**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2022-404-500**
**[2022] NZHC 1504**

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| UNDER | the Takeovers Act 1993 |
| BETWEEN | TAKEOVERS PANEL<br>Plaintiff |
| AND | NEW IMAGE GROUP LIMITED<br>First Defendant |
| | NEW IMAGE HOLDINGS LIMITED<br>Second Defendant |

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| Hearing: | 22 June 2022 |
| Appearances: | F J Cuncannon and T S Jenkin for Plaintiff<br>D Cooper for Defendants |
| Judgment: | 28 June 2022 |

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**JUDGMENT OF WYLIE J**
**(Contravention and penalty hearing)**

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This judgment was delivered by Justice Wylie
On 28 June 2022 at 2.00 pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

Solicitors/counsel:
Meredith Connell, Wellington
S Grey, Nelson/D Cooper, Auckland

## Introduction

[1] The plaintiff, the Takeovers Panel (the **Panel**), is a Crown entity established under s 5 of the Takeovers Act 1993 (the **Act**). The Act provides for the making of regulations setting out the rules relating to takeovers. These regulations are known as the Takeovers Code (the **Code**).[1] The Code governs transactions and events that can impact on the voting rights attaching to the shares owned by shareholders of what are known as "code companies".[2] The Panel has various powers to ensure that the Code is complied with. Inter alia, it can seek declarations of contravention and pecuniary penalties if the Code is breached.[3]

[2] On 4 February 2022, the Panel filed a statement of claim alleging contraventions of the Code by New Image Group Ltd (formerly New Image Trustee Ltd) (**NTL**) and by New Image Holdings Ltd (**NEW**).

[3] Two causes of action were raised against NTL. It was asserted that NTL:

(a) made a selective offer in breach of r 20 of the Code to some but not all holders of equity securities within a class on terms different than those contained in the takeover offer made for the rest of the equity securities of that class; and

(b) failed in breach of r 44(1)(d)(i) of the Code to disclose in the takeover offer the existence of persons acting jointly or in concert with it.

As against NEW, it was asserted that, in breach of r 46(1)(a) of the Code, it failed to disclose in the target company statement issued by it the equity securities held in it by NTL or its directors.

[4] In respect of all causes of action, the Panel sought a declaration of contravention and a pecuniary penalty under s 33M of the Act.

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1 At all relevant times, the relevant Code provisions were set out in the Schedule to the Takeovers Code Approval Order 2000 (SR 2000/210).

2 Takeovers Panel "Guidance: Takeovers Code Overview" <www.takeovers.govt.nz>.

3 Takeovers Act 1993, ss 35(4) and 33M.

[5] A notice of admissions was filed by the defendants on the same day as the statement of claim was filed. NTL and NEW admitted the facts set out in an agreed statement of facts (also dated 4 February 2022). NTL admitted the two causes of action against it and NEW admitted the cause of action against it.

[6] NTL and NEW have entered into a settlement agreement with the Panel pursuant to which they and the Panel have agreed to the making of declarations of contravention and to the imposition of a pecuniary penalty of $1.5 million on NTL.

**Relevant facts**

*The companies/persons involved*

[7] Between 10 May 2000 and 22 May 2013, NEW was listed on the New Zealand Stock Exchange (the **NZX**). At all relevant times NEW was a code company under the Act because it was a New Zealand listed company that had quoted voting securities on a licensed market's trading market. At all material times, the Code applied to NEW.

[8] NTL was an investment company. As at January 2013, it held 6.37 per cent of the shares in NEW. The Code also applied to it.

[9] Graeme Clegg was a director of both NEW and NTL. NEW had four other directors, Alan Stewart (**Mr Stewart**), Max Parkin, Nigel Sinclair and Chua-Nam Hoat (**Mr Chua**). Prior to June 2013, Mr Clegg was the sole director and shareholder of NTL.

*The disclosure breach by NTL*

[10] In early 2011, Mr Clegg decided that NEW should be privatised. It had no need for further capital; it was too small and it had too few shareholders. Its shares were traded infrequently. Mr Clegg began to consider options for its takeover.

[11] As at February 2013, NEW had 234,924,584 shares on issue. All shares were ordinary shares, carrying the same voting rights.

[12] The shares were held by 1,277 shareholders. Relevantly:

(a) Mr Clegg held or controlled 165,761,508 (70.56 per cent) of the shares on issue;

(b) Another entity – HWN (NZ) Holdings Ltd (**HWN**) – held 11,866,551 (5.05 per cent) of the shares on issue;

(c) Mr Stewart held 1,100,000 (0.47 per cent) of the shares on issue; and

(d) Mr Chua held 6,912,500 (2.94 per cent) of the shares on issue.

[13] On 25 October 2012, HWN and Mr Clegg entered into an agreement under which HWN agreed to accept an unconditional offer for 11,746,229 (five per cent) of its shares in NEW) at a price of not less than 26 cents per share.

[14] On 17 January 2013, NTL issued a takeover notice stating its intention to make a takeover offer in respect of all of the shares in NEW. NTL then issued a full takeover offer for NEW in an offer document dated 1 February 2013. The offer was at a price of 26 cents per share and it was conditional on a minimum acceptance level of 90 per cent. The offer identified that NTL was at a starting point of 69.72 per cent of the shares in NEW, because of commitments to accept the offer upon it becoming unconditional made by Mr Clegg and HWN. Therefore the offer indicated that acceptances for 20.28 per cent of the shares in NEW were required for NTL to become the dominant owner. The offer was despatched to shareholders on 4 February 2013.

[15] Rule 44(1)(d)(i) of the Code required an offeror to provide in the offer document the information specified in Schedule 1 to the Code as at the date of the offer. Clause 6(1)(c) of Schedule 1 required disclosure of the number, designation and percentage of equity securities of the target company held or controlled by any person acting jointly or in concert with the offeror.

[16] NTL's offer document disclosed that Mr Clegg held or controlled 64.72 per cent of NEW's shares, being the shares that Mr Clegg held in his own name, in the name of a company wholly owned by him and in the name of NTL. It did not disclose other shares controlled by Mr Clegg through nominees. Nor did it disclose

the shares held by Mr Stewart who was acting in concert with Mr Clegg and NTL in relation to the offer.

[17] NTL's failure to disclose the number and percentage of equity securities held by persons acting jointly or in concert with it and Mr Clegg concealed the true starting position of NTL. It in fact held or controlled 76.03 per cent of the shares in NEW. Acceptances from shareholders holding 13.97 per cent of the shares in NEW were required for NTL to become the dominant owner.

*The disclosure breach by NEW*

[18] NEW issued a target company statement to NTL and to its shareholders on 18 February 2013. The independent directors of NEW advised shareholders not to accept the offer as it was below the valuation range recommended by an independent advisor.

[19] Rule 46(1)(a) of the Code required a target company to provide to the offeror and shareholders, in a target company statement, the disclosures required under Schedule 2 to the Code. Clause 5(1)(a) of Schedule 2 required the target company to disclose the number, designation and percentage of equity securities of the target company held or controlled by each director or senior officer of the target company and their associates.

[20] The target company statement provided by NEW disclosed the shares held by Mr Stewart and listed him as an associate of Mr Clegg. It did not disclose that Mr Clegg controlled other shares in NEW through nominees.

*The selective offer breach by NTL*

[21] Rule 20 of the Code required that a takeover offer must be made on the same terms and provide the same consideration for all securities belonging to the same class of equity securities under offer.

[22] On or around 14 March 2013, NTL made an offer to selected NEW shareholders. Instead of receiving 26 cents per share in NEW, they could receive the

same percentage of shares in NTL as they then held in NEW. NTL's intention in making the selective offer was to try to retain strategic leaders and executives who it believed would be important to the continuation of NEW's business post-takeover.

[23] The selective offer differed from the takeover offer. Instead of being offered 26 cents per share in NEW, the shareholders who received the selective offer were offered the option of reinvesting in NTL.

[24] On 15 March 2013, NTL filed a substantial security holding notice with the NZX indicating that, if the offer became unconditional, NTL would hold or control 74.37 per cent of the shares in NEW. The increased shareholding (or control) was largely through acceptances relating to NTL's (or related companies') holdings and the HWN commitment.

[25] The independent directors of NEW informed the Panel that the selective offer had been made. The Panel contacted NTL about the selective offer on 18 March 2013. NTL responded saying that the selective offer was a collateral arrangement made to distributors and/or members of NEW's board or executive to ensure a smooth transition post-takeover. The Panel advised NTL that it had formed the view that there was "an appreciable possibility" that the selective offer breached r 20 of the Code. It sought an undertaking from NTL that it would withdraw the selective offer, declare invalid all acceptances given on the basis of the selective offer and make an announcement to the NZX recording that NTL was subject to the undertaking and explaining the circumstances that had given rise to it.

[26] On 21 March 2013, NTL's solicitors on behalf of NTL provided an undertaking in the terms required by the Panel. NTL made an announcement to the NZX on 22 March 2013 regarding the undertaking and confirming that it had contacted the recipients of the selective offer and withdrawn the same.

[27] On 8 April 2013, NTL filed a substantial security holding notice recording that, since its last disclosure on 15 March 2013, a further 107 NEW shareholders had accepted the offer, resulting in NTL acquiring a further 4.17 per cent of NEW's shares.

This indicated that, should the offer become unconditional, NTL would control 78.54 per cent of the shares in NEW.

[28] On 29 April 2013, Mr Chua accepted NTL's offer of 26 cents per share for his NEW shares.

[29] On 1 May 2013, NTL advised NEW's shareholders by letter that it would not be increasing the offer price, that as at 30 April 2013 it had received acceptances that, together with the HWN commitment, would result in it holding or controlling at least 85 per cent of NEW's shares should the offer complete, and declaring the offer unconditional by waiving the 90 per cent minimum acceptance condition.

[30] The independent directors of NEW then issued a revised recommendation to shareholders recommending that they accept the NTL offer.

[31] On 2 May 2013, NTL filed a substantial security holding notice indicating that it held or controlled 88.95 per cent of the shares in NEW. It then issued a notice of dominant ownership on 6 May 2013 and, on the following day, an acquisition notice to begin compulsory acquisition of the remaining shares in NEW. On 22 May 2013, NEW was delisted from the NZX, and the compulsory acquisition process was completed on 4 June 2013.

[32] On 5 June 2013, NTL notified the Registrar of Companies of a share split of its existing shares into 234,924,584 shares, being the same number of shares as NEW had on issue immediately prior to the takeover offer. On 13 August 2013, NTL notified the Registrar of Companies of a share issue to new shareholders. The shareholders to whom NTL issued shares were 22 former shareholders in NEW who had earlier accepted the selective offer. These shareholders were issued shares in NTL in the same or similar percentages as their NEW shareholding, in accordance with the terms of the selective offer.

[33] The takeover offer closed on 28 June 2013.

[34] Some six years later, on 26 June 2019, the Panel received a complaint alleging breaches of the Code and the Act arising out of the NTL takeover offer. The complaint was made by a third party who had previously threatened to make the complaint unless NTL withdrew an unrelated claim against it. NTL had refused to do so. In the event the Panel commenced an investigation into the allegations and issued its determination in relation to the same and a statement of its reasons on 15 February 2021. It was not satisfied that:

(a) NTL had complied with r 44(1)(d)(i) of the Code;

(b) NEW had complied with r 46(1)(a) of the Code; or that

(c) NTL had complied with r 20 of the Code when it made the selective offer.

[35] As noted above, the Panel's statement of claim was filed on 4 February 2022.

**Admissions**

[36] For the purpose of r 15.16 of the High Court Rules 2016, NTL has admitted that:

(a) between 14 March 2013 and 28 June 2013, it made a selective offer to certain shareholders in NEW in breach of r 20 of the Code (the first cause of action against NTL in the Panel's statement of claim); and

(b) it failed to disclose in the offer (as required by cl 6(1)(c) of Schedule 1 to the Code) shares controlled by persons acting jointly or in concert with it and that this was in breach of r 44(1)(d)(i) of the Code (the second cause of action against NTL).

NEW has admitted that it failed to disclose in the target company statement (as required by cl 5(1)(a) of Schedule 2 to the Code) details of equity securities held or controlled in it by NTL or its directors, in breach of r 46(1)(a) of the Code (the third cause of action in the statement of claim).

**Relevant statutory provisions**

[37] Section 33M of the Act provides as follows:

> **33M When court may make pecuniary penalty orders and declarations of contravention**
>
> If the Panel applies for a pecuniary penalty order against a person under this Act in accordance with section 35, the court—
>
> (a) must determine whether the person has contravened the takeovers code; and
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> (b) must make a declaration of contravention (*see* sections 33N and 33O) if satisfied that the person has contravened the takeovers code; and
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> (c) may order the person to pay a pecuniary penalty that the court considers appropriate to the Crown (*see* sections 33P and 33Q) if satisfied that the person has contravened the takeovers code, that the person knew or ought to have known of the conduct that constituted the contravention, and that the contravention—
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> (i) materially prejudices the interests of offerees, the code company, the offeror or acquirer, competing offerors, or any other person involved in or affected by a transaction or event that is or will be regulated by the takeovers code, or that is incidental or preliminary to a transaction or event of that kind; or
>
> (ii) is likely to materially damage the integrity or reputation of any of New Zealand's financial markets; or
>
> (iii) is otherwise serious.

[38] I turn to consider each of these matters.

**Did NTL/NEW contravene the Code?**

[39] I am satisfied that NTL breached rr 20 and 44(1)(d)(i) of the Code and that NEW breached r 46(1)(a) of the Code. Each breach was detailed in the statement of claim filed by the Panel and both NTL and NEW have signed admissions pursuant to r 15.16 of the High Court Rules. The Panel can seal judgment on the causes of action admitted. Further, the defendants have, through their counsel, signed an agreed statement of facts, large parts of which I have replicated above. They have accepted their actions and the resulting contraventions of the Code.

**Declarations of contravention**

[40] It follows that I am required to make declarations of contravention.

[41] Section 33O records what declarations of contravention must state. It provides as follows:

> **33O What declarations of contravention must state**
>
> A declaration of contravention must state the following:
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> (a) the court that made the declaration; and
>
> (b) the provision of the takeovers code to which the contravention relates or, if the contravention is of an exemption, both the term or condition contravened and the takeovers code provision to which the exemption relates; and
>
> (c) the person in contravention; and
>
> (d) the conduct that constituted the contravention and, if a transaction constituted the contravention, the transaction; and
>
> (e) the code company to which the conduct related.

[42] There was no dispute as to the terms of the declarations of contravention that I must make and I am satisfied that those terms are appropriate. Accordingly, I make declarations of contravention as follows:

(a) These declarations are made by the High Court of New Zealand.

(b) Between 14 March 2013 and 28 June 2013, New Image Group Ltd contravened r 20 of the Takeovers Code by making a selective offer, being an offer that was not made on the same terms and did not provide the same consideration for all securities belonging to the same class of equity securities under the offer, to certain shareholders in New Image Holdings Ltd.

(c) New Image Group Ltd contravened r 44(1)(d)(i) of the Takeovers Code, by failing to disclose in its offer document dated 1 February 2013 details of equity securities of the target company (being New Image

Holdings Ltd) that were held or controlled by persons acting jointly or in concert with New Image Group Ltd, being the offeror.

(d) New Image Holdings Ltd contravened r 46(1)(a) of the Takeovers Code by failing to disclose in its target company statement issued on 18 February 2013 its equity securities that were held or controlled by directors or senior officers of New Image Group Ltd and their associates.

**Pecuniary penalty**

[43] Counsel advised that this was the first application for a pecuniary penalty under the Act. The Court has however considered the imposition of pecuniary penalties recommended by the parties under a number of other, broadly similar, regulatory regimes.[4] The Courts in these contexts have acknowledged that there is no objection to parties tendering their joint view on the appropriate penalty[5] and that agreed recommended penalties serve the interests of both the parties and the community because they enable early disposal of proceedings and avoid potentially complex and lengthy litigation.[6] I can see no reason why there should be a different approach under the Act and Mr Cooper, for the defendants, did not suggest otherwise.

[44] While the parties can recommend the penalty they consider is appropriate, it is ultimately for the Court to impose the appropriate pecuniary penalty. The Court must be satisfied that the penalty proposed is within the appropriate range, having regard to the objects of the Act and, in this case, the Code, and the circumstances of the case before it.[7] If it is not so satisfied, the Court can decline to impose the penalty recommended by the parties and impose the penalty it considers is appropriate. It is

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4 Commerce Act 1986; Overseas Investment Act 2005; Unsolicited Electronic Messages Act 2007; Anti-Money Laundering and Countering Financing of Terrorism Act 2009; and Financial Markets Conduct Act 2013.

5 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 (HC) at 733.

6 At 733; and see *Chief Executive of Land Information New Zealand v Clevedon-Kawakawa Road Ltd* [2021] NZHC 1831 at [28]; and *Financial Markets Authority v Henry* [2014] NZHC 1853 at [35]–[36].

7 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [6]; *Commerce Commission v Ronovation Ltd* [2019] NZHC 2303 at [24]–[26]; *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [45]; and *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2020-404-5490, 26 December 2010 at [37].

not however necessary that each step in the methodology proposed by the parties is accepted by the Court.[8] Rather, as is the case with sentencing appeals in the Court's criminal jurisdiction, it is the final pecuniary penalty that matters.[9]

[45] Under other regulatory regimes, there is now a broad consensus that the appropriate approach to setting pecuniary penalties is to follow a similar analysis to that adopted for criminal sentencing – namely to:

(a) record the maximum pecuniary penalty;

(b) establish the appropriate starting point range for the pecuniary penalty, taking into account the aggravating and mitigating factors relating to the contravention(s); and

(c) discount or increase the starting point pecuniary penalty to take into account any aggravating or mitigating considerations specific to the defendant(s).

[46] The Panel suggested it was appropriate to adopt this approach where a pecuniary penalty is sought under the Act. The defendants did not suggest otherwise. I accept that the approach is appropriate and I have adopted it.

*The maximum penalty*

[47] Here, the maximum pecuniary penalty that can be imposed under the Act for a contravention by a body corporate is $5 million.[10] It follows that the maximum penalty that can be imposed on NTL is $10 million and that the maximum penalty that can be imposed on NEW is $5 million.

*The starting point range*

[48] As is the case in imposing pecuniary penalties under similar regulatory regimes, in determining the appropriate starting point for the pecuniary penalty, the

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8 *Commerce Commission v Ronovation Ltd*, above n 7, at [26].
9 *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1414 at [27].
10 Takeovers Act, s 33P.

paramount concern should be to impose a penalty that provides both general and specific deterrence.[11] Penalties should be at a level such that they are not regarded as a mere licence fee and to ensure that both specific and general deterrence are achieved.[12]

[49] More nuanced considerations then come into play.

[50] The Act provides in s 33Q that, when it is determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters. The section goes on to list specific matters the Court must consider. The Court must consider the principles contained in the Code, the nature and extent of the contravention, the likelihood, nature and extent of any damage to the integrity or reputation of any of New Zealand's financial markets because of the contravention,[13] the nature and extent of any loss or damage suffered by a person referred to in s 33M(c)(i) because of the contravention, the circumstances in which the contravention took place and whether or not the person in contravention has previously been found by the Court in proceedings under the Act to have engaged in similar conduct.

[51] The specific matters listed in s 33Q are not exclusive. Other factors that have been considered relevant when determining pecuniary penalties under similar regulatory regimes could well be relevant to determining the appropriate penalty under the Act. Matters which might fall for consideration include whether or not the contravention was deliberate, the duration of the contravention, the seniority of the employees or officers involved in the contravention, the extent of any benefit or

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11 See for example *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [53] – under Commerce Act 1986; *Chief Executive of Land Information New Zealand v West Drury Holding Ltd* [2021] NZHC 704 at [19] – under Overseas Investment Act 2005; *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399 at [45] – under Financial Markets Conduct Act 2013; *Department of Internal Affairs v Ping An Finance (Group) New Zealand Co Ltd* [2017] NZHC 2363, [2018] 2 NZLR 552 at [92] – under Anti-Money Laundering and Countering Financing of Terrorism Act 2009; and *Chief Executive of the Department of Internal Affairs v Mansfield* [2013] NZHC 2064 at [65] – under Unsolicited Electronic Messages Act 2007.

12 *Telecom Corporation of New Zealand Ltd v Commerce Commission*, above n 11, at [27]–[29]; *Commerce Commission v NZ Bus Ltd (No 2)* (2006) 3 NZCCLR 854 (HC) at [25]; *Chief Executive of Land Information New Zealand v Agria (Singapore) Pte Ltd* [2019] NZHC 514 at [39]–[40]; and *Phillipson v Maritime New Zealand* HC Nelson CRI-2010-442-29, 5 July 2011 at [17].

13 At the time of the contraventions, s 33Q(c) referred to New Zealand's "securities markets". The subsection was amended as from 1 December 2014 by the Financial Markets (Repeals and Amendments) Act 2013, s 150.

financial gain derived from the contravention, the role of the defendant in the contravention and the size and resources of the defendant.

[52] I turn to consider first the mandatory considerations set out in s 33Q of the Act and then such of the additional considerations as I consider are relevant in this case.

*The principles contained in the Code*

[53] The Code is a regulation made by order in Council under s 19 of the Act. It does not contain an express statement of principles. The Act however required the Minister, in formulating recommendations for the Code, to consider the following objectives:[14]

(a) encouraging the efficient allocation of resources;

(b) encouraging competition for the control of code companies;

(c) assisting in ensuring that the holders of financial products in a takeover are treated fairly;

(d) promoting the international competitiveness of New Zealand's capital markets;

(e) recognising that the holders of financial products must ultimately decide for themselves the merits of a takeover offer; and

(f) maintaining a proper relation between the costs of compliance with the code and the benefits resulting from it.

Presumably the Code seeks to embrace these broad objectives.

[54] Broadly, the fundamental rule on which the Code is based is that a person must not become the holder or controller of more than 20 per cent of the voting rights in a

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14 Section 20.

code company unless the acquisition is undertaken in accordance with the Code.[15] To avoid breaching this fundamental rule, a person or entity can comply with one of the methods the Code prescribes if he or she or it wishes to obtain increased voting control. These methods include acquisition under a full or partial takeover offer. Pursuant to r 7(a), a person can become the holder or controller of the voting rights in a code company by an acquisition under a full offer[16] – essentially an offer to all other shareholders for all of their shares. Under rr 51 and 52, an offeror who holds or controls 90 per cent or more of the shares in a code company becomes the dominant owner[17] and can acquire the rest of the shares by compulsory acquisition.

[55] The Code seeks to ensure that all shareholders have an equal and informed opportunity to participate in control change transactions. In particular, r 20 of the Code requires that an offer must be made on the same terms and provide the same consideration for all securities belonging to the same class of equity securities under offer. This rule is pivotal to the operation of the Code. Further, the Code includes disclosure obligations to ensure that all shareholders are given accurate and up to date information in the course of takeover offers. Disclosure obligations are imposed on both the offeror and the target code company. The disclosure requirements are prescriptive. They include requirements to disclose any associations between the offeror and the code company's directors or senior managers and details (including the voting control held) of those persons.

[56] The actions of NTL and NEW contravened the Code and its central premise.

*The nature and extent of the contraventions*

[57] The Panel regarded the breach of r 20 of the Code by NTL as the most serious contravention. I agree. The selective offer was a serious breach of the Code because r 20 is pivotal to the operation of the Code. Where it is contravened, shareholders are denied an equal opportunity to participate in the takeover offer. A contravention of

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15 Takeovers Code, r 6. The 20 per cent threshold seems to be regarded as the point below which a person has insufficient voting power to control or influence the activities of a company.

16 Takeovers Code, rr 7–8.

17 See r 50 (Interpretation).

r 20 undermines one of the key objectives of the Code – ensuring that the holders of financial products are treated fairly and equally on a takeover.

[58] There are some mitigating factors:

(a) The Panel has published guidance for market participants in which it has confirmed that the Code does not prohibit collateral arrangements per se and that there can be legitimate commercial justifications for collateral arrangements. In other situations which have come before it, the Panel has accepted that it can be appropriate for an offeror to allow some shareholders to acquire shares in the offeror in connection with a takeover offer, even though the takeover offer provides for a cash offer to all shareholders;

(b) While the selective offer made by NTL was a serious contravention of the Code, it was made in the context of a relatively small transaction and only to a modest number of shareholders. Similarly, it potentially impacted on only a relatively small number of shareholders – the shareholders in NEW.

[59] The breaches of the disclosure rules by both NTL and NEW resulted in shareholders not being provided with accurate information about the takeover offer. NTL's failure to disclose its associates and NEW's failure to disclose all associates of its directors resulted in the appearance of a greater number of independent shareholders accepting the offer than was actually the case. As a result, shareholders were arguably unable to make a fully informed decision regarding the merits of the offer.

[60] The offer document prepared by NTL disclosed that Mr Clegg and those acting jointly and in concert with him held or controlled 69.72 per cent of the shares in NEW. It omitted to disclose 0.47 per cent of the shares held by Mr Stewart, a director of NEW, and 5.84 per cent of the shares in NEW held by two other persons, described in the agreed statement of facts as nominees for Mr Clegg. Had the offer document included the further shares, it would have shown that Mr Clegg, together with those

acting jointly or in concert with him, held 76.03 per cent of the shares in NEW. Curiously, Mr Stewart's shareholding was disclosed in NEW's target company statement. He was described as being an associate of Mr Clegg. Rule 46 of the Code requires that the target company statement be sent inter alia to all shareholders. An astute shareholder could therefore have potentially become aware of Mr Stewart's interest, but not the interests of the nominees.

[61] The Panel does not contend that the defendants were aware that they were breaching the Code and it accepts that Mr Clegg had no prior relevant experience or qualifications. Nevertheless, both NTL and NEW (and Mr Clegg) ought to have known that their conduct breached the Code.

*The likelihood, nature and extent of any damage to the integrity or reputation of any of New Zealand's financial markets because of the contraventions*

[62] The contraventions in this case, involving a selective offer and failures to disclose, occurred in the context of a relatively small transaction which took place as long ago as 2013. The contraventions are not by their nature likely to have damaged the integrity or reputation of New Zealand's financial markets. The agreed statement of facts does not identify any such effect.

*The nature and extent of any loss or damage suffered by a person referred to in s 33M(c)(i)*

[63] It was common ground that this is an important factor when assessing penalty. Section 33M(c)(i) requires the Court to consider whether there was any material prejudice to the interests of offerees, the code company, the offeror or acquirer, competing offerors, or any other person involved in or affected by a transaction or event that is or will be regulated by the Code, or that is incidental or preliminary to a transaction or event of that kind.

[64] The Panel considered that it was difficult to accurately assess the extent of the loss or damage suffered as a result of the contraventions. It did, however, submit that the selective offer had the potential to cause financial loss to NEW shareholders. It was argued for the defendants that the contraventions in question were unlikely to cause loss.

[65] The agreed statement of facts does not identify any actual loss and it would be difficult to quantify. Nevertheless, I accept that there was the potential to cause material prejudice to the shareholders of NEW and to NEW itself.

*The circumstances in which the contraventions took place*

[66] I have already covered this issue in my discussion of the relevant facts above. I agree with Mr Cooper that the key point is that the contraventions were not deliberate. I did have concern at the transactions completed with certain NEW shareholders after the undertaking was given, but Ms Cuncannon, for the Panel, did not suggest that the undertaking was breached. She acknowledged that the transactions were completed after the compulsory acquisition process had been completed and the takeover offer had been closed. Nevertheless, she submitted that NTL had issued shares to a limited number of NEW shareholders, with knowledge of the Panel's preliminary assessment that the selective offer breached the Code. Given that there was no separate breach alleged, I take this issue no further.

[67] I accept that the contraventions of the disclosure provisions, both by NTL and NEW, were not deliberate and relatively minor.

*Prior contraventions/similar conduct*

[68] Neither NEW nor NTL has previously been before the Court in any proceedings under the Act. Nor has either company been before the Panel.

*Other relevant factors*

[69] Senior personnel were involved. Mr Clegg was the founder, chairperson and chief executive officer of NEW and the sole director and shareholder of NTL. He decided that NEW should be privatised and he instigated the offer. He approved the offer document, which failed to disclose all shares controlled by him. He then made the selective offer on behalf of NTL. He did not however have any relevant business acumen, experience or qualifications. What occurred was not deliberate.

[70] Turning to the size and resources of the defendants, at 26 cents per share, NEW was valued at the time at $61 million and the value of the shares that Mr Clegg (and

Mr Stewart) did not hold or control prior to the offer was $14.6 million. The offer was a relatively small transaction by comparison to other takeovers conducted under the Code.

*The appropriate starting point*

[71] In the various cases under other regulatory regimes, the Court has generally considered it preferable to look at the conduct overall and assess one penalty for the contravening conduct in the round, rather than attempting to delineate separate penalties for separate breaches.[18]

[72] Both the Panel and the defendants assessed the contraventions in the round and accepted that it would be artificial to separate a starting point penalty for each breach and each company given that the conduct was part of a single transaction and given that NEW has been subsumed within NTL. I agree with this approach. It accords with the reality of the contraventions.

[73] The Panel submitted that, on a totality basis, a starting point penalty in the range of $2.1 to $2.5 million in respect of the three contraventions was appropriate. The defendants accepted this.

[74] I am satisfied that the proposed starting point pecuniary penalty is appropriate. It reflects the fact that the selective offer contravention was serious and that it involved a senior executive of both NTL and NEW. It nevertheless recognises the modest scale of the overall transaction and the relatively small size of NEW by reference to other code companies.

[75] I have not been able to draw a comparison with pecuniary penalties imposed in other cases. There is no previous pecuniary penalty decision under the Act and I was advised by Ms Cuncannon, for the Panel, that there have been no pecuniary

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[18] See for example *Chief Executive of Land Information New Zealand v Hong* [2019] NZHC 1561 at [25]–[29]; *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [11]; *Commerce Commission v British Airways Plc* HC Auckland CIV-2008-404-8347, 5 April 2011 at [15]; *Commerce Commission v Geologistics International (Bermuda) Ltd*, above n 7, at [17]; and *Commerce Commission v Deutsche Bahn AG* HC Auckland CIV-2010-404-5479, 13 June 2011 at [53].

penalty decisions under equivalent legislative regimes either in Australia or in the United Kingdom. Other regulatory regimes in this country are broadly relevant to methodology but they are too different to operate as useful comparators for the purposes of determining the appropriate starting point pecuniary penalty.

*Aggravating/mitigating factors specific to the defendants*

[76] There are no aggravating factors specific to the defendants.

[77] There are however two mitigating factors relevant in the present case:

(a) as already noted, neither NTL nor NEW has previously been before the Court or the Panel in respect of any proceedings under the Act; and

(b) both NTL and NEW cooperated to resolve the proceeding and agreed to do so promptly and on terms acceptable to the Panel.

[78] These factors have been accepted as mitigating factors deserving of discounts in penalty decisions in other similar regulatory contexts.

[79] The Panel took the view that a 35 per cent discount was appropriate and in line with the level of discounts given in like contexts.[19] So did the defendants. I accept the parties' recommendation that a discount of 35 per cent is appropriate.

[80] Applying the 35 per cent discount to the starting range of $2.1 million to $2.5 million results in a final pecuniary penalty range of $1.365 million to $1.625 million. Both parties recommended a final penalty of $1.5 million. That figure is within the available range and I am satisfied that it is appropriate. It is also appropriate that the penalty be imposed only on NTL. As a result of the takeover, NEW has now been subsumed within NTL. The Panel did not seek a pecuniary

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19 *Commerce Commission v Ronovation Ltd*, above n 7, at [67]–[72]; *Chief Executive of Land Information New Zealand v Agria (Singapore) Pte Ltd*, above n 12, at [78]–[79]; *Financial Markets Authority v ANZ Bank New Zealand Ltd*, above n 11, at [87]; *Commerce Commission v Vector Ltd* [2019] NZHC 540 at [31]; *Commerce Commission v Hutt and City Taxis Ltd* [2021] NZHC 2543 at [28]–[29]; and *Commerce Commission v Japan Airlines Co Ltd* HC Auckland CIV-2008-404-8348, 29 June 2012 at [59]–[67].

penalty against Mr Clegg. It is not for me to question this decision. It is within the prosecutorial discretion enjoyed by the Panel.

*Imposition of pecuniary penalty*

[81] The pecuniary penalty agreed to between the Panel and each of the defendants is approved. It is a condign penalty and it accords with the Act's (and the Code's) broad objectives and with the overall objective of imposing a pecuniary penalty – namely specific and general deterrence.

[82] I impose a pecuniary penalty on NTL for the admitted breaches of the Code by it and by NEW in the sum of $1.5 million.

[83] In accordance with s 33R of the Act, I order that the penalty is to be applied first to pay the Panel's actual costs in bringing the proceedings.

[84] The parties have agreed that costs should lie where they fall. As a result, I make no order as to costs.

Wylie J