

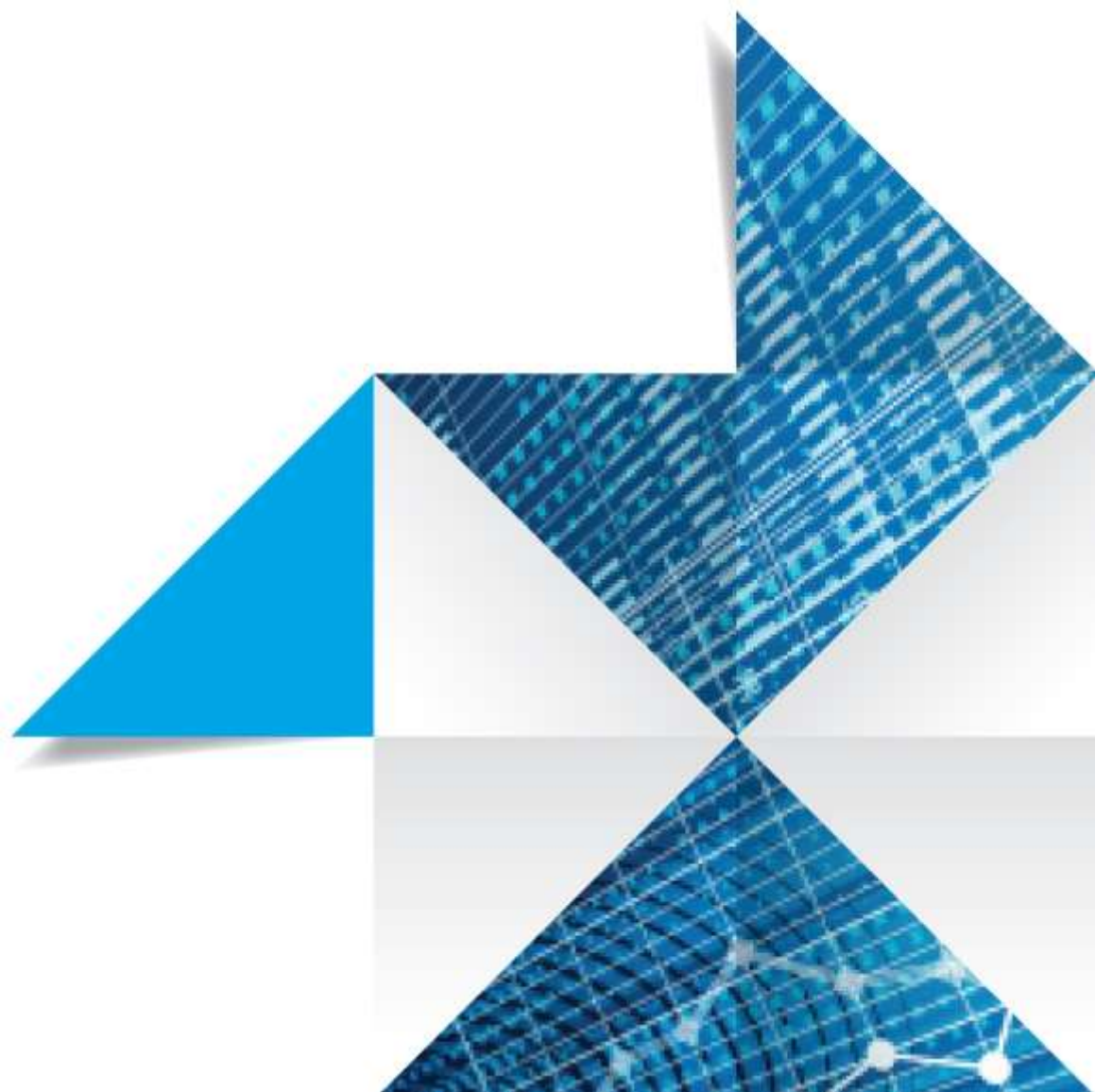


NZX Regulation Decision

Air New Zealand Limited (NS) (AIR)

Application for waivers and approvals relating to NZX Listing Rules 2.3.2(c), 2.3.2(d), 2.20.1(d), 2.20.1(e), 6.2.1, 6.2.3, 8.1.1, 8.1.3, 8.1.5, 8.1.6(b), and the definition of Equity Security

23 July 2019



Background

1. The information on which these decisions are based is set out in Appendix One to this decision. These decisions will not apply if that information is not, or ceases to be, full and accurate in all material respects.
2. The 1 January 2019 NZX Listing Rules (**Rules**) to which these decisions relate are set out in Appendix Two.
3. Capitalised terms that are not defined in these decisions have the meanings given to them in the Rules.

Ruling in relation to definition of Equity Security

Decision

4. On the basis that the information provided by Air New Zealand Limited (NS) (**AIR**) is complete and accurate in all material respects, NZX Regulation (**NZXR**) grants AIR a waiver from the definition of Equity Security so that for AIR the definition of Equity Security in AIR's Governing Document shall be:

"Equity Security" has the meaning given in sections 8(2) and 8(5) of the FMC Act and also includes a Right, and includes an Ordinary Share, subject to NZX's sole discretion to declare, by way of a Ruling, a Financial Product to be, or not to be, an Equity Security but does not include the Kiwi Share (except that, unless the written consent of the Kiwi Shareholder has been obtained, any Ruling referred to in this definition shall not have effect, for the purposes of the use of this definition in any section or clause referred to in clause 3.5(b), or in any definition referred to in clause 3.5(b) insofar as the term so defined is used in the sections, clauses, and definitions referred to in clause 3.5(b))

Reasons

5. In coming to the decision to provide the waiver set out in paragraph 4 above, NZXR has considered that:
 - a. AIR submits that the provisions in the constitution are necessary to ensure the effectiveness of the Kiwi Share Provisions which are designed to protect AIR's operating rights. NZXR has no reason not to accept these submissions; and
 - b. As the waiver allows for the operation of the Kiwi Share Provisions, any future NZXR decisions will apply except to the extent that the definition relates to the operation of the Kiwi Share Provisions.

Waiver from Rule 2.20.1(d)

Decision

6. Subject to the conditions set out in paragraph 7 below, and on the basis that the information provided by AIR is complete and accurate in all material respects, NZXR grants AIR a

waiver from Rule 2.20.1(d) to allow clause 2.4 of the AIR Governing Document to provide that, unless the consent in writing of the Kiwi Shareholder has first been obtained, an act or omission authorised by a Ruling will not be deemed to be authorised if it would be in contravention of the Kiwi Share Provisions of the Governing Document

7. The waiver in paragraph 6 above is provided on the conditions that:
 - a. In respect of any Ruling that AIR applies for, AIR must raise with NZX any potential for the Ruling to conflict with the Kiwi Share Provisions prior to the Ruling being made; and
 - b. In the context of any other Ruling made or to be made by NZX that might conflict with the Kiwi Share Provisions, AIR must promptly and without delay bring the conflict to the attention of NZX immediately after it becomes aware of the Ruling or intention to make the Ruling.

Reasons

8. In coming to the decision to provide the waiver set out in paragraph 6 above, NZXR has considered that:
 - a. AIR submits that the provisions in the Governing Document are necessary to ensure the effectiveness of the Kiwi Share Provisions which are designed to protect AIR's international operating rights. NZXR has no reason not to accept this submission; and
 - b. There is a mechanism in place by way of conditions to ensure that NZXR is made aware of any potential for a Ruling to conflict with the Kiwi Share Provisions.

Waiver from Rule 2.20.1(e)

Decision

9. Subject to the conditions set out in paragraph 10 below, and on the basis that the information provided by AIR is complete and accurate in all material respects, NZXR Regulation (**NZXR**) grants AIR a waiver from Rule 2.20.1(e) to the limited extent that if the Rules conflict with the Kiwi Share Provisions, the Kiwi Share Provisions prevail subject to the condition below in respect of the Governing Document.
10. The waiver in paragraph 9 above is provided on the conditions that:
 - a. Where changes are made to the Rules which conflict with the Kiwi Share Provisions, this waiver will be in effect in respect of each Rule change only until a revised AIR Governing Document is put forward to a meeting of shareholders to be amended to incorporate the changes made to the Listing Rules, and approved by those shareholders; and
 - b. Upon becoming aware of changes to the Rules, AIR immediately notifies NZX what rules, if any, conflict with the Kiwi Share Provisions; and
 - c. This waiver will apply to the extent only that Rule changes conflict with the Kiwi Share Provisions.

Reasons

11. In coming to the decision to provide the waiver set out in paragraph 9 above, NZXR has considered that:
 - a. No provisions of the AIR Governing Document conflict with the Rules, except to the extent outlined in this decision. NZXR will receive a legal opinion in accordance with Rule 2.19.1 confirming this;
 - b. A mechanism is in place by way of condition to ensure that any conflict between the Kiwi Share Provisions and any changes to the Rules are brought to the attention of NZX. Where changes are made to the Rules the waiver only applies until the first viable opportunity to put those changes to shareholders. If AIR does not wish to amend its constitution to comply with the Rule changes it will need to apply for any waivers before the meeting of shareholders is held; and
 - c. AIR submits that the provisions in the constitution are necessary to ensure the effectiveness of the Kiwi Share Provisions which are designed to protect AIR's international operating rights. NZXR has no reason not to accept these submissions.

Approval for restriction of transfer of securities – Rule 8.1.6(b) and waiver from Rule 8.1.5

Decision – Approval in accordance with Rule 8.1.6(b)

12. On the basis that the information provided by AIR is complete and accurate in all material respects, NZXR approves under Rule 8.1.6(b) the restrictions on transfer and ownership of AIR securities set out in the Kiwi Share Provisions of the AIR Governing Document. The transfer and ownership restrictions are imposed to enable AIR to ensure that its operating rights are not affected and that AIR remains substantially owned and effectively controlled by New Zealand nationals.

Decision – waiver from Rule 8.1.5

13. On the basis that the information provided by AIR is complete and accurate in all material respects, NZXR grants AIR a waiver from Rule 8.1.5 to enable AIR to include clause 10 in its Governing Document enabling it to cancel or vary the benefits or rights attaching to a security in certain circumstances relating solely to the Kiwi Share Provisions.
14. The waiver in paragraph 13 above is provided on the condition that AIR maintain its Non Standard (NS) designation.

Reasons

15. In coming to the decision to provide the approval in accordance with Rule 8.1.6(b), and waiver from Rule 8.1.5, NZXR has considered that:
 - a. NZXR is satisfied that there are airline landing rights which form a significant part of AIR's business and that it is likely that these would be materially and adversely affected by the holding of Equity Securities by overseas persons in breach of the Kiwi Share Provisions;

- b. NZXR accepts that it is desirable that AIR's Governing Document contains the restrictions to enable AIR to continue to have landing right benefits under the various bilateral international agreements relevant to it; and
- c. The restrictions in the Kiwi Share Provisions were made clear in the 1989 offering memorandum prepared in connection with AIR's initial listing on the New Zealand Stock Exchange and AIR has provided a summary of the restrictions in its annual reports. In addition, AIR continues to have a Non Standard (NS) designation. Accordingly, security holders are aware of the restrictions and are able to consider the restrictions in their decisions to invest in AIR.

Ruling on Rule 6.2.1

Decision

- 16. On the basis that the information provided by AIR is complete and accurate in all material respects, NZXR rules that the Kiwi Shareholder's veto provisions in the Kiwi Share Provisions of the AIR Governing Document do not fall within the definition of "Vote" in the Listing Rules.

Reasons

- 17. In coming to the decision to provide the ruling set out in paragraph 16 above, NZXR has considered that the veto rights in the Kiwi Share Provisions potentially represent a right to vote "in circumstances of a special or remote nature" in terms of the second limb of the definition of Vote. This ruling confirms that the veto provisions will not fall within the definition of "Vote" in the Rules.

Waiver from Rules 2.3.2(c) and 2.3.2(d)

Decision

- 18. On the basis that the information provided by AIR is complete and accurate in all material respects, NZXR grants AIR a waiver from Rules 2.3.2(c) and 2.3.2(d) to apply only in the situation where a Director nomination could not be accepted because the election of the nominee would result in the composition of the AIR Board breaching clause 23.2 or 25.8 of AIR's Governing Document, being that the majority of the Board are to be New Zealand citizens and the Chair is to be a New Zealand citizen, approved by the Crown.

Reasons

- 19. In coming to the decision to provide the waiver set out in paragraph 18 above, NZXR has considered that in light of the intention to ensure that AIR's operating rights are not affected, and that AIR remains effectively controlled by New Zealand nationals, it is appropriate to grant the waivers.

Confidentiality

- 20. AIR has requested that this decision remain confidential until AIR publishes its notice of annual shareholders meeting.
- 21. In accordance with Rules 9.6.2(a) and 9.7.2(a), NZXR grants this request.

Appendix One

1. Air New Zealand Limited (**AIR**) is a Listed Issuer with a “Non Standard” designation on the NZX Main Board.
2. AIR is subject to certain ownership and control provisions (the **Kiwi Share Provisions**) that entrench the requirement for AIR to remain substantially owned and effectively controlled by New Zealand nationals. AIR advises that these provisions are fundamental to AIR’s ability to ensure that its international operating rights are not adversely affected. The Kiwi Share Provisions have been included in AIR’s constitution since it was first listed in 1989 and are designed to ensure that AIR’s operating rights are not adversely affected.
3. AIR advises the Kiwi Shareholder Provisions are a fundamental requirement of the Crown (as the **Kiwi Shareholder**). The Kiwi Shareholder requires the Kiwi Shareholder Provisions to be included in AIR’s Governing Document and requires that they cannot be changed without the Kiwi Shareholder’s consent.
4. The ownership restrictions in the Kiwi Share Provisions can be summarised as:
 - a. A provision that no non-New Zealand national may hold or have an interest in AIR Equity Securities which confer 10% or more of the total voting rights in AIR without the consent of the Kiwi Shareholder; and
 - b. A restriction on airlines holding or having an interest in any Equity Security without the Kiwi Shareholder’s consent.
5. AIR’s rights to operate international air services arise under bilateral agreements negotiated between the New Zealand government and foreign governments. New Zealand is a party to numerous bilateral agreements with foreign countries relating to international air services to, from and/or beyond New Zealand and the relevant foreign country.
6. AIR advises that to operate an international airline service under a bilateral agreement an airline must be designated by its government to operate the services in question. Air New Zealand is currently New Zealand’s designated international airline under numerous bilateral agreements.
7. A designated carrier such as AIR must also be acceptable to the foreign government concerned. Air NZ advises that under most bilateral agreements it is a requirement that a designated international airline must be substantially owned and/or effectively controlled by either the government or nationals of the relevant country.
8. AIR is proposing to change its Governing Document now that it has transitioned to the 1 January 2019 NZX Listing Rules. This decision re-documents a previous 12 October 2004 NZXR decision in relation to AIR and the Kiwi Share Provisions.
9. AIR intends to adopt the new Governing Document at its next annual shareholders meeting.

Ruling in relation to definition of Equity Security – Further Background

10. AIR has applied for a waiver in respect of the definition of Equity Security in the Rules. This waiver will also permit AIR to include the revised definition of Equity Security in its Governing Document. The purpose of this waiver is to ensure that any future NZX decisions
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do not change the definition for the purposes of the Kiwi Share Provisions unless the Kiwi Shareholder's consent has been obtained.

Waiver from Rule 2.20.1(d) – Further Background

11. AIR has applied for a waiver from Rule 2.20.1(d) to provide that any ruling by NZX cannot authorise an act or omission which would contravene the Kiwi Share Provisions of the AIR Governing Document.
12. Clause 2.4 of AIR's Governing Document complies with Rule 2.20.1(d) except that clause 2.4 also provides that an act or omission authorised by a ruling will not be deemed to be authorised if it would be in contravention of the Kiwi Share Provisions of the Governing Document, and the consent of the Kiwi Shareholder has not first been obtained.

Waiver from Rule 2.20.1(e) – Further Background

13. AIR has applied for a waiver from Rule 2.20.1(e) so that clause 2.6 of AIR's Governing Document is made subject to the Kiwi Share Provisions. The effect of this is that the Rules cannot override the Kiwi Share Provisions. AIR has submitted that this is in order to satisfy requirements of the Crown.

Approval for restriction of transfer of securities – Rule 8.1.6(b) – Further Background

14. AIR has applied to for approval under Rule 8.1.6(b) to enable it to have restrictions on transfer of securities in its Governing Document. This approval is required as the Governing Document contains transfer restrictions beyond those specifically provided for in the Rules. The restrictions are to ensure that AIR's operating rights are not affected and that AIR remains substantially owned and effectively controlled by New Zealand nationals. The relevant restrictions in the Governing Document are summarised as:
 - a. Clause 3.3 which provides that an owner or operator of an airline business may not hold or have an interest in any Equity Securities unless the prior written consent of the Kiwi Shareholder is obtained;
 - b. Clause 3.4 which provides that no person who is not a New Zealand national may hold or have an interest in Equity Securities which confer 10% or more of the total Voting Rights, unless the prior written consent of the Kiwi Shareholder is obtained;
 - c. Clause 10.1 which enables the Board to require statutory declarations (or other disclosure) to ensure that the provisions relating to holdings of, or interests in, Equity Securities are complied with;
 - d. The provisions of clauses 9.5 and 9.6 which allow the Board to refuse to register transfers of Equity Securities where the provisions relating to ownership or interest in those Equity Securities are not complied with (in the case of declaration or disclosure of nationality or identity, to the satisfaction of the Board); and
 - e. The remainder of the provisions of section 10 of the Governing Document which give the Board and/or the Kiwi Shareholder the power to treat Equity Securities

as “Affected Equity Securities” and in certain circumstances to remove the voting rights and require those Equity Securities to be disposed of.

Waiver from Rule 8.1.5 – Further Background

15. AIR has applied for a waiver from Rule 8.1.5 to enable it to include the Kiwi Share Provisions in its constitution that contemplate cancelling or varying the benefits or rights attaching to Financial Products in certain circumstances.
16. Rule 8.1.5 prohibits the cancellation or variation of a benefit or right attaching to a Quoted Financial Product as a result of a transfer. AIR requires a waiver from Rule 8.1.5 in order to enable AIR to include the provisions in clause 10 of its Governing Document. The provisions enable the Board to require a shareholder to make a statutory declaration as to whether that shareholder is a New Zealand national. These provisions also enable the Board and/or the Kiwi Shareholder to declare Equity Securities to be “Affected Equity Securities” and in certain circumstances to remove voting rights and require Equity Securities to be disposed of.

Ruling on Rule 6.2.1 – Further Background

17. Clause 3.5 of AIR’s constitution requires the Kiwi Shareholder’s consent to any amendment, removal or alteration of a number of the provisions of the constitution, being provisions designed to ensure that AIR remains substantially owned and effectively controlled by New Zealand nationals.
18. AIR has also applied for a ruling in respect of Listing Rule 6.2.1 that the Kiwi Shareholder’s veto provisions in the Kiwi Share Provisions of the AIR Governing Document do not fall within the definition of “Vote” in the Rules.

Waiver from Rules 2.3.2(c) and 2.3.2(d) – Further Background

19. AIR seeks a waiver from Rules 2.3.2(c) and 2.3.2(d) to enable controls to be incorporated in the AIR Governing Document relating to the nomination of Directors. These controls in the Governing Document are:
 - a. Clause 23.2 which provides that the majority of the AIR directors (including any managing director) must be New Zealand citizens.
 - b. Clause 25.8 which provides that the AIR chairperson must, in addition to being a New Zealand citizen, be a person approved by the Crown. This restriction applies while the Crown is a substantial product holder within the meaning of section 274 of the Financial Markets Conduct Act 2013 in AIR through being the beneficial owner of Equity Securities.
20. In support of this application AIR states that the controls are to ensure that AIR remains a company effectively controlled by New Zealand nationals for the purpose of preserving AIR’s operating rights.

Appendix Two

Rule 2.3.2 Director Nominations and Appointment

2.3.2 An Issuer must comply with the following Director nomination process:

...

(c) there must be no restriction on who may be nominated as a Director, unless:

(i) the Governing Document requires Directors to hold certain Financial Products to qualify as a Director, or

(ii) applicable legislation restricts who may be a Director of the Issuer,

(d) subject to (c) above, there must be no precondition to the nomination of a Director other than compliance with the time limits in this Rule, and

...

Rule 2.20 Content of Governing Document for Issuers of Equity Securities

2.20.1 The Governing Document of each Issuer of Quoted Equity Securities must:

...

(d) provide that any Rulings authorising an act or omission which would otherwise be in breach of the Issuer's Governing Document will be deemed to be authorised by the Governing Document unless the Governing Document contains a contrary intention, and

(e) provide that, subject to (d), if a provision in the Governing Document is inconsistent with the Rules, the Rules will prevail.

Rule 6.2 Votes attaching to Financial Products

6.2.1 Subject to NZX's approval, Financial Products of an Issuer may carry different numbers of Votes.

6.2.3 NZX may grant approval under Rule 6.2.1 or Rule 6.2.2 on such conditions as it thinks fit (which may require a resolution approved by holders of any Class or group of Financial Products of the Issuer).

Rule 8.1 Transfer of Quoted Financial Products (common rules)

8.1.1 Subject to the provisions of any legislation, and to Rule 8.1.4, Rule 8.1.6(a), Rule 8.1.6(b) and Rule 8.2, no Issuer may impose, in its Governing Document or otherwise, any restriction on the right of a holder of a Quoted Financial Product to transfer that Financial Product, or any restriction upon registration of a properly completed transfer of Quoted Financial Products.

8.1.3 Subject to the provisions of Rule 8.1.2 and Rule 8.1.6(a) and (b), and of any applicable legislation, no Issuer may:

(a) require any documentation relating to transfers other than to establish an entitlement to transfer,

(b) require any information relating to the transferee (except for such information necessary to record the transfer), or

(c) impose any restriction on the acceptability of any common form of transfer.

8.1.5 Except as expressly permitted by the Rules, no benefit or right attaching to a Quoted Financial Product may be cancelled or varied by reason only of a transfer of that Quoted Financial Product.

8.1.6 The Governing Document of an Issuer may:

...

(b) with the prior approval of NZX, incorporate any other provision restricting the transfer of Relevant Interests in Financial Products, or

...

Glossary, Part A – Definitions

Equity Security has the meaning given in sections 8(2) and 8(5) of the FMC Act and also includes a Right, subject to NZX's sole discretion to declare, by way of a Ruling, a Financial Product to be, or not to be, an Equity Security (and includes any Fund Security deemed to be an Equity Security under Rule 1.1.2).