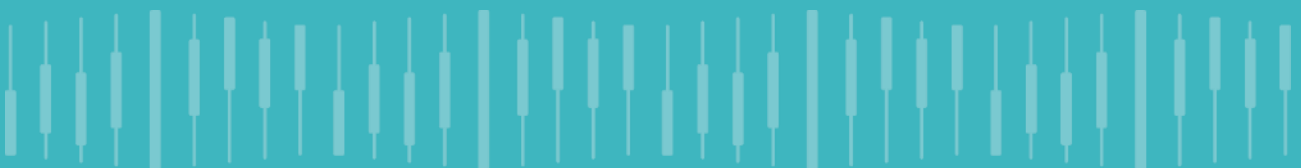


**NZ RegCo**

NZ'S LISTED  
MARKET REGULATOR

# New Talisman Gold Mines Limited Investigation Report



## Introduction

New Talisman Gold Mines Limited (**NTL**) is a New Zealand incorporated company, engaged in mine development and mineral exploration. NTL is listed and its ordinary shares are quoted on the NZX Main Board. NTL is subject to the NZX Listing Rules (**Rules**).

NZ RegCo recently concluded an investigation into NTL's compliance with the Rules, in relation to:

- a capital raise undertaken by NTL in 2019, and the provisions of section 4 of the Rules that limit the ability of issuers to raise capital without seeking shareholder approval
- NTL's disclosures regarding the acquisition of Broken Hill Historic Gold Mine Limited (**BHG**), given the continuous disclosure obligations that apply under section 3 of the Rules
- changes in the composition of NTL's board in October 2021, given the provisions of section 2 of the Rules setting out board and audit committee membership requirements.

That investigation identified that NTL breached several Rules. NZ RegCo has determined to pursue an educative outcome through the publication of this report, rather than an enforcement outcome against NTL.

## Purpose of this report

NZ RegCo has published its enforcement policy, titled "Approach to Enforcement".<sup>1</sup> The policy sets out NZ RegCo's enforcement goals and the factors taken into consideration when deciding whether to take enforcement action.

NZ RegCo may, from time to time, publish reports on its investigations if it considers that doing so has an educative value for the market.

NZ RegCo considers that the breaches identified in this investigation raise matters that are relevant for all issuers and their advisers to consider.

## The 2019 capital raise

Section 4 of the Rules governs capital raising. It sets out the circumstances in which issuers can raise capital without shareholder approval.

Rule 4.3.1(c) enables issuers to offer shares to existing shareholders under an eligible share purchase plan. Under Rule 4.3.1(c), a share purchase plan can comprise an offer to subscribe up to a maximum of \$15,000 of shares for every registered holder in any 12 month period, for shares which in the aggregate do not exceed 5% of the relevant class.

Rule 4.5 enables issuers to undertake placements of shares subject to a cap. In summary, that Rule enables issuers to issue up to a cap of 15% their current equity capital in a 12 month period.

On 6 June 2019, NTL announced that it would be undertaking a capital raise in the form of a share purchase plan (the **2019 SPP**). In the offer document released by NTL for the 2019 SPP, NTL advised that it would issue shares under Rule 4.3.1 to the maximum extent permitted by that Rule, and after that in reliance on Rule 4.5 in respect of any additional shares offered to eligible shareholders.

On 24 July 2019, NTL announced the completion of the 2019 SPP. It advised that a total of \$1.73m had been raised through the issue of 252,204,137 shares. This utilised all of the share purchase plan headroom available to NTL under Rule 4.3.1, as well as part of the placement capacity available to NTL under Rule 4.5.

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<sup>1</sup> NZ RegCo's *Approach to Enforcement* can be accessed at <https://www.nzx.com/regulation/nzregco/publications>.

On 26 July 2019, NTL announced that it intended to seek applications to subscribe for the shortfall shares under the 2019 SPP (**the SPP Shortfall**).

On 6 September 2019, NTL announced that it had raised a further \$1.89m through the placement of 275,476,885 shares. In undertaking the SPP Shortfall offer, NTL had purported to again utilise its placement capacity under Rule 4.5.

NZ RegCo investigated the issue of shares by NTL under the 2019 SPP and the SPP Shortfall offers, given the placement capacity cap under Rule 4.5.

NZ RegCo has determined that NTL issued 75,803,629 more shares than it was permitted to issue under Rule 4.5, representing approximately 3% of the NTL shares on issue.

NTL was not able to provide NZ RegCo with a definitive reason for the error in its calculation of the placement capacity available to NTL under Rule 4.5. NTL was also not able to provide evidence to NZ RegCo of any advice it had received on the calculation of that placement capacity or its consideration by the NTL board.

NTL has acknowledged its breach of Rule 4.5. The NTL board has since ratified the deficit. NZ RegCo also acknowledges that NTL utilised less than the placement capacity available to it in the year following the 2019 SPP and SPP Shortfall, which had the effect of “cleansing” the over-allotment.

## Lessons for Issuers

The capital raising provisions in section 4 of the Rules, combined with the “same class offer” exclusion under the Financial Markets Conduct Act 2013, enable issuers to efficiently raise additional equity capital. This is a key benefit of being a listed NZX issuer.

The limits imposed on the ability to raise capital without seeking shareholder approval are important safeguards. Issuers must take care when calculating the capacity to issue shares under a share purchase plan (Rule 4.3.1(c)), a placement (Rule 4.5) or an issue to employees and executive directors (Rule 4.6). It may be appropriate for issuers to take advice on those calculations, in support of board oversight.

It is recommended that issuers document calculations made of issuance capacity under Rules 4.3.1(c), 4.5 and 4.6, when planning for a capital raising under one of those Rules.

## BHG Acquisition

Issuers’ continuous disclosure obligations are fundamental obligations under the Rules.

Under Rule 3.1, issuers are required to release material information via the market announcements platform (**MAP**) promptly and without delay once they become aware of it;

- “material information” is information relating to a particular issuer which a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of that issuer’s quoted financial products
- issuers become “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 the performance of their duties

Issuers must release material information through MAP first, before other means such as media releases.

Rule 3.1.2 provides some exceptions from the general obligation to release material information in a limited number of situations, including if the information relates to an incomplete proposal or negotiation and that information remains confidential.

On 27 January 2021, NTL announced that it had entered into a binding option to acquire BHG. BHG was also engaged in mine development and mineral exploration and held mining permits covering the historic Broken Hills Mine near Tairua on the Coromandel Peninsula. NTL flagged that announcement as comprising “material information”.

NTL continued to provide market updates on the status of the BHG option during 2021.

On 14 September 2021, NTL announced that it had undertaken a private placement and would be undertaking a rights offer, with the funds intended (among other purposes) to finance the BHG acquisition.

At 4.56pm on 27 September 2021, NTL released an announcement stating that it had entered into “final documentation relating to the acquisition of ... BHG”.<sup>2</sup>

NZ RegCo queried the timing of the announcement with NTL, noting the intra-day release. Issuers are expected to try to manage the timing of entry into material agreements, so that relevant information can be released prior to the start of the trading day. NZ RegCo engaged with NTL to understand the sequence of events giving rise to NTL entering into the final documentation for the acquisition of BHG, the materiality of the BHG acquisition, and the approach taken by NTL to the disclosure of that information.

Based on the evidence available, NZ RegCo determined that NTL entered into the agreement for the acquisition of BHG on 25 September 2021 (a Saturday) and that the relevant information was “material information” for the purposes of NTL’s continuous disclosure obligations.

Under NZX guidance, a material transaction will generally be complete at the time the parties sign an agreement to implement or give effect to the transaction and disclosure would be required promptly and without delay following signing of the agreement.

In the event, NTL did not release its announcement regarding finalisation the BHG acquisition before the market opened for trading on 27 September 2021. NTL advised NZ RegCo that there was a delay in preparing and finalising the relevant announcement, with NTL directors, management and NTL’s external legal advisors continuing to review and provide comments on the draft announcement until late afternoon on 27 September 2021. NTL did not engage with NZ RegCo about a possible trading halt.

NZ RegCo has determined that NTL’s delay resulted in a breach of Rule 3.1, as NTL did not release the relevant material information promptly and without delay as required by that Rule.

It is noted for completeness that the release of the information relating to the BHG acquisition did not have an observable impact on NTL’s share price, which remained static throughout August – December 2021 (albeit NTL is a relatively illiquid stock).

## Lessons for Issuers

A breach of an issuer’s continuous disclosure obligation is a breach of a fundamental obligation.

Issuers entering into material transactions can take steps to manage their continuous disclosure obligations, by ensuring that the execution of agreements takes place out of market hours. That enables the issuer to release material information on the relevant transaction before the commencement of trading.

Issuers engaged in negotiations for a material transaction should prepare draft announcements in advance of entering into any agreement. This enables the issuer to release that announcement to the market promptly and without delay after the relevant disclosure obligation is triggered.

Issuers may need to request a trading halt to meet their continuous disclosure obligations in certain circumstances. For example, that may be appropriate if an issuer has not finalised the text of an announcement regarding a material transaction before the commencement of trading on the NZX Main Board.

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<sup>2</sup> NTL’s announcement of 27 September 2021 can be accessed at <https://www.nzx.com/announcements/379875>.

## Board and Audit Committee composition

Section 2 of the Rules sets out governance requirements that apply to listed issuers.

Rule 2.1.1 requires all equity issuers to have at least three directors at all times (Rule 2.1.1(a)), and with at least two independent directors (Rule 2.1.1(b)).

Rules 2.13.1 and 2.13.2 require equity issuers to have an audit committee comprising at least three directors, a majority of who are independent directors, and with at least one member who has an accounting or financial background. NZX has provided guidance to the market on its expectations for a suitable accounting or financial background for this purpose.<sup>3</sup>

NTL held its annual shareholder meeting on 29 September 2021. Immediately prior to the ASM, NTL had a five member board. Two directors, Victor Rabone and Kelly Wyse, had been appointed by the board as directors on 13 September 2021 as permitted by NTL's constitution. At the ASM, resolutions were put to NTL shareholders to elect them to the board under Rule 2.7.1.

Mr Rabone was elected to the board by shareholders, but Ms Wyse was not. A new director, John Upperton, was also elected to the board.

Over 7 and 8 October 2021, three of NTL's directors resigned – Murray Stevens, Charbel Nader and Matthew Hill. Those resignations left NTL with a two person board – Mr Upperton and Mr Rabone – with Mr Upperton being the sole independent director as defined under the Rules. The resignations meant that NTL was in breach of its board and audit committee composition requirements under Rules 2.1.1 and 2.13.2.

A third director, Calum McKenzie, was appointed on 11 October 2021. Two additional directors, Samantha Sharif and Michael Stiasny, were appointed to the NTL board on 1 November 2021, at which time Mr McKenzie stepped down from the board. The board agreed on 12 November 2021 that all NTL directors would serve on NTL's audit committee, with Mr Stiasny as Chair of that committee.

NZ RegCo determined that NTL had remedied the breach of Rule 2.1.1 with Mr McKenzie's appointment. Due to NTL's prompt action and the limited duration of the breach (less than a single trading day), NZ RegCo determined not to take enforcement action.

NZ RegCo has determined that NTL was in breach of the audit committee composition requirements under Rule 2.13 for a more extended period, from 8 October to 12 November 2021.

NZ RegCo acknowledges that NTL's audit committee was fully constituted in sufficient time to review NTL's interim financial statements, released on 13 December 2021. It is, however, important to note that the audit committee has wider responsibilities specified in the Rules, including a more general oversight role in respect of an issuer's financial processes.

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<sup>3</sup> NZX Guidance Note on Governance, which can be accessed here - <https://www.nzx.com/regulation/nzx-rules-guidance/nzx-mo-announcements/guidance-notes>.

## Lessons for Issuers

The board and audit committee composition requirements in section 2 of the Rules are key governance requirements. NZ RegCo is highly unlikely to grant a temporary waiver from these provisions, except in very limited circumstances (such as sudden ill health).

Issuers should proactively manage board succession planning. Issuers can manage such risks by having more than the minimum number of directors required under the different provisions in the Rules, so that an unexpected resignation will not place them in breach. Issuers may also wish to identify in advance prospective directors who would be willing to accept appointment at short notice.

## Concluding remarks

NZ RegCo has determined to pursue an educative outcome in relation to NTL's breaches, rather than an enforcement outcome through the NZ Markets Disciplinary Tribunal.

In reaching that decision, NZ RegCo has had regard to various factors.

NTL's board was effectively reconstituted during October and November 2021 - the capital raising and continuous disclosure breaches occurred under the oversight of the former board, which is no longer in place.

The reconstituted NTL board has shown itself willing to engage with NZ RegCo, and has demonstrated a commitment to lift its compliance performance.

NZ RegCo notes the unique circumstances that apply in this matter. Issuers are reminded that breaches of the type outlined in this report would ordinarily attract an enforcement outcome.

NZ RegCo encourages issuers and their advisers to consider the points noted in this report.

## Appendix – relevant provisions of the NZX Listing Rules

### Board and Audit Committee composition

#### 2.1 Composition of Board of Directors

2.1.1 The composition of the Board of an Issuer of Quoted Equity Securities must satisfy the following requirements at all times (excluding alternate Directors):

- (a) there must be at least three Directors,
- (b) at least two Directors must be ordinarily resident in New Zealand, and
- (c) at least two Directors must be Independent Directors.

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#### 2.13 Audit Committee

2.13.1 Each Issuer must establish an Audit Committee.

2.13.2 The Audit Committee must:

- (a) be comprised solely of Directors of the Issuer,
- (b) have at least three members,
- (c) have a majority of Independent Directors, and
- (d) have at least one member with an accounting or financial background.

2.13.3 The responsibilities of an Issuer's Audit Committee include as a minimum:

- (a) ensuring processes are in place and monitoring those processes so that the Board is properly and regularly informed and updated on corporate financial matters,
- (b) recommending the appointment and removal of the independent auditor,
- (c) meeting regularly to monitor and review the independent and internal auditing practices,
- (d) having direct communication with and unrestricted access to the independent and any internal auditors or accountants,
- (e) reviewing the financial reports and advising all Directors whether they comply with the appropriate laws and regulations, and
- (f) ensuring that the Key Audit Partner is changed at least every five years.

### Continuous Disclosure

#### 3.1 Disclosure of Material Information

3.1.1 Once an Issuer becomes Aware of any Material Information relating to it, the Issuer must:

- (a) promptly and without delay release that Material Information through MAP, and
- (b) not disclose any Material Information to the public, any other stock exchange (except as provided for in Rule 3.26.2(d)) or any other party without first releasing that Material Information through MAP.

3.1.2 Rule 3.1.1 does not apply when:

- (a) one or more of the following applies:
  - (i) release of the information would be a breach of law,
  - (ii) the information concerns an incomplete proposal or negotiation,
  - (iii) the information contains matters of supposition or is insufficiently definite to warrant disclosure,
  - (iv) the information is generated for internal management purposes, or
  - (v) the information is a trade secret,
- (b) the information is confidential and its confidentiality is maintained, and
- (c) a reasonable person would not expect the information to be disclosed.

## Capital Raising

### 4.1 Issue of New Equity Securities

4.1.1 Except as provided in Rule 4.1.2, an Issuer must only issue Equity Securities with approval by Ordinary Resolution in accordance with Rule 4.2.1.

4.1.2 An Issuer may issue Equity Securities, without approval by Ordinary Resolution, by way of:

- (a) a pro-rata Rights offer, bonus issue or a Share Purchase Plan in accordance with Rule 4.3 and, if applicable, Rule 4.4,
- (b) an issue under an Issuer's 15% placement capacity in accordance with Rule 4.5.1,
- (c) an issue to Employees, in accordance with Rule 4.6, or
- (d) other issues for dividend reinvestment plans, director remuneration, takeovers, amalgamation, conversions and Minimum Holdings in accordance with Rules 4.7 to 4.9.

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### 4.5 15% Placements

4.5.1 An Issuer may issue Equity Securities provided the number to be issued, together with all other Equity Securities of the same Class issued under this Rule 4.5.1 over the shorter of the previous 12 months or the period since the Issuer was Listed, will not exceed the aggregate of:

- (a) 15% of the Equity Securities of that Class on issue at the beginning of that period, and
- (b) 15% of the Equity Securities of that Class issued during that period under any of Rules 4.2.1, 4.3, 4.4.1(a), 4.6, 4.8.1 and 4.9, and
- (c) any Equity Securities of that Class issued under this Rule 4.5.1 during that period, the issue of which has been ratified by an Ordinary Resolution (such resolution being subject to the voting restrictions in Rule 6.3), less
- (d) 15% of Equity Securities of that Class which have been acquired or redeemed by the Issuer during that period (other than Equity Securities held as Treasury Stock),  
provided that:
- (e) Employees and Directors of the Issuer, and Associated Persons of a Director of the Issuer may participate only if:



- (i) all Directors voting in favour of the resolution to issue the Equity Securities sign a certificate that the participation of such persons is in the best interests of the Issuer and fair to other Equity Security holders,
  - (ii) the terms of issue are the same for all persons participating in the issue and such persons are not exclusively Employees and / or Directors of the Issuer and / or Associated Persons of a Director of the Issuer, and
  - (iii) the level of participation of any Employee, Director or Associated Person of a Director, is determined according to criteria applying to all persons participating in the issue, and
- (f) Financial Products which may Convert to Quoted Equity Securities are deemed to be of the same Class as the Quoted Equity Securities into which they may Convert, and
- (g) the Financial Products referred to in paragraph (f) are deemed to be of the same number as the Quoted Equity Securities to which they may Convert, except that for the purpose of this calculation:
- (i) in relation to the conversion ratio or conversion price, any reference to the market price (however described) of the underlying Quoted Equity Securities will instead be to the Average Market Price, and
  - (ii) any provisions for early Conversion at the option of a holder exercisable in limited circumstances (such as due to an event of default or change of control or similar) using a different formula or method will be disregarded.