

NZSA Policy No 6 – Independent Directors

Application: This policy applies to all NZX listed companies.

Purpose: NZSA maintains a range of policies to moderate the behaviour of all participants in the NZX listed company sector. These policies should be read in the context of the NZSA Policy Framework Statement.

Statement No 6:

This policy document combines two previous policies (*Non-Executive Directors* and *Independent Directors*) into a single policy document.

There are three main objectives of this policy document:

- a. **Independent judgement:** Ensuring that directors are able to apply an unfettered mind to make decisions in the best interests of the company.
- b. **Conflicts of interest:** Conflicts between the interests of the company and the individual director are identified and managed.

Conflicts between different shareholder interests (and the inherent risk that presents to minority shareholder) are identified and mitigated and/or managed.

- c. **Market confidence:** An improvement in independence instils confidence in investors.

It also incorporates a voluntary **minority shareholder regime** (see Section 2.1) as a preferred position for NZSA.

1.0 Policy: Independent Directors

Independence

- 1.0 NZSA notes that the definition of independence in the context of independent directors relates to a Director that does not have “disqualifying relationship”, as defined within the NZX Listing Rules. Specifically, that an independent director **cannot** have:

“a direct or indirect interest, position, association or relationship that could reasonably influence, or could reasonably be perceived to influence, in a material way, the Director’s capacity to:

- a) *bring an independent view to decisions in relation to the Issuer,*
- b) *act in the best interests of the Issuer, and*

c) *represent the interests of the Issuer's Financial Product holders generally, including having regard to the factors described in the NZX Corporate Governance Code that may impact director independence, if applicable."*

1.1 NZSA believes that the purpose of independent directors is to instil market confidence in the issuer, providing assurance of independent judgement in decision-making unfettered by conflicted interests or emotional ties.

- a) In this context, NZSA expects that the Board has received appropriate evidence (whether by affidavit or otherwise) to support their assessment of director's independence. There should be no information, publicly available or otherwise, that conflicts with the Board's assessment.
- b) NZSA will look favourably on disclosure of the factors and assessment against them that the Board considered in their independence determination.

1.2 The factor-based approach contained within the current NZX Corporate Governance Code should not be considered an exhaustive list.

- a) NZSA will assess independent directors against the factors in the Code as a minimum, including supplier/customer relationships and previous roles within the issuer.
- b) We will also consider relationships to non-independent Board members and other non-Code factors in our assessments.
- c) While difficult to measure, the extent to which a Director's personal wealth is invested in the issuer, by way of a shareholding, is also a factor. This may be less (or more) than the 5% threshold expressed in the Code.

1.3 NZSA's preference is for issuers with controlling shareholders (a shareholder or shareholder group with greater than 30% interest) to adopt a **minority interests regime**, as defined in section 2.1 below.

1.4 NZSA expects the majority of directors to be independent.

- a) We consider this especially important in a company that has a major or controlling shareholder, as a means of providing representation for minority shareholders.
- b) NZSA may modify this view where an issuer chooses (voluntarily) to apply a minority interests regime.

Other Policy Statements applicable to Independent Directors

1.5 NZSA will consider the time available for any director to undertake a Board role, to avoid 'overboarding'. As a rule of thumb:

- a) NZSA will not support any Director standing for election where they hold six or more Board roles (i.e., maximum of five, where a Chair counts a two roles).
- b) Directors who hold a fulltime executive position in a different company

should not hold more than one Board role.

- c) NZSA will consider the scale, nature and governance requirements in making a judgement around overboarding.

1.6 NZSA expects the Chair of Board to be an Independent Chair.

1.7 When a Director is proposed for election or re-election at a shareholders meeting:

- a) Full details of the directors skills, experience and other directorships should be provided in the Notice of Meeting
- b) The Director should be available to address the meeting and answer questions from shareholders.

2.0 Advocacy

2.1 **Minority Shareholder Regime:** NZSA has made submissions during 2022 on the NZX Corporate Governance Code and in 2023 on NZX settings related to Director Independence.

- a) In particular, NZSA will continue to advocate for a change to the Listing Rules to include a minority shareholder regime, stipulating that where a company has **30% or more of its shares owned by a single shareholder**, that shareholder (or shareholders) is/are unable to vote on the election or re-election of independent directors.
- b) Currently, independent directors on a company's Board, where controlled by a controlling shareholder, serve at the patronage of that controlling shareholder.
- c) NZSA's proposal ensures that a controlling shareholder would retain the power to nominate directors for election and propose the appointment or removal of directors (subject to a shareholder vote at the next shareholder meeting).
- d) If minority shareholders impose an independent director that the major shareholder cannot work with, we envisage that a major shareholder will still be able to participate in a shareholder vote proposing the removal of a director and will be able to nominate a new independent director (subject to voting at the next shareholder meeting).
- e) We do not propose any change to the Board's power to determine the independence of directors.
- f) In practice, NZSA believes that this would result in a form of consultation between controlling and minority shareholders.
 - i. Controlling shareholders would still retain the ability to propose their own representatives and/or independent candidates for election. They would also be able to propose (and vote) on the **removal** of

independent directors.

- ii. Independent directors proposed for election by the Board must be elected by minority shareholders.
- iii. This is effectively a 'power of veto' held by each shareholder class.
- g) In terms of precedent:
 - i. A single NZX-listed company (Synlait Dairy Ltd) operates a similar regime as that proposed by NZSA, although contains other board structure elements that are not supported by NZSA.
 - ii. In [September 2023](#), 2 Cheap Cars issued a public statement to the NZX, following a period of discussion with NZSA, committing the controlling shareholder to *"maintain(ing) a majority of independent directors on the Board and enable(ing) consultation with minority shareholders and their representatives prior to the appointment of future independent directors."*
- h) We do not believe that such a regime will add any compliance cost to a listed company, while adding significantly to investor protections.

2.2 Independent Director Resolutions: NZSA believes that a Resolution to elect an *independent* director at a shareholder meeting should be considered in two parts: the election itself and the status related to independence. This is different to most current Resolutions that 'conflate' these two aspects.

NZSA believes that considering a resolution in two parts (i.e., the individual and the status) will enhance both the clarity as to the factors underpinning the status of individual directors and the role and credibility of non-independent directors.

We do not propose any change to the Board's power to determine the independence of directors, so any resolution put to shareholders as to the independence status of the director would be advisory and non-binding in nature.

We appreciate that our advocacy for a minority interests regime set out in 2.1 may be mutually exclusive with this proposal. This suggestion may form a useful 'stepping stone' to a minority interests voting regime.

3.0 Commentary

3.1 The concept of 'independence' is separate to Board Composition, although there may be a relationship between these two governance issues.

3.2 The ability of a Board to exercise "independent judgement" is often an intrinsic part of Board culture and is therefore difficult to assess by external parties.

- a) The key focus of independence is on maintaining an 'open mind' and

ensure that directors have not been 'captured' by management, nor by other non-independent directors.

- b) Directors often point to programmes that allow board culture to be measured and assessed – however, this requires the co-operation of the Board. Minority shareholders are unlikely to have the ability to compel the Board to co-operate in any assessment nor the disclosure of resulting information.
- c) NZSA notes the commentary within the purpose section of the NZX Corporate Governance Code:

"Issuers should be continuously reviewing their corporate governance practices and seeking to improve these over time."

- 3.3 A concept of Board culture influencing independence is separate and additional to lack of independence derived from any 'interest' (and inherent conflicts therein).
- 3.4 NZSA believes that the role of non-independents is important and valuable. In general, they bring specialist skills, experience and/or 'skin in the game'. While subordinate to the requirement to act in the best interests of the company, they also bring representation for themselves or other related interests.
- 3.5 Independent directors offer fresh viewpoints, challenge and representation for minority shareholders.
- 3.6 As reference in NZSA's [Board Composition](#) policy, NZSA believes in a 'balanced board' to effect constructive debate and decision-making.
- 3.7 The introduction of a minority interests regime will add a layer of protection to minority shareholders, creating an explicit link between minority shareholders and independent directors. Notwithstanding, all directors are bound to act in the best interests of the company.
 - a) Research suggests a potential for a greater imbalance of power and/or an ability to take action between a single or small group of (concentrated) controlling shareholders and a fragmented minority shareholder base.
 - b) Currently, around a third of NZX listings contain a 'controlling shareholder' – ie, a shareholder with a greater than 30% shareholding. In effect, independent directors serve at the 'patronage' of the controlling shareholder. This is exacerbated once the shareholder achieves an outright majority (>50%).
 - c) We do not believe a minority interests regime causes a loss of rights for the major or majority shareholder, as they are still served by independent directors acting in the best interests of the company and (potentially) non-independent directors.
 - d) We also believe that this will improve the standing of the director community, with removal of any perceived association with majority interests.

- e) Should such a regime be introduced, NZSA would be supportive of a 'transition period' enabling orderly succession plans where required.

3.8 We note that a recent April 2023 study (Dahya, Dimitrov and McConnell) cited studies that showed that there were *“valuation discounts for publicly traded companies based in countries that provide weak legal protection for minority shareholders.”*

3.9 The NZSA-proposed threshold of 30% is based on the UK definition of a “controlling shareholder” as determined in rule LR 6.5 of the UK’s Financial Conduct Authority (FCA) Handbook. It has recently been the subject of consultation, with the FCA electing to retain the requirement that a listed business is able to carry on as an independent business despite having a controlling shareholder (this was initially proposed to be changed to a ‘comply or explain’ basis).

We believe that this threshold holds some applicability to the New Zealand market.

We have considered alternative thresholds – including >50% (ie, majority ownership). However, given voting patterns and the influence of passive funds, we believe that the practical ‘majority’ threshold is well below 50%.

4.0 Key Regulatory Requirements

Companies Act 2003

Takeovers Act 1993

Takeovers Regulations 2000

NZX Listing Rules

NZX Corporate Governance Code

References

NZX Listing Rules

NZX Corporate Governance Code

[G20 / OECD Principles of Corporate Governance](#)

[Bebchuk and Hamdani, Independent Directors and Controlling Shareholders](#)

[Dahya, Dimitrov and McConnell, Does board independence matter in companies with a controlling shareholder?](#)

[NZX Announcement, 2 Cheap Cars, Sep 2023](#)

[UK FCA controlling shareholder rule](#)

Definitions

See 1.0 – definition of a “disqualifying relationship”

Minority Interests Voting Regime: [see link](#)

Related Policies

Policy 17: Board Composition

Policy 14: Director Tenure: a factor

Document Control

This document was approved by the NZSA Board:	June 2024
This document is effective from:	June 2024
The next planned review date is:	June 2027