

UNDER NZ Markets Disciplinary Tribunal Rules

IN THE MATTER OF breach of NZX Listing Rules 3.1.1 and 3.20.1

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

AND **QEX LOGISTICS LIMITED**
(*QEX*)

**DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL
23 DECEMBER 2021**



Rachel Batters
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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 James Ogden (Division Chair), Geoff Brown and Rachael Reed QC.
2. Capitalised terms that are not defined in this decision have the meanings given to them in the NZX Listing Rules (*the Rules*).

Procedural background

3. On 1 December 2021, NZX Limited (*NZX*) filed a statement of case (*SOC*) alleging QEX Logistics Limited (*QEX*) had breached Rules 3.1.1 and 3.20.1.
4. On 5 December 2021, Mr Xue (*QEX*'s CEO and sole Director) emailed the Tribunal noting that it was hard for *QEX* to make a statement in response given its present circumstances, that *QEX* had already provided all the supporting documents to NZ RegCo and that *QEX* was not financially able to engage external lawyers to respond.
5. On 6 December 2021, the Tribunal responded to *QEX* (with a copy to NZ RegCo) advising that when making its decision on this matter the Tribunal would consider all of the surrounding circumstances, including the matters set out in Mr Xue's email. The Tribunal noted that as *QEX* had until 5.30pm on 15 December 2021 to provide a statement of response, it invited *QEX* to make any further submissions regarding the alleged breaches by that date. *QEX* did not make any further submissions¹.
6. On 16 December 2021, NZ RegCo advised that it did not wish to file a rejoinder.

QEX background

7. *QEX* is a New Zealand-based export and cross border logistics company which facilitates the storage, supply, packaging, customs clearance and delivery of New Zealand products to China. New Y Trading Limited (*New Y*) is a wholly owned subsidiary and trading company of *QEX*.
8. *QEX* Listed on the NXT Market on 15 February 2018 and migrated to the NZX Main Board on 11 October 2018.
9. At its Listing, *QEX* had three Directors - Conor English (*QEX*'s Chair) and Danny Chan, who were Independent Directors, and Jingjie (Ronnie) Xue, *QEX*'s CEO and a 70% shareholder.
10. At 9:10am on 18 February 2021, NZ RegCo suspended the quotation of *QEX*'s ordinary shares on the NZX Main Board. The suspension followed the market release of an announcement by *QEX* at 8:30am on 18 February 2021 advising that all *QEX*'s Independent Directors² had resigned with immediate effect. As a result of those resignations, *QEX* had one remaining Director, Mr Xue. NZ RegCo stated that the suspension was in the best interests of the market as *QEX* no longer met the board composition requirements under the Rules.

¹ The Tribunal notes that while *QEX* did not provide a formal statement of response, it did provide detailed and comprehensive submissions to NZ RegCo during its investigation of this matter, which the Tribunal reviewed during its consideration of this proceeding.

² This included Mr Martin MacDonald, whose appointment as a *QEX* Director was announced to the market on 15 February 2021 but is not recorded in the Companies Office Register.

11. On 22 April 2021, QEX advised the market that it intended to delist from the NZX Main Board. On 21 May 2021, QEX advised the market that NZ RegCo had accepted QEX's application to delist, subject to QEX satisfying their required conditions, including that QEX must obtain the approval of shareholders (excluding its majority shareholder Mr Xue), that QEX obtain an independent report to be provided to QEX shareholders with their meeting materials and that QEX lodges an additional \$200,000 cash bond with NZX to account for possible enforcement outcomes associated with NZ RegCo's ongoing investigations.
12. As at the date of this determination, QEX still has only one Director (Mr Xue) and trading in QEX's ordinary shares remains suspended. No further announcements regarding QEX's delisting have been made to the market.
13. As QEX remains Listed, it is still bound by the Rules. Neither the suspension of trading in QEX's ordinary shares nor the application for delisting release QEX from any obligation under the Rules (Rule 9.9.5).

Alleged breaches of Rules 3.1.1 and 3.20.1

14. NZ RegCo alleges in the SOC that QEX breached:

Interest Cover Breaches

- a. Rule 3.1.1 by failing to promptly and without delay advise the market of prospective and actual breaches by New Y of its interest cover covenant with Westpac New Zealand Limited (*Westpac NZ*). NZ RegCo submits that each of the five prospective and actual breaches of New Y's interest cover covenant between 10 July 2020 and 12 February 2021 constituted Material Information;

MPI Charges

- b. Rule 3.1.1 by failing to promptly and without delay advise the market that the Ministry of Primary Industries (*MPI*) had filed charges against New Y and Mr Xue personally under the Animal Products Act 1999 (*MPI Charges*). NZ RegCo submits that the MPI Charges constituted Material Information; and

Independent Director Resignations

- c. Rules 3.1.1 and 3.20.1 by failing to promptly and without delay advise the market of the resignation of three Independent Directors – Conor English (QEX's Chair), Danny Chan and Martin MacDonald. NZ RegCo submits that the resignations constituted Material Information.
15. The breaches are all alleged to have occurred before trading in QEX's ordinary shares was suspended by NZ RegCo at 9:10am on 18 February 2021.
 16. NZ RegCo has not alleged in the SOC that QEX has breached any of the board composition requirements under the Rules. Accordingly, the Tribunal has not considered in this determination whether QEX also breached Section 2 of the Rules.

Factual background

Interest Cover Breaches

17. QEX and New Y have a financial year end of 31 March.

18. Under a lending facility agreement with Westpac NZ, New Y was required to maintain an interest cover ratio of no less than 2.50x earnings per quarter (*Interest Cover Covenant*).
 1. Q1 FY21 breach (1 April to 30 June 2020)
19. On 10 July 2020, QEX's CFO advised Westpac NZ that QEX had calculated New Y's interest cover ratio as -0.61x for Q1 FY21 and that it would breach its Interest Cover Covenant for that quarter (*Q1 FY21 breach*). This was a significant drop from the 2.50x ratio required.
20. On 13 July 2020, Westpac NZ advised QEX that it would issue a breach of loan covenant letter recording the breach and Westpac NZ's decision to waive its right to take action for the Q1 FY21 breach. Westpac NZ assured QEX that the facility would not be impacted by the breach³.
21. On 23 July 2020, Westpac NZ sent a letter to QEX confirming that (a) New Y had breached its Interest Cover Covenant, noting that as at 30 June 2020 the interest cover ratio was 0.4x; and (b) Westpac NZ had waived its right to take action in respect of the Q1 FY21 breach.
22. QEX did not disclose the Q1 FY21 breach to the market⁴.
 2. Q2 FY21 prospective breach (1 July to 30 September 2020)
23. On 22 August 2020, QEX's CFO provided the QEX board with a paper advising that because a loss was forecast for Q2 FY21, New Y would breach its Interest Cover Covenant for that quarter (*Q2 FY21 prospective breach*) and that QEX had provided its forecast and financial results to Westpac NZ.
24. QEX did not disclose the Q2 FY21 prospective breach to the market at that time.
25. On 11 October 2020, QEX learnt of a possible discrepancy in its inventory at its China Customs bonded warehouse in Shanghai. QEX subsequently advised the market on 28 October 2020 that it had lost \$4million of inventory and that New Y, because of that loss, would not meet three of its financial covenants, including its Interest Cover Covenant⁵. However, the fact that QEX was already aware of the Q2 FY21 prospective breach before the inventory loss had occurred was not disclosed to the market.
 3. Q2 FY21 breach (1 July to 30 September 2020)
26. QEX says that it confirmed New Y's breach of its Interest Cover Covenant for Q2 FY21 on 18 November 2020 (*Q2 FY21 breach*). During this period, QEX provided information to Westpac NZ regarding New Y's trading position and the impact of the lost inventory.
27. On 25 November 2020, Westpac NZ confirmed the Q2 FY21 breach and that there would be no reduction in New Y's trade finance limit "*at this stage*", although close monitoring would be required. QEX sought further confirmation that Westpac NZ would waive its right to take action in respect of the Q2 FY21 breach, which Westpac NZ confirmed on 28 November 2020⁶.

³ Annexure 2 of the SOC.

⁴ QEX advised NZ RegCo that there were no prior covenant breaches before Q1 FY21 (Annexure 36 of the SOC).

⁵ Annexure 4 of the SOC. This incident was the subject of the Tribunal's decision in *NZMDT 5/2021 NZX v QEX* (discussed further below).

⁶ Annexure 6 of the SOC.

28. On 30 November 2020, QEX released its half-year financial statements for the six months ended 30 September 2020 (*HY21 Report*). In its HY21 Report, QEX advised that as a result of the loss of inventory (reported to the market on 28 October 2020) and the financial result for the six months ended 30 September 2020, New Y had not met two of its financial covenants, including its Interest Cover Covenant. QEX noted that its bank had confirmed that there would be no change to its existing banking facility and that it would provide a waiver for its non-compliance with its financial covenants for Q2 FY21⁷.
29. On 1 December 2020, Westpac NZ sent a letter confirming that (a) New Y had breached its Interest Cover Covenant, noting that as at 30 September 2020 the interest cover ratio was -4.3x; and (b) Westpac NZ had waived its right to take action in respect of the Q2 FY21 breach.

4. Q3 FY21 prospective breach (1 October to 31 December 2020)

30. On 14 December 2020, prior to the 15 December 2020 board meeting, the QEX board was provided with a Finance Report for November 2020. The report noted that New Y had not meet its Interest Cover Covenant in Q2 FY21, but that Westpac NZ would continue to lend to New Y and that QEX must ensure it kept Westpac NZ updated on progress in China.
31. The Finance Report also forecast a failure to meet New Y's Interest Cover Covenant in Q3 FY21 (*Q3 FY21 prospective breach*) and Q4 FY21⁸, and noted that this forecast had been submitted to Westpac NZ on 20 November 2020. The Finance Report forecast an interest cover ratio of 2.10x for Q3 FY21, below the required ratio of 2.50x.
32. QEX did not disclose the Q3 FY21 prospective breach (or its forecast for Q4 FY21) to the market.

5. Q3 FY21 breach (1 October to 31 December 2020)

33. On 12 February 2021, QEX's CFO provided Westpac NZ with draft results for Q3 FY21 confirming that New Y had not met its Interest Cover Covenant in Q3 FY21 (*Q3 FY21 breach*). QEX's CEO also provided Westpac NZ with an explanation of New Y's trading performance and outlined a plan for recovery.
34. At 11.19am on 16 February 2021, Westpac NZ sent a letter confirming that (a) New Y had breached its Interest Cover Covenant, noting that as at 31 December 2020 the interest cover ratio was -6.5x (a further significant drop from Q2 FY21); and (b) Westpac NZ had waived its right to take action in respect of the Q3 FY21 breach. Westpac NZ also advised that given New Y had breached its Interest Cover Covenant in three consecutive quarters, it would allow one more quarter (Q4 FY21) to see if there was an improvement and, should no improvement be evident from month to month, Westpac NZ reserved the right to reduce New Y's existing funding support, which would likely result in another downgrade and could lead to its credit restructure group taking over.
35. At 12:59pm on 16 February 2021, QEX's CFO emailed the correspondence from Westpac NZ to the QEX board and QEX's then corporate counsel.
36. At 3:57pm on 16 February 2021, following receipt of Westpac NZ's letter, QEX's then corporate counsel advised that he considered it "*would be prudent for the Board to consider disclosing this event to the market in order to ensure QEX's*

⁷ Annexure 7 of the SOC.

⁸ Annexure 9 of the SOC. The Tribunal notes that NZ RegCo has not alleged that QEX breached Rule 3.1.1 in respect of the Q4 FY21 forecast.

*compliance with the continuous disclosure regime*⁹. There is no evidence that any action was taken by the QEX board immediately following this advice.

37. At 2:31am on 17 February 2021, QEX's CEO asks QEX's CFO to contact its PR firm to draft a market announcement.
38. At 8:33am on 17 February 2021, QEX's then corporate counsel announced his resignation.
39. During the morning and early afternoon of 17 February 2021, QEX progressed a draft announcement¹⁰. On the afternoon of 17 February 2021, QEX engaged new external legal advisers who advised QEX to immediately disclose to the market the Q3 FY21 breach and waiver from Westpac NZ. QEX's new external advisers prepared a draft announcement, which was approved at 5:26pm by the QEX board (which at that time only comprised Mr Xue). QEX's CFO was instructed to release the announcement to the market, and it was uploaded to MAP at 7:30pm on 17 February 2021.
40. QEX's announcement, dated 17 February 2021, was released to the market at 8:30am on 18 February 2021 and advised the market that New Y had received notice from its first ranking security holder, Westpac NZ, that it had breached its Interest Cover Covenant (noting that its interest cover ratio was -6.50x as at 31 December 2020) and that Westpac NZ had waived its right to take action in respect of the breach¹¹. QEX did not advise the market that this was the third consecutive quarter in which New Y had breached its Interest Cover Covenant or that Westpac NZ had reserved the right to reduce New Y's existing funding support if there was no improvement in Q4 FY21 (despite the QEX board being aware of the Q4 FY 21 forecast).
41. QEX advised NZ RegCo during its investigation, that the QEX board had been informed of each prospective Interest Cover Breach by QEX's CFO in the quarters ending 30 June 2020, 30 September 2020 and 31 December 2020 at monthly board meetings held on 23 June 2020, 24 August 2020 and 15 December 2020. The Tribunal has not been provided with any evidence, such as board minutes, to demonstrate that the QEX board considered its continuous disclosure obligations upon the provision of this information.

MPI Charges

42. On 25 November 2020, MPI filed charging documents in the District Court charging New Y and Mr Xue personally with 12 breaches of the Animal Products Act 1999 (*AP Act*) and the Crimes Act 1961 for criminal offences relating to the export of animal products (*MPI Charges*). On 17 December 2020, the MPI charging documents were delivered by hand to Mr Xue at his home address and an email confirming service was also sent to him.
43. QEX and Mr Xue appear to have been unaware of the charges until the charging documents were served on Mr Xue on 17 December 2020¹². QEX advise that upon receiving the charging documents, Mr Xue immediately contacted QEX's then corporate counsel and QEX's Chair¹³.

⁹ Annexure 12 of the SOC. Following this email, on the evening of 16 February 2021, Mr MacDonald resigned from the QEX Board.

¹⁰ During this period, QEX was also advised that its two remaining Independent Directors had resigned with "*immediate effect*".

¹¹ Annexure 14 of the SOC.

¹² Paragraph 4 Annexure 36 of the SOC.

¹³ Paragraph 4 Annexure 36 of the SOC.

44. On Friday 19 December 2020, QEX's then corporate counsel instructed a QC to defend New Y and Mr Xue, with the email copied to the QEX board.
45. On Monday 21 December 2020, QEX's then corporate counsel advised the QEX board that they "*need to consider whether this development should be announced to the market. It feels like it is material information based upon my understanding of the facts at this stage, and requires disclosure*". QEX's Chair replied advising that he did not "*know anything about it*". QEX's then corporate counsel advised that it was not his area of expertise and that QEX's Chair would need to contact Mr Xue to glean more information¹⁴.
46. QEX advised NZ RegCo that the first substantive discussion about the MPI Charges between board members occurred through emails on 22 December 2020 when QEX's Chair asked QEX's CEO about the extent of the criminal charges (seemingly after a discussion between the QC engaged to act and QEX's Chair)¹⁵. QEX's Chair noted his concern that, rather than being a one-off incident, there were 746 instances between 1 November 2016 and 31 August 2019 that issues with e-certification of products was raised. QEX's CEO responded that there only needed to be a transfer record within New Zealand and there was no need to raise e-certification if export to China was through Cross Border e-Commerce parcels¹⁶. No further consideration of the matter appears to have been made by the QEX board until after the Christmas break.
47. On 20 January 2021, QEX's Chair emailed the QEX board and QEX's then corporate counsel recording several items following a meeting held on 18 January 2021 between QEX's CEO and the QC engaged by QEX. QEX's Chair noted that the QC had advised QEX's CEO that the MPI prosecution "*was not material*", seemingly based on the quantum of product involved¹⁷. QEX's Chair noted that the MPI Charges related to only about 1 ton of the 3,000 tons that were exported to the value of about \$2,000–\$3,000. QEX's Chair stated that "*So based on \$ value it isn't material. It is not stopping our business, nor threatening to stop our business. It was from August 2019 and we continue to have good audits*". QEX's Chair went on to state that based on the advice received thus far and subject to QEX's then corporate counsel's view "*...this is not a material issue*". QEX's Chair advised that the "*strategy*" is to plead not guilty as the MPI Charges could be defended and explained¹⁸.
48. In his email reply of 6:22pm on 20 January 2021, QEX's then corporate counsel noted that he had not been approached to date to provide any advice on the materiality issue and that he recalled sending an email to the QEX board before Christmas advising that it should consider whether the issue was material and required disclosure. He noted that while the quantum of product in question was not material, QEX needed to consider whether the seriousness of the offence and the potential implications for QEX were material and required disclosure. He also noted that "*In total, if all 12 charges were successfully prosecuted by MPI that could involve a sanction of up to a maximum of \$1.1 million, in addition to the imprisonment penalty. I would suggest that having regard to: 1. That sum (max of \$1.2 m) compared to the Company's total cash reserves; 2. The fact a term of imprisonment is a potential sanction; 3. The charges appear to be very serious; 4. The fact the media are potentially going to find out about these charges when they are brought in the first Court hearing, there is a genuine argument that these charges are material and*

¹⁴ Annexure 28 of the SOC.

¹⁵ Paragraph 4.1(e) of Annexure 36 of the SOC. The Tribunal notes that it did not receive copies of this email correspondence, although they appear to have been provided by QEX to NZ RegCo.

¹⁶ Paragraph 39 of the SOC.

¹⁷ The Tribunal notes that this advice was likely given in the context of the criminal proceeding and not the Rules.

¹⁸ Annexure 29 of the SOC.

*require disclosure to the market in order to ensure the Company complies with its continuous disclosure obligations*¹⁹.

49. The Tribunal has not been provided with any correspondence following receipt of this email from QEX's then corporate counsel. However, in its response to NZ RegCo of 25 June 2021, QEX notes that the QEX board did not consider the recommendations from QEX's then corporate counsel to be "*unequivocal*" and based on the advice from its QC in the criminal proceedings that the quantum of the product involved meant that the MPI prosecution was immaterial, the QEX board decided to monitor the progress of the MPI prosecution before making any further materiality assessments²⁰.
50. On 26 January 2021, the QC engaged by QEX advised the QEX board that he had obtained a remand without plea until 16 February 2021 and that interim name suppression orders for New Y and Mr Xue were made by consent. On 28 January 2021, in response to a question from QEX's Chair, QEX's QC confirmed that there would not be an update until MPI was available to meet the following week.
51. On 11 February 2021, QEX's QC emailed the QEX board advising that the planned meeting with MPI was unable to proceed as legal advice had not been provided to MPI at that date. He confirmed that the status quo would remain. In response to an email from QEX's Chair, QEX's QC said that no particular feedback had been provided yet by MPI. QEX's Chair replied to QEX's QC stating that the QEX board would have to wait for further updates before it could determine how material the MPI Charges were²¹. QEX's Chair resigned not long after this, on 17 February 2021.
52. QEX's position on materiality changed once its new external legal advisers were briefed on the matter on 22 February 2021²². QEX advised NZ RegCo that "*as soon as QEX informed [its new external legal advisers] of the MPI [Charges] on or around 22 February 2021, [they] immediately advised that the MPI charges constituted material information for the purposes of the Rules and that disclosure was required*". QEX says that this advice was unequivocal and stressed urgency. QEX's external legal adviser advised QEX that it immediately needed to make an announcement and began preparing that announcement.
53. At 2:50pm on 23 February 2021, QEX released an announcement to the market advising that "*on 25 November 2020 the Ministry for Primary Industries (MPI) brought charges under the Animal Products Act 1999 against QEX's trading subsidiary [New Y] and [Mr Xue]...MPI is continuing its investigation and the charges are currently under review by MPI and it is not known at this stage whether the matter will proceed or if further charges may arise. In any event, New Y and Mr Xue will be defending the charges*"²³.
54. QEX advised NZ RegCo that there are no board papers or minutes relating to the QEX board's consideration of the MPI Charges.

Independent Director Resignations

55. Since the date of its Listing, QEX had three Directors – Messrs English (QEX's Chair), Chan and Xue (QEX's CEO). Messrs English and Chan were Independent Directors.

¹⁹ Annexure 29 of the SOC.

²⁰ Annexure 30 of the SOC.

²¹ In its response to NZ RegCo of 25 June 2021, QEX advised that there had been no further significant updates on the MPI Charges since 11 February 2021.

²² At this stage, QEX had only one Director and trading in its ordinary shares was suspended.

²³ Annexure 31 of the SOC.

56. At 9:30am on 12 February 2021, a special meeting of the QEX board was held following a "letter of concern" sent by the QEX board to QEX's CEO regarding his employment. During the meeting QEX's CEO offered his resignation "*subject to conditions*", which he did not disclose during the meeting. The QEX board also discussed the proposed appointment of Mr Martin MacDonald as an independent director. QEX's CEO expressed his opposition to the proposed appointment and noted that as 70% shareholder of QEX his view "*should prevail*". QEX's Chair noted that as a Director, QEX's CEO had only one vote and that any appointment would need to be affirmed at the next QEX AGM, where he could exercise his shareholder rights²⁴.
57. At 10:00am on 12 February 2021, a meeting of the QEX board was held during which Mr MacDonald was interviewed. QEX's CEO continued to express his opposition to the proposed appointment and noted that he would "*undertake a EGM to have at least Mr MacDonald removed from the Board if he was appointed*". Following a vote of the QEX Directors, a resolution to appoint Mr MacDonald was passed by majority (Messrs English and Chan in favour, Mr Xue opposed)²⁵.
58. On Monday 15 February 2021, QEX announced to the market that Mr MacDonald had been appointed as an Independent Director²⁶.
59. NZ RegCo advise that at 8:17pm on 16 February 2021, Mr MacDonald sent an email to Mr Xue suggesting a call because, he said, Messrs English and Chan had resigned from the QEX board. At 9:30pm on 16 February 2021, Mr MacDonald emailed the QEX board advising that he had decided to resign effective immediately citing, among other things, an "*irreconcilable breakdown in the relationship between the board and the CEO and the complete lack of trust*"²⁷.
60. At 1:07pm on 17 February 2021, QEX's Chair emailed the QEX board and informed them that he was resigning as a director effective immediately having regard to "*recent developments ... around the board table, and differences with [Mr Xue] in his capacities as employee, Director and 70% shareholder*". QEX's Chair advised that Mr Chan also wished to resign effective immediately but was not able to communicate until after 4:30pm that day. QEX's Chair advised that he had received a text message from Mr Chan at 10:16am stating "*You could treat this message as my resignation notice to take immediate effect*". QEX's Chair also noted that as Mr MacDonald had also resigned and that, while he had not completed the Companies Office requirements following his appointment, given QEX had announced his appointment it would also need to announce his resignation²⁸. QEX's Chair requested that QEX make an announcement to the market that day regarding his and the other directors' resignations.
61. At 3:00pm on 17 February 2021, QEX's new external legal adviser advised QEX's CEO that Messrs English and Chan's resignations were effective and that this left QEX in breach of the Rules. They further advised that if QEX could not get Mr Chan and Mr MacDonald to retract their resignations immediately then QEX would need to apply for a trading halt²⁹. In response, QEX's CEO asks "*[s]hould we apply a trading halt anyway first so we have more time to deal with the issue?*". QEX's new external legal adviser replied advising that "*We can*

²⁴ Annexure 15 of the SOC.

²⁵ Annexure 16 of the SOC.

²⁶ Annexure 17 of the SOC. Mr MacDonald noted that he had not yet "signed off" his director consent form.

²⁷ Annexure 18 of the SOC.

²⁸ Annexure 19 of the SOC.

²⁹ Annexure 20 of the SOC.

do this, however if you can lock in Danny and Martin today there is no need. In any event, we will get the document drafted in advance should we need it." QEX's CEO responded "I will call Danny today after 4.30pm and Martin tomorrow morning 8am. When is the latest time to apply the trading halt?". QEX's external legal adviser advised "We can get the request away any time, but the NZX have to review and approve it. Hopefully they can do this for market opening tomorrow". QEX gave its approval for its external legal adviser to contact NZ RegCo for guidance given the novel situation.

62. At 4.33pm on 17 February 2021, QEX's CEO texted Mr Chan but Mr Chan was unable to talk to him³⁰. QEX's CEO noted in the text that he had made an appointment to speak to Mr MacDonald on 18 February 2021.
63. During the early evening of 17 February 2021, QEX, together with its external legal adviser and PR firm, prepared various drafts of a market announcement regarding the Independent Director Resignations.
64. At 6.27pm on 17 February 2021, QEX's external legal adviser emailed Mr Chan and Mr MacDonald to query their resignations and requested that they continue as QEX's Independent Directors until the Board could replace them to ensure it could meet its obligations under the Rules³¹.
65. At 7:08pm on 17 February 2021, Mr MacDonald confirmed to QEX's external legal adviser that his position remained unchanged and his resignation as a director of QEX was effective from 16 February 2021³².
66. At 7.55pm on 17 February 2021, Mr Chan advised QEX's external legal adviser that he had already resigned via a text message to QEX's then Chair and that he did not wish to reverse it³³.
67. At 8:24pm on 17 February 2021, QEX's external legal adviser provided a final draft announcement which was confirmed for disclosure and sent to QEX's CFO for release at 8.51pm. The announcement was uploaded to MAP later that evening by QEX's CFO.
68. A file note from QEX's external legal adviser at 8:42pm on 17 February 2021 outlines that it had explained to QEX that Mr Chan and Mr MacDonald's resignations were final and they were not staying on, that QEX's CEO had approved disclosure to the market about the resignations, and approved it speaking to NZ RegCo about a trading halt or suspension of trading.
69. QEX's announcement, dated 17 February 2021, was released to the market at 8.30am on 18 February 2021 (the same time as the Q3 FY21 breach was announced to the market) and advised the market that its Independent Directors Messrs English, Chan and MacDonald had resigned, effective immediately. The announcement stated that the Directors had cited "differences" with Mr Xue and that a "process to urgently appoint replacement independent directors has been established in order to ensure that the company can meet its listing requirements"³⁴.

Relevant Rules

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

³⁰ Annexure 21 of the SOC.

³¹ Annexure 22 of the SOC.

³² Annexure 23 of the SOC.

³³ Annexure 24 of the SOC.

³⁴ Annexure 25 of the SOC.

- 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.
71. "Material Information" is information which:
- 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.³⁵
72. 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 duties³⁶.
73. Rule 3.20.1 provides that an Issuer with Quoted Financial products must promptly and without delay release through MAP information regarding any decision made to change a Director of the Issuer or the chairperson of the Issuer.

Submissions on alleged breaches

Interest Cover Breaches

74. NZ RegCo submits in respect of the Interest Cover Breaches that QEX was Aware of the:
- a. Q1 FY21 breach by 10 July 2020 and did not disclose this breach to the market;
 - b. Q2 FY21 prospective breach by 22 August 2020 and did not disclose this breach to the market when it occurred;
 - c. Q2 FY21 breach by 25 November 2020, but did not disclose it to the market until 30 November 2020 when advice of the breach was included in its HY21 report;
 - d. Q3 FY21 prospective breach by 23 November 2020³⁷ and did not disclose this breach to the market; and
 - e. Q3 FY21 breach from, at the latest, 12 February 2021 but did not disclose this breach to the market until 18 February 2021.
75. NZ RegCo submits that each of the Interest Cover Breaches were Material Information because each breach could have enabled Westpac NZ to accelerate and enforce its security. NZ RegCo submits that QEX breached Rule 3.1.1

³⁵ Section 231(1) of the FMC Act.

³⁶ Section 6 of the FMC Act.

³⁷ NZ RegCo submits that QEX was Aware of the Q3 FY21 prospective breach by 23 November 2020 because it knew by that date that the inventory loss would be recognised in its accounts for HY21. It is not clear to the Tribunal where the 23 November 2020 date comes from. We suspect NZ RegCo means 25 November 2020, being the date by which QEX had provided HY21 financial information to Westpac NZ.

because the Interest Cover Breaches were not notified to the market through MAP “promptly and without delay”.

76. QEX submits that it did not disclose the prospective and actual breaches of its Interest Cover Covenant for the periods ending 30 June 2020 and 30 September 2020 “...as QEX’s [board] at the time (wrongly) did not consider that these breaches needed to be disclosed”...Further, the [QEX board] (wrongly) considered that QEX did not need to disclose the [interest cover breach for the period ending September 2020] to the market³⁸.
77. In respect of the Q3 FY21 breach, QEX advised NZ RegCo that it believes it acted as promptly as it could given the circumstances. “While an ideal result would have been to release the market announcement on 16 February 2021, due to the lapse in time between the receipt of [Westpac NZ’s breach letter] and instructions provided to [QEX’s new external legal adviser], delays caused by the timing of [QEX’s then corporate counsel’s] retirement and the complications caused by the simultaneous resignations of all of QEX’s independent directors...QEX was not able to act sooner³⁹”.

MPI Charges

78. NZ RegCo submits that the MPI Charges were significant because the potential impact of New Y and/or Mr Xue being found guilty was a fine of up to \$1.6 million for the company, and \$350,000 and a sentence of up to five years’ imprisonment for Mr Xue personally. The Director-General of MPI can also deregister an exporter for (among other grounds) serious or repeated failures to comply with the AP Act.
79. NZ RegCo submits that for these reasons, a reasonable person would expect information about the MPI Charges, if it were generally available to the market, to have a material effect on the price QEX’s ordinary shares. While a single minor charge might be able to be regarded as an unfortunate one-off event, NZ RegCo submits that multiple charges would be regarded by a reasonable observer as indicative of systemic problems within QEX’s operations.
80. NZ RegCo submits that the net gain from the attempted export was not the appropriate basis to determine the materiality of the charges for continuous disclosure purposes. NZ RegCo also notes that the charges against QEX could have been released to the market with such contextual information as it considered appropriate. For example, QEX could have stated that it would contest the charges, that it considered the charges unlikely to succeed and that they were of a minor nature.
81. NZ RegCo submits that QEX failed to promptly disclose the MPI Charges to the market because it became Aware of them by 17 December 2020 when they were served on Mr Xue and the MPI Charges were not disclosed to the market until 23 February 2021, a delay of 43 trading days. NZ RegCo notes that QEX’s then corporate counsel had raised the prospect of disclosure to the market first on 19 December 2020 and then again on 20 January 2021. Despite this, QEX did not seek further advice until 22 February 2021, when QEX’s new external legal advisers were asked to provide advice on this matter.
82. QEX submits that at the time the QEX board first considered whether the MPI Charges were Material Information, Messrs Chan and English were Directors of QEX, along with Mr Xue. QEX advises that the key factors considered were that:

³⁸ Annexure 36 of the SOC.

³⁹ Annexure 30 of the SOC.

- a. the benefit received from the alleged breaches was less than \$3,000, which the QEX board considered to be immaterial;
 - b. the MPI Charges required an intention to receive a material gain from the alleged breaches. Given the very small benefit obtained, the QEX board considered that this intention was clearly not present and called the charges into question; and
 - c. it was not clear whether MPI would continue with the charges, drop them, or change them.
83. QEX submits that given the immaterial benefit gained by QEX from the alleged breaches and uncertainty as to how any prosecution may proceed (if at all), the QEX board considered that the MPI Charges were at that stage not material.
84. QEX says that this position changed when it engaged new external legal advisers. Their advice differed to the QEX board's earlier view, and their recommendation was that the information was material and should be disclosed without delay, which QEX did.

Independent Director Resignations

85. NZ RegCo submits that the Independent Director Resignations were Material Information as they reflected a "*problematic state of affairs at QEX*". Given all three Independent Directors had resigned, including QEX's Chair and a newly announced Director, NZ RegCo considers that this information was likely to have a material effect on QEX's share price, particularly as it left Mr Xue as sole Director, QEX's CEO and 70% shareholder with effectively complete control over QEX.
86. NZ RegCo submits that the Independent Director Resignations were not disclosed to the market "promptly and without delay" because QEX was Aware of Mr MacDonald's resignation at 9:30pm on 16 February 2021 and the resignations of Messrs Chan and English at 1:07pm on 17 February 2021. NZ RegCo notes that QEX had received advice from its new external legal advisers at 3pm on 17 February 2021 that the resignations were effective and that a trading halt was necessary if independent directors were not immediately found.
87. NZ RegCo also submits that when the announcement was released to the market on 18 February 2021, it was missing Material Information because it did not state the dates the resignations had been received.
88. QEX submits that the catalyst for the director resignations related principally to the appointment by the QEX board of Mr MacDonald as a Director on 15 February 2021, which was not supported by Mr Xue. QEX also notes that there were "*differences*" regarding whether Mr Xue should remain as QEX's CEO and that Messrs Chan and English were unhappy with how Mr Xue was running the business operations in New Zealand and China, including issues around the missing inventory, and other supply issues, including issues with the delay in implementing a new on-line cloud-based system for recording stock and finding a new China Customs bonded warehouse. QEX says that the resignations of the Directors on 16 and 17 February 2021 did not make sense to Mr Xue because they were not signed written resignations in the usual form expected for a Listed Issuer and that if the resignations were effective, those directors would be knowingly placing QEX in breach of the Rules. QEX says that Mr Xue reached out to each Director to confirm that their resignation was "*actually effective*" and not undertaken as a tactical measure and that Mr Xue attempted to convince Messrs Chan and MacDonald to stay on at least until QEX could comply with the Rules and facilitate a process to find replacements. QEX says it "*never anticipated that it would be in a scenario of this magnitude or that the*

*outgoing directors would actually do this, knowing the damaging effect that it could have on the company and its shareholders. In the ordinary course, outgoing directors usually provide a notice period before the resignation takes effect or would allow until the next shareholders' meeting to give the company a reasonable amount of time to fill the vacancy*⁴⁰.

Trading data

89. NZ RegCo has not provided information regarding movements in the price of QEX's ordinary shares to support its assessment of whether the Interest Cover Breaches, MPI Charges or Independent Director Resignations were Material Information. The Tribunal notes that in this case, trading data would provide little, if any, assistance given that (a) several of the Interest Cover Breaches were never disclosed to the market; (b) trading in QEX's ordinary shares was suspended soon after the announcement on 18 February 2021 of the Independent Director Resignations and Q3 FY21 breach; and (c) trading in QEX's ordinary shares had already been suspended when the MPI Charges were announced to the market on 23 February 2021.

NZ Markets Disciplinary Tribunal Determination

Was the information Material Information?

Interest Cover Breaches

90. The Tribunal considers that each Interest Cover Breach was Material Information because a reasonable person would expect the breaches to have a material effect on the price of QEX's ordinary shares if the information were generally available to the market. Even though Westpac NZ had waived its right to act on the breaches, the extent and consistent pattern of the Interest Cover Breaches was Material Information. The first Interest Cover Breach (the Q1 FY21 breach) was a significant breach. QEX was well short of meeting the required level of cover. Therefore the extent of the breach was relevant and material.
91. Each of the breaches had the potential to have serious ramifications for QEX's on-going business given Westpac NZ had the right to act in respect of each breach and could decide to reduce its on-going funding support. The Tribunal also considers that the Interest Cover Breaches were particularly material as each successive breach highlighted QEX's deteriorating financial position, with each quarter seeing a significant drop in the interest cover ratio (Q1 FY21 0.4x, Q2 FY21 -4.3x and Q3 FY21 -6.5x). The successive breaches also made it all the more likely that Westpac NZ would shortly take action on the breach. Therefore the market needed to understand the significance of the later Interest Cover Breaches in the context of a pattern of earlier breaches.

MPI Charges

92. The Tribunal considers that the MPI Charges were Material Information because a reasonable person would expect information that criminal proceedings had been brought against New Y and QEX's CEO personally regarding a key aspect of its business would have a material effect on the price of QEX's ordinary shares if it were generally available to the market. The Tribunal notes that the MPI Charges were particularly material given that (a) the potential penalties faced by New Y and Mr Xue were significant; (b) multiple charges were brought by MPI (with the QEX Chair noting his concern that, rather than a one-off incident, there were 746 instances between 1 November 2016 and 31 August 2019 of issues with the e-certification of products); and (c) while historical, the

⁴⁰ Annexure 33 of the SOC.

charges indicated that there could be systemic issues with QEX's operational processes in respect of its core business of facilitating and managing exports to China. QEX itself acknowledged that the MPI Charges were Material Information by flagging its announcement on 23 February 2021 as price sensitive.

93. The Tribunal does not consider that the quantum or value of the products, which were the subject of the MPI Charges, was the correct basis on which to determine that the proceeding was not Material Information under the Rules. The Tribunal suspects that the advice provided by the QC engaged by QEX to act in the criminal proceeding was given in the context of that prosecution and not the Rules⁴¹. This point was highlighted by QEX's then corporate counsel.

Independent Director Resignations

94. The NZX Continuous Disclosure Guidance Note does not specify changes in Directors as being, of themselves, Material Information. Instead, Rule 3.20 requires a market announcement of a Board change, irrespective of its materiality. However, as noted in the Tribunal's decision *NZMDT 1/2021 NZX v NZME Limited*, a Director's departure may be Material Information if the circumstances of that departure suggest a development affecting the Issuer that may have a material effect on its share price.
95. In this case, the Tribunal considers that the resignations of all three Independent Directors, which left QEX with a sole Director (who was also QEX's CEO and 70% shareholder) and in breach of the corporate governance provisions in the Rules, was information that, if it were generally available to the market, would have a material effect on the price of QEX's ordinary shares. The fact that all three Independent Directors had resigned within the space of two days, including QEX's Chair and a Director whose appointment had only just been announced, clearly indicated governance problems within QEX and in the Tribunal's view constituted Material Information.

Was the Material Information released "promptly and without delay"?

Interest Cover Breaches

96. The Tribunal considers that none of the prospective and actual breaches of QEX's Interest Cover Covenant were disclosed to the market "promptly and without delay". The Q1 FY21 breach and the Q3 FY21 prospective breach were never disclosed to the market. The Q2 FY21 prospective breach, the Q2 FY21 breach and the Q3 FY21 breach were not disclosed to the market when QEX first became Aware of them. Of the five Interest Cover Breaches, the Tribunal considers the Q3 FY21 breach to be the most serious, given this breach triggered the warning from Westpac NZ on 16 February 2021 that any further breach could result in a reduction in New Y's existing funding support, another downgrade and that New Y could be handed over to Westpac NZ's credit restructure group. QEX did not disclose this breach to the market until 18 February 2021.

MPI Charges

97. The Tribunal considers that by 22 December 2020 (when the QEX board had its "first substantive discussion"), the QEX board was Aware of the MPI Charges and had sufficient information to determine that the MPI Charges were likely to be Material Information, including advice from its then corporate counsel. Given the MPI Charges were not announced to the market until 23 February 2021 (some two months later), the Tribunal considers that they were clearly not disclosed "promptly and without delay".

⁴¹ The Tribunal notes that it has not seen any written advice from the QC.

98. The Tribunal notes, as submitted by NZ RegCo, that the announcement could have been made based on the information QEX had at the time, for example that the MPI Charges related to a minimal amount of product and that it intended to defend the charges. The Tribunal also notes that, as of 22 December 2020, it appears that no name suppression orders were in place which could have potentially excluded the proceeding from being announced under Rule 3.1.2(a)(i), although it is arguable that QEX would not have satisfied Rule 3.1.2(c) in any event⁴².

Independent Director Resignations

99. Mr MacDonald resigned by email at 9:30pm on 16 February 2021. Mr English resigned by email at 1:07pm on 17 February 2021. In that email, Mr English advised that Mr Chan had resigned via text message at 10:16am that day⁴³. QEX was advised by its new external legal advisers at 3:00pm on 17 February 2021 that Messrs English and Chan's resignations were "*legally effective*", but that Mr MacDonald's was less clear (Mr MacDonald's appointment as a director had not yet been recorded with the Companies Office).
100. The Tribunal considers that at that point – on the afternoon of 17 February 2021 – QEX was Aware that its Independent Directors had resigned and should have applied for a Trading Halt pending the release as soon as possible of an announcement. QEX's external legal advisers informed Mr Xue that if he could persuade Messrs Chan and MacDonald to remain as Directors, then a trading halt would not be necessary if they could be 'locked in' that day. While the Tribunal understands the motivation for QEX's attempts into the evening of 17 February 2021 to persuade Messrs Chan and MacDonald to stay on the QEX board, at that point they had already resigned lawfully and effective immediately. QEX should have sought a trading halt that afternoon.
101. Accordingly, the Tribunal does not consider that the announcement advising that QEX's Independent Directors had resigned, which was released to the market at 8:30am on 18 February 2021, was released "promptly and without delay".

Findings of breach

102. For the reasons noted above, the Tribunal finds that QEX breached Rule 3.1.1 by not releasing information regarding the Interest Cover Breaches, the MPI Charges and the Independent Director Resignations promptly and without delay. The Tribunal also finds that QEX breached Rule 3.20.1 by not disclosing promptly and without delay the change in its Directors.

Financial penalty

103. Given the Tribunal's finding that QEX breached Rules 3.1.1 and 3.20.1, the Tribunal must consider the appropriate penalty in the circumstances of this case.
104. NZ RegCo submits that the appropriate penalty is a fine of \$200,000.
105. QEX submits that the fine proposed by NZ RegCo is unreasonable, noting that it is a small company, new to the market, was heavily reliant on external advice to ensure it fully complied with the Rules and has limited financial resources.

⁴² It is not until 26 January 2021 that QEX's QC advises the QEX board that interim name suppression orders for New Y and Mr Xue were made by consent (Annexure 30 of the SOC).

⁴³ Annexure 29 of the SOC.

QEX also notes that there was limited market impact given the very low trading volume and dollar value during the affected period.

Penalty Band

106. 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. Other factors in this case also indicate that Penalty Band 3 is the appropriate band given that:
- a. the breaches continued for an extended period in respect of the Interest Cover Breaches and the MPI Charges;
 - b. the breaches formed a pattern of misconduct; and
 - c. QEX appeared to not have effective processes and procedures in place to ensure adequate consideration was given to its continuous disclosure obligations.
107. Under Penalty Band 3, a penalty in the range of \$0 to \$500,000 may be imposed. To determine the appropriate financial penalty within Penalty Band 3, the Tribunal must consider the aggravating and mitigating factors in this case.

Aggravating factors

108. The Tribunal is very concerned by the number and duration of the breaches in this matter, particularly because they relate to a failure by QEX to comply with its continuous disclosure obligations. This demonstrates to the Tribunal that QEX was struggling with its compliance obligations on several fronts and either did not understand its obligations under the Rules or inadequate consideration was being given to these matters by the QEX board.
109. The assessment of whether the QEX board adequately considered its continuous disclosure obligations is made more difficult by the fact that there are no board meeting papers or minutes relating to its consideration of the MPI Charges and no board minutes have been provided to support QEX's consideration of the Interest Cover Breaches. Given the absence of board minutes, the evidence suggests that QEX did not have adequate systems and processes in place to ensure adequate and timely consideration was given to its continuous disclosure obligations.
110. The breaches in this matter also occurred within a few months of another breach by QEX of its continuous disclosure obligations in October 2020, which was referred to the Tribunal earlier this year. In *NZMDT 5/2021 NZX v QEX*, the Tribunal approved a settlement between NZX and QEX under which QEX accepted that it had breached Rule 3.1.1 in October 2020 by not advising the market "promptly and without delay" that \$4million of inventory had gone missing from its China Customs bonded warehouse in Shanghai. NZ RegCo's investigation into that matter began in October 2020, before the majority of the breaches in this matter occurred. The Tribunal is concerned that despite this investigation, which should have highlighted for QEX the need to ensure its continuous disclosure obligations were met, QEX's consideration of continuous disclosure matters seems to have deteriorated.

Interest Cover Breaches

111. The Tribunal considers that the pattern of misconduct with regards to the Interest Cover Breaches is a particularly aggravating factor in this case:
- a. the Interest Cover Breaches occurred on five separate occasions and over three successive quarters;
 - b. some of the breaches were never disclosed to the market, which meant that the market was not given a complete picture of QEX's deteriorating financial position;
 - c. New Y's interest cover ratios were significantly below the ratio required by its Interest Cover Covenant and got progressively worse through each quarter; and
 - d. even when the market was advised of some of the Interest Cover Breaches, that disclosure was delayed and not provided in the context of the earlier and on-going breaches. Initially the market was only informed on 28 October 2020 that QEX expected New Y to breach its Interest Cover Covenant due to the \$4 million inventory loss. However, QEX had failed to previously disclose its breach of the Interest Cover Covenant for Q1 FY21 in July 2020 and was already aware of a prospective breach for Q2 FY21 on 22 August 2020 before the loss of stock had even occurred. By the end of November 2020, QEX was Aware that it was likely to breach its Interest Cover Covenant for Q3 FY21 and knew by 12 February 2021 that it had in fact breached it. Yet the market was not informed until 18 February 2021.

MPI Charges

112. The Tribunal does not consider that QEX's board adequately considered its continuous disclosure obligations when it became Aware of the MPI Charges in December 2020. Despite QEX's Chair raising concerns over the multiple instances of alleged breach over three years and advice received from its then corporate counsel that consideration needed to be given to disclosing the MPI Charges, the matter seems to have been put to one side and not addressed again until the following month, after the Christmas break.
113. Following a meeting held with QEX's QC on 18 January 2021, QEX's Chair emailed the QEX Board and QEX's then corporate counsel advising that, subject to QEX's then corporate counsel's view, "*this is not a material issue*" based on the quantity and value of the product involved and that the MPI Charges were "*not stopping our business*". QEX's then corporate counsel replied on 20 January 2021, noting that this was not the correct test to apply with regards to whether the MPI Charges were Material Information and that he considered that there was a "*genuine argument that these charges are material and require disclosure to the market*". Again, despite this advice, QEX's board does not appear to have given further consideration to its continuous disclosure obligations under the Rules, instead deciding to wait for further updates on the proceeding. It is not until QEX's new external legal adviser is made aware of the MPI Charges that an announcement is finally made on 23 February 2021, some two months after QEX became Aware of them.

Mitigating factors

114. The Tribunal notes QEX's submission that it is a small company and new to the market, having migrated from the NXT market in 2018. The Tribunal has some sympathy for the position QEX now finds itself, particularly for the minority shareholders who have been unable to trade their shares on market since 18

February 2021. However, all Issuers regardless of their size and financial resources must understand and comply with their obligations under the Rules. That is the requirement for being Listed.

115. QEX submits that it relied heavily on external service support to make sure it fully complied with the Rules. The Tribunal considers that QEX's reliance on external legal advice is a mitigating factor with regard to the Independent Director Resignations⁴⁴. While the Independent Director Resignations appear to have been caused by "differences" between the Directors and QEX's CEO, given their immediate effect it put QEX in a very difficult position. QEX was aware of the consequences of the resignations and attempted to avoid non-compliance with its governance obligations, including seeking external legal advice. QEX sought advice on whether it should request a trading halt to give it more time to deal with the issue but were advised that it was not necessary if QEX could persuade Messrs Chan and MacDonald to stay on until replacements could be found. QEX followed that advice. Had QEX immediately requested a trading halt, it may not have breached its obligations under Rules 3.1.1 and 3.20.1.
116. The Tribunal also considers that the following mitigating factors are relevant:
- a. NZ RegCo has advised that QEX cooperated with NZ RegCo's investigation. The Tribunal notes that QEX responded promptly and fully to each of NZ RegCo's requests for information; and
 - b. there is no evidence of a financial benefit or commercial advantage for QEX because of the breaches.

Limited market impact

117. NZ RegCo has not sought to argue in this case, as an aggravating factor, that investors suffered a loss because of the breaches. QEX has drawn the Tribunal's attention to the fact that very little trading occurred during this time.
118. Following its announcement of the inventory loss on 28 October 2020, the price of QEX's ordinary shares declined significantly (36%) and continued to decline on very low trading volumes through to 18 February 2021, when trading was suspended. This was considered to be an aggravating factor in the Tribunal's earlier decision in *NZMDT 5/2021 NZX v QEX* and contributed to the penalty imposed in that case of \$80,000.
119. The Tribunal notes that there is no evidence of a significant market impact as a result of the breaches being considered in this matter⁴⁵. The Tribunal considers that this is primarily because (1) some of the Interest Cover Breaches were not disclosed; (2) trading in QEX's ordinary shares was suspended after the Q3 FY21 breach and the Independent Director Resignations were announced to the market and before trading had begun on 18 February 2021; and (3) by the time the MPI Charges were announced to the market on 23 February 2021, trading in QEX's ordinary shares was already suspended.

⁴⁴ With regard to the MPI Charges and the Q3 FY21 breach, the Tribunal notes that while QEX did receive advice from its then corporate counsel on the need to disclose this information, this advice appears to have been either disregarded or ignored by the QEX board. It was not until QEX engaged new external legal advisers that decisions were made to immediately release this information. By that stage, QEX was already in breach of Rule 3.1.1.

⁴⁵ The Tribunal notes that NZ RegCo has not alleged in the SOC that QEX has breached any of the board composition requirements under the Rules. It is QEX's apparent breach of Section 2 of the Rules which resulted in the suspension of trading in QEX's ordinary shares.

120. While none of these factors mitigates QEX's poor conduct with regards to meeting its continuous disclosure obligations, it means that this matter is not as serious as it could have been. If the breaches currently being considered had caused a significant market impact, the Tribunal considers that the starting point for the appropriate financial penalty would have been in the mid to high range of penalty band 3. Accordingly, the Tribunal considers that the starting point for the appropriate financial penalty in this case is the mid-range of penalty band 3.

Previous Tribunal decisions

121. The Tribunal considers that the most relevant previous decisions in which to compare the current breaches are *NZMDT 5/2021 NZX v QEX* (referred to above) and *NZMDT 1/2021 NZX v NZME Limited (NZM)*.
122. In *NZMDT 5/2021 NZX v 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 \$4million 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, between 19 October 2020 and 28 October 2020, during which time trading in QEX shares occurred (QEX's share price fell 36% following the announcement's release).
123. The Tribunal considers that the present case is more serious than the matter considered against QEX earlier this year given the number and duration of the breaches involved, particularly with respect to the Interest Cover Breaches and the MPI Charges. The earlier breach by QEX was also considered in the context of that breach not forming a pattern of misconduct by QEX and that QEX had been mindful of its disclosure obligations and had taken reasonable steps to determine what the position was in relation to the missing stock in difficult circumstances. Neither of these mitigating factors are relevant to the breaches in this current case.
124. The Tribunal notes, however, that the more serious nature of the current breaches is balanced somewhat because there is no evidence of a significant adverse market impact as a direct result of these breaches.
125. In *NZMDT 1/2021 NZX v NZME Limited (NZM)*, the Tribunal approved a settlement agreement under which NZM agreed to a financial penalty of \$20,000 for its breach of Rules 3.1.1 and 3.20.1. In that matter, NZM accepted breaching Rules 3.1.1 and 3.20.1 after the resignation of NZM's Chair at 11:36am on 11 June 2021 was not released to the market until 2:44pm –16 minutes before NZM's shareholder meeting at which, among other things, shareholders had been asked to vote on his reappointment. The Tribunal considered that there were several aggravating factors in that case including that NZM was aware that the Chair's resignation was both unexpected and that it occurred during a period when there was considerable market interest in its activities because of the events surrounding its efforts to acquire Stuff. The Tribunal also noted that when the Chair's resignation was announced to the market, the announcement lacked adequate context and did not contain sufficient information for investors to understand and assess its implications. The Tribunal also considered that there were several mitigating factors, including that the breaches were of limited duration, there was no evidence of any impact on the market and investors, and NZM's Board and management considered NZM's continuous disclosure obligations in accordance with NZM's continuous disclosure compliance processes and obtained and acted in reliance on external legal advice regarding the approach to disclosure.

126. In respect of the Independent Director Resignations, the Tribunal considers that there are several parallels to the NZM case in that the breach was of a limited duration, there was no evidence of any impact on the market (because trading in QEX's ordinary shares was subsequently suspended) and QEX had acted in reliance on external legal advice regarding the approach to disclosure. The resignations in the present case also had serious implications for QEX, as the Chair's resignation had for NZM, which meant that it was particularly material and imperative that it was released in a timely manner.
127. On balance, the Tribunal considers that the penalty applied in this case should be significantly higher than the penalty of \$80,000 imposed in the Tribunal's earlier decision against QEX, with the breach of Rules 3.1.1 and 3.20.1 in regards to the Independent Director Resignations contributing a similar amount to that imposed in the matter against NZM.

Public censure

128. NZ RegCo submits that a public censure of QEX 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 QEX. QEX has not made any submissions regarding a public censure.
129. 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.
130. 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 QEX given that:
- a. a breach of the continuous disclosure requirements has the potential to cause harm to the public and to damage public confidence in the market;
 - b. QEX has repeatedly breached the Rules and demonstrated insufficient regard to its obligations under the continuous disclosure Rules; and
 - c. the breaches fall within Penalty Band 3.
131. The Tribunal notes that its public censure of QEX will be released together with a copy of this determination in full.

Penalty to be imposed

132. As noted above, the Tribunal considers that a starting point for the current breaches in the mid-range of penalty band 3 is appropriate.

133. Given the timing of QEX's recent penalty decision for breach of the continuous disclosure rules, which occurred in October 2020 and in the middle of the current breaches, the Tribunal considered the starting point it would have adopted should all breaches have been considered by the Tribunal at the same time. That October 2020 breach was serious and had significant market impact. Together with the current breaches it formed a concerning pattern of breaches of fundamental obligations. If they were also considered together the Tribunal found it would have adopted a starting point in the higher range of penalty band 3. Therefore on totality principles, and separately justifiable for the current breaches, the Tribunal adopted a starting point for all the breaches in this matter together of \$200,000.
134. Having considered all the aggravating and mitigating factors, that there is no evidence of a significant adverse market impact as a direct result of these breaches and the Tribunal's previous decisions noted above, the Tribunal considers that a financial penalty of \$150,000, together with a public censure, is appropriate in this case.

Costs

135. NZ RegCo has sought an order that QEX pay the costs of NZX (including its external legal costs) in bringing this proceeding and the costs of the Tribunal in considering this matter.
136. QEX has not made any submissions regarding costs but has noted that it has limited financial resources at this time and that the recent Covid-19 lock-down in Auckland has heavily impacted its operations. While it has not been suggested that the global pandemic contributed to the breaches in this case, there is no doubt that a Covid trading environment has resulted in a fast paced and complex commercial environment where QEX and other companies must make key business decisions at speed and when it may be difficult to predict prospective market conditions. A small and closely held Listed entity, reliant on external advisors, may be stretched and vulnerable in this environment. Mistakes can be made but these breaches are consistent with a persistent pattern of poor systems in place. That said, the Tribunal is mindful that financial deterioration due to Covid trading conditions may be a factor in QEX's ability to pay its fine and costs at this time⁴⁶.
137. Given the Tribunal has found QEX in breach of the Rules, the Tribunal considers that it is appropriate for QEX to pay costs. However, the Tribunal is mindful of QEX's current financial circumstances and accordingly, makes a preliminary order that QEX pay up to \$20,000 towards the costs and expenses incurred by NZX (including its external legal costs) in considering this matter. If the amount of NZX's costs is less than \$20,000, QEX is required to pay that lesser amount.
138. The Tribunal invites further submissions from both parties on costs, if they wish to contest the Tribunal's preliminary order, by 5:30pm on 10 January 2021.
139. The Tribunal also encourages NZ RegCo to work with QEX to determine how best to make payment on its fine and costs (for example, agreeing a payment plan).

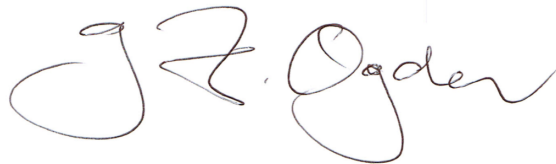
⁴⁶ The Chair of the Tribunal stated in the Tribunal's Annual Report 2019 that "the Tribunal will ensure that all referrals of alleged breaches that occur during the current turmoil are considered in their full context. All of our members appreciate the unprecedented environment we currently face and the pressure that brings to bear on all when we have to react to fast paced changes in business, the economy and consequently the market".

Orders

140. The Tribunal orders that QEX:

- 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 \$150,000 to the NZX Discipline Fund;
- c. pay the costs and expenses incurred by the Tribunal in considering this matter; and
- d. subject to any further submissions to be received and orders made, pay up to \$20,000 (including GST) towards the costs and expenses incurred by NZX (including its external legal costs) in considering this matter, subject to hearing the parties on costs.

DATED 23 DECEMBER 2021

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

James Ogden, Division Chair