



NZX Regulation Decision

Infratil Limited (“IFT”)

Application for a waiver from NZX Listing Rule 5.2.1

22 May 2020



Waiver from Rule 5.2.1

Background

1. NZX has updated the NZX Listing Rules (**Rules**), effective from 1 January 2020. This waiver decision re-documents a prior waiver decision granted by NZX Regulation (**NZXR**) dated 8 May 2017.
2. The information on which this decision is based is set out in Appendix One. This waiver will not apply if that information is not, or ceases to be, full and accurate in all material respects.
3. The Rules to which this decision relates are set out in Appendix Two.
4. Capitalised terms that are not defined in this decision have the meanings given to them in the Rules.

Decision

5. Subject to the conditions set out in paragraph 6 below, and on the basis that the information provided by Infratil Limited (**IFT**) is complete and accurate in all material respects, NZX Regulation (**NZXR**) grants IFT a waiver from NZX Listing Rule (**Rule**) 5.2.1 to the extent required to allow IFT (and related entities of IFT as contemplated by paragraph (b) of the Issuer definition in the Rules) to enter into Transactions with Co-Investors without obtaining shareholder approval.
6. The waiver in paragraph 5 above is provided on the conditions that:
 - (a) the waiver would only apply to a Transaction where IFT is not otherwise required to obtain approval of its shareholders for the Transaction (or a specific waiver has been obtained);
 - (b) IFT notifies NZXR, prior to entry into any Transaction in reliance on the waiver, that it is intending to enter into the Transaction and that IFT is not otherwise required to obtain approval of its shareholders for the Transaction or a specific waiver has been obtained;
 - (c) if IFT enters into any Transaction in reliance on the waiver it will announce to the market that the Transaction was entered into in reliance on the waiver and the reasons why reliance on the waiver was required;
 - (d) all Non-Interested Directors of IFT certify to NZXR, at or around the time of announcing the Transaction, that:
 - i. the Transaction has been entered into and negotiated on an arm's length commercial basis;
 - ii. in their opinion, entry into the Transaction is fair and reasonable to, and in the best interests of, IFT and its shareholders who are not related to, or Associated Persons of, MCO (or any MCO-related Entity) or the Co-Investor(s); and
 - iii. none of MCO, or the Director(s) of IFT who are Associated Persons of MCO (or any MCO-related Entity) or the Co-Investor(s), have unduly influenced the promotion of, or decision to enter into, the Transaction, or

voted on any resolution to approve the Transaction;

- (e) IFT may only enter into a Transaction in reliance on the waiver where any fees payable by IFT to MCO or any MCO-related Entity in connection with the Transaction are:
 - i. fees payable in accordance with existing management agreements with MCO or any MCO-related Entities; or
 - ii. any fee arrangements otherwise permitted or not prohibited by the Rules (due to a transaction specific waiver, shareholder approval or otherwise);
- (f) IFT and the Co-Investor(s) will each make their investment or divestment:
 - i. on the same or materially alike terms and at the same price for the interests acquired or disposed of, or for a price that has the same economic effect (in each case proportionate to the interests acquired or disposed of); or
 - ii. to the extent that the terms or price do not meet these conditions, the Non-Interested Directors shall certify that in their opinion the differences in the terms or the price (as applicable) are fair and reasonable to, and in the best interests of, IFT and its shareholders who are not related to, or Associated Persons of, MCO (or any MCO-related Entity) or the Co-Investor; and
- (g) the waiver, its conditions and its implications are disclosed in IFT's annual reports from when the waiver is announced to market, and any Transaction entered into in reliance on this waiver is disclosed in IFT's next annual report following the Transaction being entered into.

Reasons

- 7. In coming to the decision to provide the waiver set out in paragraph 5 above, NZXR has considered that:
 - a. rule 5.2.1 seeks to regulate transactions where there is, or there may be a perception of, the potential for undue influence by a Related Party on an Issuer's decision to enter into a Material Transaction or agree to its terms. NZXR may waive the requirement to obtain approval of a Material Transaction if it is satisfied that the personal connections with, or involvement or personal interest of any Related Party are immaterial or plainly unlikely to influence the promotion of, or the decision to enter into, the Material Transaction or its terms and conditions. The granting of this waiver will not offend the policy behind Rule 5.2.1;
 - b. IFT has submitted, and NZXR has no reason not to accept, that a Co-Investor is unlikely to influence entry into or the terms of a Transaction, as:
 - i. entry into, and the terms of, any Transaction is to be negotiated on an arm's length commercial basis;
 - ii. IFT and the Co-Investor(s) will each make their investment or divestment under the Transaction on terms pursuant to the condition at paragraph 6(f); and
 - iii. decisions to enter into any Transaction which has the benefit of waiver relief will be made by IFT's Non-Interested Directors and the MCO-related Directors, or their alternates, will not vote on the decision by IFT to enter into the Transaction;

- c. IFT has submitted, and NZXR has no reason not to accept, that it is often not practical to seek shareholder approval for a Transaction with Co-Investors. IFT has further submitted that individual waiver applications or seeking shareholder approval creates transaction risk and that a standing waiver for Co-Investor relationships will increase the efficiency with which IFT can transact while the interests of shareholders can be protected with conditions outlined in the waiver;
- d. the certifications that will be provided by IFT's Non-Interested Directors as a condition of the waiver provide comfort that any Transaction will be negotiated, and entered into, on an arm's length commercial basis and that the MCO-related Directors have not exercised any undue influence over the board of IFT in its decision in respect of the Transaction;
- e. NZXR has granted numerous transaction specific waivers in the past that are of the same or similar scope as this waiver; and
- f. while standing waivers are generally uncommon, the conditions to this waiver ensure that IFT provides NZXR with advanced notice of any Transaction.

Appendix One

1. IFT is a Listed Issuer with Financial Products Quoted on the NZX Main Board and the NZX Debt Market.
2. IFT receives investment management and advisory services from Morrison & Co Infrastructure Management Limited, a MCO-related Entity. For the purposes of this decision:
 - a. **MCO** means H.R.L Morrison & Co Group LP;
 - b. **Related Entity** has the meaning given to “related company” in section 2(3) of the Companies Act 1993, except that “company” shall mean a company or other body corporate wherever incorporated; and
 - c. **MCO-related Entity** means a Related Entity of MCO.
3. IFT’s Board has always included one or more Directors associated with MCO (**MCO-related Directors**). Currently there is one MCO-related Director, namely Marko Bogoevski. MCO itself is also technically a Senior Manager of IFT¹ and IFT has other Senior Managers who are associated with MCO (each an **MCO-related Senior Manager**). Due to the relationship described at paragraph 2, it is expected that the IFT Board will continue to include MCO-related Directors and IFT will continue to have MCO-related Senior Managers. IFT’s Board composition is subject to:
 - a. potential MCO-related Directors being nominated for appointment;
 - b. Shareholders approving the appointment; and
 - c. the Independent Director requirements in the Rules.
4. IFT often invests through a consortium, with one or more co-investors that are also managed or advised by an MCO-related Entity (**Co-Investor**).
5. For the purposes of Rule 5.2.1, IFT and a Co-Investor may be Related Parties because:
 - a. IFT and the Co-Investor each receive investment management and advisory services from MCO-related Entities;
 - b. MCO-related Entities are members of the MCO group and may be staffed by the same personnel and share common directors;
 - c. an MCO-related Director or MCO-related Senior Manager is a Related Party of IFT;
 - d. an MCO-related Director or MCO-related Senior Manager could also be an Associated Person of the Co-Investor, as the MCO-related Director or MCO-related Senior Manager may be (for example):
 - i. able, directly or indirectly, to exert a substantial degree of influence over the activities of the Co-Investor (paragraph (a) of the Associated Person definition);

¹ “Senior Manager” can include an entity under the definitions of “Senior Manager” and “Person” in the Listing Rules and Financial Markets Conduct Act 2013.

- ii. a Director or Senior Manager of the Co-Investor (paragraph (e) of the Associated Person definition);
- iii. acting jointly or in concert with the Co-Investor (paragraph (f) of the Associated Person definition),

as a consequence of the investment management arrangements between MCO and the Co-Investor;

- e. If an MCO-related Director or MCO-related Senior Manager is an Associated Person of a Co-Investor, then IFT and that Co-Investor will be Related Parties as the Co-Investor will be an Associated Person of a Director or Senior Manager of IFT (being any MCO-related Director or MCO-related Senior Manager) in accordance with paragraph (c) of the Related Party definition.
6. A co-investment transaction, or a divestment of such an investment by IFT and the Co-Investor(s), may be a Material Transaction, as defined in the Rules and as amended by IFT's constitution, for the purposes of Rule 5.2.1 (**Transaction**).
7. IFT's constitution, lowers the threshold for a Material Transaction for the purpose of Rule 5.2.1:
- a. for the purposes of paragraphs (a) – (d) of the Material Transaction definition in the Rules, to 5% of the Average Market Capitalisation of IFT; and
 - b. for the purposes of paragraph (e) of the Material Transaction definition in the Rules, 0.5% of the Average Market Capitalisation of IFT.
8. This waiver provides relief for the relationship between IFT and any Co-Investor where in entering any Transaction, the relationship would be limited to:
- a. a Related Party relationship between IFT and the Co-Investor arising solely due to management of the Co-Investor by MCO or any MCO-related Entity;
 - b. in relation to the Transaction, any advice being provided by MCO or any MCO-related Entity would be under the terms of IFT's and the Co-Investor's own investment management agreements (in the case of IFT, existing prior to the Transaction), or as otherwise permitted or not prohibited by the Rules;
 - c. any fees to be received by MCO or any MCO-related Entity in respect of the Transaction will be in accordance with existing agreements or as otherwise permitted or not prohibited by the Rules. The fees may include performance fees if the performance of the investment is successful and exceeds thresholds specified in those agreements; and
 - d. outside each of those agreements, neither any consortium nor joint venture will be charged for advice from MCO-related Entities in relation to the Transaction unless otherwise permitted or not prohibited by the Rules.
9. IFT has submitted that any investment or divestment under a Transaction will either:
- a. be on the same or materially alike terms and at the same price for the interests acquired or disposed of, or for a price that has the same economic effect (in each case proportionate to the interests acquired or disposed of); or

- b. to the extent that the terms or price are not those specified in paragraph 9(a), the differences in the terms or the price (as applicable) will be fair and reasonable to, and in the best interests of, IFT and its shareholders who are not related to, or Associated Persons of, MCO (or any MCO-related Entity) or the Co-Investor(s).
10. An MCO-related Director may participate in Board discussions about any Transaction, but will not vote on any resolution to enter into a Transaction. Only those IFT Directors who are not interested in the Transaction (**Non-Interested Directors**) would vote on entry into any Transaction.

Appendix Two

Definition of Associated Person

Associated Person

a person (**A**) is associated with, or an **Associated Person** of, another person (**B**) if:

- (a) A is able, directly or indirectly, to exert a substantial degree of influence over the activities of B (or vice versa),
- (b) B is a body corporate and A has the power, directly or indirectly, to exercise, or control the exercise of, more than 50% of the Votes attaching to the Financial Products of B (or vice versa),
- (c) A and B are Relatives or Related Bodies Corporate,
- (d) A and B are partners to whom the Partnership Act 1908 applies,
- (e) A is a director or Senior Manager of B (or vice versa), or
- (f) A and B are acting jointly or in concert,

except that:

- (g) A is not an Associated Person of B merely because:
 - i. A acts as a professional or business adviser to B, without a personal financial interest in the outcome of that advice,
 - ii. A's ordinary business includes dealing in Financial Products on behalf of others and A is acting in accordance with the specific instructions of B,
 - iii. A acts as a proxy or representative of B for the purposes of a meeting of holders of Financial Products, or
 - iv. there is another person with which A and B are both associated,

- (h) persons will not be Associated Persons if NZX makes a Ruling that they are not Associated Persons.

Definition of Related Party

Related Party

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

- (a) a Director or Senior Manager of the Issuer or any of its Subsidiaries,
- (b) the holder of a Relevant Interest in 10% or more of a Class of Equity Securities of the Issuer carrying Votes,
- (c) an Associated Person of the Issuer or any of the persons referred to in (a) or (b), except where the person becomes an Associated Person as a consequence of the Material Transaction, or
- (d) a person in respect of whom there are arrangements which are intended to result in that person becoming, or expected to become, a person described in (a), (b), or (c) other than as a consequence of the Material Transaction,

but a person is not a Related Party of an Issuer if:

- (e) the only reason why that person would otherwise be a Related Party of the Issuer is that a Director or Senior Manager of the Issuer is also a Director of that person, so long as:
 - (i) the proportion of Directors of the Issuer who are also Directors of that person is one third or less, and
 - (ii) no Director or Senior Manager of the Issuer has a material direct or indirect economic interest in that person, other than receiving reasonable Director's fees or executive remuneration, or

- (f) that person is a Subsidiary or incorporated joint venture of, or unincorporated joint venture participant with, the Issuer and:
 - (i) no Related Party of the Issuer has or intends to obtain, other than through the Issuer itself, a material direct or indirect economic interest in that Subsidiary or joint venture other than receiving reasonable Director's fees or executive remuneration, and
 - (ii) the Issuer has at least 50% of the Votes in or is entitled to at least 50% of the dividends declared or paid by the Subsidiary or incorporated joint venture or is entitled to at least one half of the income or profits, and the assets, of the unincorporated joint venture (if and when distributed).

5.2 Transactions with Related Parties

5.2.1 An Issuer must 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 **Error! Reference source not found.**) or conditional on such approval.