

IN NZ MARKETS DISCIPLINARY TRIBUNAL

NZMDT 6/2021

UNDER NZ Markets Disciplinary Tribunal Rules

IN THE MATTER OF breach of NZX Listing Rules 3.1.1 and 3.26.2(c)

BETWEEN **NZX LIMITED**
Acting by and through NZX Regulation
Limited (*NZ RegCo*)

AND **GENEVA FINANCE LIMITED**
(*GFL*)

**DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL
4 NOVEMBER 2021**



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NZ Markets Disciplinary Tribunal
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1. This is a decision of a division of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising Mariëtte van Ryn (Division Chair), Kirsty Campbell and John Dixon QC.
2. Capitalised terms that are not defined in this decision have the meanings given to them in the NZX Listing Rules (*the Rules*).
3. Geneva Finance Limited (*GFL*) is an Issuer and is bound by the Rules.

Procedural background

4. On 10 September 2021, NZX Limited (*NZX*) filed a statement of case (*SOC*) alleging GFL had breached Rules 3.1.1 and 3.26.2. On 12 September 2021, GFL's legal counsel contacted the Tribunal advising that GFL would be requesting more time to file its statement of response and noting that NZX had not filed a complete and signed SOC. NZX resubmitted its SOC on 12 September 2021 (being a Sunday, the Tribunal recorded this as being received on 13 September 2021).
5. On 16 September 2021, GFL requested an extra 10 Business Days to file its statement of response noting that (a) legal counsel had only been instructed on the matter on 9 September 2021; (b) GFL was not familiar with the implications of the matter or the Tribunal process; (c) the resolution of the matter was not urgent (GFL had only been advised of NZX's intention to file proceedings on 3 September 2021); and (d) the level 4 lockdown in Auckland was restricting GFL and its counsel's ability to meet and access documents. On 17 September 2021, the Tribunal granted the extension requested, allowing GFL until 11 October 2021 to file its statement of response.
6. On 11 October 2021, GFL filed a statement of response (*SOR*) in which it disputed breaching Rule 3.1.1, but accepted breaching Rule 3.26.2(c).
7. On 14 October 2021, NZX filed a rejoinder (*Rejoinder*).

Alleged breach of Rules 3.1.1 and 3.26.2

8. NZ RegCo alleges that GFL breached Rule 3.1.1 by not releasing Material Information to the market when required. GFL released earnings guidance for its financial year ending 31 March 2021 (*Earnings Guidance*) at 10.45am on 15 March 2021 (*the Announcement*). NZ RegCo submits that the Earnings Guidance was Material Information, that GFL became Aware of the Earnings Guidance on 2 March 2021 and that GFL breached Rule 3.1.1 by not releasing the Earnings Guidance through MAP promptly and without delay.
9. NZ RegCo also alleges that GFL breached Rule 3.26.2 because it failed to mark the Announcement with a "P" flag in MAP, which denotes price sensitive information.
10. GFL considers that the Announcement was Material Information at the time it was approved by its Directors for release. It submits that it did not contravene Rule 3.1.1 from 2 March 2021 as a reasonable person would not expect a document prepared for internal management purposes to require release before Board consideration and approval. GFL also considers that the most "significant aspect" of the Announcement was GFL's decision to restore its final dividend for its financial year ending 31 March 2021 (*FY21*).
11. GFL accepts that it breached Rule 3.26.2(c) by not marking the Announcement with the "P" flag in MAP.

Factual background

Market announcements regarding FY21

12. On 31 August 2020, GFL released its annual report for its financial year ended 31 March 2020¹. In respect of forward looking statements, the annual report noted:

"Events Subsequent to Balance Date

Since year end:

Both of the loss making operations (Invoice factoring (GCL) and Debt litigation (MFL)), with combined losses in the March 20 year of \$0.8m. have moved into profit on a monthly basis.

Both Quest and GFSL has continued the lending/sales growth into the new year and GFSL is showing improved collections arrears. Cash collections from our receivables ledgers have returned to pre COVID-19 levels and while we are assisting customers with repayment plans as required, to date we have not seen a large number of customers seeking assistance.

However, despite the good progress above, the full impact of COVID-19 is still unknown and it is still widely expected that the slowdown in the economy will be widespread and unemployment will increase. These factors have been taken into consideration by the board, particularly in determining provisioning referred to in GFSL as above, but note that COVID-19 could also bring opportunities to aspects of the group's operations.

...

Strategic Direction

The Group remains focused on the core trading operations referred to above. Each of these businesses face challenges but also have considerable opportunities to expand. As such we will continue to invest in our people, marketing and IT systems across each of these businesses to realise their potential.

Summary and Outlook

It has been a difficult year. One where some operations performed very well while others required restructuring to turn around performance. Now that these changes have been made, despite the COVID-19 impact, the group is well positioned to return to sustainable profit and revenue growth. The company has a strong balance sheet, the receivables ledgers are well provisioned, and the board is looking forward to taking advantage of the opportunities the coming market will offer."²

13. On 30 September 2020, GFL released a copy of its Annual Meeting presentation to shareholders. In the presentation, GFL forecast for the six months to 30 September 2020 a group trading result before tax of \$3million (an increase of 33% on the same period in 2019) and a group trading result after tax of \$2.8million (an increase of 91.4% on the same period in 2019). The presentation also stated that:

¹ Under a class waiver granted by NZX on 19 March 2020, Issuers were given up to five months (rather than the usual 3 months) to file their 2020 annual reports.

² Page 8 of GFL's Annual Report 2020 (Annexure 1 of the SOC).

"Update on Performance to September 2020

6. Outlook and Summary:

- o It has been a difficult year*
- o Some operations performed very well while others required restructuring to turn around performance*
- o Changes have been made and despite the COVID-19 impact, the group is well positioned to return to sustainable revenue and profit growth*
- o Strong balance sheet*
- o Receivables ledgers are well provisioned*

*The board is looking forward to taking advantage of the opportunities the coming market will offer.*³

14. On 30 November 2020 at 4.56pm, GFL released its half year results for the six months ending 30 September 2020 (HY21) together with commentary titled "Geneva Finance Half year pretax results up 44%". GFL advised the market that:

"The group reported a pre-tax profit of \$3.3m, 44% up on last year. Profit after tax, attributable to the Geneva Group shareholders, totaled \$3.0m up 108% on last year. The pre-tax profit improvement was led by Quest insurance (Up \$0.9m, 126%) and the invoice finance operation (GCL up \$0.3m, 96%). In addition, each of the trading operations continued to build on the business improvements initiated last year, with all positioned to deliver profit improvements in the second half of this financial year.

The "Covid shut down(s)" in April and then August impacted our Lending and Insurance sales, but post shut down, in each instance, these operations bounced back with double digit sales increases. The impact on the debt litigation (as clients elected to manage debt collection inhouse to save cost) and invoice financing (as clients used the wage subsidy to fund their receivables) has similarly shown to be a timing difference. Our expectation is that both these operations will benefit from the recessionary impacts the economy will experience once we are through the Christmas break. COVID-19 had a lesser impact on our receivables arrears than expected and no additional provision was required. No tax expense was recorded for the period as the group utilized un-recognized tax losses.

...

COVID-19 update

The full impact of COVID-19 is not yet known and as such it is the board's view to maintain conservatism in releasing the overlay provision that was put in place in March 2020.

...

Summary and Outlook

The Group delivered a 44% increase on the prior year's pretax profit despite the interruptions of COVID-19. Operationally, this was primarily attributable to ongoing improvements following the personnel and business changes put in place in the latter part of last year and the beginning of the current year. This positive outcome is a steppingstone in the right direction. The board remain committed to building on this result to further increase shareholder value."

³ Page 22 of GFL's Annual General Meeting Presentation 30 September 2020 (Annexure 4 of the SOC).

15. GFL's share price did not increase materially immediately following the release of GFL's HY21 results (from \$0.425 on 30 November 2020 to \$0.440 on 1 December 2020), although the Tribunal notes that GFL's share price continued to climb through December 2020.
16. On 15 March 2021 at 10.45am, GFL released the Announcement⁴, which stated as follows:

"March 2021 pre-tax profit forecast +56% on previous year

Geneva Finance Limited (NZX: GFL) now expects FY21 net profit before tax (NPBT) to be within a range of \$6.3 million to \$6.5 million (up 56% on last financial year), with trading results since September 2020 exceeding expectations across the consumer finance (New Zealand and Tonga), insurance, invoice factoring and debt collections business units.

Managing Director David O'Connell said, "While we were pleased with the September 2020 half-year result (NPBT +44% on previous year), and had reservations regarding the recurring risk of further lockdowns, the hard work from the management team has seen continued improvements across every business unit."

Each of the business units contributed to the profit increase, though the finance operations (invoice factoring and consumer finance) and Quest Insurance provided the majority of the uplift. New lending volumes are tracking well ahead of last year. The traditional seasonal spike in finance arrears has also been lower than previous years, reflecting continued improvements in ledger quality. The debt collections and debt litigation business are similarly showing consistent improvements.

In light of the improved trading position, the directors are of the view that the final dividend for the March 2021 year should be restored to 2.25 cents per share. This dividend was reduced from 2.25cps to 1.75cps following the March 2020 lockdown. The updated FY21 NPBT guidance implies that the indicative full-year dividend of around 3.50cps equates to a dividend pay-out rate of approximately 35% - 40% of NPBT, which the directors consider appropriate in the current environment.

While there remains the risk of further lockdowns affecting performance, the board is encouraged by the broad-based profit improvement, which reflects the increased focus on the core lending businesses supplemented by the related insurance and debt collection functions.

ENDS"

Events leading up to the Announcement

17. GFL advised NZ RegCo that forecast information for FY21 was prepared between 25 February 2021 and 2 March 2021 by GFL's Managing Director and reviewed by GFL's CFO. The forecast was based on the January 2021 year to date results, with estimated outcomes for the months of February and March 2021. GFL noted that it was not until it had the January management accounts completed at the end of February and a clear sense of collections performance through February that management had sufficient information to prepare a forecast for FY21 that was "sufficiently robust" to be presented to the GFL Board⁵.

⁴ The Announcement was GFL's first announcement to the market since its half year report was released on 30 November 2020.

⁵ Annexure 8 of the SOC.

18. A draft market announcement dated 5 March 2021 and a short form summary of the forecast for FY21 against budget by operating division were circulated to the GFL Board ahead of its scheduled Board meeting on 9 March 2021⁶. The forecast group trading result before tax was stated as \$6.4million, an increase of 56.6% on the previous year.

19. An extract of the minutes of GFL's Board meeting on 9 March 2021 states that:

*"The board considered the forecast and the draft profit announcement circulated earlier and concurred that the forecast was credible and it was appropriate to make a profit guidance announcement. It was agreed that the proposed comment on announcing a dividend increase should be removed and the directors would reconsider the dividend increase once the full year result was known. It was then agreed that the directors should provide their individual feedback on the press release, Once all feedback was received and approval given, Management would make the required announcement"*⁷

20. In its SOR, GFL notes that following the Board meeting when preparing the draft announcement for review by Directors, the Managing Director decided to revisit the Board's initial decision to defer increasing its final dividend and sought Board approval to include its restoration in the Announcement. GFL advised NZ RegCo that feedback on the draft announcement was received from its Directors on an ongoing basis and that a "final draft" announcement was prepared and circulated to GFL's Directors for "final sign off" on Thursday 11 March 2021. As GFL's Managing Director was away sick on Monday 15 March 2021, GFL's CFO communicated with GFL's Managing Director and Directors to confirm final approval by 10.39am and then released the Announcement at 10.45am on 15 March 2021⁸.

Trading post Announcement

21. NZ RegCo advise that GFL's shares closed on Friday 12 March 2021 at \$0.54, with 4,134 shares traded in seven trades. Following the Announcement, GFL's shares closed on Monday 15 March 2021 at \$0.63, with 53,526 shares traded in 37 trades. This represented a 16.67% increase on the closing price of the previous trading day. The number of shares traded on 15 March 2021 was the second highest trading volume for GFL in the first quarter of 2021.

Disclosure of Material Information

22. Rule 3.1.1 requires Issuers who become Aware of any Material Information:

- a. to promptly and without delay release the Material Information through MAP; and
- b. not to disclose any Material Information to the public, any other stock exchange, or any other party without first releasing the Material Information through MAP.

23. "Material Information" is information which:

⁶ It is not clear to the Tribunal exactly when this information was provided to the GFL Board. However, based on the information provided by GFL, it is clear that the forecast was completed by 2 March 2021 and that it was circulated to the GFL Board before its meeting on 9 March 2021 (GFL's Board Minutes refer to the forecast and draft announcement "circulated earlier").

⁷ Annexure A of the SOR.

⁸ Annexure 6 of the SOC.

- a. a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of quoted financial products of the Issuer; and
 - b. relates to particular financial products, a particular Issuer, or particular Issuers rather than to financial products generally or Issuers generally.⁹
24. An Issuer becomes “Aware” of information if, and as soon as, a Director or a Senior Manager of the Issuer has, or ought reasonably to have, come into possession of the information in the course of performing their duties. A “Senior Manager” is “a person who is not a director but occupies a position that allows that person to exercise significant influence over the management or administration of [the Issuer] (for example, a chief executive or a chief financial officer).”¹⁰

Earnings guidance

25. Issuers are not required as a matter of course to provide earnings guidance to the market¹¹. The NZX Continuous Guidance Note (*Guidance Note*) notes that:
- “It is normal business practice for issuers to track financial performance against internal budgets or projections. Those budgets or projections are likely to be confidential to the issuer and generated for internal management purposes. Accordingly, if the issuer continues to satisfy the other requirements of Rule 3.1, an issuer’s internal budgets or projections will be subject to a disclosure safe harbour, and there will be no requirement for issuers to provide earnings guidance to the market.”*¹²
26. However, Issuers must assess changes in its financial performance against market expectations. The Guidance Note states that “An Issuer should consider whether a reasonable person would expect a deviation in its actual or projected earnings from market expectations to have a material effect on the price of its quoted securities, such that the deviation should be disclosed as material information for the purposes of rule 3.1.”¹³.
27. In determining market expectations, the Guidance Note stipulates that an Issuer should consider:
- a. its own published earnings guidance;
 - b. outlook statements and other disclosures by the Issuer;
 - c. earnings forecasts of any analysts;
 - d. its earnings results for the prior comparable period; and
 - e. the impact on the Issuer of external events known to the market.¹⁴
28. In determining what constitutes a material deviation in financial performance from market expectations (particularly where those expectations are based on the Issuer’s own statements), the Guidance Note states that:

⁹ Section 231(1) of the FMC Act.

¹⁰ Section 6 of the FMC Act.

¹¹ The Guidance Note describes earnings guidance as an Issuer’s forecast (usually presented as a range) of one or more particular financial measures for a particular reporting period (rather than a qualitative outlook statement).

¹² Section 3.4 of the Guidance Note.

¹³ Section 3.5 of the Guidance Note.

¹⁴ Section 3.5.1 of the Guidance Note.

"NZX considers that deviations from an issuer's own guidance:

- of 10% or more will usually be material;
- of between 5% and 10% may be material; and
- below 5% will not usually be material.

*In quantifying the extent of the deviation, where an issuer has presented its guidance as a range, the issuer should use the floor of the issuer's guidance range as the base amount in respect of negative deviations, and should use the ceiling of the issuer's guidance range as the base amount in respect of positive deviations.*¹⁵

Submissions from NZ RegCo

29. NZ RegCo submits that GFL breached Rule 3.1.1 because GFL did not release Material Information through MAP promptly and without delay.
30. NZ RegCo submits that the Earnings Guidance was Material Information on the basis that it represented a material deviation from existing market expectations of GFL's performance. NZ RegCo considers that, given GFL had not released FY21 earnings guidance before the Announcement and was not covered by analysts, market expectations are most appropriately determined by reference to GFL's performance in previous periods (FY20 and HY21) and the outlook statements made by GFL. NZ RegCo acknowledges that the market likely expected GFL to exceed its net profit before taxation performance and potentially expected strong continued performance from GFL following its HY21 results. However, NZ RegCo submits that *"the ceiling for the market's expectations would have been in the region of 44%, given the caution sounded in the HY FY21 commentary about the potential full impact of COVID-19"*¹⁶. NZ RegCo notes that the Guidance Note provides that a deviation of 10% or more will usually be material and of between 5% and 10% may be material. In this instance, the Earnings Guidance was that GFL expected projected earnings to be up 56% on the previous period. NZ RegCo also submits that the Earnings Guidance was sufficiently certain to require disclosure having been based on management accounts for ten months of GFL's FY21 to January 2021 and with GFL having a *"clear sense of collections performance through February"*¹⁷.
31. NZ RegCo submits that the Material Information was not released through MAP promptly and without delay because GFL was Aware of the Earnings Guidance, at the latest, on 2 March 2021 and the Announcement was not made until 15 March 2021 (nine Business Days later). NZ RegCo submits that GFL's Managing Director and GFL's CFO, who prepared the forecast information between 25 February 2021 and 2 March 2021, came into possession of the Material Information by the latest on 2 March 2021.
32. NZ RegCo submits that GFL breached Rule 3.26.2 because the Announcement was not marked with a "P" flag to denote that it contained Material Information.

Submissions from GFL

33. GFL submits that it did not contravene Rule 3.1.1 from 2 March 2021 by first seeking Board discussion and review of the management view on the FY21 result before finalising its release to the market.

¹⁵ Section 3.5.3 of the Guidance Note.

¹⁶ Paragraph 57 of the SOC.

¹⁷ Annexure 8 of the SOC.

34. GFL considers that the Announcement was Material Information at the time it was finally approved by its Directors for release to the market. However, GFL submits that:
- a. a reasonable person would not have expected the Announcement to be released at the time its senior management prepared internal work papers indicating the full year net profit before tax would exceed FY20 by approximately 56%, as the internal work papers required Board discussion and the Board needed to consider and assess the reliability of the forecast. The draft announcement also required Board approval. The internal view was kept confidential to GFL's Board and senior management and GFL submits the exception in Rule 3.1.2 applied.
 - b. the Announcement also signalled a restoration of GFL's final dividend to 2.25 cents per share from a reduced amount of 1.50 cents per share following the March 2020 lockdown. At its 9 March 2021 meeting, the Board initially decided to defer a decision on increasing the final dividend. However, following the Board meeting, when preparing the draft announcement for review by its Directors, GFL's Managing Director decided to revisit that and sought Board approval to restore GFL's final dividend and to include this decision in the Announcement. This decision necessarily required Board approval before any announcement. GFL considers that the restoration of the final dividend was the more significant aspect of the Announcement and explains the price rise following the Announcement's release.
35. GFL does not agree with NZ RegCo's submission that the Guidance Note on deviations from market guidance or correcting market expectations applied in this situation:
- a. GFL had not previously provided specific earnings guidance for FY21, had not previously issued profit guidance in earlier periods and is not covered by any analysts. In the absence of previously published guidance, there was no ready existing guidance to measure any 'deviation' from.
 - b. GFL considers that NZ RegCo understates the strong improvement expected in its full year financial performance when GFL released its HY21 results on 30 November 2020. The 30 November announcement had already signaled that GFL expected an improvement in its full year profit before tax. GFL considers its 30 November announcement, read as a whole, did not place a 44% 'ceiling' on the improved full year performance and that several aspects of the commentary referred to an expectation of continuing improvements in financial performance for the balance of the FY21 year.
 - c. A key element of the Announcement, explaining the subsequent price movement, was GFL's disclosure that GFL would restore its final dividend.
36. GFL accepts that it breached Rule 3.26.2(c) by not tagging the Announcement with a (P) to indicate it was price sensitive.

NZ RegCo's submissions in response

37. NZ RegCo submits in its Rejoinder that GFL as an Issuer became Aware of Material Information because a Director and a Senior Manager had prepared the forecast and thus GFL ought to have expediated Board approval of disclosure in accordance with its obligations under Rule 3.1.1(a). NZ RegCo notes that it is only Material Information that is required to be released and that an Issuer can

determine how it will present that information for disclosure – NZ RegCo has never asserted that a document prepared for internal management purposes is required to be disclosed.

38. NZ RegCo also submits that GFL admitted that the Earnings Guidance was material without reference to the restoration of GFL's final dividend during NZ RegCo's investigation¹⁸ and that the subsequent decision to restore its final dividend was not a justification to delay releasing the Earnings Guidance as the increase in dividend could have been announced separately.

NZ Markets Disciplinary Tribunal Determination

Was the information Material Information?

39. NZ RegCo submits that the Earnings Guidance was Material Information. While GFL considers that the Announcement "*was Material Information at the time it was finally approved by the directors for release to the market*"¹⁹ it submits that the forecast information was prepared for internal management purposes and that the Guidance Note provisions on market deviations do not apply in this instance²⁰.
40. While Issuers are not, as a matter of course, required to release financial information prepared for internal management purposes, Issuers must assess whether any such information represents a material deviation in its financial performance from market expectations, such that an obligation to disclose may arise under Rule 3.1.1.
41. GFL submits that the Guidance Note on deviations from market guidance or correcting market expectations does not apply in this instance because GFL had not previously provided specific earnings guidance for FY21, had not historically issued profit guidance and is not covered by any analysts. The Tribunal notes that while GFL had not provided specific earnings guidance before, GFL had made a number of statements on its ongoing outlook for FY21 and had signalled that it expected continuing improvement. In the Tribunal's view, GFL was required to assess any changes in its financial performance against these outlook statements²¹. Accordingly, the Tribunal considers that the guidance provided on material deviations does apply in this instance.
42. As noted by GFL, several aspects of its market commentary refer to an expectation of continuing improvements in financial performance for FY21, particularly in GFL's announcement on 30 November 2020 which stated that "*The Group delivered a 44% increase on the prior year's pretax profit despite the interruptions of COVID-19. Operationally, this was primarily attributable to ongoing improvements following the personnel and business changes put in place in the latter part of last year and the beginning of the current year. This positive outcome is a steppingstone in the right direction. The board remain committed to building on this result to further increase shareholder value*"²². The Tribunal does not agree with NZ RegCo's submission that this commentary imposed a "ceiling" of 44% on market expectations i.e. that the market did not expect FY21 pretax profit to increase by more than 44%. GFL's commentary clearly signalled continuing improvements.

¹⁸ Annexure 5 of the SOC.

¹⁹ Paragraph 6 of the SOR.

²⁰ The Tribunal notes that GFL has restated its position somewhat, after initially accepting that the information was material.

²¹ In determining market expectations an Issuer should consider, among other things, outlook statements and other disclosures by the Issuer (section 3.5.1 of the Guidance Note).

²² GFL announcement 30 November 2020.

43. However, even if the market may have expected GFL's FY21 result to increase by more than 44%, the forecast 56% improvement was significantly more and likely constituted a material deviation from market expectations (being at least in the range of 5% to 10% more). As stated in the Guidance Note, the primary consideration for an Issuer when determining whether it is required to disclose a deviation will always be whether a reasonable person would expect a deviation from market expectations in its actual or projected earnings to have a material effect on the price of its quoted securities. When taking into account the circumstances of this case, including the percentage improvement and the lingering uncertainty of the impact of COVID-19 on GFL's business (as noted in the Announcement), the Tribunal considers that a reasonable person would expect a forecast 56% improvement in GFL's FY21 performance to have a material effect on the price of GFL's shares and to have required disclosure.
44. The Tribunal also considers that the forecast information was sufficiently certain to require disclosure, having been prepared based on completed management accounts to the end of January 2021, with a clear sense of collections performance through February 2021 and being "*sufficiently robust*" to be presented to the GFL Board²³, which subsequently found it "*credible*".
45. Accordingly, for the reasons noted above, the Tribunal considers that the forecast information which informed the Earnings Guidance was Material Information.
46. The Tribunal notes that, while GFL's share price increased 16.67% following the Announcement, this provides limited evidential guidance on whether the forecast information was material because it is not possible to ascertain if, or by how much, the restoration of GFL's final dividend contributed to this increase.

Did GFL breach Rule 3.1.1?

47. NZ RegCo submits that GFL breached Rule 3.1.1 because a Director and a Senior Manager were Aware of the Material Information, at the latest, on 2 March 2021 and the Announcement was not made until 15 March 2021. GFL submits that a reasonable person would not have expected the Announcement to be released at the time its senior management had prepared internal work papers and before Board discussion and approval. GFL also says that the decision to restore GFL's final dividend required Board approval and that this was the "*more significant aspect*" of the Announcement and explained the price rise following its release.
48. Rule 3.1.1 requires Issuers who become Aware of Material Information to promptly and without delay release that information through MAP, unless an exception applies. As noted above, the Tribunal considers that the forecast information which informed the Earnings Guidance was Material Information. The Tribunal must therefore consider when the obligation to disclose that information was triggered.
49. As advised by GFL, the forecast information was prepared by GFL's Managing Director and reviewed by GFL's CFO between 25 February 2021 and 2 March 2021. Accordingly, by 2 March 2021, a Director and a Senior Manager of GFL were Aware of the forecast information and they had "*formed the view it would be appropriate to ask the board to provide market guidance for the full [FY21] result*"²⁴. By 5 March 2021, they had also prepared a draft Earnings Guidance.
50. GFL has submitted that Board consideration was necessary to assess the reliability of the forecast and to approve an announcement. The Tribunal

²³ Annexure 8 of the SOC.

²⁴ Paragraph 19 of the SOR.

acknowledges that GFL would seek Board approval, particularly given that GFL was providing earnings guidance for the first time. However, the obligation to disclose the forecast information was triggered once GFL's Managing Director and CFO became Aware of it. Accordingly, the forecast information should have been escalated to the Board for immediate consideration and release on 2 March 2021 (or as soon as practical thereafter²⁵).

51. The discussion with Directors should not have been deferred to the next scheduled Board meeting five Business Days later. This was an event that required immediate escalation to the Board. It is also concerning that having received the forecast information together with a draft announcement in advance of the 9 March Board meeting, none of GFL's Directors appear to have considered that the information was material and required their immediate attention.
52. Furthermore, GFL then failed to promptly release the Earnings Guidance following the 9 March Board meeting having determined that "*the forecast was credible and it was appropriate to make a profit guidance announcement*"²⁶. It took a further four Business Days for GFL to release the Announcement which occurred on 15 March 2021.
53. GFL submits that the exception in Rule 3.1.2 applies in this instance because a reasonable person would not have expected a document prepared for internal management purposes to require market release before Board consideration (noting that the information was kept confidential)²⁷. The Tribunal disagrees and considers that a reasonable person would expect a forecast 56% increase in the performance of GFL for FY21 over the previous year to be disclosed. The Tribunal also notes that GFL does not appear to argue that Rule 3.1.2 applied once the Board had met on 9 March 2021 and determined that it was appropriate to make an announcement. In addition, the change to the proposed dividend did not impact on the need for an announcement, or the timing of it.
54. For the reasons noted above, the Tribunal finds that GFL breached Rule 3.1.1 by not releasing the forecast information promptly and without delay on or about 2 March 2021.
55. The Tribunal notes that NZ RegCo has not sought to establish a breach of Rule 3.1.1 in respect of GFL's decision to restore its final dividend. Accordingly, the Tribunal has not made an assessment on whether this aspect of the Announcement itself constituted Material Information (although GFL appears to consider that it does) or whether it was released promptly and without delay in compliance with Rule 3.1.1.

Financial penalty

56. Given the Tribunal's finding that GFL breached Rule 3.1.1 and GFL's acceptance that it breached Rule 3.26.2(c), the Tribunal must consider the appropriate penalty in the circumstances of this case.
57. NZ RegCo submits that the appropriate penalty is a fine of \$80,000. GFL submits that in the event that the Tribunal finds GFL in breach of Rule 3.1.1

²⁵ The Guidance Note states that "*There will inevitably be a period of time between a director or senior manager of an issuer becoming aware of material information and the release of that information to the market*" – Section 6.1.

²⁶ Annexure A of the SOR.

²⁷ Rule 3.1.2(a)(iv) provides that Rule 3.1.1 does not apply when the information is generated for internal management purposes, the information is kept confidential and a reasonable person would not expect the information to be disclosed.

from 2 March 2021, it considers the \$80,000 penalty proposed by NZ RegCo is excessive, having regard to the circumstances facing it and some of the precedents referred to by NZ RegCo. GFL accepts that it overlooked flagging the Announcement as price-sensitive but considers that breach to be of an administrative nature.

58. The requirement under Rule 3.1.1 to immediately disclose Material Information to the market is a fundamental obligation placed on Issuers under the Rules. The Rules are 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 NZX Markets. Accordingly, the Tribunal generally considers that a breach of the continuous disclosure requirements falls within Penalty Band 3 of Procedure 9 of the Tribunal Procedures. Under Penalty Band 3, a penalty in the range of \$0 to \$500,000 may be imposed.
59. In order to determine the appropriate financial penalty within Penalty Band 3, the Tribunal must consider the aggravating and mitigating factors in this case.

Aggravating factors

60. The breach by GFL in this matter appears to have been caused by GFL not fully understanding its obligations under the Rules. In response to NZ RegCo's query on why GFL did not escalate the forecast information for release as soon as its senior management was Aware of the information, GFL responded that *"Management and a Board are NOT AWARE of a forecast. A forecast is Not a Fact that is Known to be unassailable correct"*²⁸. While acknowledging in its initial response to NZ RegCo that GFL did consider the information to be material, GFL's position was that it considered the 56% improvement in earnings to be *"not much different"* to the 44% increase for HY21²⁹ and that five working days between the Board's discussion and the market release was *"quite reasonable"*³⁰.
61. Issuers must understand their obligations under the Rules. The obligation to notify the market of material deviations in actual or projected earnings from market expectations is a core component of an Issuer's continuous disclosure obligations. GFL's breach of Rule 3.26.2(c) is a further indication that GFL did not understand the extent of its obligations. GFL noted that when it releases its half year and full year results in MAP, they are flagged "P" by default. When GFL loaded the Announcement it *"skipped this part"* in error and did not select the "P" flag.
62. The evidence suggests that GFL did not have adequate systems and processes in place to (a) escalate the forecast information to the Board for prompt consideration and release on or about 2 March 2021; and (b) once the Board had determined on 9 March 2021 that an announcement should be made, to then immediately release the Earnings Guidance. GFL waited five Business Days for its scheduled Board meeting on 9 March 2021 before the Board considered the forecast information.
63. Importantly, although in receipt of the relevant financial information and the draft announcement, none of the Directors appear to have considered it necessary to accelerate the timing of the Announcement, either before or after, the 9 March Board meeting.

²⁸ Annexure 8 of the SOC.

²⁹ Annexure 5 of the SOC.

³⁰ Annexure 8 of the SOC.

64. Having concluded at that meeting that the FY21 forecast was credible and that it was appropriate to update the market³¹, there was a further delay of four Business Days before the Announcement was released. In the context of the requirement to release Material Information promptly and without delay, the expectation is that such information would be released immediately after the conclusion of a Board meeting³².
65. Even when the Announcement was ultimately released on 15 March 2021, GFL did not follow best practice - the Announcement was released after trading had commenced and without GFL having requested a trading halt. This was despite GFL considering that the Announcement was material.
66. NZ RegCo submits that GFL has not implemented or undertaken to implement or enhance its continuous disclosure processes to ensure the same breach is not repeated. GFL noted in its response to NZ RegCo that "*This event has been a valuable learning experience*" and that it has reminded its staff of the need to flag announcements as material in MAP³³. The Tribunal recommends that GFL review its "Market Disclosure Policy" to ensure that it includes processes to adequately escalate information which may be material to its Board for consideration, to expedite the release of Material Information to the market and to adopt best practice with regards to managing the timing of its market releases. The Tribunal also recommends that GFL's staff undertake MAP training with NZX Product Operations, in accordance with NZ RegCo's normal approach to MAP data entry breaches.
67. The market remained uninformed of the Earnings Guidance from 2 March 2021 to 15 March 2021, a period of nine Business Days. The Tribunal agrees with NZ RegCo that the duration of this breach is lengthy given that the obligation under Rule 3.1.1 is to release Material Information promptly and without delay. While GFL submits that its Board also needed to consider whether it would restore GFL's final dividend for FY21, as NZ RegCo notes, the Earnings Guidance could have been released in a separate announcement.
68. NZ RegCo submits, as an aggravating factor, that there is no indication that GFL sought independent advice on its obligations. Under Tribunal Procedure 9.2.2, an Issuer failing to seek independent advice may be considered by the Tribunal as an aggravating factor when determining the level of penalty. While independent advice may have assisted GFL in understanding the Rules, ultimately GFL was required to exercise its own judgement with respect to the credibility of the forecast information based on its knowledge of GFL and its business. Accordingly, the Tribunal does not consider that GFL's failure to obtain independent advice in this instance is an aggravating factor of any weight.
69. NZ RegCo submits, as an aggravating factor, that GFL did not self-report the breach. GFL appears to have believed it was compliant with its obligations at the time the Announcement was made, although it acknowledges its error in not flagging the Announcement as price sensitive. While self-reporting may be considered as a mitigating factor for Issuers, the Tribunal does not consider that a failure to self-report is necessarily an aggravating factor. Accordingly, the Tribunal does not consider that GFL's failure to self-report the breach is an aggravating factor of any weight in this instance.

³¹ Annexure 8 of the SOC.

³² Section 6.1 of the Guidance Note.

³³ Annexure 6 of the SOC.

70. The Tribunal notes that NZ RegCo has not sought to argue, as an aggravating factor, that investors suffered a loss as a result of the delay in releasing the Earnings Guidance. The Tribunal considers this to be appropriate, noting that it is not possible to ascertain whether the increase in GFL's share price and trading volumes following the Announcement are attributable to the Earnings Guidance or to the restoration of GFL's dividend.

Mitigating factors

71. The breach by GFL appears to have been unintentional. GFL has not previously provided profit guidance to the market. GFL made the decision to do so "based on the view that it would be beneficial for all parties if we communicated more frequently with the market, to keep the market better informed on how the business is performing. We consider that this is an area of improvement for [GFL] and have introduced this process accordingly"³⁴. While GFL "felt it was helping investors by providing more formal profit guidance"³⁵, GFL still needed to ensure that it complied with the Rules when releasing the forecast information.
72. The Tribunal considers that the following mitigating factors are relevant:
- a. NZ RegCo has advised that the breach was an isolated event and the first instance of a continuous disclosure breach by GFL;
 - b. NZ RegCo has advised that the breach does not form part of a pattern and that GFL has an overall good compliance history, with only minor previous breaches;
 - c. GFL cooperated with NZ RegCo's investigation; and
 - d. there is no evidence of a financial benefit or commercial advantage for GFL as a result of the breach.

Previous Tribunal decisions

73. The Tribunal has considered two previous breaches of the continuous disclosure obligations as they relate to reporting material deviations from market expectations since 2016. In *NZMDT 1/2017 NZX v Issuer A*, Issuer A had released forecast financial information to the market during 2015, which forecast achieving a positive EBITDA and a substantial increase in sales revenue. The market in which the Issuer traded changed substantially during the course of its financial year and the Issuer failed to meet its sales targets. Issuer A was aware in February and March that there was a material risk of not meeting its announced projections, but considered that there was still a chance, even in late March, of receiving last minute sales orders. These orders did not eventuate and Issuer A failed to meet its forecast EBITDA (posting a loss) and revenue (40% less) by significant margins. However, there was no evidence of measurable harm to investors, with no material effect on the price of Issuer A's shares. Issuer A was fined \$52,500.
74. In *NZMDT 4/2018 NZX v Issuer B*, Issuer B failed to disclose a 30% decrease in actual year end sales from the guidance provided to the market some two months earlier. While the Tribunal was concerned that Issuer B's Board did not appear to have effective oversight of its continuous disclosure obligations, there had been no measurable harm to investors, with no material effect on the price of Issuer B's shares. Issuer B was fined \$40,000.

³⁴ Annexure 8 of the SOC.

³⁵ Paragraph 33.5 of the SOR.

75. In addition, the Tribunal has considered three matters in 2021 involving breaches of the continuous disclosure requirements, two of which have some relevance here. Most recently in *NZMDT 5/2021 NZX v QEX Logistics Limited (QEX)*, the Tribunal approved a settlement agreement under which QEX agreed to a financial penalty of \$80,000 for its breach of Rule 3.1.1. The Tribunal considered that QEX's breach was serious given the aggravating factors, including that the loss of \$4 million of inventory from its China Custom's bonded warehouse was particularly material in the context of QEX's business and that the market remained uninformed for five Business Days, during which time trading in QEX shares occurred (QEX's share price fell 36% following the announcement's release).
76. In *NZMDT 2/2021 NZX v NZME Limited (NZM)*, the Tribunal approved a settlement agreement under which NZM agreed to a financial penalty of \$80,000 for its breach of Rules 3.1.1 and 3.2.1. In that matter, the Tribunal considered that the announcements made by NZM on 11 May 2020 about its proposed acquisition of Stuff Limited (*Stuff*) were incomplete and had the potential to mislead the market because they gave the impression that NZM's acquisition of Stuff was still progressing, subject only to overcoming the competition obstacle. The Tribunal considered that the lack of balance in the 11 May 2020 announcements and the fact that NZM did not act promptly to prevent the development or subsistence of a false market were particularly aggravating factors in that case.
77. The Tribunal considers that the present case is more serious than the matters it considered in 2017 and 2018 because of the delays in making the Announcement which did not occur until 15 March 2021. This was despite GFL's Director and Senior Manager having formed the view on 2 March 2021 that Board approval should be sought to release the forecast information and the GFL Board then determining on 9 March 2021 that it was appropriate to make an announcement. The Tribunal attributes this delay primarily to GFL's failure to both understand its obligations under the Rules and also to ensure adequate systems and processes were in place.
78. However, the Tribunal considers that the present case is less serious than the matters it considered against QEX and NZM, taking into account both the aggravating factors outlined above and the potential the breaches in those cases had to significantly impact the NZX Markets.

Penalty to be imposed

79. The Tribunal notes that GFL's breach of 3.26.2(c) is a relatively minor administrative matter and, in isolation, would not have warranted referral to the Tribunal³⁶. Therefore, the Tribunal does not consider that GFL's breach of Rule 3.26.2(c) should contribute in any significant way to the appropriate penalty in this case (although it notes that this failure is relevant in assessing the aggravating factors as noted above).
80. Having considered all the aggravating and mitigating factors, the Tribunal's previous decisions and that there is limited evidence of any market harm caused by GFL's breach of Rule 3.1.1, the Tribunal considers that the breach by GFL falls at the low end of Penalty Band 3. Accordingly, it considers a financial penalty of \$65,000 is appropriate.

³⁶ NZ RegCo's general policy with regards to MAP data entry breaches is that upon any third breach, an Issuer is required to undertake mandatory MAP training.

Public censure

81. NZX submits that a public censure of GFL is appropriate in this case because the breach falls within Penalty Band 3, the breach is of a fundamental obligation and there is educative value in naming GFL. GFL accepts that, if the Tribunal does find a breach of Rule 3.1.1, in accordance with the Tribunal Procedures a censure would be required.
82. The Tribunal has considered the guidance set out in Tribunal 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.
83. Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal agrees that it is appropriate in this case to publicly censure GFL given that:
 - a. while there is limited evidence of any actual market harm, 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
 - b. the breach falls within Penalty Band 3.
84. The Tribunal notes that its public censure of GFL will be released together with a copy of this determination in full.

Costs

85. NZ RegCo has sought an order that GFL pay the costs of NZX (including its external legal costs) in bringing this proceeding and the costs of the Tribunal in considering this matter. GFL has not made any submissions on costs.
86. Given the Tribunal has found GFL in breach of the Rules, the Tribunal considers that it is appropriate for GFL to pay the costs.

Orders

87. The Tribunal orders that GFL:
 - a. be publicly censured in the form of the announcement attached to this determination (which will include a full copy of this determination);
 - b. pay \$65,000 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 (including its external legal costs) in considering this matter.

88. The Tribunal recommends that the appropriate GFL staff undertake MAP training.

DATED 4 NOVEMBER 2021

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Mariëtte van Ryn, Division Chair, NZ Markets Disciplinary Tribunal