

29 May 2015

NZX Limited
PO Box 2959
Wellington

Attention: Hamish Macdonald, NZX Head of Policy

By email: consultation@nzx.com

Review of penalties available within NZ Markets Disciplinary Tribunal Rules and Procedures: Discussion Document

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the *Review of penalties available within NZ Markets Disciplinary Tribunal Rules and Procedures: discussion document, 20 April 2015* (discussion document). The Law Society has consulted its Commercial and Business Law Committee in preparing the following comments, which focus on questions in section 3.3 of the discussion document: Penalties against directors and officers of issuers.

Penalties against directors and officers of listed issuers

2. NZX is seeking initial views on whether the NZ Markets Disciplinary Tribunal (Tribunal) should have the power to impose financial penalties on directors and officers of listed issuers in relation to breaches of NZX's Rules.
3. Any proposal to amend the NZX Rules to provide the Tribunal with power to impose penalties on directors and officers for a breach by a listed issuer should be approached with caution. The discussion document notes that ASX does not have such power and that the question of personal liability only arises where there is scope for ASIC to commence proceedings for non-compliance with legislation. The same relationship exists in New Zealand in the case of a number of the secondary market provisions contained in Part 5 of the Financial Markets Conduct Act 2013. For example, a breach of NZX continuous disclosure obligations may ultimately lead to proceedings by the Financial Markets Authority where a person who directs or controls the listed issuer is alleged to have failed to take reasonable steps to ensure that the listed issuer complied with its obligations.
4. The Law Society is not aware of examples of a power that is exercisable by a non-statutory tribunal or authority to impose penalties against a person with whom it does not have a direct contractual relationship. The legal basis for such liability is not clear.
5. Any proposal to provide a contract or rules-based administrative body with the power to impose personal liability on directors and officers for an administrative penalty based on the non-compliance of a listed issuer would need to address administrative law issues such as ensuring the adequacy of the process and the ability of the directors and officers to be heard.

6. The power to impose personal liability on directors and officers in a capital markets context risks New Zealand being seen to be out of step with Australia, which may be a disincentive for new listings in the New Zealand market when compared with Australia. In addition, the Law Society notes that the risk of personal liability is likely to raise concerns about a 'chilling effect' on director recruitment and retention.¹

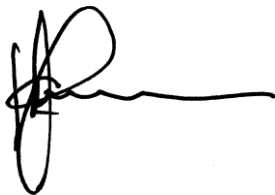
Naming/public censure of directors of listed issuers

7. NZX is seeking views on the scope for the Tribunal to issue a public statement or censure in respect of a director's involvement in a breach of the Listing Rules by a listed issuer. This includes, in what must be extreme cases, the existing power to publicly state that the retention of the office of director and/or executive of an issuer by a named individual is prejudicial to the interests of investors.
8. The discussion document notes that NZX does not generally seek the naming of directors and there have been no recent examples of the Tribunal making such orders. Nor is the Law Society aware of any recent examples of the naming of directors in Australia.
9. Any proposal to exercise these powers should provide at-risk individuals with adequate notice and the opportunity to be heard, in accordance with the principles of natural justice. At a minimum, any director at risk of an adverse finding or naming must be given adequate opportunity to make submissions on the matter, to be considered by the Tribunal before it decides to name the director and/or impose a censure.

Conclusion

10. The discussion document (at [4]) indicates that NZX plans to undertake further consultation if specific reform proposals are developed from this initial round of consultation. The Law Society looks forward to participating in any further consultation, in particular in relation to any proposal to take the section 3.3 options further.
11. In the meantime, if you wish to discuss the above comments please do not hesitate to contact the Law Society's Law Reform Manager, Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz / 04 463 2912).

Yours sincerely,



Chris Moore
President

¹ Similar concerns, about proposals to criminalise breaches of certain directors' duties, were raised by a number of stakeholders including the New Zealand Law Society (http://www.lawsociety.org.nz/__data/assets/pdf_file/0006/74715/ICFoss-Companies-and-Limited-Partnerships-Amendment-Bill-SOP-403-041213.pdf). The government subsequently reduced the scope of the relevant provisions in the Companies and Limited Partnerships Amendment Bill.