

PROPOSAL FOR RULE CHANGES

3 August 2022

INTRODUCTION

The trustees wish to recommend to members some changes to the rules of the Fund.

The changes fall into three main categories:

- (a) A proposed reorganisation of rule 13 and changes to that rule required by the Trusts Act 2019 (rules applying to the trustees).
- (b) The “emergency state” rules first put forward by the trustees in 2020, to deal with situations caused by Covid and similar emergencies.
- (c) Other administrative changes, including changes required by the Trusts Act 2019.

The text below sets out the proposed changes and, where relevant, explanations for them.

Changes to the rules are highlighted in red or shown with tracked changes.

Explanations for the proposed changes are in blue.

PART A – REORGANISATION OF AND SOME CHANGES TO RULE 13 (TRUSTEES)

Introduction:

The trustees have been advised that they need to make changes to rule 13 to comply with the Trusts Act 2019. As well, rule 13 is difficult to follow, as it is not arranged logically. The trustees are therefore proposing to both update the rule to comply with the Trust Act 2019 and to re-arrange it. This involves some wording changes, but unless noted, the trustees do not consider the wording changes are significant, so no explanation for them is given.

RULE 13 – TRUSTEES, ADMINISTRATION OF THE FUND AND POWERS AND DUTIES OF TRUSTEES

Number, mix, rotation and election of trustees

(a) Number of trustees and qualifications:

- i) The number of trustees of the Fund shall not be less than seven or more than ten.
- ii) Any person appointed a trustee of the Fund must be a natural person who is not disqualified from appointment as a trustee under the provisions of the Trusts Act 2019 (whether by virtue of being a minor, an undischarged bankrupt, a person who lacks capacity to perform the functions of a trustee, or for any other reason).
- iii) Where any trustee of the Fund loses capacity to perform the functions of a trustee after appointment, the office of that trustee shall become vacant.

Explanation for ii) and iii): The current rule sets out provisions relating to appointment of trustees but does not expressly deal with capacity to be a trustee.

Under section 96(2) of the Trusts Act 2019 in certain circumstances a person is disqualified from being appointed a trustee. Section 104 of the Act provides for certain circumstances when it is compulsory to act to remove a trustee.

The Fund has received advice from Paul Michalik, barrister, to add sub-clauses ii) and iii) as above.

(b) Mix of trustees and terms of appointment:

- i) At least four, but up to six trustees shall be members of the Fund. The trustees shall be elected by ballot in accordance with rule 13(d), and subject to rotation according to rule 13(c).

Explanation: Require a pilot trustee to be a member of the Fund.

The trustees believe the reference for a pilot trustee being a financial member of NZALPA is an oversight, and the rule should require pilot trustees to be members of the Fund.

Presently, the current rule (13(b)iii) says pilot trustees must be “financial members” of NZALPA and elected by members of NZALPA.

So, any member of NZALPA who meets the definition of “financial member” in rule 1(d) could be a trustee of the Fund, even if they are not a financial member of the Fund:

Rule 1(d): ***Financial member** means a person who is a member of the New Zealand Airline Pilots’ Association under the provisions of rule 5(1)(a), (d) or (e) (but excluding any air traffic controller) and is not a member under rule 12. Provided that in the case of any person who comes within rule 5(1)(d)(ii) or (iii) or rule 5(1)(e) of such Association’s rules, continued membership of the Fund will be subject to obtaining the prior approval of the trustees and to such conditions as they may impose.*

A “member” of the Fund is defined in rule 1 as: ***Member** means a pilot who is a financial member of the New Zealand Airline Pilots’ Association and who is participating in the Fund and is a financial member of the Fund by virtue of his/her own contributions and/or the contributions of his/her employer.*

For the avoidance of doubt all members of the Fund will need to be financial members of NZALPA.

- ii) At least one, but up to two trustees shall be persons other than members of the Fund. These independent trustees shall be appointed for a maximum period of five years but after the expiry of such period shall be eligible for reappointment. The replacement or reappointment of any such trustee shall be made at an annual meeting of the members of the Fund.

Explanation: as above – change from “financial members of the New Zealand Airline Pilots Association” to “members of the Fund”.

- iii) Up to two trustees shall be appointed from persons nominated by employers of members of the Fund. Any employer of members may, not less than 14 days before an annual meeting, nominate one person to be appointed as trustee. In the event of nominations of more than two persons being received the trustees shall be elected from those nominated by the members of the Fund at the annual meeting.

(c) **Rotation of pilot trustees:**

Of the pilot trustees elected pursuant to rule 13(b)i), the trustee with the longest length of service **since last elected** shall retire each year and if there be more than one with equal service the trustee who so retires shall be determined by lot. The retiring pilot trustee shall be eligible for re-election. A ballot for the election of a trustee to replace the retiring trustee will be conducted in accordance with rule 13(d) and shall be conducted not less than 14 days before

an annual meeting. The results will be announced by the returning officer at the annual meeting.

Explanation: this change gives effect to how the rule is applied in practice.

(d) **Election of trustees:**

- i) When the election of trustees is required, **the trustees shall appoint a returning officer. The returning officer** shall call for nominations by notice posted on the Fund's website and by email to such personal email address as the member may have provided to the Fund.
- ii) Nominations shall be signed by the nominator, seconder and nominee, with full names to be printed in a legible way alongside or below the respective signatures.
- iii) Nominees for election as trustees must prepare a "statement to voters" of not more than 500 words as to the reasons the nominee wishes to be a trustee. Included in this statement to voters shall be a declaration of any current financial interest in the Fund, other than as a contributing pilot.
- iv) When a ballot is required to be held for the election of trustees:
 1. The ballot will be conducted not less than 14 days before the annual meeting.
 2. The returning officer shall be responsible for the conduct of the ballot.
 3. **Voting for trustees will be conducted by appropriate electronic format to ensure members can participate if they choose.**
 4. **Voting will close at the notified time sent to members.**
 5. After the close of voting the returning officer shall tally the results and declare the candidate(s) with the highest valid votes cast to be elected. **This declaration will be posted electronically, on the Fund's website, or in a similar manner.**
- v) The successful candidate(s) will take office as a trustee(s) with immediate effect.
- vi) Despite anything in these rules, where the number of nominations received coincides with the number of vacancies the provisions of **sub-clauses (d)iii) and iv)** shall be inapplicable, and the returning officer shall declare the nominee or nominees duly appointed as trustees with immediate effect. The successful candidate(s) will take office as a trustee(s) with immediate effect.

(e) **Vacancy:**

In the event of the office of any trustee being vacant then the continuing trustees shall have the power to appoint a trustee and such trustee so appointed shall hold office until the next annual meeting of the members when the trustee shall resign but may be eligible either for reappointment or (as the case may be) for re-election under rule 13(d). Any trustee so appointed shall be qualified as provided in rule 13(a)ii) and (b).

(f) **Trustee becomes a claimant:**

A trustee who becomes a claimant on the Fund and is in receipt of disability benefits shall stand down from their duties as a trustee and as a director in any corporate entity established for the administration of the Fund. If, after a period of six months from the entitlement date the trustee has not relicenced, a vacancy shall be deemed to have arisen under rule 13(e) in respect of the office of that trustee.

(g) **Removal:**

A trustee may be removed from office by a majority vote of the members of the Fund present at any annual or special meeting of the members **called in accordance with rule 22**. In the event of any trustee being removed from office as aforesaid such general or special meeting as the case may be shall thereupon arrange for a trustee to be appointed or (as appropriate) elected by ballot in his/her place.

(h) **Financial interest:**

All trustees are forbidden from having any financial interest in the Fund, other than as a contributing pilot member. Any trustees holding any financial interest at the time of appointment (other than as allowed herein) must relinquish that interest within 6 months of appointment as trustee.

- (i) Subject to rule 20, no member trustee may make or seek to make any financial gain or advantage as a result of his/her position as trustee to the Fund.

Administration of the Fund

(j) **Chairman:**

Each year the trustees shall elect as Chairman one of their number, who shall be a member of the Fund. The Chairman shall serve in that capacity for one year and shall have a casting vote for the purposes of rule 13(n).

At any meeting from which the Chairman shall be absent, the trustees present shall elect one of their number, who is a member of the Fund, to act as Chairman at that meeting and the person so elected shall also have a casting vote at that meeting.

[Explanation:](#) see the explanation above for rules 13(b)i and ii).

(k) **Meetings:**

Meetings of the trustees shall be held at least once in every three months. Special meetings may be called at any time by the Chairman. The Chairman shall call a special meeting upon being requested in writing so to do by any two trustees.

It shall be the duty of every trustee to attend in person, **or through internet or other electronic conferencing**, every meeting of trustees.

[Explanation of the second paragraph:](#) Allow explicitly for meetings of trustees to be held electronically by Zoom or Teams.

The current rules deal with trustees' duties to attend meetings and include provision for trustees to attend a meeting by proxy.

These rules do not allow explicitly for electronic attendance at meetings, so it is proposed to add this to the rule.

With regard to proxies, one of the effects of the Trusts Act 2019 is to make it impractical to use proxies at meetings. This is because under section 67 while some functions can be delegated, the power to delegate excludes eight matters set out in section 67(a) to (h). The rules cannot vary that list of eight matters. This means for a proxy to be valid, the trustee granting the proxy must give specific instructions on how he or she wishes his or her vote to be exercised. The trustees consider this may not always be practical, and that the option of electronic attendance at meetings will mean proxies are no longer needed. It is therefore proposed to do away with proxies for trustee meetings.

Accordingly, the trustees feel it would be useful and preferable for trustees to be able to attend trustee meetings in person or through internet or other electronic conferencing.

Rule 13(i) (which will become (n) under the reorganisation) would also need to be amended to deal with attendance by internet or other electronic conferencing – see below.

- (l) **Notice of meeting:**
Notice of a meeting shall be given **by email** to all trustees not less than 14 days before the day appointed for such meeting.
- (m) **Quorum:**
Five trustees present at any meeting **or through internet or other electronic conferencing** shall constitute a quorum provided that three of such trustees are members of the **Fund**.

Explanation: see the explanations for rules 13(b)i) and ii) above, and 13(k).

- (n) **Power to act by majority:**
Any trusts and powers exercisable by the trustees are exercisable by a majority of them present in person or through internet or other electronic conferencing, and any act or decision of the majority shall take effect as if it had been the unanimous act or decision of the trustees.
- (o) **Power to act by written resolution:**
 - i) Any trusts and powers exercisable by the trustees are exercisable by a resolution passed without a trustee meeting in accordance with this clause. Written notice of the proposed resolution must be given to all trustees. The resolution is passed by the trustees when a majority of the trustees eligible to vote on the resolution signify in writing their assent to the resolution.
 - ii) For the purposes of this clause, “written notice” and “writing” include written forms of electronic communication such as email or messages transmitted through an electronic communications platform.

- iii) Any resolution passed by the trustees under this clause shall take effect as if it had been the unanimous act or decision of the trustees.
- iv) Resolutions passed by the trustees under this clause shall be tabled at the next meeting of the trustees following the passing of the resolution and shall be formally recorded in the minutes of that meeting as passed before the meeting under the provisions of this clause.
- v) For the avoidance of doubt, this clause does not apply to trustee decisions made under rule 4 – Acceptance of Membership.

Explanation: Clause (o) recognises that much trustee business is now done electronically, and formalises this, in line with the move to electronic attendance at trustee meetings. (See rule 13(k) above.)

Trustees powers and duties

- (p) The trustees shall control the administration of the Fund and shall in addition to any other powers and duties expressed or implied under these rules or the **Trusts Act 2019** and any subsequent amendments:

Explanation: This needs to be updated to refer to the Trusts Act 2019 rather than the Trustee Act 1956.

- i) Examine all applications for membership of the Fund.
- ii) Authorise the acceptance of a member into the Fund, and stipulate any conditions or exclusions appertaining thereto.
- iii) Examine all claims made on the Fund.
- iv) Examine all notifications of loss of licence made.
- v) Authorise all payments that are to be made on claims, either as monthly benefits or capital benefits.
- vi) Authorise and supervise the investment of monies in the Fund.
- vii) Ensure that members are kept informed as to the rules of the Fund and any changes made thereto.

Explanation: “financial member” means a member of NZALPA. The trustees do not need to keep members of NZALPA informed of rules and rule changes, but do need to keep members of the Fund informed of these. The definition of “member” in the rules means a financial member of NZALPA who is also a financial member of the Fund.

- viii) Delete the sub-clause entirely.

Explanation: The financial markets in NZ have changed materially. Modern investment practice involves reliance on specialist investment advisors and fund managers who are not likely to also be stockbrokers.

Rule 17 Investment of Funds was updated materially 3 years ago and provides guidance as to the use of fund managers. This sub-clause viii) should have been deleted at the time.

- viii) To keep the records of the application claims and correspondence in relation to the Fund and to keep and record minutes of all meetings of the trustees.
- ix) To do all such acts and things as may be necessary for the carrying out of the objects of the Fund.
- x) To engage such professional or financial advisors as the trustees consider necessary to carry out the objects of the Fund and to maintain its financial stability.
- xi) As the trustees see fit, to engage in and to expend monies belonging to the Fund on any course of action including litigation (whether carried on by the trustees personally or not) intended to advance the members' collective interests in relation to the medical certification of pilots.
- xii) To expend monies on the administration of the Fund, including the lease or purchase of premises and office equipment, the employment of staff or the engagement of contractors, and the establishment of such corporate structure as may appear best suited in the trustees' opinion to achieve the efficient administration of the Fund.

PART B – EMERGENCY STATE RULES

Explanation:

Before the 2020 AGM your trustees sent you a proposed rule set and explanation for special rules to apply during an emergency state.

The proposed rules were on the agenda for the 2020 AGM for members to discuss or ask the trustees about during the AGM. A question was asked about the definition of “Period of the Emergency State” and if this meant the Period was too open ended. The trustees obtained legal advice and made some changes to proposed clause (c).

The trustees are now ready to present the proposed emergency rule set to you for voting.

The trustees recommend these rule changes to members without reservation and believe they are necessary to help trustees manage the Fund in the event of significant and unexpected disruption, including but not limited to COVID-19.

The reasons for the proposed rule changes have already been circulated and are viewable on the website (member login needed):

<https://www.pilotsmbf.org.nz/index.php/member-downloads-2>

1. Proposed new rule 13A:

TRUSTEES’ SPECIAL POWERS DURING AN EMERGENCY

- (a) Notwithstanding any other provision of these rules, where an Emergency State has arisen, the trustees may in their absolute discretion decide during the Period of the Emergency State to use the special powers as set out in (f) below, including but not limited to make temporary or permanent changes to disability payments under rule 7.
- (b) An Emergency State is a state of affairs, current at the time that the trustees decide to act under this rule, in which there is a serious and continuing and material disruption to the aviation industry within which members are employed and/or any financial market in which more than one tenth of the assets of the Fund is invested, and includes:
 - i) when any notice of epidemic is in force under the Epidemic Preparedness Act 2006 (or any later Act passed in substitution for this Act);
 - ii) when any national notice of civil defence emergency is in force under the Civil Defence Emergency Act 2002 (or any later Act passed in substitution for this Act);
 - iii) when a state of war exists between New Zealand and any country to which members operate scheduled passenger flights;

- iv) when there is serious financial market disruption or market suspension in any country in which more than one tenth of the assets of the Fund is invested;
 - v) when the Air Operator's Certificate of any airline employing one tenth or more of the members of the Fund is suspended or cancelled;
 - vi) when any "state of emergency" has been declared by the New Zealand government under any Rule or power of Parliament.
- (c) On the occurrence of an Emergency State under (b) above, the Period of the Emergency State is the period of any notice, suspension, or other action by the New Zealand government and/or such period or further period determined by the trustees as (in their sole judgment) the effects of the Emergency State on the Fund continue and have not yet ended.
- (d) A disability benefit is all benefits paid or payable (including benefits first becoming payable during the Period of the Emergency State) which are paid under rule 7 of these rules. For the avoidance of doubt, the special powers do not apply to any capital benefit payable under rule 8 or the exercise by the trustees of their power under rule 5(d) to vary capital benefits.
- (e) A decision by the trustees to act under this rule shall be notified to members of the Fund as soon as is reasonably feasible.
- (f) The special powers which may be exercised by the trustees during this Emergency State are, notwithstanding any other provisions of these rules:
- i) to vary the amount payable for any disability benefit which a member would otherwise, in the discretion of the trustees, be entitled to receive at any future date;
 - ii) to determine special conditions, including waiting periods or reduced benefit levels, for new entrants who apply to join the Fund during the Period of the Emergency State or who apply to increase their level of cover;
 - iii) to adjust, defer or otherwise vary the payment dates of any disability benefit in any of the following ways:
 1. To alter the date on which any payment of disability benefit may be paid to new claimants as a class so as to take into account the resources and cashflow of the Fund;
 2. To defer and so "freeze" payment of a disability benefit to any class of claimant members by adoption of a specified future date so the initial payments are not a current liability of the Fund;
 3. To alter the level of benefits with effect from a future date.
- (g) In exercising the special powers, the trustees shall have regard to:

- i) The overall state of the Fund (including future projections of revenue and claims);
- ii) Any actuarial advice held by them;
- iii) The Objects of the Fund (rule 1(b));
- iv) That it is a mutual discretionary Fund;
- v) The need to achieve equity between members to the extent that the Fund's resources and powers allow;
- vi) Any general representations or recommendations received from members and/or the New Zealand Airline Pilots' Association;

but shall be wholly free to make such decision as in the sole discretion of the trustees they determine.

- (h) For the avoidance of doubt the special powers may be exercised from time to time during the Period of the Emergency State.
- (i) Any special power must be exercised in relation to a class of members, or applicants for membership even if that class comprises only one member but may not be exercised solely in respect of any identified member.

2. Related addition to rule 22 – Special meetings – add the following:

- (e) If a special meeting is called within a Period of Emergency State the trustees in their absolute discretion may:
 - i) determine the time date and location of such meeting,
 - ii) abbreviate the time periods for giving notice;
 - iii) determine that the meeting is held by such means as in their sole judgment are appropriate including (without limiting the general power) by internet or other electronic conferencing, electronic voting, or any form of member poll.

Change 22(e) to be numbered 22(f).

3. Consequential amendments:

- A. Amend definition of “claim” in rule 1(d) to end: “... pursuant to any provision of rules 5, 6, 6A, 7, 8 and 13A.”
- B. Amend rule 7(a) to commence:

“Subject to rules 6, 8(f) and rule 13A ...”
- C. Amend rule 24(c) to state at the end:

“For the avoidance of doubt, the adoption by the Fund of rule 13A and any decisions afterwards made under that rule affecting a disability benefit are not an alteration prohibited by this clause.”

PART C – OTHER ADMINISTRATIVE CHANGES

1. REMOVE REFERENCES TO “SECRETARY” FROM THE RULES

It is **proposed** to delete the reference to Secretary from rule 5(e):

Explanation:

The Fund no longer has a formal position of Secretary. In the Fund’s rules there are four references to Secretary – in the last paragraph in rule 5(e), rule 13(m)i) (twice), and rule 13(m)vii). The last three will be dealt with by the proposed changes to rule 13 (see Part A above). The first reference needs to be deleted.

2. CHANGE WORDS IN RULE 6

- (a) **Proposed amendment:** Amend rule 6(e)iii) to refer to “**him or herself**” rather than “himself”.

3. RULE 14 – **EXCLUSION OF LIABILITY AND INDEMNITY**

Replace rule 14 with following:

Every trustee for the time being under the Fund:

- (a) Shall be exempted from all liability incurred by them or any of them in the carrying out of, or in the breach of, their duties as trustee; and
- (b) Shall be indemnified out of the assets of the Fund from all liability, losses and expenses incurred by them or any of them in the carrying out of, or in the breach of, their duties as trustee; unless;
- (c) The relevant liability under rule 14(a) or the relevant liability, loss or expense under rule 14(b) is incurred as a result of dishonesty, wilful misconduct or gross negligence.

For the purposes of this rule 14, “trustee” includes any employee or agent of the trustees when that employee or agent is acting in a managerial or supervisory capacity to administer the Fund.

Explanation:

Rule 14 contains a general indemnity for the trustees. The advice from Paul Michalik, barrister, is that this rule needs amendment as it would cover gross negligence in a way that infringes section 41 of the Trusts Act. It is too wide for the new regime under the Act. It also excludes indemnity for anything that happened “in a deliberate way” and the advice is that this seems too narrow. Almost all of the trustees’ actions will be deliberate. The advice from Mr Michalik is that it is the deliberately wrongful acts that need to be excluded from the operation of the indemnity, not any deliberate act.

Mr Michalik’s advice is to replace rule 14 so it deals expressly with exemption from liability and indemnity in terms that mirror the exemptions and indemnities allowable in the new Act.

“Other person holding office”: Under the current rule 14, medical advisers appointed by the trustees appear to be indemnified under the rule, which was probably not what was intended. It is therefore proposed to remove the references to “other person[s] holding office” and to add a definition of “trustee” for this rule only, to include in the indemnity MBF office staff when they are acting as employees or agents in a managerial or supervisory capacity to administer the Fund.

4. RULES 21-23 – ANNUAL AND SPECIAL MEETINGS

- (a) **Proposed amendment:** Amend rules 21(b)iv) and 23 to **delete the references to proxies.**

Explanation: As members can attend these meetings electronically (as well as in person), and as voting can be electronic, or by member poll, as well as by proxy, it is reasonable to remove proxy voting for these meetings. Also, with the removal of proxies for trustees, it is consistent to remove it for members as well.

- (b) **Proposed amendment:** Amend rule 22(b) to refer to **“the special meeting”** rather than to “the special general meeting”.

Explanation: It is recommended that the wording used in these rules be changed to be consistent as they presently refer to “annual meetings” and “special meetings”, but rule 22(b) refers to “special general meeting”. This appears to be a drafting slip.

- (c) **Proposed amendments:** Amend rules 23(a) and (c) to change the wording for the quorum from referring to “financial members” of the Mutual Benefit Fund to referring to **“members”** of the Mutual Benefit Fund.

Explanation: see the explanation for rules 13(b)i) and ii) above.