



20 April 2021

## **PUBLIC CENSURE OF NZME LIMITED BY THE NZ MARKETS DISCIPLINARY TRIBUNAL FOR BREACH OF NZX LISTING RULES 3.1.1 AND 3.2.1**

1. The NZ Markets Disciplinary Tribunal (**Tribunal**) has approved a settlement agreement between NZX Limited (**NZX**) and NZME Limited (**NZM**) dated 26 March 2021 (**Settlement Agreement**).

### **Summary**

2. NZM is a New Zealand incorporated company, with its ordinary shares quoted on the NZX Main Board. NZM is a Listed Issuer and is therefore bound by the NZX Listing Rules (**Rules**).
3. After an investigation NZX found that two market announcements made by NZM breached:
  - a. Rule 3.1.1 by omitting Material Information in a manner that gave a misleading impression to the market; and
  - b. Rule 3.2.1 by failing to release Material Information to prevent the development or subsistence of a false market that had been materially influenced by the misleading information emanating from NZM.

### **Background**

4. NZM is a provider of news and media services in New Zealand.
5. In 2016, the predecessors of NZM and Stuff Limited (**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.
6. In 2019, NZM and Stuff's then-owner Nine Entertainment Co. Holdings Limited (**Nine**) entered discussions about the acquisition by NZM of Nine's shares in Stuff. NZM and Stuff entered into a confidentiality deed in respect of their negotiations. 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.
7. In April 2020, NZM made a non-binding indicative offer for Nine's shares in Stuff (**NBIO**). The offer 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 by Nine. Nine agreed to these terms.
8. Nine's Board concluded that a sale of Stuff needed to be complete by 31 May 2020.

9. 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 lead by Stuff's Chief Executive Officer. Unlike NZM's offer, this proposal did not require Commerce Commission intervention or support from the Government.
10. On 7 May 2020, Nine wrote to NZM stating that Nine had received an unsolicited competing bid to acquire Stuff for \$1 on an unconditional basis and that the transaction would be completed by the end of May 2020. The information in the letter was stated to be confidential. The letter requested that NZM advise Nine the following day whether NZM could match the terms of the proposal. Nine informed NZM that if NZM was not able to match this proposal, Nine anticipated terminating discussions with NZM.
11. 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 negotiations with any other party. NZM also stated that it required further details of the competing bid in order to assess whether it was able to match the terms of the bid.
12. Nine replied later that day, at 8.13pm, stating that it had provided the key term from the competing proposal 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 proposal. 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.
13. The NZM Board met with NZM management and NZM's external legal advisors to discuss its response to this letter 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 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 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.
14. 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, 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".

15. NZX investigated the market announcements made by NZM for the purpose of assessing whether NZM had failed to comply with any of the Rules. As a Listed Issuer, NZM is required:
  - a. Under Rule 3.1.1 to promptly and without delay release Material Information through NZX's market announcement platform (**MAP**).
  - b. Under Rule 3.2.1 to promptly and without delay release Material Information through MAP to the extent necessary to prevent development or subsistence of a market which is materially influenced by false or misleading information emanating from the issuer.
16. After investigation, NZX concluded:
  - a. NZM breached 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:
    - i. 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 did not face the competition problems that confronted a deal between Nine and NZM and which could be completed by 31 May 2020.
    - ii. 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's failure to release all Material Information to the market also constituted a breach of Rule 3.2.1. NZX considers that the incomplete announcements led to an increase in the NZM share price that reflected market optimism in circumstances where the market had not been provided all Material Information. It was incumbent on NZM in these circumstances to issue a corrective release.

## **Determination**

17. NZM accepts the findings by NZX 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 and thereby breached Rules 3.1.1 and 3.2.1. NZM accepts that a penalty should be imposed by the Tribunal for these breaches.
18. The Tribunal considers that a breach of the Rules relating to continuous disclosure is a breach of a fundamental obligation. Compliance with these Rules by Issuers is essential in maintaining market integrity and investor confidence.
19. Accordingly, the Tribunal considers that the breach of both Rules 3.1.1 and 3.2.1 relate to fundamental obligations on Issuers that falls within Penalty Band 3 of Procedure 9 of the Tribunal Procedures. Under Penalty Band 3, a penalty of between \$0 and \$500,000 may be imposed.

20. The Tribunal considered that there were aggravating factors in this case, namely:
- a. that the lack of balance in the announcements is a particularly aggravating factor in this case. 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.
  - 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 via MAP on 19 November 2019 confirming that it was in preliminary discussions with Nine and would provide further information to the market as required.
  - c. NZX'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.
  - d. NZM did not act promptly to prevent the development or subsistence of a false market.
21. The Tribunal does not accept that NZM was required to announce that Nine had received a competing proposal, as asserted by NZX, given that NZM could not confirm the veracity of the competing proposal at that time, the information had been provided by Nine in confidence and the competing proposal was incomplete. However, in the circumstances of the competing proposal, 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.
22. The Tribunal also considered that there were mitigating factors:
- a. The breach arising from the first market announcement at 9.31am was partially rectified by the 12.11pm announcement, although the Tribunal considers that this announcement also 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.
  - c. NZM sought, received and acted in reliance on external legal advice regarding the effect of the exclusivity period on Nine and the approach to the disclosure that was released on 11 May 2020. The Tribunal however does not accord this factor significant weight 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 Rules. Ultimately Directors must exercise their own judgement to determine whether disclosure is required under the Rules based on their knowledge of the Issuer and its business.
  - d. NZM did not itself benefit financially from the breaches.
23. Taking these aggravating and mitigating factors into account, the Tribunal considers that while the breach comes within Penalty Band 3 of its procedures, a penalty at the lower end of the available range, together with a public censure, is appropriate. The Tribunal also considers 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 has breached both Rule 3.1.1 and 3.2.1.

## **Penalties**

24. NZX and NZM have agreed that:
- a. A public censure will be made by the Tribunal;
  - b. NZM will pay to the NZX Discipline Fund a financial penalty of NZ\$80,000 for the breach of Rules 3.1.1 and 3.2.1;
  - c. NZM will pay the costs of the Tribunal (plus GST, if any);
  - d. NZM will pay the costs incurred by NZX (plus GST, if any) in bringing this proceeding; and
  - e. NZM will pay the external legal costs incurred by NZX (plus GST, if any) in bringing this proceeding.

## **Approval**

25. The Settlement Agreement is approved by the Tribunal pursuant to NZ Markets Disciplinary Tribunal Rule 8, and as such, the Settlement Agreement is the determination of the Tribunal.

## **Censure**

26. The Tribunal hereby censures NZM for a breach of Rules 3.1.1 and 3.2.1.

## **The Tribunal**

27. The Tribunal is a disciplinary body which is independent of NZX and its subsidiaries. The Financial Markets Authority approves its members. Under the NZ Markets Disciplinary Tribunal Rules, the Tribunal determines and imposes penalties for referrals made to it by NZX in relation to the conduct of parties regulated by the NZX market rules.

## **ENDS**