

NZ RegCo

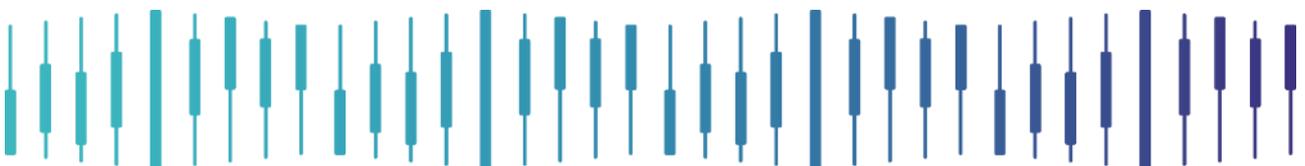
NZ'S LISTED
MARKET REGULATOR

14.12.2021

NZ RegCo Decision

Air New Zealand Limited (**AIR**)

Application for waivers from NZX Listing Rules 5.1.1 and
5.2.1



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Background

1. The information on which these decisions are based is set out in Appendix One to this decision. These waivers will not apply if that information is not, or ceases to be, full and accurate in all material respects.
2. The 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.

Waiver from Listing Rule 5.1.1

Decision

4. Subject to the conditions set out in paragraph 5 below, and on the basis that the information provided by Air New Zealand Limited (NS) (**AIR**) is complete and accurate in all material respects, NZX Regulation Limited (**NZ RegCo**) grants AIR a waiver from NZX Listing Rule 5.1.1 (Rule 5.1.1) to the extent required to allow AIR to enter into and perform the Amended Crown Loan Facility without needing to obtain shareholder approval.
5. The waiver in paragraph 4 above is provided on the conditions that:
 - a. That two Independent Directors of AIR certify (on behalf of the AIR Board) that:
 - i. the Crown Loan Facility Amendments have been negotiated on an arms' length basis;
 - ii. entry into the Amended Crown Loan Facility is in the best interests of all AIR shareholders (other than the Crown); and
 - iii. entry into the Amended Crown Loan Facility is not a major transaction for AIR requiring shareholder approval for the purposes of the Companies Act 1993.
 - b. That the conditions and implications of this waiver are disclosed in AIR's 2022 annual report.
 - c. That the entry into and performance of the Amended Crown Loan Facility is ratified by Ordinary Resolution by 31 December 2022 with:
 - i. a notice of meeting having been provided to shareholders in accordance with the Rules, with the information included under Rule 7.8.2 relating to both the Amended Crown Loan Facility and the Debt Issuance; and
 - ii. NZX having provided written confirmation to AIR that it does not object to the notice of meeting prior to dispatch of the notice of meeting,provided that this condition in this sub-paragraph (c) will be deemed to have been satisfied upon:
 - iii. the Amended Crown Loan Facility being terminated; and
 - iv. the Subscription Agreement being terminated with the effect that no shares under the Debt Issuance remain on issue or are capable of being issued.

Reasons

6. In coming to the decision to provide the waiver of Rule 5.1.1 set out in paragraph 4 above, NZ RegCo has considered that:
 - a. AIR submits, and NZ RegCo has no reason not to accept AIR's submission, that due to the ongoing uncertain circumstances facing its business and the anticipated need for further drawdowns under the Crown Loan Facility in the near term, AIR does not have the ability to wait until it can convene a shareholders' meeting in order to implement the Proposed Restructure, including for clarity the Amended Crown Loan Facility.
 - b. AIR further submits, and NZ RegCo has no reason not to accept, that the terms of the Amended Crown Loan Facility, in conjunction with the Debt Issuance described below and the Crown's on-going support for a capital raise, will provide additional comfort to AIR's directors as they make decisions from time to time about whether it is appropriate to draw-down further under the Crown Loan Facility.
 - c. AIR submits, and NZ RegCo has no reason not to accept AIR's submission, that the Crown Loan Facility Amendments have been negotiated on an arms' length basis, with AIR directors making the final decision whether to agree to the Crown Loan Facility Amendments. The conditions of the waiver require two Independent Directors of AIR to give certification to this effect.
 - d. AIR submits, and NZ RegCo has no reason not to accept, that the terms of the Amended Crown Loan Facility are in the best interests of all AIR shareholders (other than the Crown).
 - e. The entry into or performance of the Amended Crown Loan Facility by AIR will not change the essential nature of the business of AIR.
 - f. If the Amended Crown Loan Facility is still in place, and a Debt Issuance has occurred and the Subscription Agreement remains in force, than a shareholders' meeting will be held before the end of 2022, and shareholders will be provided with a notice of meeting containing information relating to both the Amended Crown Loan Facility and the Debt Issuance in a form that NZX has reviewed and confirmed that it has no objection to such notice of meeting. However, no shareholders' approval (and, accordingly, no notice of meeting or shareholders' meeting) would be required if the Amended Crown Loan Facility has been terminated and the Subscription Agreement has been terminated with the effect that no redeemable shares under the Debt Issuance remain on issue or are capable of being issued.
 - g. The policy behind Rule 5.1.1 is to regulate those transactions which will significantly change the nature of an Issuer's business or which have a value that represents a majority of the equity that investors hold in the Issuer and, as a result, are deemed to be so significant to the Issuer, and therefore so likely to impact shareholders interests, that shareholders should have an opportunity to consider the transaction and exercise their right to vote before the transaction can take effect. NZ RegCo consider that the condition above at paragraph 5(c) will allow, if the Amended Crown Loan Facility and Subscription Agreement have not been terminated, shareholders the opportunity to consider the transaction. This shareholder vote strikes a balance between certainty of funding for AIR, and the ability of shareholders to consider Rule 5.1.1 transactions.
 - h. NZ RegCo notes that if AIR was to convene a shareholder meeting in the manner contemplated under Rule 5.1.1, the Crown would not be restricted by Rule 6.3.1 from voting on the ordinary resolution to approve the entry into the Amended Crown Loan Facility. Given the Crown's majority shareholding, the Crown would be able to control the outcome of that Rule 5.1.1 vote. As outlined below this is not the case in relation to Rule 5.2.1.
 - i. AIR will release all material information relating to the Proposed Restructure to the market in accordance with AIR's continuous disclosure obligations, and AIR has provided NZ RegCo

with a draft copy of the market announcement about the Proposed Restructure prior to announcement.

- j. The remaining amount available to borrow under the Crown Loan Facility is being reduced (i.e., the transaction that would, absent a waiver, be subject to Rule 5.1.1 is a smaller transaction than that which is currently in place, which already has the benefit of previous waivers from Rule 5.1.1). While this is the case in relation to Rule 5.1.1 applying to the Crown Loan Facility, Rule 5.1.1 does not apply to the Debt Issuance in accordance with Rule 5.1.2 (c).
- k. The major transaction provisions of the Companies Act 1993 provide that transactions the value of which exceed 50% of the value of the company's assets must be approved by a special resolution of shareholders, or be contingent upon such approval. This requirement cannot be waived. Accordingly, shareholders are afforded the protections of the Companies Act 1993 for transactions that are significant compared to the value of the company's assets, and will have the opportunity to vote on these transactions. In this instance, the entry into the Amended Crown Loan Facility by AIR does not trigger this requirement and AIR shareholder approval is not required by the Companies Act 1993. The conditions of the waiver require two Independent Directors of AIR to give certification to this effect.
- l. There is precedent for this decision, including the waiver decisions granted to AIR on 19 March 2020, 30 April 2021 and 30 September 2021 in relation to the entry into, and amendments to, the Crown Loan Facility.

Waiver from Listing Rule 5.2.1

Decision

7. Subject to the conditions set out in paragraph 8 below, and on the basis that the information provided by AIR is complete and accurate in all material respects, NZ RegCo grants AIR a waiver from NZX Listing Rule 5.2.1 (**Rule 5.2.1**) to the extent required to allow AIR to enter into and perform the Subscription Agreement and the Amended Crown Loan Facility without needing to obtain shareholder approval.
8. The waiver in of Rule 5.2.1 in paragraph 7 above is provided on the following conditions:
 - a. That two Independent Directors of AIR certify (on behalf of the AIR Board) that:
 - i. the Proposed Restructure has been negotiated on an arms' length basis;
 - ii. entry into the Proposed Restructure is in the best interests of all AIR shareholders (other than the Crown); and
 - iii. the Crown, as the majority shareholder in AIR, has not influenced the AIR Board's decision to enter into the Proposed Restructure.
 - b. That the conditions and implication of this waiver are disclosed in AIR's 2022 annual report.

Reasons

9. In coming to the decision to provide the waiver of Rule 5.2.1 set out in paragraph 7 above, NZ RegCo has considered that:
 - a. AIR has submitted, and NZ RegCo has no reason not to accept, that the timing considerations referenced at paragraph 6.a above explain why AIR cannot wait for a shareholder meeting to approve the Proposed Restructure.
 - b. AIR further submits, and NZ RegCo has no reason not to accept, that the Proposed Restructure, in conjunction with the Crown's on-going support for a capital raise, will provide additional comfort to AIR's directors as they make decisions from time to time about whether it is appropriate to draw-down further under the Crown Loan Facility.
 - c. All material information relating to the Proposed Restructure will be disclosed to the market in accordance with AIR's continuous disclosure obligations, and AIR has provided NZ RegCo with a draft copy of the market announcement about the Proposed Restructure prior to announcement.
 - d. Rule 5.2.1 seeks to regulate transactions where a Related Party to a Material Transaction may gain favourable consideration due to their relationship with the issuer. NZX has noted in the NZX Guidance Note Major and Related Party Transactions that it may waive the requirement to obtain approval of a Material Transaction if it is satisfied that the involvement of any Related Party is plainly unlikely to have influenced the promotion of, or the decision to enter into, the relevant transaction. The granting of this waiver will not offend the policy behind Rule 5.2.1.
 - e. AIR has submitted, and NZ RegCo has no reason not to accept, that the Crown (as the Related Party) is unlikely to have influence over AIR's decision to enter into the Proposed Restructure for the following reasons:
 - i) the need for the Crown Loan Facility arose as a result of external factors currently adversely affecting AIR, namely the ongoing travel restrictions in New Zealand and other countries and reduced demand for travel as a result of the COVID-19 virus;

- ii) the Proposed Restructure is being entered into in the context of a number of deferrals of a proposed capital raising by AIR. Those deferrals have given AIR more time to assess the impact of the current developments, including the vaccine roll-out, the suspension of the trans-Tasman travel bubble, the ongoing domestic travel restrictions, other potential border openings and broader consumer demand for international travel. Each of those matters are factors that could impact the ultimate timing for a capital raise and the amount of capital to be raised;
 - iii) each of AIR and the Crown has been involved (through and together with their respective advisers) in its own assessment of the Proposed Restructure, with each party acting in its own best interests;
 - iv) the Proposed Restructure is considered by the AIR's Board to be in the best interests of all AIR shareholders (other than the Crown);
 - v) the terms of the Proposed Restructure represent the best available terms in the circumstances;
 - vi) the terms of the Amended Crown Loan Facility and the Debt Issuance are, taken as a whole, in the best interests of all AIR shareholders (other than the Crown);
 - vii) while the Crown is the majority shareholder in AIR, it is not directly involved in AIR's day to day business operations; and
 - viii) while the Crown does vote its shares to approve the appointment of directors (and is consulted on appointments), it has not selected or appointed directors to the Board.
- f. The condition at paragraph 8(a) provides comfort that any decision to enter into the Proposed Restructure will be considered on an arms' length basis, that the Proposed Restructure will be in the best interests of all AIR shareholders (other than the Crown), and that the Crown's connection as the majority shareholder in AIR has not influenced the AIR Board's decision to enter into the Proposed Restructure.
- g. There is precedent for this decision.

Confidentiality

10. AIR has requested this decision be kept confidential until an announcement about the Proposed Restructure has been released to the market.
11. In accordance with Rule 9.7.2(a), NZ RegCo grants this request.

Appendix One - Background

1. Air New Zealand Limited (NS) (**AIR**) is a Listed Issuer with Equity Securities Quoted on the NZX Main Board, and Debt Securities quoted on the NZX Debt Market.
2. The COVID-19 virus has had a material adverse impact on AIR's operations and financial performance and position, due to travel restrictions in New Zealand and other countries and reduced demand for air travel.
3. AIR entered into a debt funding agreement with the Crown on 27 May 2020 which was amended and restated on 10 May 2021, and subsequently further amended pursuant to a letter of amendment dated 30 September 2021 (the **Crown Loan Facility**). NZ RegCo granted waivers from Rule 5.1.1 and Rule 5.2.1 on 19 March 2020 to permit AIR to enter into the original Crown Loan Facility without shareholder approval, and again on 30 April 2021 and 30 September 2021 to permit AIR to amend the terms of the Crown Loan Facility without shareholder approval.
4. The impacts of COVID-19 and associated global and national lock-down measures, including travel restrictions, social distancing requirements and border closures have had, and continue to have, an unprecedented adverse impact on AIR's operations and financial performance and position. In light of these continuing adverse impacts of COVID-19 on AIR, AIR and the Crown have been discussing AIR's financial support requirements during the period up to a planned capital raising of new ordinary shares (currently intended to occur in the first calendar quarter of 2022) and how the Crown's financial support for AIR might be re-shaped to better suit current circumstances. The parties currently intend that any financial support provided by the Crown under the Amended Crown Loan Facility and the Debt Issuance (each as defined below) be terminated upon AIR's capital raise occurring.
5. As a result of these discussions, AIR is proposing to restructure the Crown's existing financial support for AIR as follows:
 - a. increase the overall quantum of liquidity support available to AIR;
 - b. issue non-preferential non-voting redeemable shares to the Crown pursuant to the terms of a subscription agreement (**Subscription Agreement**) entered into between AIR and the Crown (**Debt Issuance**); and
 - c. amend the terms of the Crown Loan Facility (including to reduce that facility) (**Crown Loan Facility Amendments**).
6. The Debt Issuance and the Crown Loan Facility Amendments (together, the **Proposed Restructure**) are inter-conditional and will be implemented at the same time. The Crown Loan Facility, as amended by the Crown Loan Facility Amendments, is referred to as the **Amended Crown Loan Facility** for the purposes of this decision.
7. The Proposed Restructure has been and will be negotiated on an arms' length basis. All parties are independently advised.
8. The entry into and performance of the Amended Crown Loan Facility:
 - a. will be a Major Transaction for the purposes of Rule 5.1.1 because it will involve AIR entering into a transaction with a Gross Value in excess of 50% of its Average Market Capitalisation; and
 - b. will be a Material Transaction for the purposes of Rule 5.2.1 because it will involve AIR issuing its own Financial Products and borrowing an amount, in each case in excess of 10% of its Average Market Capitalisation.
9. The Debt Issuance:

- c. will be excluded from the requirements of Rule 5.1.1 because, in accordance with Rule 5.1.2(c) it will involve an issue of a Financial Product for cash which does not significantly change the nature of the Issuer's business; but
 - d. will be a Material Transaction for the purposes of Rule 5.2.1 because it will involve AIR issuing its own Financial Products and borrowing an amount, in each case in excess of 10% of its Average Market Capitalisation.
10. The Crown is a Related Party of AIR because the Crown is a 51.91% shareholder of AIR exceeding the 10% threshold pursuant to the definition of Related Party in the NZX Listing Rules.
11. The Crown has undertaken to AIR that it will vote in favour of any shareholder resolution required under the condition stipulated in paragraph 5(c) in respect of the waiver from Rule 5.1.1.

Appendix Two

Rule 5.1 Disposal or Acquisition of Assets

5.1.1 An Issuer must not enter into any transaction, or a related series of transactions, to acquire, sell, lease (whether as lessor or lessee), exchange, or otherwise (except by way of charge) dispose of assets where the transaction or related series of transactions:

(a) would significantly change, either directly or indirectly, the nature of the Issuer's business; or

(b) involves a Gross Value above 50% of the Average Market Capitalisation of the Issuer,

Unless the transaction, or related series of transactions, is:

(c) approved by an Ordinary Resolution, or a special resolution if approval by way of special resolution is required under section 129 of the Companies Act 1993, or

(d) conditional upon such approval required by paragraph (c) above.

Rule 5.2 Transactions with Related Parties

5.2.1 An Issuer shall not enter into a Material Transaction if a Related Party is, or is likely to become:

(a) a direct party to the Material Transaction; or

(b) a beneficiary of a guarantee or other transaction which is a Material Transaction,

unless that Material Transaction is approved by an Ordinary Resolution (such resolution being subject to the voting restrictions in Rule 6.3) or conditional on such approval.

"Material Transaction" means a transaction, or a related series of transactions, whereby an Issuer:

...

(b) issues its own Financial Products, or acquires its own Equity Securities, having a market value above 10% of the Issuer's Average Market Capitalisation...

(c) borrows, lends, pays or receives money, or incurs an obligation of an amount above 10% of the Average Market Capitalisation of the Issuer (except in the case of an issue of Debt Securities, in which case only the nominal amount of Debt Securities being issued to any Related Party or to any Employees of the Issuer are to be taken into account);

"Related Party" means a person who, at the time of a Material Transaction, or at any time within the previous six months, was:

...

(b) the holder of a Relevant Interest in 10% or more of a Class of Equity Securities of the Issuer carrying Votes.