISCIPLINARY TRIBUNAL FOR BREACH OF NZAX LISTING RULE 10.5.1**

#### **Background**

1. In a determination of the NZ Markets Disciplinary Tribunal (*the Tribunal*) dated 1 March 2013 (see separate announcement made today, [x] March 2013, for the full text of the determination), the Tribunal found that RIS acted in breach of NZAX Listing Rule (*Rules*) 10.5.1.
2. Rule 10.5.1 requires an issuer to make its annual report available within four months of the end of its financial year. RIS' financial year-end is 30 June, and accordingly its 2012 annual report was due by 31 October 2012.
3. RIS breached Rule 10.5.1 because its annual report was not released to the market until 30 November 2012 and then re-released on 4 December 2012. As a result of the breach, trading in RIS' securities was suspended from 8 November 2012 until 5 December 2012. RIS admitted the breach.
4. The Tribunal has stated on numerous occasions that an issuer's compliance with the periodic reporting requirements in the Rules is fundamental. Information in relation to the performance and financial position of an issuer must be promptly made available to the market. Any breach of these Rules brings the market into disrepute. The Tribunal has increased the penalties it imposes for such breaches in past cases, and will continue to do so, in the hope that this will act as a deterrent.

#### **Decision**

5. The Tribunal was dismayed to find RIS in breach of Rule 10.5.1 for the second consecutive year. It is reprehensible that RIS has again failed to release its annual report when due.
6. In considering the appropriate penalty to impose in this case, the Tribunal considered the following aggravating factors:
  - (a) This is the second time RIS has been referred to the Tribunal for a breach of Rule 10.5.1. The Tribunal agreed to a settlement between RIS and NZX which included a penalty of \$30,000 for the breach of Rule 10.5.1 when RIS failed to release its 2011 annual report when due.



- (b) In the settlement agreed between RIS and NZX regarding the breach in 2011, RIS provided assurances to NZX that it had implemented changes to its financial arrangements to mitigate the risk of further or similar breaches of the periodic reporting requirements. Yet a breach has again occurred.
- 7. In considering the appropriate penalty to impose in this case, the Tribunal considered the following mitigating circumstances:
  - (a) RIS advised NZX in early October 2012 that it was likely to breach the Rule; and
  - (b) RIS engaged in discussions with NZX in the period leading up to and immediately after the reporting deadline, including seeking a waiver to extend the time by which the annual report was due.

### **Orders**

- 8. The Tribunal made the following orders:
  - (a) RIS be publicly censured;
  - (b) That RIS pay to the NZX Discipline Fund **\$40,000** by way of penalty for the breach of Rule 10.5.1;
  - (c) That RIS pay the actual costs and expenses incurred by the Tribunal in considering this matter; and
  - (d) That RIS pay the actual costs and expenses incurred by NZX in considering this matter.

### **Censure**

- 9. The Tribunal hereby publicly censures RIS for its breach of NZAX Listing Rule 10.5.1.

**DATED** [x] March 2013

Peter Wilson, Division Chairman, NZ Markets Disciplinary Tribunal