

27 September 2010

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Commerce Commission  
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Dear John

## **TOPIC FOR TECHNICAL CONSULTATION ROUND - DIRECTOR CERTIFICATION**

As you are aware, in its submission on the Draft Information Disclosure Determination the NZ Airports Association ("**NZ Airports**") indicated that it would revert to the Commerce Commission ("**Commission**") on its concerns with the proposed director certification requirements once it had the opportunity to consider the issues in greater detail.

You have advised NZ Airports that any concerns regarding the director certification (along with other issues that have not been included on the working session agenda) would be best addressed as part of the technical consultation round, which is scheduled to commence in early October. We understand that by this stage, the Commission will have had the opportunity to consider the submissions on this issue and will be able to update interested parties on any changes to its draft decisions.

NZ Airports accepts that this is an appropriate way forward. However, NZ Airports considers that it would be beneficial for the Commission, as well as other interested parties, for NZ Airports to set out its concerns with the proposed director certification requirements in advance of the technical consultation round. Interested parties can then at that stage provide further views on the topic in a prepared and considered manner.

NZ Airports explains its concerns with the current director certification requirements and proposes a solution below.

### **Overview**

NZ Airports accepts that it is reasonable to require some form of director certification as part of the Part 4 information disclosure regime. However, NZ Airports is concerned that the requirement that directors have made "all reasonable enquiry" is overly onerous, does not meet the purpose of information disclosure under Part 4, and will result in unjustified compliance costs.

### **Commission's proposal**

The Commission's draft decision is that director certification is required for all disclosures to certify that the information being disclosed complies with the relevant requirements. Separate director certification is required for:

- Disclosed information;
- Forecast Total Revenue Requirements Disclosure;
- Pricing Disclosures; and
- Initial Regulatory Asset Value Disclosure.

Director certifications must be signed by two directors, who must certify that having made all reasonable enquiry and to the best of their knowledge, the disclosures comply with the relevant determination.

### **Relevant statutory provisions**

In its Information Disclosure Discussion Paper (July 2009), the Commission relies on section 53C(3)(f) of the Commerce Act 1986 ("**Act**") as providing it with powers to require directors' certificates.<sup>1</sup> Section 53C(3)(f) states that a section 52P determination may:

Impose any other requirements that the Commission considers **necessary or desirable** to promote the purpose of information disclosure regulation.

NZ Airports is concerned, however, that the Commission has not yet made a case as to why requiring the directors' certificates to the extent proposed by the Commission is "necessary or desirable" to promote the purpose of information disclosure. Given the implications discussed below, NZ Airports submits that the Commission must carefully consider whether its proposals achieve the correct balance of incentivising companies to take care in preparing accurate disclosures, without imposing additional compliance costs.

It should also be borne in mind that there are already offence provisions that are sufficient to encourage compliance with the information disclosure requirements. For example, section 86 of the Act establishes penalties for failing to comply with information disclosure requirements, which includes failing to disclose information required to be disclosed and providing false and misleading information. Individuals who contravene an information disclosure requirement can be liable to pay a pecuniary penalty not exceeding \$500,000, which will act as an incentive on for responsible individuals of the company to ensure the accurate disclosure of information in accordance with the Commission's determination.

### **The proposal is onerous**

Under the draft determinations, a great deal of technical information must be disclosed in accordance with the information disclosure requirements. The relevant input methodologies must also be applied. Preparing information in a manner that complies with the information disclosure determination is therefore an extremely complex undertaking, which will require relevant expertise and a detailed understanding of all matters on which information must be disclosed.

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<sup>1</sup> Paragraph 522. The Commission also makes references to promoting "good corporate governance" in relation to directors' certificates at paragraph 429-431 and 527 of the Information Disclosure Discussion Paper (July 2009). The Commission's powers under information disclosure regulation do not include that objective.

It is unreasonable to expect directors to possess the requisite knowledge or understanding to ensure and certify compliance with information disclosure requirements, or to invest the time and effort to obtain it. Yet, by requiring directors to provide various certifications that the information disclosure requirements have been complied with and to undertake enquiries before doing so, this is exactly what the Commission is asking directors to do. A director exercising due diligence and care would face considerable pressure to invest a large amount of time and effort to ensure that his or her certification(s) (as currently proposed by the Commission) was appropriately provided in accordance with applicable law. NZ Airports doubts whether the Commission intended that its certification requirements would be this costly and onerous, or would displace the normal position under general company law, as discussed below.

### **Commission's proposal displaces normal company law standard**

NZ Airports is concerned that the Commission has not considered the extent to which its requirements are consistent with established company law standards. In NZ Airports' view, the "all reasonable enquiry" standard appears to take away the protections afforded to directors that would otherwise be available to them under general company law.

Under section 138(1) of the Companies Act 1993 ("**Companies Act**") directors may rely on employees believed on reasonable grounds to be reliable and competent, and on professional advisers and experts in relation to matters believed on reasonable grounds to be within the person's professional or expert competence. They may also rely on any other director or a committee of directors in relation to matters within the director's or committee's designated authority. This is subject to the requirement that the director relies on such advice in good faith, makes proper inquiry where the need for inquiry is indicated by the circumstances and has no knowledge that reliance is unwarranted.

These principles have recently been confirmed in the *Ministry of Economic Development v Feeney & Ors*<sup>2</sup> (otherwise known as the *Feltex* decision). In confirming these principles, Doogue J described the argument that directors "should themselves have engaged in a study of the accounting standards" as "utterly unrealistic".

NZ Airports cannot see any principled basis for requiring a different standard for regulatory disclosure than for other decisions that directors make that have material implications for shareholders and consumers. In both situations, directors should be able to rely on the expertise of relevant management staff and advisers to ensure technical requirements are met.

By expressly requiring the directors to independently make "all reasonable enquiry", the Commission is therefore proposing a requirement that appears to remove the well-established ability of directors to rely on the competence of management and other professionals, or is at the very least ambiguous as to what extent of enquiry is required. This is particularly so given that the Commission proposes that directors provide separate certification on specific information disclosure requirements. This strongly implies an expectation that directors will inform themselves of what the specific requirements are, and then satisfy themselves that the disclosed information meets those requirements.

As NZ Airports has set out in previous submissions, the due diligence required will "add considerable compliance costs for questionable benefit to an unidentified problem".<sup>3</sup>

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<sup>2</sup> CRI-2008-004-029199, DC, Auckland, August 2 2010.

<sup>3</sup> NZ Airports Association, Submission on Information Disclosure Paper, 11 September 2009, paragraph 200.

## NZ Airports' solution

In the interest of avoiding unnecessary compliance costs, NZ Airports proposes a single certification mechanism similar to the approach adopted by the Australia Competition and Consumer Commission ("ACCC"). The ACCC requires a Directors' Responsibility Statement that regulated airport companies' regulatory accounting statements are drawn up in accordance with the information disclosure requirements and other relevant legislative requirements and that the regulatory accounting statements present a true and fair view of the results for a particular period. There is no express requirement that the director has personally made "all reasonable enquiry".

Directors should also certify compliance with the Commission's information disclosure requirement *on behalf of* the Board of the airport company, not just *being a director* of the Board of the airport company. This clarification will assist in making it clear that the directors are not certifying compliance independently from the company, but as a representative of the Board and the company.

We propose single certification as follows:

### Schedule 21 - Certification for disclosed information

We, [full names], being the directors of [name of Airport], certify on behalf of the Board of [name of Airport] that, to the best of our knowledge, the following attached information of [name of Airport] prepared for the purposes of the *Commerce Act (Specified Airport Services Information Disclosure) Determination 2010* complies with that determination.

[Signature of two directors on behalf of the Board]

[Date]

Accordingly, NZ Airports also proposes the following amendments to clause 11 of the Draft Information Disclosure Determination:

### 11. Certificates

11.1 Where an Airport is required to Publicly Disclose any information pursuant to either of clauses 7.1 or 8.1, 9.1 to 9.6, and/or clause 15.1, the Airport must at that time Publicly Disclose a certificate in the form set out in Schedule 21 in respect of that information, duly signed by two Directors of the Airport.

~~11.2 Where an Airport is required to Publicly Disclose any information pursuant to any of clauses 9.1-9.4, the Airport must at that time Publicly Disclose a certificate in the form set out in Schedule 22 in respect of that information, duly signed by two Directors of the Airport.~~

~~11.3 Where an Airport is required to Publicly Disclose any information pursuant to either of clauses 9.5 or 9.6, the Airport must at that time Publicly Disclose a certificate in the form set out in Schedule 24 in respect of that information, duly signed by two Directors of the Airport.~~

~~11.4 Where an Airport is required to Publicly Disclose any information pursuant to clause 15.1, the Airport must at that time Publicly Disclose a certificate in the form set out in Schedule 23 in respect of that information, duly signed by two Directors of the Airport.~~

NZ Airports looks forward to discussing the above proposal with the Commission and other interested parties during the technical consultation round.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Kevin Ward', is positioned above the typed name.

Kevin Ward  
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