

**IN NZ MARKETS DISCIPLINARY TRIBUNAL**

**NZMDT 1/2023**

**UNDER**

NZ Markets Disciplinary Tribunal Rules

**IN THE MATTER OF**

breach of NZX Listing Rules 2.6.3 and 2.13.2(c)

**BETWEEN**

**NZX LIMITED**

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

**AND**

**HALLENSTEIN GLASSON HOLDINGS LIMITED**

(*HLG*)

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**DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL  
21 JULY 2023**

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1. This is a decision of a division of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising Hon Sir Terence Arnold KC (Division Chair), Jennifer Page and Mariëtte van Ryn.
2. Capitalised terms that are not defined in this decision have the meanings given to them in the NZX Listing Rules (*the Rules*) or the Tribunal Rules as the case may be.

### **Procedural background**

3. On 8 June 2023, NZ RegCo filed a statement of case (SOC) alleging HLG had breached Rules 2.6.3 and 2.13.2(c).
4. On 15 June 2023, Chapman Tripp, acting on behalf of HLG, requested a 10 Business Day extension to submit HLG's statement of response to give them more time to take instructions from HLG and assist HLG in preparing its response. NZ RegCo advised the Tribunal that while it had indicated to HLG a willingness to support a reasonable extension, it considered that 10 Business Days went beyond what was reasonable in the circumstances.
5. On 16 June 2023, the Tribunal granted HLG an extension until 6 July 2023 noting that NZ RegCo had not objected to an extension per se and that there did not appear to be any prejudice in granting the extension requested (as opposed to a shorter extension).
6. On 5 July 2023, HLG filed a statement of response (SOR) accepting it breached Rules 2.6.3 and 2.13.2(c) as alleged in the SOC.
7. On 6 July 2023, NZ RegCo confirmed that it would not be filing a rejoinder.

### **Factual background**

8. HLG is Listed on the NZX Main Board and is subject to the Rules.
9. Mr Graeme Popplewell was an Executive Director of HLG from 1985 to 2016. Following his retirement as Chief Executive on 31 December 2016, Mr Popplewell remained on HLG's Board as a non-executive Director. He also provided consultancy services to HLG at various times from 2017 until April 2021.
10. On 29 October 2021, HLG's Board determined that Mr Popplewell was an Independent Director.
11. On 19 November 2021, HLG advised the market that:

*"The Board has determined that Graeme Popplewell is now considered an Independent Director for the purposes of the NZX listing rules.*

*In particular, the Board is satisfied that sufficient time has now passed since Graeme held an executive role with Hallenstein Glasson Holdings Limited for his previous executive role not to impact on his independence."*

12. In December 2022, NZ RegCo received a complaint from an institutional investor in HLG, disputing HLG's determination that Mr Popplewell is an Independent Director. NZ RegCo advised the Tribunal that it does not dispute HLG's determination that Mr Popplewell is an Independent Director and has "closed out" its investigation into this complaint. The issue of Mr Popplewell's independence has not been referred to the Tribunal and, accordingly, is not considered in this determination.

13. During its investigation into the complaint, NZ RegCo identified past breaches by HLG of Rules 2.6.3 and 2.13.2(c), which have been referred to the Tribunal and are the subject of this determination.
14. With respect to the breach of Rule 2.13.2(c), NZ RegCo reviewed five accounting periods – between 2017 and 2021<sup>1</sup>. A review of previous periods does not appear to have been undertaken.

#### ***Timing of independence announcement***

15. Under Rule 2.6.3, if at any time a Board decides that a Director's independence differs from the position most recently released to the market, that determination must be released promptly and without delay through MAP<sup>2</sup>.
16. HLG advised NZ RegCo that its Board determined that Mr Popplewell was an Independent Director at the time it published its 2021 annual report on 29 October 2021<sup>3</sup>. Before that determination, Mr Popplewell was considered a non-executive Director<sup>4</sup>.
17. HLG says that it identified in November 2021 that it had not "specifically announced" the change of Mr Popplewell's categorisation to an Independent Director. Once identified, HLG says it moved promptly to release an announcement on 19 November 2021. This announcement was released 15 Business Days after HLG made its determination.
18. NZ RegCo submits that HLG breached Rule 2.6.3 by not advising the market of Mr Popplewell's change in independence until 19 November 2021.
19. HLG accepts that it did not announce the change in its assessment of Mr Popplewell's independence promptly and without delay.

#### ***HLG Audit Committee***

20. Under the Rules, HLG is required to have an Audit Committee. The Audit Committee must have a majority of Independent Directors<sup>5</sup>.
21. HLG's 2016 annual report, released to the market on 18 October 2016, recorded HLG's Audit Committee as comprising the non-executive Directors. HLG had five non-executive directors, three of whom were Independent Directors. At that time, HLG's Audit Committee had a majority of Independent Directors (Mr Popplewell was then an Executive Director).
22. HLG's 2017 annual report, released to the market on 26 October 2017, again recorded HLG's Audit Committee as comprising the non-executive Directors. There were six non-executive Directors (with Mr Popplewell's retirement as Chief Executive at the end of 2016, he had become a non-executive Director), three of whom were Independent Directors. HLG advised NZ RegCo that while Mr Popplewell was a non-executive Director when its 2017 annual report was

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<sup>1</sup> Annexure 3 of the SOC – NZ RegCo email to HLG of 28 February 2023.

<sup>2</sup> At the time of HLG's breach, the Rules dated 10 December 2020 applied. Rule 2.6.3 remains unchanged in the current version of the Rules, dated 1 April 2023.

<sup>3</sup> On page 65 of the HLG 2021 annual report Mr Popplewell is listed as an Independent Director. On page 59 of that report, he is listed as a non-executive Director.

<sup>4</sup> Page 65 of the HLG 2020 annual report.

<sup>5</sup> This requirement dates back at least 20 years (based on the archive records available on [www.nzx.com](http://www.nzx.com)).

released, he was not in fact appointed to the Audit Committee until 13 December 2017<sup>6</sup>.

23. With Mr Popplewell's appointment on 13 December 2017, the Audit Committee had three Independent Directors and three non-executive Directors. HLG's Audit Committee did not have a majority of Independent Directors.
24. During HLG's 2018 financial year, the composition of its Audit Committee changed to three members – Malcom Ford (an Independent Director), Warren Bell (Board Chair and non-executive Director) and Mr Popplewell.
25. HLG's 2018 annual report, released to the market on 31 October 2018, recorded the Audit Committee as comprising Mr Ford, Mr Bell and Mr Popplewell. It stated that "*The [Audit] Committee has a majority of independent Directors*"<sup>7</sup>. This was untrue – HLG's Audit Committee did not have a majority of Independent Directors.
26. HLG's 2019 annual report, released to the market on 29 October 2019, recorded the Audit Committee as comprising Mr Ford, Mr Bell and Mr Popplewell. It stated that "*Although the Committee does not currently have a majority of Independent Directors in line with Code recommendation 3.1, and did not during the accounting period, the Board believes the current membership has an optimal mix of skills and experience to ensure the Committee achieves its objectives*"<sup>8</sup>. This statement was repeated in HLG's 2020 annual report, released to the market on 30 October 2020<sup>9</sup>.
27. Code recommendation 3.1 refers to the NZX Corporate Governance Code (*the Code*) which, at the time HLG's 2019 annual report was released, was contained in Appendix 1 of the Rules dated 1 January 2019. Recommendation 3.1 states "*An issuer's audit committee should operate under a written charter. Membership on the audit committee should be majority independent (4) and comprise solely of non-executive directors of the issuer. The chair of the audit committee should be an independent director and not the chair of the board*". Footnote (4) states "*The requirement for a majority of independent directors is set out in Listing Rule 2.13*". The commentary to recommendation 3.1 also sets out the requirements of Rule 2.13 in full, including that the Audit Committee must have a majority of members that are Independent Directors.
28. HLG advised NZ RegCo that its Board determined that Mr Popplewell was an Independent Director at the time it published its 2021 annual report on 29 October 2021. HLG's 2021 annual report recorded the Audit Committee as comprising Mr Ford, Mr Bell and Mr Popplewell. It did not include a statement on whether the Audit Committee had a majority of Independent Directors<sup>10</sup>.
29. During the period under review – 2017 to 2021 – HLG's annual reports record Mr Ford, an Independent Director, as Chair of the Audit Committee.
30. NZ RegCo submits that HLG breached Rule 2.13.2(c) (and former Rule 3.6.2(c)<sup>11</sup>) from 13 December 2017, when Mr Popplewell was appointed to the Audit

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<sup>6</sup> Annexure 6 of the SOC - HLG email to NZ RegCo of 23 May 2023.

<sup>7</sup> HLG 2018 annual report, page 56.

<sup>8</sup> HLG 2019 annual report, page 60.

<sup>9</sup> HLG 2020 annual report, page 66.

<sup>10</sup> HLG 2021 annual report, page 66.

<sup>11</sup> There were several amendments to the Rules during the period of HLG's breach – 1 October 2017 (Rule 3.6.2(c)), 1 January 2019 (Rule 2.13.2(c)), 1 January 2020 (Rule 2.13.2(c)), 3 November 2020 (Rule 2.13.2(c)) and 10 December 2020 (Rule 2.13.2(c)). All required the Audit Committee to have a majority of Independent Directors.

Committee, until 29 October 2021, when Mr Popplewell was determined by HLG’s Board to be an Independent Director.

31. HLG accepts that it failed to have a majority of Independent Directors on its Audit Committee for a four-year period from December 2017 to October 2021 as required by Rule 2.13.2(c).

**Tribunal approach to penalty**

32. The Tribunal must consider the appropriate penalty for HLG’s breaches of Rules 2.6.3 and 2.13.2(c).
33. Under the Tribunal Rules, the Tribunal can impose a fine of up to \$500,000 for a breach of the Rules<sup>12</sup>. Section 9 of the Tribunal Procedures (*the Procedures*)<sup>13</sup> provides guidance to the Tribunal when assessing the appropriate financial penalty up to this maximum amount. The Procedures are not determinative. The Tribunal will ultimately exercise its discretion to determine the appropriate penalty when considering the overall circumstances of the matter.
34. The Procedures set out a two-step process for the Tribunal to follow:
- Step 1 – identify a starting point penalty by assessing the factors relevant to the breach and the impact or potential impact of the breach; and
  - Step 2 – adjust that starting point penalty to reflect all the aggravating and mitigating factors relevant to the respondent.

**Step 1: Factors relating to the breach**

35. The Procedures set out three starting point penalty bands, within which the Tribunal will identify a starting point penalty:

| Penalty Band                              | Range of Financial Penalty |
|---|----------------------------|
| <b>Penalty Band 1 – Minor Breaches</b>    | \$0 to \$40,000            |
| <b>Penalty Band 2 – Moderate Breaches</b> | \$30,000 to \$250,000      |
| <b>Penalty Band 3 – Serious Breaches</b>  | \$200,000 to \$500,000     |

36. Procedure 9.2.1 states that the appropriate penalty band for a breach of the Rules will be determined based on an overall assessment of the seriousness of the breach in each case.
37. Procedure 9.2.2 sets out factors which fall within each penalty band which the Tribunal may consider when assessing the most appropriate penalty band and the starting point penalty within that band<sup>14</sup>. These factors all relate to the obligation breached and the impact or potential impact of the breach. As noted in Procedure 9.2.2, it is unlikely that all the factors within one penalty band will

<sup>12</sup> Tribunal Rules 9.1.2(e) and 9.2.2(f).

<sup>13</sup> The Procedures came into force on 17 October 2022. When the amendments were announced, NZX advised that in accordance with Tribunal Rule 1.5.1, any matters referred to the Tribunal after 17 October 2022 would be considered under the Procedures. NZ RegCo submits that this referral should be determined under the amended Tribunal Rules and Procedures. HLG did not dispute this in its SOR.

<sup>14</sup> See Appendix 1 for a copy of the table of factors which fall within each penalty range.

be present in a particular matter. In most cases, a matter will likely have a combination of factors from two or more penalty bands. It is also possible for a matter to fall within a penalty band where only one factor exists. Accordingly, the Tribunal will use its discretion to weigh up all the factors present to ensure that they are appropriately balanced.

38. The Procedures differ significantly from the previous Tribunal Procedures dated 29 February 2016 (*2016 Procedures*). One of these differences is that under the 2016 Procedures, Penalty Band 3 included the following factor "The breach relates to a fundamental obligation". Previously, breaches of a "fundamental obligation", such as corporate governance breaches, generally fell within Penalty Band 3. The "fundamental obligation" factor has been removed from the current Procedures. This means that a breach of a fundamental obligation may not necessarily fall within Penalty Band 3. The Tribunal must consider all the factors relevant to the breach when assessing the most appropriate penalty band. This broadens the Tribunal's focus from considering the nature of the Rule breached to considering the overall seriousness of the breach and its impact or potential impact on investors and the market.

### ***Step 2: Factors relating to the respondent***

39. Once the Tribunal has determined the appropriate penalty band and the starting point penalty, it must then determine the final penalty by adjusting the starting point penalty to reflect all the aggravating and mitigating factors relevant to the respondent (Procedure 9.2.3).
40. Procedures 9.2.5 and 9.2.6 set out a non-exhaustive list of factors which are likely to lower or increase (or reduce the ability to lower) the starting point penalty<sup>15</sup>.
41. Procedure 9.1.1 notes that the ultimate financial penalty for the breach may fall outside of (above or below) the starting point penalty band initially identified by the Tribunal. For example, discounts for mitigating factors may take a breach initially assessed as falling within Penalty Band 3 to a final penalty of less than \$200,000 (the bottom of the range for penalties in Penalty Band 3).

### **NZ RegCo and HLG submissions on penalty**

42. In summary, NZ RegCo submits that the appropriate penalty band for HLG's breaches is Penalty Band 2 and that the appropriate starting point penalty is \$50,000. NZ RegCo gave particular weight to its assessment that there was limited potential risk associated with the breach of Rule 2.13.2(c) based on HLG's "generally stable and profitable trading conditions" during the relevant period. Given the lack of apparent harm to the market or benefit to HLG, NZ RegCo submits that HLG's Audit Committee breach is best categorised as moderate.
43. NZ RegCo submits that having regard to the mitigating and aggravating factors in this case, the starting point penalty should be "materially reduced" to a final penalty of \$35,000. NZ RegCo submits that considerable weight should be given to HLG's prompt acceptance of the breaches once identified and that the breach of Rule 2.13.2(c), while it occurred over an extended period, related to a "single misunderstanding" which should not be regarded as constituting a pattern of conduct.

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<sup>15</sup> See Appendix 2 for a copy of the non-exhaustive list of factors which are likely to lower or increase the starting point penalty.

44. NZ RegCo advises that in making its submissions on the appropriate penalty it “concentrated on the breach of Rule 2.13.2(c)” because, on its own, a breach of Rule 2.6.3 would not ordinarily be referred to the Tribunal.
45. HLG accepts the \$35,000 penalty proposed by NZ RegCo, which takes into account (a) HLG’s prompt admission of the breaches once brought to its attention; (b) co-operation with NZ RegCo’s investigation; (c) the breach of Rule 2.13.2(c) resulting from a single error of judgement in misunderstanding the Rule, rather than any intention to commit the breach; and (d) no identified loss, or financial benefit or commercial advantage to HLG arising from the breaches, with NZ RegCo noting that the potential harm caused by the breach was limited given HLG’s “stable and profitable trading conditions during the relevant period”.

### **The Tribunal’s assessment**

46. The Tribunal begins by emphasising that the scheme set out in the Procedures for assessing penalty does not operate in a fixed or mechanical way. Procedure 9.1.2 makes this clear, stating that the Procedures are “not determinative” and that the Tribunal “will ultimately use its discretion in determining the appropriate starting point penalty band, starting point penalty and ultimate penalty”.
47. Accordingly, the Procedures provide a framework, which identifies some, but not all, factors relevant to penalty-setting. It encourages a consistent and rational approach to the fixing of penalties by directing the Tribunal’s attention to a range of matters, but it allows sufficient flexibility to enable the Tribunal to take account of the particular circumstances of individual cases. In short, the Procedures confine and structure discretion but do not eliminate it.
48. Before setting out our assessment of the appropriate penalty in the present case, the Tribunal notes three matters where it has taken a different view to that taken by NZ RegCo.

#### *(1) Breaches of both Rule 2.6.3 and 2.13.2(c) relevant when assessing penalty*

49. NZ RegCo did not take HLG’s breach of Rule 2.6.3 into account when giving its assessment of penalty because a breach of that Rule would generally be considered minor and not warrant referral to the Tribunal.
50. The Tribunal notes that HLG’s breach of Rule 2.6.3 did not occur in isolation but after its breach of Rule 2.13.2(c). While HLG’s breach of Rule 2.6.3 would not, of itself, be of any particular significance, it is still relevant to HLG’s overall conduct. Accordingly, the Tribunal will consider both Rule breaches when assessing penalty.

#### *(2) Breach of Rule 2.13.2(c) is a serious compliance breach*

51. Each penalty band includes, as a factor, whether the breach is a minor (Penalty Band 1), moderate (Penalty Band 2) or serious (Penalty Band 3) administrative, operational and/or compliance breach.
52. NZ RegCo submits that HLG’s breach of Rule 2.13.2(c) is a moderate compliance breach based on its assessment of the limited potential harm, and the lack of actual harm or benefit to HLG as a result of the breach<sup>16</sup>.
53. The Tribunal notes that whether the breach is a minor, moderate or serious compliance breach is not an assessment of the overall severity of the breach (that happens when the Tribunal considers all the relevant factors). Rather, it is an assessment of the seriousness of the compliance failure.

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<sup>16</sup> Pages 12-13 of the SOC.

54. The requirement for an Audit Committee to have a majority of Independent Directors is an important shareholder safeguard. This requirement supports an unbiased and robust audit process and ensures sufficient separation from an Issuer's management. As HLG states in its annual reports "The main responsibility of the Committee is to ensure internal controls are effective, financial reporting is reliable, and applicable laws and regulations are complied with". NZ RegCo notes that Audit Committee deficiencies may lead to a lack of confidence in the price discovery process, an important component of investor confidence in market integrity.
55. Given the importance of a properly constituted Audit Committee, the Tribunal considers that HLG's failure to comply with Rule 2.13.2(c) is a serious compliance breach.

*(3) Assessment of the potential impact of HLG's breach*

56. To assess the potential impact of HLG's breach of Rule 2.13.2(c), NZ RegCo reviewed HLG's annual reports, financial statements and audit reports for the relevant period "to assess the nature of the potential risk". NZ RegCo did not identify any matters that it considered would "pose particular challenges for an Audit Committee" and concluded that the potential harm was limited, "given the generally stable and profitable trading conditions HLG reported during the relevant period".
57. NZ RegCo's assessment of HLG's trading performance during the period in breach is relevant to whether there was any actual loss or harm to investors or the market. It does not, however, provide the correct basis for assessing the potential impact a breach of this nature could have had. In a case such as this, the potential impact of a breach is not determined by the relevant company's subsequent trading performance. Using subsequent trading performance in that way runs the risk that a finding of no actual harm will mean that there is no potential harm either. The key to whether there is potential harm is to look at the nature of the harm that the relevant Rule is seeking to prevent and to assess the potential for that harm to occur at the time of the breach.
58. As noted above, a properly constituted Audit Committee is an important safeguard. The potential impact of failing to meet this requirement on investors and the market could be significant.
59. During the period HLG was in breach, its Audit Committee was Chaired by an Independent Director and consisted of only non-executive Directors (according to HLG's annual reports). While not alleviating HLG from its obligation to have a majority of Independent Directors, in the Tribunal's view the facts that HLG had an Independent Chair and only non-executive members on the Audit Committee during the period it was in breach lessened the potential impact of HLG's breach on investors and the market given the purpose of this requirement. Based on these facts, the Tribunal considers that HLG's breach had the potential to cause a moderate (as opposed to a significant) impact on investors and the market.

**Step 1: Tribunal assessment of the starting point penalty**

***Penalty Band factors***

60. The Tribunal has considered the applicable penalty band factors relevant to HLG's breaches and outlines its assessment of these below.



*Applicable Penalty Band 1 factors*

*a) Not caused any loss;*

61. NZ RegCo has not identified any loss caused by HLG's breaches. The lack of any actual harm appears to be supported by the breach of Rule 2.13.2(c) going unnoticed for four years.
62. As HLG submits, it is unlikely investors were prejudiced by the late release of its announcement on Mr Popplewell's independence.

*b) No financial benefit and/or commercial advantage;*

63. NZ RegCo has not identified any financial benefit or commercial advantage to HLG as a result of the breaches.

*Applicable Penalty Band 2 factors*

*c) The breach had the potential to cause a moderate impact on investors and the market;*

64. As noted above, the Tribunal considers that HLG's failure to have a properly constituted Audit Committee had the potential to cause a moderate impact on investors and the market. While a breach of this nature has the potential to cause a significant impact, the potential impact in this case was reduced because HLG's Audit Committee was Chaired by an Independent Director and consisted of only non-executive Directors (according to HLG's annual reports) during the period it was in breach.

*Applicable Penalty Band 3 factors*

*d) The breach was a serious compliance breach;*

65. As noted above, the Tribunal considers that HLG's failure to have a properly constituted Audit Committee was a serious compliance breach.

*e) The breach continued for an extended period of time;*

66. HLG's breach of Rule 2.13.2(c) continued for approximately four years. The Tribunal is concerned that the breach went unnoticed by HLG for such a long time (this is discussed further below under "aggravating factors").

***Starting point penalty***

67. After weighing up all the factors outlined above and assessing the overall seriousness of the breach, the Tribunal considers that the breach falls within Penalty Band 2.
68. This decision was finely balanced. Given the Tribunal considers HLG's breach of Rule 2.13.2(c) to be a serious compliance breach which continued for an extended period, the breach could well have been assessed as falling within Penalty Band 3. However, when weighing these matters against the following factors in particular, the Tribunal determined that Penalty Band 2 was appropriate:
  - a. the potential impact of the breach of Rule 2.13.2(c) was reduced by HLG's Audit Committee having an Independent Director as Chair and consisting of only non-executive Directors;

- b. no actual loss or impact on investors or the market has been identified by NZ RegCo; and
  - c. no financial benefit or commercial advantage to HLG has been identified by NZ RegCo.
69. As for determining the starting point within Penalty Band 2, the Tribunal considers that this matter falls within the mid-range of Penalty Band 2. While NZ RegCo submits that this matter should fall at the low end of Penalty Band 2, the Tribunal considers that the seriousness of HLG's compliance breach and its extended duration elevates this matter within Penalty Band 2.
70. The Tribunal considers that the appropriate starting point penalty is \$150,000.

**Step 2: Tribunal assessment of factors relating to HLG**

71. To determine the final level of penalty, the Tribunal must adjust the starting point penalty of \$150,000 to reflect the aggravating and mitigating factors relevant to HLG.

***Aggravating factors***

*(1) Breaches were unintentional, but negligent;*

72. HLG submits that the breach of Rule 2.13.2(c) resulted from a "single error of judgement in misunderstanding the nature of the rule, rather than any intention on the part of HLG to commit the breach"<sup>17</sup>. The breach of Rule 2.6.3 is described by HLG as an omission it did not identify until after the release of its 2021 annual report.
73. The breaches do appear to have been unintentional. However, they highlight a concerning and ongoing lack of awareness of the Rules by HLG. It is a long-standing requirement that an Audit Committee must have a majority of Independent Directors. It is difficult to see how this could be misunderstood, given the Code clearly states that this is a requirement of the Rules. HLG's failure to identify its error also led to an incorrect statement being made in its 2018 annual report. HLG then made a further error by failing to comply with Rule 2.6.3. The Tribunal considers that HLG has been negligent in its compliance with these Rules.

*(2) Insufficient compliance procedures;*

74. HLG submits that despite the procedures it had in place to follow its obligations under the Rules, the requirement to have a majority of Independent Directors on the Audit Committee was missed. HLG erroneously believed it was a Code recommendation, rather than a mandatory requirement under the Rules.
75. No submissions were made outlining what HLG's procedures were. Regardless, it is apparent that the procedures were either inadequate, or they were not followed.
76. HLG also appears to have failed to do compliance checks on the Audit Committee information included in its annual reports over a successive number of years.

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<sup>17</sup> Paragraph 9.3 of the SOR.

*(3) Recurring breach or pattern of behaviour/conduct;*

77. NZ RegCo submits that while the breach occurred over an extended period, it was caused by a "single error of judgement" and so should not be regarded as forming a pattern of behaviour.
78. While there may have been a "single error", HLG had numerous opportunities to identify that error if compliance checks had been undertaken on the information included in its annual reports. Those checks should be thorough and robust each year. HLG's annual reports included and repeated inaccurate information over a successive number of years.
79. Had it not been for the investigation conducted by NZ RegCo as a result of a complaint, HLG's errors may never have been identified.
80. The Tribunal notes that a separate breach of Rule 2.6.3 also occurred.

***Mitigating factors***

*(1) Early admission of breach;*

81. HLG admitted the breaches to NZ RegCo when they were first raised.

*(2) Cooperation with investigation;*

82. NZ RegCo submits that HLG fully complied with its investigation.

*(3) Committed to improving practices;*

83. HLG has advised NZ RegCo that it is placing a greater focus on its corporate governance practices, including an emphasis in ensuring compliance with the relevant requirements of the Rules and the Code.

*(4) Good compliance history;*

84. NZ RegCo submits that HLG has a good compliance history. This is HLG's first referral to the Tribunal.

*Mitigating factor not considered relevant*

85. One factor included in Procedure 9.2.5 which is likely to lower the starting point penalty is, where applicable, a respondent obtains independent legal, accounting or professional advice that the conduct did not constitute a breach and reasonably relied upon that advice. NZ RegCo appears to suggest that this factor applies in this matter because when the breaches were identified by NZ RegCo, HLG acted promptly to engage external legal advice and accept liability.
86. In the Tribunal's view, that is not the correct application of this mitigating factor. It is not a mitigating factor to engage lawyers after a breach has occurred and while NZ RegCo is investigating. Rather this factor may be relevant in circumstances where an Issuer takes independent advice prior to deciding on a course of action and then later seeks to rely on that advice. As noted in previous decisions, however, relying on such advice may carry little weight as it does not alleviate a Board from using its own commercial judgement based on its knowledge of the Issuer.

## **Penalty**

87. The Tribunal considers that having regard to the factors noted above, a financial penalty of \$75,000 is appropriate in the circumstances of this case.
88. This represents a 50% discount from the starting point penalty of \$150,000. This reduction is based on:
  - (a) HLG's early admission of the breaches;
  - (b) HLG's cooperation with NZ RegCo's investigation;
  - (c) HLG taking steps to address its compliance issues; and
  - (d) HLG's good compliance history before this referral to the Tribunal.
89. This discount could have been higher but for the deficiencies in HLG's compliance practices. The Tribunal expects Issuers to understand the requirements under the Rules and to have processes in place to check compliance. An adequate compliance review of HLG's annual report each year would likely have identified this error much sooner.
90. Under Procedure 9.1.4, the Tribunal may also consider what amount of financial penalty could deter future breaches by the respondent or other Issuers of the same or a similar obligation. The Tribunal is satisfied that the penalty of \$75,000 will act as a sufficient deterrent. The Tribunal encourages NZ RegCo to remind Issuers of their Audit Committee obligations under the Rules, as distinct from the recommendations made in the Code. The Tribunal also encourages NZ RegCo to remind Issuers that compliance checks should be undertaken on the statements made in their annual reports each year.

## **Public censure**

91. Procedure 9.3 provides guidance on when the Tribunal may be likely to exercise its power under the Tribunal Rules to publicly censure a respondent.
92. NZ RegCo submits that none of the grounds favouring non-publication have been demonstrated in this case, and that accordingly it is appropriate for the Tribunal to publicly censure HLG for the breaches.
93. HLG submits that a public censure is not appropriate for the breach of Rule 2.6.3, noting NZ RegCo's submission that an administrative breach of this nature, in isolation, would not ordinarily be referred to the Tribunal.
94. HLG accepts none of the grounds in Procedure 9.3.3 clearly apply with regards to the breach of Rule 2.13.2(c), but that the Tribunal could exercise its discretion not to publicly censure HLG because it considers that the breach falls at the lower end of Penalty Band 2, in a situation where HLG promptly admitted the breaches and fully co-operated with NZ RegCo.
95. HLG submits, in the event the Tribunal does order a public censure, that it include the mitigating factors in this case – that the breach was unintentional, HLG promptly accepted the breaches once brought to its attention and that HLG fully co-operated with NZ RegCo's investigation.
96. The Tribunal has considered the guidance set out in Tribunal Procedure 9.3, including that the name of a respondent is likely to be published when:

- a. the impact of the breach has caused the public to be harmed and/or has damaged public confidence in the sector or the breach had the potential to cause harm to the public or the potential to damage public confidence in the sector; and/or
  - b. the respondent has been involved in repeated breaches and shown disregard for the Rules; and/or
  - c. the respondent committed a breach that falls within Penalty Band 2 or Penalty Band 3.
97. Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal considers that it is appropriate in this case to publicly censure HLG as the failure to have a properly constituted Audit Committee and for such a length of time had the potential to damage confidence in the market and the breach falls within Penalty Band 2.
98. While a breach of Rule 2.6.3 may not be referred by NZ RegCo to the Tribunal on its own, here HLG's breach of Rule 2.6.3 followed its breach of Rule 2.13.2(c). The Tribunal considers it appropriate that the censure also include reference to HLG's breach of Rule 2.6.3.
99. The Tribunal notes that its public censure of HLG will be released together with a copy of this determination in full.

#### **Previous Tribunal decisions**

100. The Tribunal considers that its previous decisions involving breaches of the Audit Committee requirements, as cited by NZ RegCo, were of limited value as a comparison for assessing the penalty in this case. The decisions made before 29 February 2016 were determined under Tribunal Procedures which had significantly different penalty bands (a corporate governance breach fell within a penalty range of \$0 to \$20,000). The Tribunal's most recent decisions - *NZMDT 5/2019 NZX Ltd v Good Spirits Hospitality Ltd (GSH)* and *NZMDT 3/2016 NZX Ltd v Pyne Gould Corporation Ltd (PGC)* - were determined under the 2016 Procedures which, as noted above, differ from the Procedures particularly with regards to breaches of a "fundamental obligation".
101. The Tribunal notes that in each of its previous decisions cited by NZ RegCo, the Issuer was publicly censured.

#### **Costs**

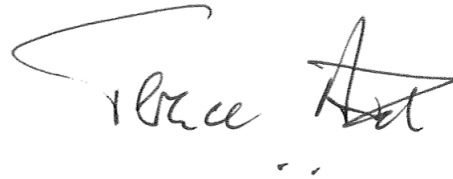
102. NZ RegCo submits that HLG should pay the costs incurred by NZX and the Tribunal in relation to this matter. HLG has not made a submission on costs.
103. Generally, where a respondent is found to have breached the Rules the Tribunal will award the actual costs of NZX and the Tribunal against that party. Given the circumstances of this case, the Tribunal considers it appropriate to order HLG to pay the costs of NZX and the Tribunal in considering this matter.

#### **Orders**

104. The Tribunal orders that HLG:
- a. be publicly censured in the form of the announcement attached to this determination (which will include a full copy of this determination);
  - b. pay \$75,000 to the NZX Discipline Fund;

- c. pay the costs and expenses incurred by the Tribunal in considering this matter; and
- d. pay the costs and expenses incurred by NZX in considering this matter.

DATED 21 JULY 2023

A handwritten signature in black ink, appearing to read "Terence Arnold". The signature is stylized with a large, sweeping initial 'T' and a prominent 'A'.

Hon Sir Terence Arnold KC, Division Chair, NZ Markets Disciplinary Tribunal

## Appendix 1

| Penalty Band                            | Factors   |
|---|---|
| <b>Penalty Band 1 Minor Breaches</b>    | <ul style="list-style-type: none"> <li>• The breach is a minor administrative, operational and/or compliance breach.</li> <li>• The breach has not caused any loss.</li> <li>• The breach has not had an impact on or has only had a minor impact on investors, clients, and/or the market.</li> <li>• The breach was promptly addressed.</li> <li>• The breach did not result in a financial benefit and/or commercial advantage to the Respondent.</li> </ul>   |
| <b>Penalty Band 2 Moderate Breaches</b> | <ul style="list-style-type: none"> <li>• The breach is a moderate administrative, operational and/or compliance breach.</li> <li>• The breach has caused a moderate impact on investors, clients, and/ or the market.</li> <li>• The breach had the potential to cause a moderate impact on investors, clients, and/or the market.</li> <li>• The breach occurred for a short period of time.</li> <li>• The breach resulted in a minor to moderate financial benefit and/or commercial advantage to the Respondent.</li> </ul>   |
| <b>Penalty Band 3 Serious Breaches</b>  | <ul style="list-style-type: none"> <li>• The breach is a serious administrative, operational and/or compliance breach.</li> <li>• The breach has caused significant impact on investors, clients and/ or the market.</li> <li>• The breach had the potential to cause significant impact on investors, clients and/or the market.</li> <li>• The breach continued for an extended period of time.</li> <li>• The breach continued to occur once discovered.</li> <li>• The breach resulted in a significant financial benefit and/or commercial advantage to the Respondent.</li> <li>• The Respondent committed the breach to obtain a financial benefit and/or a commercial advantage.</li> </ul> |

## Appendix 2

- 9.2.5 The following non-exhaustive factors relating to the Respondent may be considered by the Tribunal as factors that are likely to lower the starting point penalty:
- (a) The Respondent admitted the breach at an early stage, and/or self-reported the breach;
  - (b) The Respondent cooperated fully and openly with NZX or CHO (as the case may be) with any investigation surrounding the breach and provided all material facts;
  - (c) The Respondent has implemented or has undertaken to implement or enhance processes, systems, or procedures to prevent similar future breaches;
  - (d) The breach occurred even though effective compliance / administrative / operational processes were in place;
  - (e) The Respondent provided prompt redress for any harm caused as a result of the breach;
  - (f) The breach is a one-off event and does not form part of a pattern of behaviour or conduct;
  - (g) The Respondent has a good compliance history;
  - (h) where applicable, the Respondent obtained independent legal, accounting or professional advice that the conduct did not constitute a breach and reasonably relied upon that independent advice; and
  - (i) the starting point penalty having an adverse effect on the ongoing commercial viability of the Respondent.
- 9.2.6 The following non-exhaustive factors relating to the Respondent may be considered by the Tribunal as factors that are likely to increase the starting point penalty or reduce the ability to lower it:
- (a) The breach was caused intentionally by the Respondent, or through the Respondent's recklessness;
  - (b) The Respondent hindered NZX or CHO (as the case may be) with any investigation surrounding the breach and did not provide all material facts;
  - (c) The Respondent should reasonably have been aware that the breach could occur and did not implement or undertake to implement or enhance processes, systems or procedures to prevent similar future breaches;
  - (d) The Respondent was aware that its compliance / administrative / operational processes were not adequate or ineffective and failed to rectify them;
  - (e) The Respondent failed or delayed in providing redress for any harm caused as a result of the breach;
  - (f) The breach is a recurring breach, or forms part of a pattern of behaviour or conduct;
  - (g) The Respondent has a poor compliance history; and
  - (h) Where applicable, the Respondent either failed to seek independent legal, accounting or professional advice or acted contrary to legal, accounting or professional advice obtained that the conduct did constitute a breach.