ASX
AUSTRALIAN SECURITIES EXCHANGE

ASX Circular

Date: 10 July 2009

Key topics

1. Tricom Equities Limited

Reading List

Client Advisers
Compliance Managers
DTR Operators
Managing Directors
Office Managers
Operations Managers (back office)

Contact

Jodie Maurer

Telephone

(02) 9227 0472

ASX Limited
ABN 98 008 624 691
Exchange Centre
20 Bridge Street
Sydney NSW 2000
PO Box H224
Australia Square NSW 1215

Internet: http://www.asx.com.au

DISCIPLINARY MATTERS

(The views expressed in this announcement are those of the Disciplinary Tribunal, an independent body vested with the responsibility of determining, through a process of peer review, disciplinary proceedings in relation to alleged contraventions of ASX's Operating Rules.)

The Disciplinary Tribunal ("the Tribunal") has determined that Tricom Equities Limited ("Tricom") has committed 10 contraventions of ASX Operating Rules over an extended period of time. The Tribunal found that some of the contraventions were so significant and serious that they deserved the imposition of the highest financial penalty available at the time the contraventions occurred. The breaches ranged from Tricom's inability to meet its payment obligations within the time required through to blatant and unmistakable market manipulation. The contravening conduct spanned a period from 30 December 2005 to 31 October 2008.

In the Tribunal's view the most important function of the ASX and the Operating Rules is to maintain the reputation and integrity of the market. Tricom's contravening conduct had the potential to seriously undermine the integrity of the market and the level of sanction must take that into account. The events have potentially corroded market confidence and require the imposition of the maximum financial penalty. The substantial sanctions imposed by the Tribunal constitute a real punishment on Tricom and send a strong deterrent message to other Market Participants.

The result is that Tricom has been fined a total of $1,350,000 plus GST – a record amount. The facts and findings of the various contraventions are set out in Attachment A.

In respect of each matter the Tribunal took into account two facts particular to Tricom: first, Tricom had been sanctioned in the past for contraventions of the Operating Rules, albeit in different circumstances; and second, there has been a change in management that has shown itself eager to reform the practices that allowed these contraventions to occur.

The Contraventions

The tables below contain a breakdown of the contraventions as found by the Tribunal.

Settlement and capital liquidity failure January 2008

The first contraventions related to the settlement failure in January / February 2008, together with additional capital liquidity failures. The applicable penalty regime to these contraventions was that in operation prior to 31 March 2008, with the maximum fine being $250,000. The maximum available penalty was imposed for two of these matters.

The total fine imposed in relation to the settlement and capital liquidity failures was $800,000 (plus GST).

Relevant ASX Operating Rule	Summary of Contravention	Penalty
Participants to provide additional Cover ACH Clearing Rule 14.6.1	On 18 January 2008 Tricom failed to provide additional cover by the specified time. On 30 January 2008 Tricom failed to provide additional cover by the specified time.	$100,000 (2 contraventions)
Compliance with directions of ASTC ASTC Settlement Rule 6.1.1	On 29 and 30 January 2008 Tricom failed to comply with directions of ASTC in relation to settlement as required.	$250,000 Maximum penalty
Financial records and Capital Liquidity Returns ACH Clearing Rule 4.2.2 and ACH Clearing Rule 5.1.1	Between January 2006 and September 2008 Tricom failed to maintain records as required, prepare returns that accurately reflect its accounts and financial position, and ensure that its liquid capital was at all times greater than its total risk requirement.	$200,000
Appropriate Management Structures ACH Clearing Rule 4.8.1	Between January 2006 and September 2008 Tricom failed to have an appropriate management structure in place to ensure its operations and processes were reasonably designed and implemented, and functioned so as to achieve compliance by Tricom with the rules.	$250,000 Maximum penalty
Total: $800,000		

Market Manipulation

The second contraventions involved market manipulation. The applicable penalty regime for the first of these matters was that in place prior to 31 March 2008, with the maximum fine being $250,000. A substantial part of the conduct which was the subject of the second matter continued after 31 March 2008 and hence the new substantive rules applied.

The total fine imposed for the market manipulation matters was $500,000 (plus GST).

Relevant ASX Operating Rule	Summary of Contravention	Penalty
Manipulative trading ASX Market Rule 4.10.1 and ASX Market Rule 13.4.1(b)(i)	Between 30 December 2005 and 25 January 2008 Tricom failed to maintain sufficiently detailed trading records and, on account of other persons, manipulated the price of CLF.	$250,000 Maximum penalty
Ought reasonably have suspected manipulative trading ASX Market Rule 13.4.1(1)(b)(iii)	Between 19 December 2007 and 31 October 2008 Tricom on account of another person, manipulated the price of DKN, RPX, TSM and CSB.	$250,000
Total: $500,000		

Market participants should be aware that the Tribunal has the power to impose a financial sanction of up to $1,000,000 in respect of Level 3 (Very Serious) contraventions where the relevant conduct or omission occurred after 31 March 2008. This increase in penalty will mean that the sort of conduct engaged in by Tricom throughout the relevant period will in future warrant very considerable financial sanction.

Settlement T+3

The third contraventions involved the failure to ensure settlement of certain transactions occurred on T+3.

Relevant ASX Operating Rule	Summary of Contravention	Penalty
Settlement T+3 ASX Market Rule 5.7.3	On 21 February 2008 Tricom failed to ensure that a market transaction for 100,000 MDXOA was settled on T+3 as required.	$25,000
Settlement T+3 ASX Market Rule 5.7.3	On 31 January 2008 Tricom failed to ensure that a market transaction for 21 MXX was settled on T+3 as required.	$25,000
Total: $50,000		

Tricom did not dispute the facts presented to the Tribunal and, without making any admissions, did not contest the contraventions.

In assessing the level of sanction, the Tribunal has taken into account the manner in which Tricom has dealt with these issues. First, since February 2008 Tricom has maintained regular contact and met frequently with ASX compliance staff and others including ACH staff in respect of restructuring its operations, changing its personnel and the manner in which it deals with matters; second, the implementation by Tricom of the changes recommended by an independent auditor (PwC) as required by ASX and the considerable costs involved therein; third, the additional conditions that have been imposed by ASX, ACH and ASTC for Tricom's continued participation; fourth, its agreement to a further engagement until December 2011 of an independent reviewer to continue to review, enhance and embed its compliance and risk internal controls thereby incurring considerable additional costs, and perhaps most importantly, ensuring that the contraventions which have brought these proceedings are not likely to recur.

The new management of Tricom elected to have all outstanding ASX investigations heard as a single matter before the Tribunal. The Tribunal acknowledged the high degree of cooperation of the new management. Tricom's cooperative approach to the investigations and subsequent proceedings brought by ASX reduced the penalty that would otherwise have been imposed.

ATTACHMENT A

FACTS AND FINDINGS BY THE DISCIPLINARY TRIBUNAL

(Note that the Tribunal heard 10 matters involving the contraventions outlined in the summary above. For the purposes of the summary above, the contraventions were grouped according to type.)

Contravention 1: 18 January 2008 - Participants to provide additional Cover (ACH Clearing Rule 14.6.1)

Facts

Following a downward movement of the benchmark S&P/ASX 200 Index in excess of 2% on the morning of 18 January 2008, an intraday margin run was carried out by ACH.

At approximately 11.00am on 18 January 2008, ACH telephoned Tricom and alerted it to the possibility of an intraday margin call. At approximately 12.30pm, ACH telephoned Tricom and notified Tricom of an intraday margin call of $3,847,884.00 to be paid by 2.30pm the same day.

At approximately 1.15pm, ACH telephoned Tricom and confirmed that the payment should be made via Real Time Gross Settlement (RTGS).

At 1.20pm, ACH sent an email to Tricom confirming payment details including the amount, payment method and relevant bank account details stating the call is to be paid via RTGS funds into the above account by no later than 2.30pm Sydney time.

Between approximately 2.30pm and 3.00pm, ACH spoke to Tricom confirming that payment had not been received and informing that payment failure was an event of default.

At approximately 2.55pm, ACH spoke to Tricom, advising that payment had not been received and that Tricom was technically in default.

Between approximately 3.40pm and 3.45pm, ACH spoke to Tricom on a number of occasions confirming that payment had not been received.

At approximately 3.52pm, Tricom telephoned ACH confirming that Tricom had contacted its bank's Relationship Manager who was arranging payment to ACH.

At approximately 4.10pm, ACH telephoned Tricom to advise that payment had not been received and the cut-off for RTGS was 4.20pm. In a conference telephone call Tricom stated that funds had been transferred to Tricom's options operating account at around 2.00pm and was waiting for ACH to debit the account. ACH advised that it could not debit Tricom's account and that Tricom had not followed the payment instructions.

At approximately 4.15pm, Tricom telephoned ACH to advise that Tricom had transferred payment of $3,847,844 to ACH.

At 4.27pm, ACH received payment of $3,847,844 from Tricom.

Findings

The Tribunal found the contravention proved. The Tribunal was satisfied that on 18 January 2008, ACH was of the opinion that additional cover was necessary having regard to relevant circumstances being a significant downward movement of the S&P/ASX 200 Index and that it notified Tricom of the amount, manner and form that it must pay under Rule 14.6.1. Tricom did not comply with that requirement and so contravened ACH Clearing Rule 14.6.1(a(1)).

The Tribunal was of the view that this contravention was a serious contravention. A Participant's failure to pay additional cover at the time that it becomes due and payable has the potential to adversely affect the position of ACH as central counterparty, and therefore also has the potential to undermine overall confidence in the market. However, Tricom's cooperative approach to the investigations and subsequent proceedings brought by ASX acted in mitigation of a serious contravention and reduced the penalty that would otherwise have been appropriate.

Fine: $50,000

Contravention 2: 29 and 30 January 2008 - Compliance with Directions of ASTC (ASTC Settlement Rule 6.1.1)

Facts

On 29 and 30 January 2008, Tricom failed to comply with directions and requirements given to it by ASTC in respect of settlement obligations. The relevant directions and requirements given to Tricom by ASTC related to Tricom's obligations to pay funds by the prescribed time. Tricom's failure to settle payments with ASTC on 29 and 30 January 2008 caused overall market settlement on both days to be delayed.

Prior to 29 and 30 January 2008, Tricom offered a margin lending facility to its clients. Under this arrangement a client would transfer title over a parcel of securities to Tricom as collateral for a margin loan. The loan to value ratio used by Tricom varied depending on the collateral provided. If the value of the collateral decreased, a client might be required to provide additional funds or collateral to Tricom.

In turn, Tricom often used the collateral provided to Tricom by clients of its margin lending facility as collateral to obtain cash funding from various financiers, a practice known as equity financing.

On 22 January 2008, the benchmark S&P/ASX 200 index dropped by 7.3%. This fall had been preceded by 12 consecutive trading days on which the index had fallen. Falls of this kind are likely to result in a decrease in the value of collateral lodged by clients of a large lending facility and thereby increase the likelihood that a margin call would be made on a client of the margin lending facility.

As the market worsened in the lead up to this event, Tricom realised that it was going to experience significant margin calls and started talking to its financiers and clients about this. Tricom sold down over $400,000,000 in securities on 24 and 25 January 2008 to meet margin calls where clients were unable to provide cash or further collateral.

On Thursday 24 January 2008, Friday 25 January 2008 (the trading days immediately prior to 29 January 2008) and on the morning on Tuesday 29 January 2008, Tricom sent emails to its financiers requesting that the ownership of securities to be settled on 29 and 30 January 2008 be transferred to Tricom via CHESS as off-market transactions.

Tricom's financiers did not return to Tricom all of the securities recalled by 29 and 30 January 2008. Tricom's Australian Master Securities Lending Agreements (AMSLA) with each of its financiers allowed for up to three days redelivery time for lent stock and Tricom had made its recall requests one and two days prior to settlement. As a result, Tricom's financiers were under no obligation to provide Tricom with the on lent stock by 29 or 30 January 2008.

At 10.56am on 29 January 2008, ASTC notified Tricom in accordance with the batch settlement procedure of its obligation to settle payments to the value of $121,660,618.71 by the required time of 12.30pm. On 29 January 2008, Tricom had expected to be a net payer to ASTC in the sum of $26.4 million.

Tricom's enquiries indicated that on 29 January 2008, some of its financiers unexpectedly failed to deliver to Tricom on some prematched lines and this caused significant values of internal stock transfers to its market settlement HIN to fail, resulting in the payment obligation.

At 3.37pm a participant funds obligation rejection confirmation was received from Tricom's bank. After receiving the rejection confirmation, and in order to effect settlement that day, ACH removed Tricom's off market transactions from the batch settlement and thereby changed Tricom's status from a net payer of funds to a net receiver of funds for the day. The ASTC batch settlement process was completed at 4.42pm.

At 10.30am on 30 January 2008, ASTC notified Tricom of its obligation to settlement payments to the value of $75,095,025.03 by the required time of 12.30pm. On 30 January 2008, Tricom had expected to be a net receiver of funds from ASTC to the sum of $20.4 million.

Payment was not received from Tricom by the required time. After initially refusing to authorise net payment, Tricom's payment provider subsequently approved and transferred payment to ASTC at approximately 2.30pm. The ASTC batch settlement process was completed by 2.47pm.

Findings

The Tribunal found the contraventions proved. The Tribunal regarded the contravening conduct as among the most serious there could be. It held that it constitutes conduct which undermines trust and confidence in the market and the associated clearing and settlement facilities and should therefore be met with a penalty that is very substantial. The inability of Tricom to meet its payment obligations resulted in the batch being delayed on two occasions. These were very significant delays and Tricom was aware in advance that it needed to get its house in order.

The requirement to ensure settlement of payment obligations is a fundamental measure for ensuring the efficiency and integrity of the system for the settlement of transactions.

In the Tribunal's view the most important function of the ASX and the Operating Rules is to maintain the reputation and integrity of the market, and these breaches have caused damage to that integrity and the level of sanction must take that into account. The events have potentially corroded market confidence and require the imposition of the maximum financial penalty.

The consideration of deterrence (both of Tricom itself and other participants) played an important role in the Tribunal's consideration of this contravention. Although deterrence was considered in respect of each contravention, the seriousness of this contravention required a strong message to be sent to other participants that contraventions of this rule will be met with harsh penalties.

The imposition of penalties is also meant to impose a real punishment on the contravening party. A punishment, by definition, must involve some pain or loss. The Tribunal was of the view that a financial penalty is sufficient in the circumstances, and the matter did not warrant the exercise of any of the Tribunal's additional powers, such as suspension.

Fine: $250,000 (maximum fine available)

Contravention 3: 30 January 2008 - Participants to provide additional Cover (ACH Clearing Rule 14.6.1)

Facts

At approximately 9.45am on 30 January 2008, ACH telephoned Tricom and gave notice that additional cover of $8 million would be required from Tricom that morning due to a change in Tricom's settlement position (namely, the position which has been referred to under Contravention 2). Tricom was told that a formal request would be sent shortly.

At 10.11am ACH sent an email to Tricom advising Tricom that Tricom was required to pay ACH $8 million in cash by 12.00pm AEST.

At approximately 10.45am a teleconference was held between ACH, Tricom and Tricom's bank to discuss the reasons for the change in Tricom's settlement position. ACH recorded that Tricom's bank would come back to ASX in relation to ensuring settlement by 12.00pm.

At approximately 1.05pm, ACH telephoned Tricom. Tricom advised that it had arranged for the $8 million additional cover payment to be processed as soon as possible now that Tricom's bank had agreed to settle. Tricom asked for a 2.30pm deadline but ACH replied that it required it as soon as possible.

At approximately 2.25pm, ACH telephoned Tricom to say that it had not yet received payment of the $8 million and asked for an email of the Swift confirmation to be sent to ACH as soon as possible. At 2.46pm, Tricom sent an email to ACH confirming that the $8 million surplus margin for the ACH would be paid that day.

At 2.53pm, ACH sent an email to Tricom seeking clarification of when the payment was going to be made and at 2.54pm, Tricom replied by email saying that it was chasing its Bank for a receipt.

At 3.10pm ACH sent an email to Tricom asking for another update and expressing concern in respect of the cutoff time for payment. At 3.24pm Tricom sent an email to ACH confirming that payment would be made by the 4.20 cutoff.

At 4.15pm, Tricom's bank provided a copy of the Swift confirmation for payment of $8 million from Tricom to ACH.

Findings

The Tribunal found the contravention proved. The Tribunal considered that the failure to settle in the manner described in the facts above constituted a serious contravention. A Participant's failure to pay additional cover at the time that it becomes due and payable has the potential to adversely affect the position of ACH as central counterparty, and therefore also has the potential to undermine overall confidence in the market.

Fine: $50,000

Contravention 4: 31 January 2008 - Settlement T+3 (ASX Market Rule 5.7.3)

Facts

On 25 January 2008, at 12.19pm Tricom sold 21,000 Mineral Securities Limited (MXX) at $1.395. The sale was conducted for one of its clients. The trade was due to settle on the third business day following the day of the transaction which was 31 January 2008 (T+3). The sale was covered by an AMSLA between Tricom and its bank dated 21 June 2006. At approximately 10.26am on 25 January 2008, Tricom contacted its bank seeking to borrow 21,000 MXX and the bank confirmed that the MXX was available. Accordingly, Tricom borrowed 21,000 MXX from its bank in advance of its sale to cover the sale.

On 31 January 2008, Tricom's bank advised Tricom that the loan of 21,000 MXX was declined on the basis that the stock was not available for delivery. As a result, Tricom was unable to settle the sale of 21,000 MXX on T+3.

On 12 February 2008 (T+11), Tricom delivered the stock for settlement. The stock used for settlement was obtained from exercising MXX options.

Findings

The Tribunal found the contravention proved. It held that this was a serious contravention that threatened the integrity and efficiency of the market.

Fine: $25,000

Contravention 5: 21 February 2008 - Settlement T+3 (ASX Market Rule 5.7.3)

Facts

On 18 February 2008, Tricom received orders from various clients to sell 170,000 Mindax Limited company options (expiring 30 June 2008) (MDXOA) and executed the orders.

These market transactions were due to settle on the third business day following the date of the transactions which was 21 February 2008 (T+3).

Tricom settled 10,000 MDXOA on 21 February 2008 (T+3) and 60,000 MDXOA on 22 February 2008 (T+4). No issues arise in respect of these settlements.

Tricom failed to settle market transactions totalling 100,000 MDXOA on T+3. The clients mistakenly believed that in accordance with the Mindax Limited rights issue in November and December 2007 they each held 40,000 MDXOA. Under the rights issue, existing holders were entitled to two new shares for every five existing shares held with one free attaching new option (MDXOA). Based on the rights issue these clients appear to have been entitled to 40,000 new shares and 20,000 MDXOA each.

On 10 December 2007, 120,000 new shares and 60,000 MDXOA were delivered to Tricom's HIN. There is no explanation for why amounts that appear to be less than the total entitlements of Tricom's clients were delivered to Tricom. Each of the clients appears to have mistakenly believed that the 40,000 new options was their allocation of MDXOA and sold a corresponding amount of MDXOA. As a result Tricom was unable to settle the sale of 100,000 MDXOA on T+3. The outstanding 100,000 MDXOA were finally settled on 12 March 2008 (T+17).

Findings

The Tribunal found the contravention proved. The considerations relating to this contravention are similar if not identical to those relating to contravention 4 and the differences in factual circumstances did not warrant any different treatment in respect of penalty.

Fine: $25,000

Contraventions 6 & 7: January 2006 to September 2008 - Financial Records and Capital Liquidity Returns (ACH Clearing Rule 4.4.2 and 5.1.1)

Facts

It is convenient to deal with these matters together.

Tricom's practice of obtaining equity finance by lodging securities with financiers in exchange for cash funding noted above created a counterparty risk. The ACH Clearing Rules require that this risk be accounted for in the capital liquidity returns (CLR) lodged by Tricom with ACH.

On 17 June 2008, as a result of concerns raised by an independent auditor of Tricom that Tricom had failed to correctly calculate its counterparty risk requirement, ASX Investigations requested information and records in respect of Tricom's counterparty exposure and its ratio of liquid capital to total risk requirement for January 2006 to March 2008.

On 15 September 2008, Tricom lodged amended CLRs and informed ASX that it was not in possession of records and information in relation to the value of collateral lodged with a number of financiers. It stated that the few gaps in the information it relied upon in preparing the recalculated returns were due to the lack of availability of third-party information. As a consequence, Tricom was not able to include information in the amended CLRs and was not able to advise ASX Investigations of its total counterparty exposure. Tricom advised that it had requested this information from the financiers.

When the 27 CLRs for the months January 2006 to March 2008 were first lodged they all reported a capital ratio in excess of 1.0. However, every one of them was incomplete to the extent that they did not disclose significant counterparty risk exposure. When the amended CLRs were lodged at the request of ASX Investigations on 15 September 2008, they revealed considerable inadequacy of the capital ratios and, still being incomplete, left uncertain whether the ratios were in fact lower than even now revealed.

As part of its response to the ASX Investigations request, Tricom stated that it believed that its returns were calculated properly and in good faith and did not admit that the current basis for compiling the returns as directed by ASX was correct. It said that it believed it would be constructive to have a clear, agreed basis for preparing the returns and that it would take up with ASX the possibility of agreeing a pathway for resolving technical issues.

Findings

The Tribunal found the contraventions proved. The risk-based capital requirements are of fundamental importance to the supervision of ACH participants. The failure to comply with them has the potential to adversely affect the financial stability of participants and the integrity of the market. These factors indicate that these contraventions are matters of serious concern.

The requirement of maintaining the capital ratio above 1.0 is a critical element. The Tribunal noted that it is the maintenance of the financial records and the submission of accurate returns that allows both the participants and ASX to determine at an early stage whether or not the capital ratios have been maintained and whether any action needs to be taken.

The Tribunal gave consideration in this matter, as in each of the other contraventions, to the conduct of Tricom in cooperating with ASX in these proceedings. In addition, it took into account the matters raised by Tricom in response to ASX's request to amend the CLRs, including Tricom's view that the method of calculation of the ratios had been a grey area for Tricom.

Fine: $200,000

Contravention 8: January 2006 to September 2008 – Appropriate Management Structures (ACH Clearing Rule 4.8.1)

Facts

This matter arises out of the accumulation of a number of the previous contraventions by Tricom dealt with by the Tribunal. The detailed facts in respect of these earlier contraventions have been set out above, obviating the necessity to set them out in full in respect of this contravention.

On two occasions (18 and 30 January 2008) Tricom failed to comply with the requirement to provide additional cover within the specified times: see the details in respect of matters 1 and 3 above. These were in contravention of ACH Clearing Rule 14.6.1.

From January 2006 to April 2007 and in March 2008, Tricom failed to maintain sufficiently detailed financial records which complied with the provisions of the Corporations Act which govern the maintenance of financial records, specifically ss.988A(1)(a) and 988E(b), (d) and (e): see the matters set out in respect of matters 6 and 7 above. This constituted contraventions of ACH Clearing Rule 4.4.2.

On 27 occasions between January 2006 and March 2008, Tricom submitted CLRs that did not accurately reflect its accounts and financial position as required by Schedule 1.2.10(1) of the ACH Clearing Rules: see again under matters 6 and 7 above. This was a contravention of ACH Clearing Rule 5.1.1.

Tricom submitted a further 17 amended CLRs on 15 September 2008 that did not accurately reflect its accounts and financial position as required by Schedule 1.2.10(1) of the ACH Clearing Rules: see again under matters 6 and 7 above. This again, was a contravention of ACH Clearing Rule 5.1.1.

On 21 occasions between June 2006 and February 2008, Tricom failed to ensure that its liquid capital was at all times greater than its total risk requirement as required by Schedule 1.2.1(1)(a) of the ACH Clearing Rules: see in respect of matters 6 and 7 above. This again was in contravention of ACH Clearing 5.1.1.

Findings

The Tribunal found the contravention proved. The facts as outlined above and set out in more detail in respect of the earlier contraventions indicate a very serious failure by Tricom over an extended period of time to have in place proper management structures and a failure to acknowledge or understand the risks of not doing so.

The Tribunal took into account the penalties that have already been imposed in respect of the earlier contraventions as well as the following mitigating circumstances: first, since February 2008 Tricom has maintained regular contact and met frequently with ASX compliance staff and others including ACH staff in respect of restructuring its operations, changing its personnel and the manner in which it deals with matters; second, the implementation by Tricom of the changes recommended by an independent auditor (PwC) as required by ASX and the considerable costs involved therein; third, the additional conditions that have been imposed by ASX, ACH and ASTC for Tricom's continued participation; fourth, its agreement to a further engagement until December 2011 of an independent reviewer to continue to review, enhance and embed its compliance and risk internal controls thereby incurring considerable additional costs, and perhaps most importantly, ensuring that the contraventions which have brought these proceedings are not likely to recur.

Fine: $250,000 (maximum available penalty)

Contravention 9: Between 30 December 2005 and 25 January 2008 - Manipulative Trading (ASX Market Rule 4.10.1 and 13.4.1)

Facts

This contravention involves an allegation of market manipulation in the form of window dressing and a related failure to keep accurate records of orders.

ASX conducted extensive investigations into the trading relevant to this contravention and a large amount of material was presented to the Tribunal to support the allegations of market manipulation. The Tribunal concluded that Tricom by its former employee, engaged in blatant and unmistakable market manipulation. Further, on the material before the Tribunal, it is clear that both Tricom and its former employee consistently sought to excuse the former employee's conduct by presenting possible rationales for it. But, even if accepted, these did not undermine the severity of the breaches of the Market Rules. These efforts by both Tricom and its former employee to avoid the consequences of the employee's actions do not stand in Tricom's favour in relation to the appropriate sanction to be imposed in respect of this contravention.

The trading in this matter involved Community Life Limited securities. Community Life Limited (CLF) is a developer of homes and units for individuals over the age of 50. CLF was first listed on the ASX on 19 November 2004 at $1 per security. At close of market on 30 June 2008, it traded at $0.14 per security.

The trading by Tricom was on behalf of two clients. The first client was a managed investment scheme ('the Scheme'). Tricom Investment Management Limited ('TIML'), a funds management company within the Tricom Group, acted as the Responsible Entity for the Scheme. Tricom was the Scheme's custodian and delegated investment manager. An authorised representative of both Tricom and TIML was the investment manager of the Scheme. The second client was connected to the former employee.

During the relevant period (30 December 2005 and 25 January 2008) Tricom acquired a substantial holding in CLF on behalf of the Scheme. The Scheme began to acquire CLF on 9 August 2005 and by 31 December 2005 had increased its holding to 1,529,553 CLF. A year later the holding increased to 4,600,000 CLF and by 25 January 2008 it held a total of 5,590,000 CLF. It had a strategy to accumulate a significant holding in CLF. Tricom has said that all bids were placed in order to carry out that strategy.

The pattern of trading by Tricom in CLF during the relevant period is critical to this contravention. During the period there were 9 partial or complete quarters. The price of CLF increased due to the final trade of the quarter for each of these quarters all of which were placed by Tricom for accounts managed, owned or advised by the former employee. Six of the 9 trades were placed in the last 20 minutes of the final trading of the quarter with a seventh being placed in the final hour of the final trading day of the quarter. The remaining 2 trades were placed in the lead up to the Christmas/New Year period.

There were 25 partial or complete months during the relevant period. During this time the price of CLF increased due to the final trade of the month on 17 of the 25 months. Tricom placed all 17 trades that caused increases. Of these, 14 were placed on the final day of the month, 13 were placed in the final hour of the month and 10 were placed in the final 20 minutes of the month.

Tricom was responsible for making the final trade of the month for 23 out of 25 months and all of the 23 were placed for accounts managed, owned or advised by the former employee.

When placing a trade which caused an increased closing price for CLF for the month, Tricom paid a higher than daily VWAP on 12 of the 17 occasions and on the remaining 5 occasions it was the only broker who traded that day. When placing a trade which caused an increase during the closing price of CLF for the month, Tricom paid higher than the weekly VWAP on 16 of the 17 occasions and on the last of these occasions it placed the only bid for the week.

While Tricom generally traded at close to the monthly VWAP for CLF during a month, it paid a substantial premium for CLF at month end or in its final trade. This shows that, even if it may have been attempting to accumulate a substantial holding in CLF as it claimed, it was also lifting the value of CLF at month-end in order to show an inflated performance by the Scheme.

The employee-related accounts paid a lower average price for CLF over the course of its 396 orders for CLF but paid above the monthly VWAP on 16 of the 17 occasions and it set an increased closing price for CLF at month-end. This pattern of trading clearly shows that Tricom deliberately acquired CLF at low prices during each month and then established an increased price at month-end in order to inflate the value of its holding.

Findings

The Tribunal found the contravention proved and imposed the maximum penalty available in respect of it.

The Tribunal considered that, quite apart from the former employee's behaviour in the matter, the conduct of Tricom's old management in general has not been what should be expected of any market participant. First, even though Tricom received internal alerts in relation to 20 separate orders placed by the employee for CLF it failed to undertake any further investigation of the trading of concern. This was notwithstanding the fact that those alerts contained clear indications of window dressing. Tricom sought to explain this by saying that CLF was illiquid and therefore there was a difficulty in accumulating the stock. The Tribunal did not accept that explanation.

Next, when investigations were undertaken by ASX into the trading by the employee it made several written enquiries of Tricom. Tricom's response was, in the Tribunal's view, arrogant and unhelpful. The way in which it dealt with ASX throughout the investigation exacerbated the seriousness of the contraventions that had already taken place. This conduct, as well as the extreme seriousness of those contraventions, outweighs the fact that Tricom did not contest this matter. Although a lot of time and resources have been saved, it must be recalled that a discount has been given in respect of other contraventions where similarly arrogant conduct has not been in evidence.

In this case, the substantial duration of the conduct together with the conflicting positions and roles held by the former employee throughout the relevant period distinguishes this case from earlier proceedings.

The Tribunal did not accept that there was a cooperative approach to the extent required by the Rules except that the matter was not contested.

The Tribunal acknowledged that there is new management and that there has been cooperation in respect of the resolution of the proceedings. However, taking into account the matters set out above, including the seriousness of the contraventions, their duration, the attitude taken by both the employee and Tricom to the investigation, as well as having regard to comparable matters, the Tribunal was of the view that the maximum penalty of $250,000 should be imposed.

Fine: $250,000 (maximum available penalty)

Contravention 10: Between 19 December 2007 and 31 October 2008 (ASX Market Rule 13.4.1)

Facts

This matter involves market manipulation in the form of price support but, in contrast to matter 9, does not involve the intention of the market participant. Instead, it involves an allegation that Tricom ought reasonably have suspected that its customer placed an order with the intention of creating a false or misleading appearance with respect to the market or the price of a product.

Tricom was appointed manager of an investment fund ('the Fund') as agent to invest and manage the assets of the Fund. Tricom delegated all its powers and authorities as manager of the Fund to its corporate authorised representative. All orders were placed by the Director of the corporate authorised representative on behalf of the Fund.

The matter concerns four securities:

(a) DKN Financial Group Limited (DKN);

(b) ARP Data Limited (RPX);

(c) ThinkSmart Limited (TSM); and

(d) CSV Limited (CSV).

DKN Financial Group Limited ("DKN")

In relation to dealing in DKN between 24 January 2008 and 16 October 2008 ("The DKN Relevant Period"), despite purchasing only 1.15% of the total volume of DKN purchased during the DKN Relevant Period, Tricom was responsible for:

- 22% of transactions in DKN;
- 53% of the total price increases in DKN;
- 59% of the total price increases in DKN within the last 20 minutes of trading;
- 61% of the total price increases in DKN within the last 60 minutes of trading;
- a price increase on 92% of the days on which it traded in DKN;
- the highest price increase of the day on 97% of the days on which Tricom caused a price increase;
- setting the closing price for DKN on 79% of the days it traded in DKN;
- setting the closing price for DKN after causing a price increase on 68% of the days it traded in DKN;
- setting the closing price for DKN after causing a price increase with the last trade of the month for 66% of the nine month-ends; and
- increasing the price of DKN due to the final trade of the month by Tricom in six of the nine complete months during the period.

These orders gave rise to 32 separate incidents of trading.
RP Data Limited ("RPX")

In relation to dealing in RPX between 19 December 2007 and 10 October 2008 ("The RPX Relevant Period"), despite purchasing only 0.51% of the total volume of RPX purchased during the RPX Relevant Period, Tricom was responsible for:

- 7% of transactions in RPX;
- 30% of the total price increases in RPX;
- 55% of the total price increase in RPX within the last 20 minutes of trading;
- a price increase on 98% of the days on which it traded in RPX;
- the highest price increase of the day on 100% of the days on which Tricom caused a price increase in RPX;
- setting the closing price for RPX on 76% of the days it traded in RPX;
- setting the closing price for RPX after causing a price increase on 73% of the days it traded in RPX; and
- setting the closing price for RPX after causing a price increase with the last trade of the month for 50% of the 10 month-ends during the period.

These orders gave rise to 28 separate incidents of trading.

ThinkSmart Limited ("TSM")

In relation to dealing in TSM between 19 December 2007 and 8 October 2008 ("The TSM Relevant Period"), despite purchasing only 0.59% of the total volume of TSM purchased during the TSM Relevant Period, Tricom was responsible for:

- 11% of transactions in TSM;
- 48% of the total price increases in TSM;
- 60% of the total price increase in TSM within the last 20 minutes of trading;
- causing a price increase on 97% of the days on which it traded in TSM;
- the highest price increase of the day on 97% of the days on which Tricom caused a price increase;
- setting the closing price for TSM on 76% of the days it traded in TSM;
- setting the closing price for TSM after causing a price increase on 73% of the days it traded in TSM; and
- setting the closing price for TSM after causing a price increase with the last trade of the month for 40% of the 10 month-ends during the period.

These orders gave rise to 21 separate incidents of trading.

CSV Limited ("CSV")

In relation to dealing in CSV between 18 January 2008 and 28 October 2008 ("The CSV Relevant Period"), despite purchasing only 1.58% of the total volume of CSV purchased during the CSV Relevant Period Tricom was responsible for:

- 5% of transactions in CSV;
- 19% of the total price increases in CSV;
- 37% of the total price increases in CSV within the last 20 minutes of trading;
- causing a price increase on 98% of the days on which it traded in CSV;
- the highest price increase of the day on 92% of the days on which Tricom caused a price increase;
- setting the closing price for CSV on 65% of the days it traded in CSV during the period;
- setting the closing price for CSV after causing a price increase on 59% of the days it traded in CSV;
- setting the closing price for CSV after causing a price increase with the last trade of the month for 40% of the 10 month ends; and
- setting the closing price for CSV after causing a price increase with the last trade of the quarter for 100% of the three quarter-ends during the period.

These orders gave rise to 26 separate incidents of trading.

By letter dated 18 June 2008, ASX wrote to Tricom indicating that it was conducting preliminary enquiries into possible price support in DKN between 3 March 2008 and 11 June 2008. The letter noted that the trades involved were less than 1% of the total volume traded and yet amounted to 54% of all price increases in the period and 60% of price increases in the last 20 minutes of trading. ASX requested a copy of Tricom's scrip ledger for DKN for the relevant period and asked whether it had any comments to make in relation to the trading.

By letter dated 26 June 2008, ASX wrote to Tricom noting a preliminary enquiry into price support in RPX between 2 January and 24 January 2008 and noting concerns similar to those held in respect of DKN. It also asked for the relevant scrip ledger and for any comments that Tricom wished to make. Tricom provided the information requested but did not make any comments. It is clear that in spite of the notification by ASX, the orders continued to be placed by Tricom in circumstances similar to those which had pertained before ASX wrote to Tricom.

Findings

The Tribunal found the contravention proved. The Tribunal held that the trades in the four securities (DKN, RPX, TSM and CSV) revealed that the trades had many characteristics of price support that meant that Tricom ought reasonably to have suspected that the orders were placed with the intention of creating a false or misleading appearance with respect to the price of each of the securities. These characteristics included small volume/value; late trading; and price impact (including price increases; setting the close; suspicious trading methods including entering after a fall in price or intra-day intervention; placing a bid that was higher in volume than the amount of security available at the price level and leaving support on the buying side; purchasing all available securities at a price level and a small amount at the next ask level; and breaking up an order into several bids throughout the course of a day despite there being sufficient volume to fill an order in its entirety at the time the order was placed).

The Tribunal took into account the substantial period of time over which the contraventions occurred, the continuation of trading in spite of notice from ASX, the interlinking of relationships between Tricom, the Fund, the corporate authorized

representative and the director of the corporate authorised representative, and the significance of the adverse effect of such conduct on public confidence in the market.

There were several reasons why the Tribunal in this case decided not to impose a penalty in excess of the previous maximum penalty. First, the considerable weight in the early assistance and cooperation given by Tricom's new management and the time and expense saved by the fact that the proceedings were not contested. Second, the Tribunal accepts that where conduct of a similar nature straddles two periods in which different penalty provisions apply there may be some confusion as to which is the appropriate regime. Although the Tribunal is of the view that both regimes are appropriate and that the higher sanction can be taken into account, in this case Tricom's cooperative approach has outweighed the significance of the increase in the sanction and for that reason a penalty of $250,000 was imposed.

Fine: $250,000