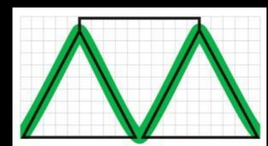
ANNUAL REPORT 2021

NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL



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This report covers the period 1 January 2021 to 31 December 2021.

TRIBUNAL CHAIR’S REPORT

TRIBUNAL CHAIR'S REPORT

Tēnā koutou katoa

2021 proved to be another difficult year dominated by the COVID-19 pandemic. No doubt the pandemic required Issuers and Participants alike to be nimble and inventive in all aspects of their business, while market volatility dominated.

The year also saw the Tribunal consider several referrals arising from Issuer deficiencies in the timely release of accurate information to the market. As was my message last year, even under difficult circumstances, ensuring compliance with an Issuer's continuous disclosure obligations should be front of mind for all Boards. Continuous disclosure is ultimately and fundamentally a Board responsibility. While Board's may seek legal advice on the requirements of the Listing Rules, the decision whether information is Material Information is an exercise of commercial judgement, not a legal issue.

Not only do Boards need to consider at each Board meeting if there is information which may be material and require release to the market, an Issuer needs adequate processes to ensure that information is escalated to the Board in a timely manner so that it can consider its materiality.

This year provided examples of breaches at both Board level, and in failing to escalate matters to the Board. They serve as a reminder to Issuers of the processes, procedures and discipline required to meet continuous disclosure obligations.

NZ Markets Disciplinary Tribunal

The NZ Markets Disciplinary Tribunal (*Tribunal*) is an independent body established under the NZ Markets Disciplinary Tribunal Rules (*Tribunal Rules*). The Tribunal serves in an adjudicative role. It is not an inspectorate of market conduct. That role is performed by NZ RegCo (acting on behalf of NZX Limited (*NZX*)) and the Financial Markets Authority (*FMA*).

The Tribunal's principal role is to determine whether there has been a breach of the NZX Participant Rules, the NZX Listing Rules, the NZX Derivatives Market Rules, the Clearing and Settlement Rules of New Zealand Clearing Limited or the Fonterra Shareholders' Market Rules (*NZX Market Rules*) in matters referred to it by NZ RegCo. If a breach of the NZX Market Rules is established, the Tribunal must

determine what, if any, penalties should be imposed. The Tribunal may also review decisions made by NZ RegCo in respect of a waiver or ruling in matters referred to it by the applicant, provided the basis for such a referral are met, for example where the decision was irrational having regard to the evidence available or where NZ RegCo did not observe the rules of procedural fairness.

NZ RegCo

NZ RegCo is responsible for monitoring and enforcing the NZX Market Rules. NZ RegCo published its Oversight and Engagement Report for 2021 on 28 February 2022 – see here. This report includes information on the investigation and enforcement activity undertaken by NZ RegCo during 2021 and was provided to the Tribunal in connection with NZX's annual regulatory reporting requirements under the Tribunal Rules.

During 2021, NZ RegCo, in conjunction with NZX, undertook a review of the Tribunal Rules with a particular focus on three areas:

(a) clarifying the position regarding appeals of Tribunal decisions, with expert advice provided by the Hon Sir Terence Arnold QC;

(b) consolidating the membership structure of the Tribunal, with membership categories reduced to three groups – legal, market participant and issuer appointees – with broader qualifying requirements (for example, an officer or former officer or Director of an Issuer can be appointed as an issuer appointee); and

(c) reviewing the penalty regime to ensure that the Tribunal Procedures on penalty are fit for purpose and provide greater guidance on how penalties will be determined within the revised penalty bands.

At the time of writing, public consultation on the proposed Tribunal Rule and Procedure changes had closed and NZX was in the process of finalising the proposed amendments. The changes being proposed can be viewed here.

Under the Tribunal Rules, NZ RegCo has the power to issue fines of up to $10,000 for minor breaches of the NZX Market Rules. NZ RegCo issued three Infringement Notices in 2021 – see here.

Referrals

Seven matters were referred by NZ RegCo to the Tribunal during 2021, up from three matters referred during 2020. Six matters involved breaches by an Issuer of the obligation to release Material Information to the market in a timely manner. One matter involved breaches by a Market Participant of its obligations to ensure an orderly market when trading is conducted by a client with direct market access. In five of the seven matters, NZ RegCo reached a settlement with the Issuer or Market Participant. All matters resulted in the Tribunal publicly censoring the Issuer or Market Participant.

Details on these referrals and the Tribunal's decisions are set out on pages 10 to 36 of this report.

Members

In June 2021, NZX appointed four new Tribunal members – John Dixon QC, Pip Dunphy, Rachael Newsome and Dave Roberton. I am pleased to welcome members of such calibre and their high level of experience will be of great benefit to the Tribunal.

David Lane was appointed as Deputy Chair at the Tribunal's 2021 AGM. I am grateful for the support I receive from David in this role.

Special Division

Rachael Newsome and Dave Roberton joined the Special Division in August 2021. Their appointment adds further experience to the Special Division and meets the Division's succession needs. James Ogden continues in his role as Chair of the Special Division. James' report on the activities of the Special Division during 2021 can be found on page 38 of this report.

Resourcing

As required by the Tribunal Rules, the Tribunal confirms that it believes it has adequate resources available to it to undertake its role under the Tribunal Rules and that NZX has continued to provide all the assistance which the Tribunal requires to undertake its role.

The NZX Discipline Fund accounts (which are included in the NZ RegCo Oversight and Engagement Report) indicate that there is an accumulated surplus of $579,420 as at 31 December 2021.

I thank all of the members of the Tribunal and our committed and outstanding Executive Counsel for their work during 2021.

Ngā mihi

Rachael Reed QC | CHAIR
14 April 2022

MEMBERS

MEMBERS

Members of the Tribunal (as at 31 December 2021)

LEGAL

Rachael Reed QC (Chair), Hon Sir Terence Arnold QC, Deemple Budhia, John Dixon QC, Rachel Dunne, Kristy McDonald ONZM QC, Simon Vodanovich

LISTED ISSUER

Kirsty Campbell, Pip Dunphy, Nicola Greer, James Ogden

MARKET PARTICIPANTS

Matt Blackwell, Geoff Brown, David Lane (Deputy Chair), Rachael Newsome, Dave Roberton

MEMBERS OF THE PUBLIC

Richard Keys, Richard Leggat, Christopher Swasbrook, Mariëtte van Ryn

CLEARING PARTICIPANTS

Geoff Brown and David Lane

DERIVATIVES PARTICIPANTS

Matt Blackwell

Rachel Batters and Stephen Layburn act as Executive Counsel to the Tribunal.

Members of the Special Division (as at 31 December 2021)

James Ogden (Chair), Matt Blackwell, Rachael Newsome, Dave Roberton, Mariëtte van Ryn

Rachel Batters acts as Executive Counsel to the Special Division.

REFERRALS

NZMDT 1/2021 NZX V NZME LIMITED

Division: Simon Vodanovich (Division Chair), Deemple Budhia and Kirsty Campbell

Statement of Case filed: 19 February 2021

Settlement Agreement dated: 26 March 2021[1]

Date of Determination: 19 April 2021

Rules Breached: NZX Listing Rules 3.1.1 and 3.20.1

FACTS:

NZME Limited (*NZM*) is an Issuer with ordinary shares quoted on the NZSX.

On 12 May 2020, NZM gave notice via MAP of its annual shareholders' meeting (*ASM*) scheduled for 3pm on 11 June 2020. The agenda for the ASM included an ordinary resolution supported by the NZM Board that its current Chair, Mr Cullinane, be re-elected as a Director. Once advance voting and proxies closed, it became apparent that Mr Cullinane was unlikely to be re-elected.

At 11.36am on 11 June 2020, NZM received a letter of resignation from Mr Cullinane which stated that it was effective immediately. After receiving Mr Cullinane's resignation, and after taking external legal advice on their disclosure obligations, the NZM Board met to discuss the letter and its implications. In this time, NZM also prepared a draft announcement, which it sent to Mr Cullinane seeking his comments at 12.02pm. Mr Cullinane responded that he had no comments at 12.16pm. NZM did not release an announcement to the market regarding Mr Cullinane's resignation until 2.44pm on 11 June 2020, 16 minutes before the ASM was due to start.

When the announcement was released, it was marked with the 'P' flag to denote price sensitivity. NZM considered that the 'P' flag reflected the package of information being released in advance of the ASM, rather than Mr Cullinane's resignation specifically. NZ RegCo disagreed with this approach. NZ RegCo considered that each announcement should be individually assessed for materiality and that bundling multiple announcements detracted from this analysis.

NZ RegCo investigated the information held by NZM prior to the ASM for the purpose of assessing whether any part of it constituted Material Information and whether NZM had complied with the Listing Rules. As an Issuer, NZM was required under (a) Listing Rule 3.1.1 to promptly and without delay release Material information through MAP; and (b) Listing Rule 3.20.1 to promptly and without delay release through MAP information regarding any change of Director.

After conducting its investigation, NZ RegCo concluded that:

(a) Mr Cullinane's resignation was Material Information because the resignation related to the Chair and the circumstances of it were sudden and unexpected. As a result, NZ RegCo concluded that NZM had breached Listing Rule 3.1.1 by failing to release this information promptly and without

[1] The parties sought and were granted an extension of time to allow settlement discussions to occur. The Tribunal made its determination within 15 business days of receiving the settlement agreement.

delay; and

(b) NZM's failure to release information about a change in a Director promptly and without delay also constituted a breach of Listing Rule 3.20.1.

FINDINGS:

The Tribunal approved a settlement agreement between NZX and NZM under which NZM accepted the findings by NZ RegCo that it failed to release Material Information about a change in Director promptly and without delay in breach of Listing Rules 3.1.1 and 3.20.1.

The NZX Continuous Disclosure Guidance Note (*Guidance Note* – see here) does not specify that a change of Director is, of itself, Material Information (although the list of the type of information likely to be material is not definitive). However, as was the case in this matter, a Director's resignation may be Material Information if a reasonable person would expect that if the circumstances of their departure were generally available to the market, it would have a material effect on the Issuer's share price. The materiality of a change of Director will depend on the particular circumstances of each case.

In determining the appropriate penalty, the Tribunal considered that there were aggravating factors in this case:

(a) NZM was aware that the Chair's resignation was unexpected and it had occurred during a period when there was considerable market interest in its activities, particularly its efforts to acquire Stuff Limited (*Stuff*); and

(b) the market announcement of Mr Cullinane's resignation lacked adequate context and did not contain sufficient information for investors to understand and assess its implications.

The Tribunal considered that there were also mitigating factors in this case:

(a) The breaches were of limited duration, with Mr Cullinane's resignation received at 11.36am and the announcement to the market issued at 2.44pm on 11 June 2020;

(b) There was no evidence of any impact on the market and investors as a result of the announcement's delay;

(c) NZM's Board and management turned their minds to 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; and

(d) NZM co-operated with NZ RegCo's investigation.

PENALTY:

NZM was ordered to pay $20,000 to the NZX Discipline Fund.

COSTS:

NZM was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION:

Under the terms of the settlement agreement, NZM accepted the penalty of a public censure for its breach of the Listing Rules.

The Tribunal's public censure can be viewed here.

NZMDT 2/2021 NZX V NZME LIMITED

Division: James Ogden (Division Chair), Richard Keys and Kristy McDonald QC

Statement of Case filed: 19 February 2021

Settlement Agreement dated: 26 March 2021[2]

Date of Determination: 15 April 2021

Rules Breached: NZX Listing Rules 3.1.1 and 3.2.1

FACTS:

In 2016, the predecessors of NZM and Stuff sought authorisation from the Commerce Commission to merge their New Zealand media operations. Authorisation was ultimately declined and appeals lodged by the applicants were unsuccessful.

In 2019, NZM and Stuff's then-owner Nine Entertainment Co. Holdings Limited (*Nine*) entered confidential discussions about the acquisition by NZM of Nine's shares in Stuff. Following media reports in November 2019, NZM made a market announcement confirming that it was in preliminary discussions with Nine and had put a proposal to the New Zealand Government (*Government*) concerning a potential transaction.

In April 2020, during New Zealand's first COVID-19 lockdown and accompanying uncertainty in New Zealand's media industry, NZM made a non-binding indicative offer for Nine's shares in Stuff (*NBIO*). The NBIO provided for an exclusive and confidential top-up due diligence period and included undertakings that Nine would not solicit or otherwise engage in negotiations with any other party during that period and NZM had matching rights for any competing proposal. Nine agreed to these terms, although subsequently concluded that a sale of Stuff needed to be completed by 31 May 2020.

On 6 May 2020, Nine received an unsolicited indicative offer to buy Stuff from a competing bidder, now known to be a management buy-out led by Stuff's Chief Executive Officer. Unlike NZM's bid, this bid did not require Commerce Commission approval or Government support.

On 7 May 2020, Nine advised NZM that it had received an unsolicited competing bid to acquire Stuff for $1 on an unconditional basis and that the transaction could be completed by 31 May 2020. The information was stated to be confidential. Nine requested that NZM advise it the following day on whether NZM could match the terms of the competing bid. Nine informed NZM that if NZM was not able to match this proposal, Nine anticipated terminating discussions with NZM.

On 8 May 2020, NZM responded and stated its intention to complete its due diligence, submit a clearance application with the Commerce Commission and work towards agreeing transaction documentation. NZM stated that the NBIO contained legally binding confidentiality and exclusivity provisions to which Nine had agreed. These prohibited Nine from granting access to due diligence materials or engaging in

[2] The parties sought and were granted an extension of time to allow settlement discussions to occur. The Tribunal made its determination within 15 business days of receiving the settlement agreement.

negotiations with any other party. NZM also stated that it required further details of the competing bid in order to assess whether it could match its terms.

Nine replied later that day, at 8.13pm, stating that it had provided the key term from the competing bid that went to NZM's ability to match that offer, namely, unconditional completion by 31 May 2020. Other proposed terms were said to be broadly comparable to NZM's offer, so Nine considered that NZM had the necessary information to decide whether to match the competing bid. Nine stated that it did not consider it was realistic for NZM to complete a transaction by 31 May 2020 and accordingly Nine was "terminating further engagement" with NZM. Aside from the correspondence, NZM did not have information to verify Nine's claim of an unconditional competing bid on similar terms.

The NZM Board met with NZM management and NZM's external legal advisors to discuss its response to Nine on Sunday 10 May 2020. During this meeting, the Board decided to file a public clearance application with the Commerce Commission, seek the assistance of the Government, make a market announcement and inform Nine of its planned course of action. At the meeting, the Board sought advice from its external legal advisors. The external legal advice to the Board was:

(a) NZM was able to make the proposed announcement to the market, as required by the Listing Rules, in compliance with NZM's confidentiality obligations to Nine, as long as notice was given to Nine prior to the announcement being released.

(b) NZM continued to be in an exclusive negotiating period with Nine and did not need to announce Nine's termination of engagement.

On Monday 11 May 2020, the following market announcements were made:

(a) At 9.31am NZM released a market announcement confirming that NZM had made an offer to acquire Stuff from Nine, that an exclusivity period was in place between NZM and Nine for the purpose of progressing that offer and that NZM had that day written to the Government seeking "urgent legislation" to allow NZM to acquire the shares in Stuff by 31 May 2020.

(b) At 10.52am (NZST), Nine responded to this market announcement in a release on the ASX, stating that Nine had notified NZM that it had "terminated further engagement with NZM".

(c) At 12.11pm, NZM released a further market announcement stating that NZM's view was that it was "still in a binding exclusive negotiation period with Nine and does not accept that exclusivity has been validly terminated".

After investigation, NZ RegCo concluded that:

(a) NZM had breached Listing Rule 3.1.1 because NZM's announcements on 11 May 2020 were incomplete and therefore misleading. Once NZM had decided to make the clearance application and announce it, NZM could not present only part of the Material Information to the market:

- The 9.31am market announcement gave the impression to the market that a proposal to acquire Stuff by NZM was well advanced. The implication was that it was competition concerns that were the obstacle to a deal that could otherwise settle in the very near future.

The substance of the announcement was that Government intervention in the market was needed to enable completion of the transaction by 31 May 2020. The announcement gave no sense that the deal was at risk of not proceeding because Nine had purported to terminate engagement with NZM and an alternative bid had come to light which could be completed by 31 May 2020.

- Following Nine's ASX release at 10.52am (NZST) and NZM's second market announcement of the day at 12.11pm, the market was better informed. However, even at this point, the market was not made aware by either NZM or Nine of the important detail that Nine was in receipt of an alternative bid that did not require Commerce Commission clearance.

(b) NZM had breached Listing Rule 3.2.1 because NZM's incomplete announcements led to an increase in the NZM share price that reflected market optimism in circumstances where the market had not been provided with all the Material Information. It was incumbent on NZM in these circumstances to issue a corrective release.

FINDINGS:

The Tribunal approved a settlement agreement between NZX and NZM under which NZM accepted the findings by NZ RegCo that it failed to release all Material Information about its offer to acquire shares in Stuff and that it failed to prevent the development of a false market in breach of Listing Rules 3.1.1 and 3.2.1.

In determining the appropriate penalty, the Tribunal considered that there were a number of aggravating factors in this case:

(a) in the Tribunal's view, the announcements were incomplete and had the potential to mislead the market because they gave the impression that NZM's acquisition of Stuff was still progressing and subject only to overcoming the competition obstacle. This lack of balance in the announcements was a particularly aggravating factor in this case;

(b) NZM was on notice of the materiality of the information relating to the potential acquisition of Stuff given previous media coverage and NZM's announcement on 19 November 2019 confirming that it was in preliminary discussions with Nine and would provide further information to the market as required;

(c) NZ RegCo's advice that NZM's share price trended upwards on 11 May 2020 following the market announcements closing at $0.245, an increase of 13.9% from the price on the previous trading day. This likely reflected optimism about the prospects for NZM's acquisition of Stuff in circumstances where the market had not been fully informed; and

(d) NZM did not act promptly to prevent the development or subsistence of a false market.

The Tribunal noted in its determination, that it did not accept that NZM was required to announce that Nine had received a competing bid, as asserted by NZ RegCo, given that NZM could not confirm the veracity of the competing bid at that time, the information had been provided by Nine in confidence and the competing bid was incomplete. However, in the Tribunal's view, given the circumstances, the deadline given by Nine for any sale to be completed and the Commerce Commission's processes, the

prospect of a successful purchase being able to be completed should not have been presented so optimistically by NZM.

The Tribunal considered that there were mitigating factors in this case:

(a) the breach arising from the first market announcement at 9.31am was partially rectified by the 12.11pm announcement, although the Tribunal also considered that the later announcement had the potential to mislead the market;

(b) NZM's Board and management considered NZM's continuous disclosure obligations in accordance with NZM's continuous disclosure compliance processes; and

(c) NZM did not itself benefit financially from the breaches.

Under Tribunal Procedure 9, an Issuer obtaining independent legal advice that its conduct did not constitute a breach and reasonably relying on that advice may be considered by the Tribunal as a mitigating factor when determining the level of penalty. The Tribunal noted that ultimately Boards must exercise their own judgement to determine whether disclosure is required under the Listing Rules based on their knowledge of the Issuer and its business. In this case, the decisions made by NZM on what information would be released were of a commercial nature, as opposed to difficulties in understanding the legal requirements of the Listing Rules. Accordingly, the Tribunal did not consider that NZM's reliance on external legal advice was a mitigating factor of any significant weight in this case.

PENALTY:

The Tribunal noted in its determination that the penalty in this case should be higher than the penalties imposed in other recent matters determined by the Tribunal involving a breach of the continuous disclosure obligations to reflect that NZM had breached both Listing Rules 3.1.1 and 3.2.1.

NZM was ordered to pay $80,000 to the NZX Discipline Fund.

COSTS:

NZM was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION:

Under the terms of the settlement agreement, NZM accepted the penalty of a public censure for its breach of the Listing Rules.

The Tribunal's public censure can be viewed here.

NZMDT 3/2021 NZX V JARDEN SECURITIES LIMITED

Division: Mariëtte van Ryn (Division Chair), David Lane and Chris Swasbrook

Memorandum of Counsel filed: 12 August 2021

Settlement Agreement dated: 12 August 2021

Date of Determination: 27 August 2021

Rule Breached: NZX Participant Rules 8.8.1, 10.2.2(a), (b) and (f), and 10.8.1(a)

FACTS:

Jarden Securities Limited (*Jarden*) is a Trading and Advising Participant and is bound by the Participant Rules. Jarden provides Direct Market Access (*DMA*) to a number of DMA Authorised Clients who can submit orders and trade on New Zealand markets using Jarden's order entry system. Jarden has responsibilities and obligations in respect of this trading under the Participant Rules.

Client A is a DMA Authorised Client of Jarden who submits orders on its own behalf and on behalf of its underlying clients using Jarden's order entry system. On 26 June 2020, an underlying client of Client A used a volume weighted average price (*VWAP*) algorithm to execute orders in Mainfreight Limited (*MFT*) using Client A's DMA account with Jarden:

(a) between 10:18am and 12:52pm, 32 orders to sell MFT shares were entered resulting in 54 trades of 1,266 MFT shares. MFT's share price moved from $40.06 to $40.38, then back down to $40.15. Client A accounted for 39% of the total volume sold during this period. At 12:52pm, the last traded price for MFT was $40.17; and

(b) between 12:59pm and 1:38pm, 52 orders to sell MFT shares were entered resulting in 96 trades of 14,353 MFT shares (*the MFT Trades*). In this period of about 40 minutes, MFT's share price moved down through 26 price levels, from $40.17 to $36.25, a decrease of $3.92 or 9.8%. The MFT Trades did not themselves occur as low as $36.25 and were responsible for 12 of the 26 downward price movements. However, the MFT Trades accounted for 83% of all the shares sold during this period and NZ RegCo considered they likely influenced trading by other sellers in the market (including other algorithms).

This trading activity was observed by a senior member of Jarden's dealing team who contacted Client A to question the trading. Client A confirmed that its client had mistakenly put the order into a VWAP algorithm without applying a volume cap (a volume cap would have meant that the algorithm was controlled to selling a certain percentage of the volume that traded, and not all the volume). Independently of this exchange, the MFT Trades triggered four SMARTS alerts which were reviewed by Jarden's compliance team who considered that the trades raised "no concerns" as the price of MFT shares had stepped down within acceptable levels. No consideration was given to the cumulative effect that the series of orders had on MFT's share price when reviewing the alerts.

NZ RegCo began an investigation into the MFT Trades after it also received a SMARTS alert following the rapid decline in MFT's share price. During the course of NZ RegCo's investigation, Jarden advised that its

"% from previous close" filter (*the Filter*), which it would have expected to have prevented some of this activity, was not activated at the time of the MFT Trades. Had the Filter been activated, the orders would likely have been stopped and diverted to a Dealer to be reviewed and either authorised or rejected.

Jarden advised NZ RegCo that the Filter had been deactivated on 24 July 2019 after an issue was identified and assistance sought from Iress. Jarden had failed to implement any checks or controls in its place, had failed to follow-up on this issue and had incorrectly advised NZ RegCo on 25 June 2020, as part of NZ RegCo's regular pre-inspection request for information, that the Filter was in place believing that it was operational (Jarden corrected this advice following its investigation into this matter). Jarden had also not conducted regular reviews of its DMA filters as part of its compliance monitoring programme, despite NZ RegCo previously highlighting the need for Jarden to specifically monitor key areas including DMA in its onsite inspection reports of 2018 and 2019. The Filter had remained deactivated until the investigation into the MFT Trades.

NZ RegCo found that Jarden had breached:

(a) Participant Rule 8.8.1 by not ensuring its conduct promoted and helped maintain an orderly market;

(b) Participant Rules 10.2.2(a), (b) and (f) by accepting Client A's orders without considering whether the orders were consistent with recent trading in MFT, whether they would materially affect MFT's share price and whether they may have formed a series of orders (and if so, the effect of that series of orders); and

(c) Participant Rule 10.8.1(a) by not ensuring it had appropriate DMA filters in place.

FINDINGS:

The Tribunal approved a settlement agreement between NZX and Jarden under which Jarden accepted the findings by NZ RegCo that it breached Participant Rules 8.8.1, 10.2.2(a), (b) and (f), and 10.8.1(a).

The Tribunal considered that the breaches by Jarden related to a number of fundamental obligations under the Participant Rules, including the need to maintain an orderly market and to ensure appropriate DMA filters are in place. The Tribunal was also particularly concerned that Jarden's failure to comply with the Participant Rules resulted in a disorderly market in MFT's shares and that its conduct did not meet the standards expected of a Trading Participant given the long-standing compliance system failures.

In determining the appropriate penalty, the Tribunal considered that there were a number of aggravating factors in this case:

(a) Jarden failed to ensure the maintenance of an orderly market with the MFT Trades significantly contributing to a 9.8% fall in MFT's share price over a 40 minute period on 26 June 2020;

(b) Jarden did not have appropriate DMA filters in place for almost 12 months;

(c) Jarden's compliance monitoring of its DMA was inadequate despite being advised by NZ RegCo to address this on two previous occasions;

(d) Jarden's post-trade monitoring failed to consider the cumulative effect of the MFT Trades; and

(e) Jarden has been the subject of previous enforcement action by NZ RegCo regarding a failure to have adequate filters in place.

The Tribunal also considered that there were mitigating factors:

(a) Jarden had since established a compliance monitoring task to regularly check its DMA filters; and

(b) Jarden had updated its post-trade monitoring policies and procedures to ensure greater detail is recorded when addressing alerts, including the rationale for any decision taken.

PENALTY:

Jarden was ordered to pay $40,000 to the NZX Discipline Fund.

COSTS:

Jarden was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION:

Under the terms of the settlement agreement, Jarden accepted the penalty of a public censure for its breach of the Participant Rules.

The Tribunal's public censure can be viewed here.

NZMDT 4/2021 NZX V BLACKWELL GLOBAL HOLDINGS LIMITED

Division: Deemple Budhia (Division Chair), Pip Dunphy and Richard Keys

Memorandum of Counsel filed: 12 November 2021

Settlement Agreement dated: 12 November 2021

Date of Determination: 25 November 2021

Rule Breached: NZX Listing Rules 3.5.1 and 3.26.1

FACTS:

Under the Listing Rules, when an Issuer releases its financial information for its half and full year results to the market, it must also:

(a) directly enter certain data into MAP, including a Net Tangible Assets (*NTA*) value which represents the after tax dollar value per share; and

(b) complete and release an NZX Results Form in the template provided, which includes a field for “Net tangible assets per Quoted Equity Security”. A dollar amount for the current period and prior comparable period must be entered.

NTA data entered into MAP is used to populate the summary of an Issuer’s corporate and securities information displayed on nzx.com. The purpose of the NZX Results Form is to enable investors to review a summary of an Issuer’s financial results in an easily comparable format.

Blackwell Global Holdings Limited (*BGI*) is an Issuer with ordinary shares quoted on the NZSX.

On 27 November 2019, BGI released its preliminary results for the half year to 30 September 2019. BGI incorrectly entered its NTA in MAP and in the NZX Results Form as $0.15 per share, when its NTA was 0.15 cents per share and in the NZX Results Form $0.28 for the prior comparable period, when its NTA was 0.28 cents per share for the half year to 30 September 2018. On 13 December 2019, BGI released its interim report and again incorrectly entered its NTA in MAP and in the NZX Results Form as $0.15 per share (instead of $0.0015) and, in the NZX Results Form, $0.28 for the prior comparable period (instead of $0.0028). In both instances, NZX identified the MAP data entry error and corrected it on nzx.com. Due to an oversight by NZX, neither BGI or NZ RegCo were advised of the MAP data entry errors or that NZX had corrected them. The NZX Results Forms continued to show incorrect NTA information.

Between 9 June 2020 and 22 June 2020, BGI’s share price increased from $0.007 to $0.016 (an increase of around 1 cent or 129%) with higher volumes of shares traded. On 22 June 2020, NZ RegCo issued a Price Enquiry to BGI noting the 129% increase in BGI’s share price and requesting confirmation that it continued to comply with Listing Rule 3.1.1. In its market response, BGI’s Directors confirmed that BGI continued to comply with Listing Rule 3.1.1 and that it was not aware of Material Information that should be released to the market.

On 25 June 2020, BGI released its preliminary full year results announcement for the year ended 31 March 2020. BGI again incorrectly entered its NTA in MAP and in the NZX Results Form as $0.15, rather

than the correct figure of $0.0015 and the prior comparative figure as $0.22 rather than $0.0022. On this occasion the error was not identified and rectified by NZX. While the NTA was correctly disclosed in the preliminary announcement and accompanying financial statements, nzx.com displayed the incorrect NTA information.

NZX's MAP data system is configured to generate alerts for Issuers if certain trigger events occur. When BGI submitted the NTA data on 25 June 2020, BGI received a warning in MAP that the NTA value entered varied by greater than 10% from the last recorded figure. BGI subsequently advised NZ RegCo that the warning was misinterpreted as relating to movements in BGI's balance sheet, and did not lead to BGI amending the incorrect NTA figure.

Following a period of increased trading in BGI from 6 July to the morning of 23 July 2020, BGI's share price moved from $0.016 to $0.093 (an increase of around 8 cents or 481%). From approximately 13 July 2020 onwards, there was social media discussion concerning BGI on Facebook's (members only) "Sharesies' Share Club" page and chat website Sharetrader.co.nz. It appears this may have contributed to the increased interest in BGI by retail investors, with the increased interest having a consequent impact on the trading in, and price momentum of, BGI's shares. Trading volumes had increased more than ten-fold in the period following the publication by BGI of the incorrect NTA figure compared with the long-term average for the period before the release of the incorrect NTA figure.

NZ RegCo issued a further Price Enquiry on 22 July 2020. At that time BGI advised that it was not aware of any matter to explain the recent change in BGI's share price. However, after seeing online commentary, NZ RegCo subsequently assessed that the NTA was potentially incorrect, and sought clarification from BGI. BGI's shares were placed into a trading halt at 11.02am on 23 July 2020, pending validation by BGI. BGI confirmed that the NTA figure was incorrect, and released a market announcement to that effect at 4.02pm. Trading in BGI's shares resumed on 24 July 2020, and BGI's share price fell from $0.091 to $0.043 that day, falling further to $0.015 by 31 July 2020.

While it was not possible to assess the exact extent of a cause and effect relationship, NZ RegCo considered on a balance of probabilities that the incorrect NTA figure contributed to the significant volume and price impact on BGI's shares observed in July 2020. BGI did not accept that the error could have been the primary cause of the trading increase since the NZX Results Form showed a deterioration in net assets from the prior period, the preliminary announcement correctly stated BGI's NTA, BGI's share price and trading volume had already significantly increased in June prior to the error, and there was no reference to the NTA in any of the social media posts prior to 22 July 2021.

NZ RegCo received multiple complaints about losses which are alleged to have resulted from investment decisions made in BGI during July 2020 based on BGI's incorrect NTA. While NZ RegCo was not able to quantify the extent of that harm caused by the incorrect NTA being published, or whether in fact investors placed any reliance on BGI's NTA, it noted that BGI's share price dropped over 80% in a short period following the correction of the NTA data.

After an investigation, NZ RegCo determined that BGI had breached:

(a) Listing Rule 3.5.1 by providing incorrect NTA information in the NZX Results Form; and

(b) Listing Rule 3.26.1 by entering incorrect NTA information in MAP.

FINDINGS:

The Tribunal approved a settlement agreement between NZX and BGI under which BGI accepted the findings by NZ RegCo that it breached Listing Rules 3.5.1 and 3.26.1 in relation to the entry of incorrect NTA data on 25 June 2020.

The Tribunal considered that BGI's breaches were moderate, rather than serious, because they were administrative in nature and did not appear to have been intentional (although they arose out of what the Tribunal considered to be a significant lack of care).

In determining the appropriate penalty, the Tribunal considered that there were a number of aggravating factors in this case:

(a) BGI demonstrated a significant lack of care and due process when it repeatedly provided incorrect NTA information to the market. BGI failed to adequately consider the warning generated by the MAP data system and failed to validate the information entered in the NZX Results Form;

(b) BGI had no compliance or operational processes in place to verify the accuracy of the NZX Results Form or the data entered into MAP;

(c) having received a Price Enquiry from NZ RegCo on 22 July 2020, BGI failed to identify any potential cause. Beyond asking its Board and senior management if they were aware of any reasons for the increase in share price and trading volumes, BGI took no further action to investigate;

(d) the breaches adversely affected NZX's market and posed a risk to investor confidence in the integrity of NZX's market;

(e) as a result of the breaches, an incorrect NZX Results Form was published by BGI and incorrect NTA information was displayed on nzx.com for 29 days; and

(f) the breaches were recurring, with BGI having entered incorrect NTA information on three separate occasions.

The Tribunal considered that investors should have been able to rely on the accuracy of the information available on nzx.com, regardless of whether they had reviewed BGI's full financial statements.

The Tribunal also considered that there were mitigating factors:

(a) due to an oversight by NZX, BGI was not advised of its error on the first two occasions it occurred;

(b) BGI had since changed its practices to now include an external review of its preliminary announcements, NZX Result Form and data entry into MAP;

(c) the breach did not result in any financial benefit or commercial advantage to BGI; and

(d) BGI reached a settlement in this matter.

PENALTY:

BGI was ordered to pay $40,000 to the NZX Discipline Fund.

COSTS:

BGI was ordered to pay the costs of the Tribunal and to contribute to the costs of NZX.

PUBLICATION:

Under the terms of the settlement agreement, BGI accepted the penalty of a public censure for its breach of the Listing Rules.

The Tribunal's public censure can be viewed here.

NZMDT 5/2021 NZX V QEX LOGISTICS LIMITED

Division: Hon Sir Terence Arnold QC (Division Chair), Nicola Greer and Richard Leggat

Memorandum of Counsel filed: 26 August 2021

Settlement Agreement dated: 24 September 2021[3]

Date of Determination: 1 October 2021

Rule Breached: NZX Listing Rule 3.1.1

FACTS:

QEX Logistics Limited (*QEX*) is an Issuer who, at the time the breach considered in this matter occurred, had ordinary shares quoted on the NZSX. As at the date of this report, trading in QEX's shares is suspended and QEX is in the process of delisting.

On 11 October 2020, the QEX Board learnt of a possible inventory discrepancy at its secured China Customs bonded warehouse. QEX instructed its Chinese-based auditors to conduct a further detailed stocktake of the inventory and also instructed its CEO, who had travelled to China and was in COVID-19 quarantine, to undertake a personal investigation as soon as possible. The auditor's further stocktake was completed on 19 October 2020 and provided to the QEX Board. It confirmed that stock was missing from QEX's leased area of the warehouse. QEX's CEO commenced his investigation once released from quarantine on 23 October 2020. He concluded that the stock was missing and unlikely to be recovered and advised the QEX Board of this on 27 October 2020.

On 28 October 2020, QEX made an announcement to the market that an estimated $4 million of inventory had been removed from its warehouse without authorisation (*the Announcement*). The Announcement confirmed that it considered the stock had been stolen, it was actively investigating whether any of it could be recovered and a failure to recover the missing inventory would have a materially adverse impact on its financial performance. The Announcement was marked with the 'P' flag to denote price sensitivity.

Following the Announcement, QEX shares experienced a sharp decline, falling from $0.47 the day before the Announcement to $0.30 at the close of trading on 28 October 2020. This represented a 36% reduction in QEX's share price.

NZ RegCo investigated the information held by QEX prior to the Announcement for the purpose of assessing whether QEX had complied with the Listing Rules. NZ RegCo concluded that:

(a) the information contained in the Announcement was Material Information, because a reasonable person would expect the information to have a material effect on the price of QEX's quoted financial products. The missing stock included infant formula, which QEX had stated in its 2020 Annual Report was a main revenue driver for the company;

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[3] The Tribunal sought further submissions from the parties before making its decision.

(b) QEX became Aware of the Material Information on 19 October 2020, when its auditors completed the requested second stocktake and confirmed that the stock was missing from QEX's leased area. QEX did not have complete information at that stage but it had enough to trigger its disclosure obligations; and

(c) there was a period of five Business Days between QEX becoming Aware of the Material Information on the evening of 19 October 2020 and the Announcement being released (26 October 2020 was a public holiday). Accordingly, QEX did not release the relevant Material Information to the market promptly and without delay in breach of Listing Rule 3.1.1.

FINDINGS:

The Tribunal approved a settlement agreement between NZX and QEX under which QEX accepted NZ RegCo's finding that it had breached Listing Rule 3.1.1.

In determining the appropriate penalty, the Tribunal considered that there were a number of aggravating factors in this case:

(a) the breach related to a fundamental obligation. Compliance with the continuous disclosure provisions by Issuers is essential for maintaining market integrity and investor confidence;

(b) the late disclosure of the Material Information adversely affected NZX's markets and posed a risk to the confidence and integrity of those markets;

(c) the substance of the Material Information was materially adverse for QEX and resulted in a significant adverse share price movement. This information was highly relevant for investors;

(d) in this context, the duration of the breach as a result of the delay (five Business Days) was lengthy; and

(e) investors who bought QEX shares during the five Business Days the market remained uninformed likely suffered a loss.

The Tribunal also considered that there were mitigating factors:

(a) QEX was aware of its disclosure obligations and took reasonable steps to determine what the position was in relation to the missing stock in difficult circumstances;

(b) assessing when the obligation to disclose arises in a situation of incomplete or emerging information may not be straightforward. The Tribunal did not consider that QEX's breach was intentional, but rather reflected the fact that in a developing situation, it can be difficult to determine when the obligation to disclose is triggered;

(c) QEX cooperated with NZ RegCo's investigation;

(d) the breach did not form a pattern of misconduct by QEX at that time; and

(e) there was no financial benefit or commercial advantage to QEX as a result of the breach.

At the time this matter was considered, the Tribunal was not aware of the further breaches of the Listing Rules by QEX as detailed in its decision *NZMDT 7/2021 NZX v QEX* – see page 31.

PENALTY:

QEX was ordered to pay $80,000 to the NZX Discipline Fund.

COSTS:

QEX was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION:

Under the terms of the settlement agreement, QEX accepted the penalty of a public censure for its breach of the Listing Rules.

The Tribunal's public censure can be viewed here.

NZMDT 6/2021 NZX V GENEVA FINANCE LIMITED

Division: Mariëtte van Ryn (Division Chair), Kirsty Campbell and John Dixon QC

Statement of Case filed: 13 September 2021

Date of Determination: 4 November 2021[4]

Rules Breached: NZX Listing Rules 3.1.1 and 3.26.2(c)

FACTS:

Geneva Finance Limited (*GFL*) is an Issuer with ordinary shares quoted on the NZSX.

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 submitted that the Earnings Guidance was Material Information, that GFL became Aware of the Earnings Guidance on 2 March 2021 and that GFL breached Listing Rule 3.1.1 by not releasing the Earnings Guidance through MAP promptly and without delay. GFL considered that the Announcement was Material Information at the time it was approved by its Directors for release. GFL submitted that it did not breach Listing 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 considered 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*).

NZ RegCo also alleged that GFL breached Listing Rule 3.26.2 because it failed to mark the Announcement with a ‘P’ flag to denote price sensitivity. GFL accepted that it breached Listing Rule 3.26.2(c).

FINDINGS:

The Tribunal found that the forecast information which informed the Earnings Guidance was Material Information.

In the Guidance Note, Issuers are advised that they are not, as a matter of course, required to release financial information prepared for internal management purposes. Issuers must, however, 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 Listing Rule 3.1.1. GFL submitted that this did not apply in this instance because GFL had not previously provided specific earnings guidance for FY21, had not historically issued profit guidance and was not covered by any analysts.

The Tribunal noted that GFL had made a number of market statements on its ongoing outlook for FY21 and had signalled that it expected continuing improvement. In the Tribunal’s view, GFL was therefore required to assess any changes in its financial performance against these outlook statements. Accordingly, the Tribunal considered that the guidance provided on material deviations did apply.

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[4] GFL sought, and the Tribunal granted, an extension of time to provide its statement of response.

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 considered 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. The Tribunal also considered 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.

The Tribunal found that GFL breached Listing Rule 3.1.1 by not releasing the Material Information promptly and without delay on or about 2 March 2021.

Listing 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. Given the Tribunal's finding that the forecast information which informed the Earnings Guidance was Material Information, the Tribunal was required to consider when the obligation to disclose that information was triggered.

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*". By 5 March 2021, they had also prepared a draft Earnings Guidance. GFL has submitted that Board consideration was necessary to assess the reliability of the forecast and to approve an announcement.

The Tribunal acknowledged 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 thereafter). 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. The Tribunal was concerned 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. 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 an announcement. It took a further four Business Days for GFL to release the Announcement.

Penalty

In determining the appropriate penalty, the Tribunal considered that there were a number of aggravating factors in this case. 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. The breach by GFL in this matter appeared

to have been caused by GFL not fully understanding its obligations. 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*". 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 HY21 and that five working days between the Board's discussion and the market release was "*quite reasonable*". GFL's breach of Listing Rule 3.26.2(c) was a further indication that GFL did not understand the extent of its obligations.

The Tribunal considered 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; and (b) once the Board had determined on 9 March 2021 that an announcement should be made, to then immediately release the Earnings Guidance. When the Announcement was 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.

The market remained uninformed of the Earnings Guidance from 2 March 2021 to 15 March 2021 (nine Business Days). The Tribunal considered that the duration of the breach was lengthy given that the obligation under Listing Rule 3.1.1 is to release Material Information promptly and without delay. While GFL submitted that its Board also needed to consider whether it would restore GFL's final dividend for FY21, as NZ RegCo noted, the Earnings Guidance could have been released in a separate announcement.

The Tribunal also considered that the following mitigating factors were relevant:

(a) the breach by GFL appeared to have been unintentional. GFL had not previously provided profit guidance and had made the decision to do so to communicate more frequently with the market and to keep the market better informed on how its business was performing. The Tribunal noted that, despite the good intentions, GFL still needed to ensure that it complied with the Listing Rules when releasing the forecast information;

(b) NZ RegCo advised that the breach was an isolated event and the first instance of a continuous disclosure breach by GFL;

(c) NZ RegCo advised that the breach did not form part of a pattern and that GFL had an overall good compliance history, with only minor previous breaches;

(d) GFL cooperated with NZ RegCo's investigation; and

(e) there was no evidence of a financial benefit or commercial advantage for GFL as a result of the breach.

The Tribunal recommended that GFL review its "Market Disclosure Policy" to ensure that it included 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 recommended that GFL's staff undertake MAP training.

PENALTY:

The Tribunal noted that GFL's breach of Listing Rule 3.26.2(c) was a relatively minor administrative matter and, in isolation, would not have warranted referral to the Tribunal. Therefore, that breach should not contribute in any significant way to the appropriate penalty.

The Tribunal also noted that it considered this matter to be less serious than the matters it had considered against QEX and NZM earlier in 2021 and that there was limited evidence of any market harm.

GFL was ordered to pay $65,000 to the NZX Discipline Fund.

COSTS:

GFL was ordered to pay the costs of the Tribunal and NZX.

PUBLICATION:

Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal considered that it was appropriate to publicly censure GFL given that:

(a) while there was limited evidence of 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 fell within Penalty Band 3.

The Tribunal's public censure and a copy of its full determination can be viewed here.

NZMDT 7/2021 NZX V QEX LOGISTICS LIMITED

Division: James Ogden (Division Chair), Geoff Brown and Rachael Reed QC

Statement of Case filed: 1 December 2021

Date of Determination: 23 December 2021

Rules Breached: NZX Listing Rules 3.1.1 and 3.20.1

FACTS:

At 9:10am on 18 February 2021, NZ RegCo suspended the quotation of QEX's ordinary shares on the NZSX following the market release of an announcement by QEX at 8:30am on 18 February 2021 advising that all QEX's Independent Directors had resigned with immediate effect. As a result of those resignations, QEX had one remaining Director, Mr Xue (who was also QEX's CEO and 70% shareholder). NZ RegCo stated that the suspension was in the best interests of the market as QEX no longer met the board composition requirements of the Listing Rules.

In this matter, the Tribunal considered a number of breaches of the Listing Rules which NZ RegCo alleged occurred before trading in QEX's shares was suspended. NZ RegCo alleged that QEX had breached:

(a) *Interest Cover Breaches* – Listing Rule 3.1.1 by failing to promptly and without delay advise the market of prospective and actual breaches by New Y Trading Limited (*New Y*) of its interest cover covenant with Westpac New Zealand Limited (*Westpac NZ*). New Y was a wholly own subsidiary and trading company of QEX. NZ RegCo submitted 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;

(b) *MPI Charges* – Listing 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 submitted that the MPI Charges constituted Material Information; and

(c) *Independent Director Resignations* – Listing 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 then Chair), Danny Chan and Martin MacDonald. NZ RegCo submitted that the resignations constituted Material Information.

FINDINGS:

The Tribunal found that the Interest Cover Breaches, the MPI Charges and the Independent Director Resignations were Material Information

Interest Cover Breaches

The Tribunal considered 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 as QEX was well short of meeting the required level of cover and each of the subsequent four 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.

MPI Charges

The Tribunal considered 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 noted 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 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.

Independent Director Resignations

While the Guidance Note does not specify changes in Directors as being, of themselves, Material Information, 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. In this case, the Tribunal considered that the resignations of all three Independent Directors, which left QEX with Mr Xue as its sole Director and in breach of the corporate governance provisions in the Listing 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.

The Tribunal found that QEX breached Listing Rule 3.1.1 by not releasing the Material Information promptly and without delay

Interest Cover Breaches

The Tribunal considered 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

The Tribunal considered that by 22 December 2020 (when the QEX Board had its "first substantive discussion" on the matter), 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 not disclosed promptly and without delay.

Independent Director Resignations

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 day. 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). The Tribunal considered that at that point – on the afternoon of 17 February 2021 – QEX was Aware that its Independent Directors had resigned and should have either (a) applied for a Trading Halt; or (b) made an immediate 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 understood 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. Accordingly, the Tribunal did 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". The Tribunal also found that QEX breached Listing Rule 3.20.1 by not disclosing promptly and without delay the change in its Directors.

Penalty

The Tribunal considered that the breaches in this case were serious:

(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.

In determining the appropriate penalty, the Tribunal considered that there were a number of aggravating factors in this case.

The Tribunal was very concerned by the number and duration of the breaches in this matter, particularly because they related to a failure by QEX to comply with its continuous disclosure obligations. This demonstrated to the Tribunal that QEX was struggling with its compliance obligations on several fronts

and either did not understand its obligations under the Listing Rules or inadequate consideration was given to these matters by the QEX Board.

The assessment of whether the QEX Board adequately considered its continuous disclosure obligations was made more difficult by the fact that there were no board meeting papers or minutes related to its consideration of the MPI Charges and no board minutes were provided to support QEX's consideration of the Interest Cover Breaches. Given the absence of board minutes, the evidence suggested that QEX did not have adequate systems and processes in place to ensure adequate and timely consideration was given to its continuous disclosure obligations.

The breaches in this matter also occurred within months of another breach by QEX of its continuous disclosure obligations in October 2020 – see page 24.

With regard to the Interest Cover Breaches, the Tribunal considered that the pattern of misconduct with regards to the Interest Cover Breaches was 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.

With regard to the MPI Charges, the Tribunal did not consider that the QEX 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.

Following a meeting held with QEX's QC on 18 January 2021, QEX's Chair emailed the QEX Board and its then corporate counsel advising that "*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, the QEX Board does not appear to have given further consideration to its continuous disclosure obligations under the Listing 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.

The Tribunal also considered that there were mitigating factors in this case.

The Tribunal noted QEX's submission that it is a small company and new to the market, having migrated from the NXT market in 2018. The Tribunal had some sympathy for the position QEX now found 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 Listing Rules. That is the requirement for being Listed.

QEX submitted that it relied heavily on external service support to make sure it fully complied with the Listing Rules. The Tribunal considered that QEX's reliance on external legal advice was a mitigating factor with regard to the timing of the announcement of the Independent Director Resignations. 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 Listing Rules 3.1.1 and 3.20.1.

The Tribunal also considered that the following mitigating factors were relevant:

(a) 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 was no evidence of a financial benefit or commercial advantage for QEX because of the breaches.

The Tribunal noted that there was no evidence of a significant market impact as a result of the breaches considered in this matter. The Tribunal considered that this was 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 where 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. While none of these factors mitigated QEX's poor conduct, it meant that the market impact of the breaches was not as serious as it could have been.

PENALTY:

The Tribunal considered 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.

Given QEX's previous breach, the Tribunal considered the starting point it would have adopted if all of the breaches had been considered by the Tribunal at the same time. QEX's October 2020 breach was serious and had significant market impact. Together with the current breaches it formed a concerning pattern of non-compliance. If the breaches were 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.

Having considered all the aggravating and mitigating factors, the limited market impact and the Tribunal's previous decisions, the Tribunal considered that a financial penalty of $150,000, together with a public censure, was appropriate in this case.

QEX was ordered to pay $150,000 to the NZX Discipline Fund.

COSTS:

QEX was ordered to pay the costs of the Tribunal and contibute $20,000 to the costs of NZX.

PUBLICATION:

Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal considered that it was appropriate 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 had repeatedly breached the Listing Rules and demonstrated insufficient regard to its continuous disclosure obligations; and

(c) the breach fell within Penalty Band 3.

The Tribunal's public censure and a copy of its full determination can be viewed here.

SPECIAL DIVISION REPORT

SPECIAL DIVISION REPORT

Special Division

The Special Division is a division of the Tribunal constituted under the Tribunal Rules to regulate NZX and its Related Entities' compliance with the NZX Market Rules. As at the date of my report, NZX's Related Entities are NZX Wealth Technologies Ltd (a Depository Participant) and Smartshares Ltd (the manager of a number of listed exchange traded funds). The objective of the Special Division is to foster market confidence that the NZX Market Rules and the Tribunal Rules are applied to NZX and its Related Entities in an impartial and independent manner.

The FMA is responsible for ensuring that NZX meets its obligations as a licensed market operator.

New members

Two new members were appointed to the Special Division in August 2021 – Rachael Newsome and Dave Roberton. Both bring a high level of experience to the division and their contribution has already proven invaluable.

Monitoring of trading activity

The Special Division is responsible for assessing trading activity in the quoted securities of NZX and its Related Entities. On behalf of the Special Division, NZ RegCo Market Surveillance (*NZMS*) conducts front-line monitoring of trading on the exchange in the securities of NZX and any Related Entity. NZMS refers system generated alerts from its SMARTS Surveillance software and any other abnormal trading activity to the Special Division for consideration.

The Special Division considered 68 referrals from NZMS in 2021. This number of referrals is comparable to the number received in previous years, aside from 2020 when the division received 111 referrals (a number which reflected the volatility in both the global equity markets and NZX's markets when the COVID-19 pandemic first emerged).

A summary of each referral to the Special Division in 2021 follows this report. In most instances, the Special Division did not consider that the alert raised any concerns or warranted further investigation on the basis that the activity was consistent with permissible trading. In some instances, the Special Division sought further information from NZMS or the Market Participant involved (these referrals are identified with an * or ** respectively in the following summary).

Other activities

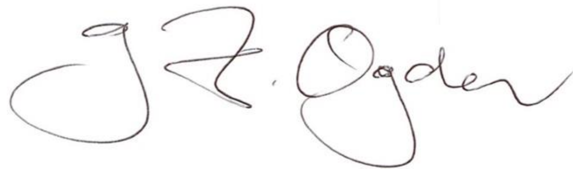
The Special Division's activities in 2021 also included:

(a) considering two complaints (one was resolved and the other was referred to NZ RegCo because it did not relate to the listing of NZX or its Related Entities and was therefore outside the jurisdiction of the Special Division);

(b) investigating an administrative breach related to a MAP data entry error; and

(c) considering a waiver application from NZX to exclude NZ RegCo's Independent Directors from the requirements of Listing Rule 2.11. The Special Division granted the waiver subject to several conditions. A copy of the Special Division's waiver decision can be viewed here.

I would like to thank the other members of the Special Division – Matt Blackwell, Rachael Newsome, Dave Roberton and Mariëtte van Ryn - for their work during 2021. Also, special thanks to Len Ward whose term on the Special Division was completed in July 2021.



James Ogden | SPECIAL DIVISION CHAIR
14 April 2022

NZMS REFERRALS – 1 JANUARY 2021 TO 31 DECEMBER 2021

During 2021, the Special Division received 68 referrals from NZMS as outlined below.

MONTH 2021	ISSUER	DATE REFFERRED
January	NZX	14, 15, 18, 21, 25
	NZG	13, 20**, 22**, 28
	TNZ	11
February	NZX	22, 25, 26
	NZG	1
March	NZX	3, 4, 10
	NPF	10*
	MZY	30
April	NZX	6, 19, 23
	FNZ	30
May	NZX	12, 21, 28
	NZG	5, 6, 7, 13, 14*
	ASR	6*, 12
	ASP	7, 12
	TNZ	12, 13, 14*
	MZY, USS, AUS	13
	USG, AUS	14*
	FNZ	27
June	NZX	1, 1, 4, 9, 16, 17, 30
	NZG	17
July	NZX	2, 8, 21, 22, 27, 30
	MDZ	28*
August	NZX	10, 11, 18, 19
	FNZ	11
	USG	30*
September	ASR	22
	EMG, USF	22
October	NZX	19
	MZY	13

MONTH 2021	ISSUER	DATE REFFERRED
November	NZX	19
	EMF	25
December	NZX	9, 14, 20
	MDZ	3, 15
	AUS	31

* Sought further information from NZMS and determined no further action required.

** Sought further information from the Market Participant involved and determined no further action required.

DIRECTORY

NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL

https://nzx.com/NZMDT

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