

NZ MARKETS DISCIPLINARY TRIBUNAL

HEARING PROCEDURE

NZMDT 3/2018

UNDER the NZ Markets Disciplinary Tribunal Rules

IN THE MATTER OF breach of NZAX Listing Rule 10.5.1

BETWEEN **NZX LIMITED**

AND **WINDFLOW TECHNOLOGY LIMITED**

Respondent

**DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL
11 MAY 2018**



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1. This is a determination of a division of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising Susan Peterson (division chair), Matthew Blackwell and Mariëtte van Ryn.
2. Capitalised terms that are not defined in this determination have the meanings given to them in the NZAX Listing Rules (*the Rules*).

Procedural Background

3. Windflow Technology Limited (*WTL*) is an Issuer with ordinary shares Quoted on the NZAX Market. WTL is subject to the Rules.
4. On 13 April 2018, NZX Limited (*NZX*) filed a statement of case (*SOC*) alleging that WTL breached Rule 10.5.1 by failing to deliver its Annual Report to NZX within four months of the end of its financial year.
5. On 26 April 2018, WTL filed a statement of response (*SOR*).
6. On 1 May 2018, NZX filed a rejoinder.

Factual Background

7. Rule 10.5.1 requires each Issuer to deliver to NZX, and make available to each Quoted Security holder, an annual report within four months of the end of the Issuer's financial year.
8. WTL's financial year end is 30 June. Accordingly, under Rule 10.5.1, WTL's 2017 annual report (*2017 Annual Report*) had to be released by 31 October 2017.
9. On 2 November 2017, WTL filed its 2017 Annual Report, two business days after it was due.
10. WTL has previously breached Rule 10.5.1 (filing its 2016 annual report two business days late) and Rule 10.4.1 (filing its 2017 preliminary full year report less than one business day late). Neither of these breaches resulted in the suspension of WTL's securities, nor were they referred to the Tribunal.

NZ Markets Disciplinary Tribunal Determination

11. WTL accepts in the SOR that it breached Rule 10.5.1 by filing its 2017 Annual Report two business days late. Accordingly, the Tribunal is simply required to determine the penalty that is to be imposed on WTL for breaching that Rule.

Financial Penalty

12. 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.
13. Accordingly, 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.
14. 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.

15. The Tribunal considered each of these factors, where relevant in this case, and found that the following factors were likely to reduce the penalty:
 - a. the duration of the breach was short - two business days;
 - b. WTL's securities were not suspended by NZX as a result of the breach¹;
 - c. WTL cooperated fully with NZX Regulation's investigation into the breach, as acknowledged in the SOC;
 - d. the Tribunal saw no evidence that WTL intentionally failed to file the 2017 Annual Report when due;
 - e. no particular measurable harm to investors can be identified as arising from the breach;
 - f. no financial benefit or commercial advantage for WTL appears to have resulted from the breach; and
 - g. this is the first occasion WTL has been referred to the Tribunal.
16. The Tribunal considered the above factors to have significantly reduced the penalty that would otherwise have been imposed for a breach of this nature.
17. The Tribunal notes that the parties have differing views on whether WTL was required to advise the correct "team" within NZX (either NZX Regulation or NZX Issuer Relationships) that its 2017 Annual Report would be delayed. Regardless, WTL failed to provide prior notice to the market that there would be a delay and the reasons for that delay. Accordingly, the Tribunal did not consider the prior notification to NZX to be a particularly noteworthy mitigating factor in this case.
18. The Tribunal considered that the following factors were likely to increase the penalty in this case:
 - a. WTL also breached the periodic reporting requirements on two previous occasions (as noted in paragraph 10 above), making this breach WTL's third consecutive breach; and
 - b. repeated breaches of the Rules demonstrate to the Tribunal that WTL did not have effective compliance and operational processes in place to ensure that reporting deadlines were met.
19. The Tribunal is greatly concerned that this is the third consecutive breach of the periodic reporting requirements by WTL. Listing is a privilege and it is incumbent on all Issuers who wish to maintain their listing to comply with the Rules. While this breach is the first occasion WTL has been referred to the Tribunal, in the Tribunal's view WTL's conduct over the previous 24-month period forms a pattern of poor compliance with these requirements.
20. WTL submits that the primary reason for the delay in providing its 2017 Annual Report was eleventh hour audit issues. WTL noted in the SOR that the audit issues which arose were not typical audit issues that might have been reasonably foreseen and provided for in the timetable to signing and filing an annual report. However, as previously stated by the Tribunal, all Issuers must manage the audit process to ensure deadlines are met, regardless of the issues that may arise. This is particularly true of WTL, who also breached Rule 10.5.1 in respect of its 2016 annual report due to audit issues (as submitted by NZX in the SOC).

¹ In accordance with the policy set out in footnote 2 to Rule 5.4.3, NZX will suspend an Issuer's securities if they have not complied after five Business Days.

21. WTL has submitted that it was never given any formal warnings or notification from NZX that another periodic reporting breach may amount to a significant penalty. However, it is a cornerstone of the Rules, which each Issuer agrees to comply with, that any breach may be referred by NZX to the Tribunal. It is not beholden on NZX to individually advise each Issuer that referral is a possibility if they breach the Rules, which in the circumstances of this case, occurred for the third time.
22. The Tribunal also considers that Issuers should be cognisant of the decisions it makes. 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, including most recently in its decision in *NZMDT 2/2016 NZX v Pyne Gould Corporation (NZX v PGC)*. In *NZX v PGC* (upheld on appeal), the Tribunal noted in its determination a number of serious aggravating factors, including PGC's concerning compliance history (having been referred to the Tribunal on four 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 approximately 9 months. Given PGC's serious, repeat offending the Tribunal imposed a penalty of \$275,000.
23. As noted above, the Tribunal considers that there are a number of factors in this case which reduce the penalty that would otherwise have been imposed for a repeated breach of this nature. Accordingly, after careful consideration, including having regard to the short duration of WTL's breach (two business days), that no particular measurable harm to investors can be identified as arising from the breach (including that trading in the securities of WTL was not suspended) and that this is WTL's first referral to the Tribunal, the Tribunal considers that the breach in this instance falls at the low end of Penalty Band 3. Accordingly, the Tribunal considers that a penalty of \$25,000 is appropriate in this case.
24. The Tribunal notes that the ability of an Issuer to pay any penalty imposed should they breach the Rules, is not of itself a reason to discount the amount which the Tribunal would otherwise consider an appropriate penalty having regard to the seriousness of the breach and the conduct of the Issuer. The Tribunal also notes that under the Procedures, it has the discretion to take into account that the amount of the financial penalty is likely to deter future breaches by the respondent and to deter other parties from breaching the same or similar obligation.

Public censure

25. NZX has sought a penalty of public censure. WTL submits that the Tribunal should not exercise its discretion under the Rules to publicly censure WTL because:
 - a. The public has not been harmed, nor has public confidence in the sector been damaged by WTL's late filing of its 2017 Annual Report; and
 - b. WTL has not been referred to the Tribunal before and submits that it is cognisant of the Rules at all times.
26. 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:
 - c. 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
 - d. The respondent has been involved in repeated breaches and shown disregard for the Rules; and/or

- e. The respondent committed a breach that falls within Penalty Band 2 or Penalty Band 3 of Procedure 9.
27. While there was no measurable harm to investors in this instance, given the short duration of the breach and that WTL's securities were not suspended, the Tribunal considers that any breach of the periodic reporting requirements has the potential to damage public confidence in the market. The Tribunal also notes that while WTL has not previously been referred to the Tribunal, it has repeatedly breached the Rules which, in the Tribunal's view, demonstrates a disregard for the Rules.
28. Having regard to Procedure 9.3, including that the Tribunal must use its discretion when deciding whether to impose a penalty of public censure and in doing so must have regard to the overall conduct of the respondent, the Tribunal considers that a public censure in this case is appropriate.
29. The Tribunal also notes that the market is already aware that WTL breached Rule 10.5.1 by virtue of the announcement made by NZX on 1 November 2017.

Orders

30. The Tribunal orders that WTL:
- a. be publicly censured in the form of the announcement attached to this decision (which will include a full copy of this decision);
 - b. pay \$25,000 to the NZX Discipline Fund;
 - c. pay the costs and expenses incurred by the Tribunal in considering this matter; and
 - d. pay the costs and expenses incurred by NZX in considering this matter.

DATED 11 MAY 2018



Susan Peterson, Division Chair, NZ Markets Disciplinary Tribunal