

EXTRAORDINARY



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GOVERNMENT OF FIJI

CIVIL AVIATION (OWNERSHIP AND CONTROL OF NATIONAL AIRLINES) DECREE 2012 (DECREE NO. 26 OF 2012)

IN exercise of the powers vested in me pursuant to section 4 of the Office of the Vice-President and Succession Decree 2009 (Decree No. 8 of 2009), I hereby make the following Decree—

PART 1—PRELIMINARY

Short title and commencement

1. This Decree may be cited as the Civil Aviation (Ownership and Control of National Airlines) Decree 2012 and shall come into force on the date of its publication in the *Gazette*.

Interpretation

2. In this Decree, unless the context otherwise requires—

“air carrier” means—

- (a) a corporate entity having its registered company address in Fiji;
- (b) engages in scheduled air service and the carriage by air of passengers or cargo for hire or reward; and
- (c) is licensed by the Republic of Fiji to take on in its territory such passengers or cargo destined—
 - (i) to another point within Fiji; or
 - (ii) to a point outside of Fiji.

“corporate governance documents” are those documents created by or on behalf of an air carrier, which direct and control the business of that air carrier and includes articles of association, memorandum of association or other relevant documents for that air carrier.

“Minister” means the Minister responsible for Civil Aviation.

PART 2—OWNERSHIP AND CONTROL OF AIR CARRIERS

Prohibition

3. No air carrier may operate under the laws of Fiji unless it is a citizen of Fiji.

Definition of citizen of Fiji

4.—(1) For the purposes of this Part—

“citizen of Fiji” means, as the context so requires —

- (a) the Government of Fiji or any institution of the State;
- (b) an individual who is a citizen of Fiji;
- (c) a partnership each of whose partners is an individual who is a citizen of Fiji; or
- (d) a corporation or association of which at least 51 percent of the voting interest is owned and controlled by persons who are citizens of Fiji, at least two thirds of the board of directors and any committee are citizens of Fiji, and such corporation or association is under actual and effective control of citizens of Fiji.

(2) In the case of a partnership in which one or more of the partners is a corporation or association, each partner must satisfy the definition of “citizen of Fiji” set out in subsection (1) (d) of this section.

Provision of Corporate Governance documents

5.—(1) All existing air carriers must submit to the Minister all corporate governance documents within 30 days of the commencement of this Decree for the purposes of determining citizenship under section 6.

(2) Any entity wishing to become an air carrier after the commencement of this Decree shall first submit all its proposed or final corporate governance documents to the Minister for review and approval to ensure compliance with this Decree.

Determination of Citizenship

6. The Minister shall, upon receipt of the corporate governance documents submitted under section 5, by way of a written notice, make a determination whether an air carrier is a citizen of Fiji, and shall issue the notice to that air carrier.

Determination of Control

7.—(1) In evaluating actual and effective control of a partnership, corporation or association which operates as an air carrier for the purposes of section 4(1) (d), the Minister shall examine the totality of circumstances to determine whether a foreign citizen has, or could have, actual control, potential to actually control, or an impermissible ability to influence or substantially influence the partnership's, corporation's or association's activities.

(2) Circumstances under which the actual and effective control of a Fijian partnership, corporation or association will be deemed not to reside with a citizen of Fiji include—

- (a) Provisions or language in shareholder agreements, contracts, or corporate governance documents which permit foreign citizens to actually or potentially control the partnership, corporation, or associations;
- (b) agreements or arrangements that allow foreign citizens to have disproportionate interests by means of shareholder or board voting rights;
- (c) provisions or language in equity or debt agreements, corporate governance documents or contractual agreements or arrangements that permit foreign citizens to actually or potentially exercise control over the partnership, corporation, or association through its budget, funding, financing, loans, capital needs or expenditures;
- (d) agreements or arrangements that allow foreign citizens supermajority approval or veto rights over commercial or joint venture agreements, mergers or acquisitions, takeovers, or prevent or force the partnership, corporation or association from selling or disposing of all or part of the business or prevent or force the partnership, corporation, or association to wind up or liquidate;
- (e) agreements or arrangements that permit foreign citizens to require the partnership, corporation or association to repurchase its stock from those citizens or that prevent the issuance of dividends, or affect issuance of additional stock or options or listing of shares on any stock exchange or market;
- (f) agreements or arrangements which permit foreign citizens to exercise buyout clauses that, if exercised, would jeopardise the partnership's, corporation's or association's ability to continue operations;
- (g) agreements or arrangements which permit foreign citizens supermajority approval or veto rights over the start, termination, acquisition, use, or disposal of air routes, air route authorities, airport or gate slots, or other customary or essential airline rights;
- (h) membership, appointment or veto or supermajority rights over board, board committees, or company executives which could result in the ability of foreign citizens to exert actual or potential control over the partnership, corporation or association;
- (i) the counting of foreign citizens or their designees for shareholder or board quorum purposes;
- (j) veto or supermajority rights of foreign citizens over major or key decisions, leases, purchases, capital expenditures, capital disposals, debt, financing, mortgages, liens, lawsuits, corporate policies, employee policies or remuneration schemes or other plans of the partnership, corporation, or association; and
- (k) contracts with foreign citizens that could be used to control the partnership, corporation or association.

Compliance

8. Where the Minister has made a determination under section 6 that an air carrier is not under the actual and effective control of a Fijian partnership, corporation, association or other legal entity, that air carrier must amend its

corporate governance documents, or any document mentioned in the notice issued under section 6 or otherwise do all that is necessary to ensure compliance with this Decree within 30 days from the date of the Minister's determination.

Non-complying documents to be null and void

9. All provisions or terms of corporate governance documents, or any document mentioned in the notice issued under section 6 for air carriers which do not comply with the provisions of this Decree within the time set out in section 8 shall be deemed to be null and void and of no legal effect.

PART 3—MISCELLANEOUS

Power to make regulations

10. The Minister may make regulations prescribing matters that are required or permitted by this Decree to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Decree.

Decree and decisions made under this Decree not to be challenged

11. No court, tribunal, commission or any other adjudicating body shall have the jurisdiction to accept, hear, determine, or in any other way entertain any challenge at law, in equity or otherwise (including any applications for judicial review) by any person or body, or to award any compensation or grant any other remedy to any person or body in relation to any decision or determination of the Minister under this Decree.

GIVEN under my hand this 26th day of March 2012.

W. CALANCHINI
Acting Chief Justice