

**NZ MARKETS DISCIPLINARY TRIBUNAL
HEARING PROCEDURE**

NZMDT 3/2016

UNDER the NZ Markets Disciplinary Tribunal Rules

IN THE MATTER OF breach of NZX Main Board Listing Rules

BETWEEN **NZX LIMITED**

AND **PYNE GOULD CORPORATION LIMITED**
Respondent

**DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL
27 SEPTEMBER 2016**



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1. This is a determination of a division of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising Susan Peterson (division chair), Christopher Swasbrook and Leonard Ward.
2. Capitalised terms that are not defined in this determination have the meanings given to them in the NZX Main Board Listing Rules (*the Rules*).

Background

3. Pyne Gould Corporation Limited (*PGC*) is an Issuer with ordinary shares Quoted on the NZX Main Board. PGC is subject to the Rules.
4. On 17 August 2016, NZX Limited (*NZX*) filed a statement of case (*SOC*) alleging PGC had breached Rules 3.3.1(b), 3.3.1(c), 3.6.2(b), 3.6.2(c), 10.3.1(b), 10.4.1 and 10.4.2.
5. On 26 August 2016, PGC asked the Tribunal to grant an extension of time to file its statement of response. The Tribunal granted an extension until 15 September 2016.
6. On 15 September 2016, PGC filed a statement of response (*SOR*).
7. On 20 September 2016, NZX filed a rejoinder.
8. The Tribunal acknowledges the detailed submissions made by NZX and PGC. The Tribunal's findings and reasons, as outlined in this decision, are based on its careful review of all the submissions received.
9. This decision deals with each set of breaches in turn – those relating to periodic reporting and those relating to corporate governance.

Periodic Reporting

Rules Breached

10. PGC accepts in the SOR that it breached Rules 10.3.1(b), 10.4.1 and 10.4.2:
 - a. PGC failed to provide its annual report for the year ended 30 June 2015 by 30 September 2015 as required under Rule 10.4.1. The duration of this breach was **159 business days**, from 1 October 2015 to 24 May 2016.
 - b. PGC failed to provide its preliminary announcement for the six months ended 31 December 2015 by 29 February 2016 as required under Rule 10.3.1(b). The duration of this breach was **70 business days**, from 1 March 2016 to 13 June 2016.
 - c. PGC failed to provide its half year report for the six months ended 31 December 2015 by 31 March 2016 as required under Rule 10.4.2. The duration of this breach was **49 business days**, from 1 April 2016 to 13 June 2016.

Financial Penalty

11. The Tribunal considers that a breach of the periodic reporting requirements is a breach of a fundamental obligation under the Rules. Compliance by Issuers with the periodic reporting requirements is essential in maintaining market integrity and investor confidence.
12. Accordingly, the Tribunal considers a breach of the periodic reporting requirements to be serious and to fall within Penalty Band 3 of Procedure 9 of the Tribunal Procedures (*the Procedures*)¹. Under Penalty Band 3, a penalty of between \$0 and \$500,000 may be imposed.

¹ The penalty band guidelines set out in the Procedures were amended on 29 February 2016.

13. To determine the appropriate level of penalty, the Tribunal must consider the overall conduct of the respondent. Accordingly, the Tribunal considers that, in this case, it is appropriate to treat the breaches of Rules 10.3.1(b), 10.4.1 and 10.4.2 by PGC as one offence given, in our view, they arose from the same acts and omissions.
14. The Procedures set out the factors which the Tribunal must take into account when assessing the appropriate level of penalty. These factors provide guidance on whether the penalty should fall at the lower or higher end of Penalty Band 3.
15. The Tribunal considered each of these factors, where relevant in this case, and found that the following factors were likely to reduce the penalty:
 - a. While the parties have differing views on the timeliness of PGC's responses, NZX acknowledged in the SOC that PGC cooperated throughout its investigation and provided information proactively.
 - b. PGC's failure to meet its obligations under the Rules was unintentional. NZX acknowledged in the SOC that PGC was reliant on Grant Thornton and its processes for completing the audit report.
 - c. No financial benefit or commercial advantage appears to have resulted from the breaches.
16. The Tribunal considered that the following factors were likely to increase the penalty:
 - a. The breach of the reporting requirements occurred over a significant period of time. The breach of Rule 10.4.1 by PGC is the longest period a breach of a reporting requirement has occurred in any matter previously referred to the Tribunal.
 - b. The failures in this instance form a pattern and in the Tribunal's view PGC has a poor compliance history. This is PGC's fourth referral to the Tribunal, the most referrals of any Issuer to the Tribunal.
 - c. The breach of the reporting requirements is a recurring one. PGC also breached Rule 10.4.1 for failing to release its 2014 annual report when due.
 - d. The Tribunal is concerned that a breach of the periodic reporting requirements for a second consecutive year indicates that PGC did not have effective compliance and operational processes in place to ensure the reporting deadlines were met. PGC states in the SOR that it has a new protocol for PGC's board to manage compliance with its obligations under the Rules. However, in the Tribunal's view such a protocol should have been implemented following PGC's previous breach of Rule 10.4.1.
17. While PGC did announce to the market that its annual report would be delayed, it did not do so until the last day on which it was required to be released. Accordingly, the Tribunal did not give significant weight to this factor.
18. PGC attributes the delay in finalising its annual report (which led to the delay in releasing its half year report) to its new auditor Grant Thornton's "extremely conservative and unduly cautious" approach and processes. PGC submitted that the single biggest factor for the delay was the unexpected decision by Grant Thornton that PGC must treat Torchlight Fund LP as a subsidiary in the 2015 financial year.
19. The Tribunal takes no view on the appropriateness of that decision by Grant Thornton or on Grant Thornton's audit approach or processes. The onus of complying with the obligations under the Rules rests with PGC. All Issuers must manage the audit process to ensure deadlines are met. This is particularly true of PGC, who has previously breached these Rules due to audit delays.

20. PGC has submitted that the breaches by Diligent Corporation in *NZMDT 09/14* in which Diligent also breached three consecutive reporting requirements are more serious. The Tribunal disagrees – this is the second instance PGC has breached the periodic reporting requirements, the duration of this breach is longer and trading in PGC shares was suspended for approximately 9 months to the detriment of PGC’s shareholders. The Tribunal also notes that the Diligent decision was considered under the previous penalty regime.

Findings

21. The Tribunal has repeatedly advised the market that it intends to increase the penalties it imposes for breaches of the periodic reporting requirements, including in its public censure of PGC following its breach of Rule 10.4.1 in 2014. The Tribunal has also advised the market of its intention to increase penalties involving repeat offenders.
22. Having considered all of the factors noted above, on balance the Tribunal determined that the financial penalty should fall at the high end of the range in Penalty Band 3.
23. However, after careful consideration, including having regard to the overall conduct of PGC and the submissions made by both parties, the Tribunal considers that the appropriate financial penalty in this instance is \$275,000.
24. NZX has sought, and PGC accepts, a penalty of public censure. The Tribunal considers a public censure to be entirely appropriate.

Board Composition

Rules Breached

25. Under the Rules:
- a. a Board must include a minimum of two Directors who are ordinarily resident in New Zealand (Rule 3.3.1(b));
 - b. a Board must include a minimum of two Independent Directors (Rule 3.3.1(c));
 - c. an Audit Committee must have a minimum of three members (Rule 3.6.2(b)); and
 - d. the majority of Audit Committee members must be Independent Directors (3.6.2(c)).
26. PGC accepts in the SOR that it breached Rules 3.3.1(c) and 3.6.2(b) following the resignation of its Independent Director, Mr Bryan Mogridge, on 29 October 2015. A new Independent Director, Mr Paul Dudley, was appointed on 23 May 2016. PGC was in breach of Rules 3.3.1(c), 3.6.2(b) and Rule 3.6.2(c)² for 138 business days.
27. NZX allege that PGC also breached Rule 3.3.1(b) because, following the resignation of Mr Mogridge on 29 October 2015, PGC had only one Director ordinarily resident in New Zealand. PGC denies that it breached Rule 3.3.1(b) stating in the SOR that Mr George Kerr has been ordinarily resident in New Zealand since “late 2015”.
28. While the factors outlined by PGC in the SOR support Mr Kerr being ordinarily resident in New Zealand, the Tribunal is concerned that PGC has not definitively stated that as at 29 October 2015, or earlier, Mr Kerr achieved this status. However, the Tribunal considers that it does not currently have sufficient evidence to determine that Mr Kerr was not ordinarily resident in New Zealand as at 29 October 2015.

² Although not specifically addressed in the SOR, PGC did not deny NZX’s allegation that it was also in breach of Rule 3.6.2(c).

Financial Penalty

29. The Tribunal considers that a breach of the corporate governance requirements, particularly those regarding Independent Directors and the composition of the Audit Committee, is a breach of a fundamental obligation under the Rules.
30. The corporate governance provisions of the Rules are important to the integrity of the market. Rule 3.3.1(c) is intended to ensure that there is an independent perspective to Board decision-making and give confidence to investors that their interests will be represented. The requirements of Rule 3.6.2 for an Audit Committee to have three members, with a majority of Independent Directors, are an important shareholder safeguard. An appropriately comprised Audit Committee is critical in ensuring that an Issuer maintains a robust audit process.
31. Accordingly, the Tribunal considers a breach of the corporate governance requirements to be serious and to fall within Penalty Band 3 of the Procedures. Under Penalty Band 3, a penalty of between \$0 and \$500,000 may be imposed.
32. As noted above, to determine the appropriate level of penalty, the Tribunal must consider the overall conduct of the respondent. Accordingly, the Tribunal considers that, in this case, it is appropriate to treat the breaches of Rules 3.3.1(c), 3.6.2(b) and Rule 3.6.2(c) by PGC as one offence given, in our view, they arose from the same acts and omissions.
33. The Tribunal considered each of the factors set out in the Procedures to determine whether the penalty should fall at the lower or higher end of Penalty Band 3. The Tribunal considered that the following factors were likely to reduce the penalty:
 - a. The breaches were promptly reported – Mr Mogridge’s resignation was effective the day it was announced to the market.
 - b. NZX acknowledged in the SOC that PGC had actively engaged with NZX to resolve the matter.
 - c. The breaches by PGC were unintentional. PGC note in the SOR that Mr Mogridge’s resignation was immediate and that he had not given any notice or warning to PGC of his intended resignation.
 - d. No financial benefit or commercial advantage appears to have resulted from the breaches.
 - e. PGC considers that it undertook all reasonably practical endeavours to obtain a replacement Independent Director but recruitment was challenging primarily because of the delay in the release of its 2015 annual report.
34. The Tribunal considered that the following factors were likely to increase the penalty:
 - a. The breaches occurred over a significant period of time – 138 business days.
 - b. The failures in this instance form a pattern and in the Tribunal’s view PGC has a poor compliance history. This is PGC’s fourth referral to the Tribunal.
 - c. The breach of the corporate governance requirements is a recurring one. This is PGC’s third referral to the Tribunal for a breach of the corporate governance requirements; the most of any Issuer for a breach of this nature.
 - d. The Tribunal is concerned that this further breach demonstrates that PGC does not have effective compliance processes in place.

35. The Tribunal notes that Directors, for various reasons, may resign without warning. However, as PGC had only the minimum number of Independent Directors on its Board, it was imperative that it have a succession plan in place should one of these members resign, particularly given PGC's history of non-compliance.
36. The Tribunal recognises that the appointment process for a replacement Director must be robust and that Boards need sufficient time to identify and select suitable candidates. However, appointments must be made promptly to ensure any breach of the Rules is not prolonged.
37. The Tribunal accepts that the delay in appointing a replacement Independent Director was exacerbated by PGC's continued breach of the periodic reporting requirements. However, in the Tribunal's view the fact that PGC found it difficult to find an Independent Director because it was in breach of the Rules is not a mitigating factor.

Findings

38. The Tribunal has advised the market of its intention to increase penalties involving repeat offenders. The Tribunal also notes that previous decisions involving breaches of the corporate governance requirements are of limited value given the amendments made to the Procedures earlier this year³.
39. Having considered all of the factors noted above, on balance the Tribunal determined that the financial penalty should fall at the low end of the range in Penalty Band 3.
40. After careful consideration, including having regard to the overall conduct of PGC and the submissions made by both parties, the Tribunal considers that the appropriate financial penalty in this instance is \$25,000.
41. NZX has sought, and PGC accepts, a penalty of public censure. The Tribunal considers a public censure to be entirely appropriate.

Orders

42. The Tribunal orders that PGC:
 - a. be publicly censured in the form of the announcements attached to this decision (which will include a full copy of this decision);
 - b. pay \$275,000 to the NZX Discipline Fund for the breaches of Rules 10.3.1(b), 10.4.1 and 10.4.2;
 - c. pay \$25,000 to the NZX Discipline Fund for the breaches of Rules 3.3.1(c), 3.6.2(b) and 3.6.2(c);
 - d. pay the costs and expenses incurred by the Tribunal in considering this matter; and
 - e. pay the costs and expenses incurred by NZX in considering this matter.

DATED 27 SEPTEMBER 2016



Susan Peterson, Division Chair, NZ Markets Disciplinary Tribunal

³ Formerly, breaches of the corporate governance requirements fell within penalty band 3 (of 6) under which a fine of up to \$20,000 was applicable.



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ANNOUNCEMENT OF NZ MARKETS DISCIPLINARY TRIBUNAL

PUBLIC CENSURE OF PYNE GOULD CORPORATION LIMITED FOR BREACH OF NZX MAIN BOARD LISTING RULES 10.3.1(b), 10.4.1 AND 10.4.2

In a determination of the NZ Markets Disciplinary Tribunal (*the Tribunal*) dated 27 September 2016, the Tribunal found that Pyne Gould Corporation Limited (*PGC*) breached NZX Main Board Listing Rules 10.3.1(b), 10.4.1 and 10.4.2.

PGC failed to provide its annual report for the year ended 30 June 2015 by 30 September 2015 as required under Rule 10.4.1. The duration of this breach was 159 business days.

PGC failed to provide its preliminary announcement for the six months ended 31 December 2015 by 29 February 2016 as required under Rule 10.3.1(b). The duration of this breach was 70 business days.

PGC failed to provide its half year report for the six months ended 31 December 2015 by 31 March 2016 as required under Rule 10.4.2. The duration of this breach was 49 business days.

The Tribunal has repeatedly advised the market that it intends to increase the penalties it imposes on Issuers for breaches of the periodic reporting requirements. The Tribunal has also advised the market of its intention to increase penalties involving repeat offenders.

The Tribunal has ordered that PGC pay a financial penalty of \$275,000, pay the costs of NZX and the Tribunal, and be publicly censured.

The full decision of the Tribunal is attached to this release.



[x] 2016

ANNOUNCEMENT OF NZ MARKETS DISCIPLINARY TRIBUNAL

PUBLIC CENSURE OF PYNE GOULD CORPORATION LIMITED FOR BREACH OF NZX MAIN BOARD LISTING RULES 3.3.1(c), 3.6.2(b) AND 3.6.2(c)

In a determination of the NZ Markets Disciplinary Tribunal (*the Tribunal*) dated 27 September 2016, the Tribunal found that Pyne Gould Corporation Limited (*PGC*) breached NZX Main Board Listing Rules (*Rules*) 3.3.1(c), 3.6.2(b) and 3.6.2(c) following the resignation of Independent Director, Mr Bryan Mogridge, on 29 October 2015. A new Independent Director, Mr Paul Dudley, was appointed on 23 May 2016. PGC was in breach of the Rules for 138 business days.

The Tribunal notes that directors, for various reasons, may resign without warning. While the process for replacing a director must be robust, such appointments must be made promptly. If an Issuer has only the minimum number of Independent Directors, it is imperative that it have a succession plan in place should one of these members resign.

The Tribunal has ordered that PGC pay a financial penalty of \$25,000, pay the costs of NZX and the Tribunal, and be publicly censured.

The full decision of the Tribunal is attached to this release.