

TO: Auckland International Airport Limited
FROM: Russell McVeagh
DATE: 20 August 2012
SUBJECT: Appointment of candidates for a future director programme

1. INTRODUCTION

- 1.1 We understand that Auckland International Airport Limited ("**AIAL**") is considering participating in a programme for future directors, and that their role is likely to encompass attending board meetings, acting as observers to AIAL's board of directors ("**Board**"), participating in management discussions, and receiving mentoring from AIAL's Board ("**Future Director Programme**", and each a **Future Director**). We understand that AIAL wants guidance on how the nature and terms of such a role might be formulated so as to enable Future Directors to perform their role under the Future Director Programme while ensuring that they are not considered to be directors of AIAL under the Companies Act 1993 ("**Act**"). Set out below is our advice in relation to this matter.
- 1.2 References to sections and schedules are references to sections and schedules of the Act, unless otherwise stated.

2. EXECUTIVE SUMMARY

- 2.1 In summary, Future Directors performing their role under the Future Director Programme are unlikely to be considered to be directors of AIAL under the Act so long as:
- (a) Future Directors have no voting rights;
 - (b) the Board is not accustomed to act on the directions of a Future Director;
 - (c) the Board alone makes management decisions, even if that decision is to follow the advice of a Future Director; and
 - (d) Future Directors do not perform one or more Board powers or duties with the consent or acquiescence of the Board.
- 2.2 It is important to note that these rules relate not only to the actions of Future Directors, but also to the Board and the Board's relationship with Future Directors.
- 2.3 It may be worth implementing certain procedural rules to be followed by the Board and Future Directors to emphasise the distinction between the role Future Directors will play and the Board's decision-making processes.
- 2.4 While remuneration and insurance for directors are subject to various restrictions in the Act, as Future Directors will not be directors, these specific restrictions will not apply to the terms of the Future Director Programme. Therefore, AIAL can, subject to the Board's compliance with the Act generally, provide Future Directors with the insurance

and remuneration that it considers appropriate. The funding for these should, however, be sourced from a pool that is separate to that of the Board.

3. DIRECTORS UNDER THE ACT

3.1 Whether Future Directors would be considered directors under the Act turns on the definition of director in section 126, attached as schedule 1 to this memorandum.

3.2 Broadly, section 126 sets out two categories of directors; de jure and de facto. A de jure director is one who is properly and formally appointed as a director of the company in accordance with the Act. A de facto director includes one who, though not formally appointed as a director, occupies a position within the company where:

- (a) they occupy the position of director, by whatever name called;¹
- (b) the Board or a director may be required to, or is accustomed to act in accordance with that person's directions²; and/or
- (c) they exercise one or more Board powers or duties with the consent or acquiescence of the Board.³

4. CONSEQUENCES OF BEING A DIRECTOR

4.1 The consequence of a Future Director being a director is that they would be subject to the full range of directors' obligations and liabilities.

4.2 These include directors' duties under the Act, for example to act in good faith and in the best interest of the company,⁴ to exercise their powers for a proper purpose,⁵ to comply with the Act and company constitution,⁶ and to exercise reasonable care, diligence and skill in performing their role.⁷ A breach of director's duties under the Act may attract civil and/or criminal liability.

5. NATURE OF RELATIONSHIP

5.1 The relationship between a Future Director and the company will be that of independent contractor and principal as opposed to employee and employer. This is important regarding obligations under the Employment Relations Act 2000 including the obligation to act in good faith, the entitlement to certain remuneration and leave benefits, and the substantive and procedural requirements around terminating an employment contract.

5.2 This is unlikely to be contentious given that the underlying policy concern of the independent contractor/employee distinction is unequal bargaining power.⁸ However, it is important to note that factors tending to suggest that the relationship is a contract of

¹ Section 126(1)(a) Companies Act 1993

² Section 126(1)(b) Companies Act 1993

³ Section 126(1)(c) Companies Act 1993

⁴ Section 131 Companies Act 1993

⁵ Section 133 Companies Act 1993

⁶ Section 134 Companies Act 1993

⁷ Section 137 Companies Act 1993

⁸ See *James Bryson v Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721

service⁹ when considered holistically, have the potential to undermine independent contractor status. Such factors include the company paying withholding tax on the Future Director's behalf, and providing them with cellphones or company cars with company branding. These factors may well also lead the Courts to consider carefully whether a Future Director is a director.

6. ROLE OF FUTURE DIRECTORS AND THE CURRENT BOARD

- 6.1 There are two sides to consider regarding the way the Future Director role is formulated; the Future Directors' conduct, and the Board's conduct.
- 6.2 In terms of the Future Directors' conduct, Future Directors may attend Board meetings, participate in Board discussions and receive Board documentation, so long as they do not exercise Board powers and duties, participate in Board decisions and do not direct the Board to follow a course of action which is then followed.
- 6.3 In terms of the Board's conduct, the Board must make its own independent decisions. Each director as well as the Board must not be required to act, or be accustomed to act, on the directions of a Future Director. Where there might be a risk of this is where a Future Director has a particular area of expertise which is not currently represented on the Board, resulting in the Board acquiescing to follow the Future Director's instructions on matters in that area. The Board may well decide to follow a Future Director's advice on such a matter, so long as the directors turn their minds to the issues, consider the information available to them, and make their own decision on whether to do so.¹⁰

7. PRACTICAL STEPS AND PROCEDURES

- 7.1 AIAL may consider implementing the following steps and procedures to emphasise the observation-only nature of the Future Director Programme:
- (a) having Future Directors leave the room while the Board passes Board resolutions, or at least making it sufficiently clear that the directors alone resolved to follow a certain course of action. This is particularly so for Board documentation such as Board minutes;
 - (b) in Board meetings, ensuring that when a Future Director provides their opinion, that this is framed as the provision of advice as opposed to directing the Board to act in a certain way;
 - (c) Future Directors must not be held out by the company as being directors, for example in publications or on the company website; and
 - (d) the Board must not delegate authority to a Future Director to carry out any action on the company's behalf, for example signing contracts, unless it is as an attorney¹¹ and involves merely the execution of a document as opposed to substantively considering whether the company should enter into it.

⁹ See section 6 of the Employment Relations Act 2000.

¹⁰ The recent James Hardie decision has highlighted the need to do so: *Australian Securities and Investments Commission (ASIC) v Hellicar* [2012] HCA 17; BC201202609.

¹¹ Section 181 Companies Act 1993

8. REMUNERATION

8.1 For directors, the Act requires that directors' remuneration is fair to the company¹² and sets out certain procedures to follow regarding the authorisation of director remuneration. Future Directors are not directors, so there is no requirement to follow the procedures set out in the Act relating to Board remuneration, for example the duty to enter particulars of any payment to a director into the interests register,¹³ and the duty on the directors who vote in favour of a payment to a director to certify that the payment is fair to the company.¹⁴ As independent contractor advisers, the Board may remunerate Future Directors in the way they consider appropriate, consistent with the process for other contractors and advisers.

8.2 It is however important that Future Directors are not remunerated from the same pool of funds as directors, as this may amount to evidence on the basis of which a Court might find them to be directors. It would not be on the basis of this alone, rather there would need to be some element of control or management as required by the Act and explained above, but it would be best practice to have a separate funding arrangement for Future Directors.

9. INSURANCE

9.1 The Act places certain restrictions on the ability to indemnify or effect insurance for directors and employees.¹⁵ As Future Directors will not be directors or employees, these restrictions will not apply. AIAL may therefore take out such insurance and effect indemnities for the benefit of Future Directors in the manner that the Board considers appropriate. Alternatively, the cost of such insurance might be built into Future Directors' remuneration packages.

10. USE OF INFORMATION

10.1 Future Directors will be provided with the same information as the Board. This will include confidential information which might be used by a Future Director or their associates for personal gain. For directors, this is covered by the restriction on use of information obtained in a director's capacity as a director by section 145. As section 145 should not apply to Future Directors, consideration should be given as to whether Future Directors ought to be subject to similar restrictions expressed in their terms of appointment.

RUSSELL MCVEAGH
20 August 2012

¹² Section 161 Companies Act 1993

¹³ Section 161(2) Companies Act 1993

¹⁴ Section 161(4) Companies Act 1993

¹⁵ Section 162(1) Companies Act 1993

SCHEDULE 1 - SECTION 126(1) OF THE ACT

1. In this Act, **director**, in relation to a company, includes—
- (a) A person occupying the position of director of the company by whatever name called; and
 - (b) For the purposes of sections 131 to 141, 145 to 149, 298, 299, 301, 383, 385, 386A to 386F, and clause 3(4)(b) of Schedule 7,—
 - (i) A person in accordance with whose directions or instructions a person referred to in paragraph (a) of this subsection may be required or is accustomed to act; and
 - (ii) A person in accordance with whose directions or instructions the Board of the company may be required or is accustomed to act; and
 - (iii) A person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the constitution of the company, would fall to be exercised by the Board; and
 - (c) For the purposes of sections 131 to 149, 298, 299, 301, 383, 385, 386A to 386F, and clause 3(4)(b) of Schedule 7, a person to whom a power or duty of the Board has been directly delegated by the Board with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the Board; and
 - (d) For the purposes of sections 145 to 149, and clause 3(4)(b) of Schedule 7 of this Act, a person in accordance with whose directions or instructions a person referred to in paragraphs (a) to (c) of this subsection may be required or is accustomed to act in respect of his or her duties and powers as a director.
- (1A) In this Act, director, in relation to a company, does not include a receiver.
- (2) If the constitution of a company confers a power on shareholders which would otherwise fall to be exercised by the Board, any shareholder who exercises that power or who takes part in deciding whether to exercise that power is deemed, in relation to the exercise of the power or any consideration concerning its exercise, to be a director for the purposes of sections 131 to 138 of this Act.
- (3) If the constitution of a company requires a director or the Board to exercise or refrain from exercising a power in accordance with a decision or direction of shareholders, any shareholder who takes part in—
- (a) The making of any decision that the power should or should not be exercised; or
 - (b) The making of any decision whether to give a direction,—
 - (c) as the case may be, is deemed, in relation to making any such decision, to be a director for the purposes of sections 131 to 138 of this Act.
- (4) Paragraphs (b) to (d) of subsection (1) of this section do not include a person to the extent that the person acts only in a professional capacity.