REGIONAL AIRPORTS NEWSLETTER

powered by Ford Sumner Lawyers

In this edition

Welcome to Ford Sumner Lawyers' inaugural Regional Airports Newsletter

After discussion with some of our regional airport clients, we have identified that the sector could benefit from a quarterly update on legal issues impacting airports (and the businesses they operate).

We will be reporting on actual and proposed legislative changes, new case law, and other helpful legal matters.

We hope you will find the content relevant. Feel free to reach out to us anytime regarding the content of this newsletter or your legal matters.

Responding to Information Requests as an Airport

The legal structure and status of airport authorities and airport companies are critical to understanding whether the entity is subject to obligations under the Local Government Official Information and Meetings Act 1987 ("**LGOIMA**") or the Official Information Act 1982 ("**OIA**") when an information request is received.

LGOIMA

LGOIMA permits the general public to request official information held by local government agencies and to access local government meetings.

If you are an airport authority (but not an airport company), you are subject to LGOIMA as a defined class of local authority. Some local authorities may be unaware of LGOIMA, and the requirement to respond to an information request. Local government authorities also sometimes have greater restraints when it comes to servicing requests, given staff resourcing capacities.

OIA

An airport company is captured by and will be subject to the OIA if more than 50% of its ordinary shares are owned by a local authority.

Responding to a Request

If you receive an OIA or LGOIMA information request, the general rule of thumb is information must be made available, unless there is good reason to withhold it.

However, you must reasonably be able to identify the specific information requested.

A decision to service a request must be made no later than 20 working days after it is received (unless the time for responding to the request is validly extended).

In limited circumstances, there is an ability to refuse an information request. However, the grounds to do so are fact-dependent and require certain steps to be taken prior to application. Some common bases to refuse a request are where:

- Information is unable to be made available without substantial collation or research. "Substantial" means, where the request would have a significant and unreasonable impact on the entity's ability to carry out its other operations.
- Information is unable to be located (despite reasonable efforts), does not exist or has been destroyed.
- It is frivolous, vexatious or trivial in nature. There is a high threshold to refuse information under this ground.

Various factors together must be considered prior to refusal, including the history and context of the request, effect on staff, if the request is for the same information.

Most times, the request will ultimately require answering with provision of relevant information – even if it is not readily available.

How can I deter repetitive requesters or requests for voluminous information?

In our experience, it is not uncommon for airports to be subject to repetitive and sometimes frivolous requests for information. Importantly, each request must be treated in isolation – even where it arises from the same requester. Where possible, we recommend applying a fee from the outset of the request. This will assist to assess whether the requester has any real intention to genuinely pursue the request.

You may set a reasonable charge for supplying information based on the cost of the labour and materials for making information available, if you decide to grant the request. You can also require a deposit to be paid by the requester. Where possible, ask the requester to refine the scope of their request to reduce the charge or even, remove the requirement. To read the Ombudsman's guidance on charging under the OIA or LGOIMA, see here.

Holidays Act Overhaul Aims for Fairness and Clarity

In a move aimed at addressing longstanding concerns held by employees, employers, and payroll providers alike, the Government has announced its intention to undertake significant reforms to the Holidays Act 2003. The reforms will impact all employers, including those in the aviation industry.

Background

The Holidays Act has long been considered overly-complex, making it challenging to interpret and implement. Employers' non-compliance with the Act has resulted in employees not receiving the correct remuneration for their leave entitlements and many employers have spent significant time and money remedying historical underpayments. Recognising these issues, the Holidays Act Taskforce was established in 2018. The Taskforce comprised individuals from the business, Government and union sectors. Following extensive consultation, the Taskforce proposed a number of recommendations for reform to the Holidays Act.

In June 2024, the Minister for Workplace Relations and Safety, Hon Brooke van Velden, confirmed an exposure draft Bill will be released for targeted consultation in September 2024, prior to the Bill's formal introduction in Parliament.

Expected Reforms

Based on the Taskforce's recommendations, as well as subsequent advice from the Ministry of Business, Innovation and Employment, we expect the exposure draft Bill will include the following revisions to the current system for determining, calculating and paying employees' statutory leave entitlements:

- **Accrual System**: An "accrual system" to replace the existing "entitlement system" for annual holidays. Under the current Holidays Act, annual holidays do not "accrue". Instead, employees only become "entitled" to annual holidays after reaching the anniversary of their employment. This entitlement system can be problematic from a payroll perspective because, in practice, many payroll providers approach annual leave calculation on an accrual basis.
- **Pro-Rated Sick Leave**: A proposed approach to pro-rating sick leave is expected to feature. Currently, all eligible employees are entitled to receive 10 days' sick leave per annum, regardless of whether the employee works part-time or full-time. A pro-rated system would ensure a fairer sick leave entitlement system.
- **Right to Leave in Advance:** Employees will become entitled to four weeks' leave after 12 months continuous employment, but have the ability to take leave in advance on a pro-rata basis. Currently, leave in advance is at the employer's discretion.
- **Earlier Leave Entitlement**: Bereavement leave and family violence leave will be available to employees from their first day of employment (rather than after six months' employment, which is the current rule). Further, eligible employees will be entitled to one day of sick leave from their first day of employment, with an additional day of sick leave being granted per month of employment until the full entitlement of ten days is reached.

- **Leave Entitlements When Transferring to New Employer**: On the sale and transfer of a business, employees will have a choice about whether to transfer all of their leave entitlements to the new employer or have them paid out and reset. Currently, employees' outstanding leave entitlements cannot be transferred to a new employer because the Holidays Act requires outstanding leave entitlements to be paid out at the end of employment.

Takeaways

A simplified framework for statutory leave entitlements should improve employer compliance, which will benefit employers and employees alike. The reforms will also set a precedent for other legislative improvements that prioritise fairness and clarity.

Until the new legislation comes into force, employers must continue to comply with the existing Holidays Act, including remedying any historical underpayments. We encourage employers to monitor the reforms as they progress through Parliament, particularly as the final version of the Bill will likely differ from the current proposal following further consultation.

Spotlight on: New Plymouth Airport ✈️

Renewable energy in the regional airport space is on the rise, with New Plymouth Airport announcing it has the green light to proceed with the development of a 10MW large-scale solar farm on 15 hectares of land adjacent to the airport (click here for more information). This decision marks the introduction of a significant diversification of the airport's business activities and future sustainability.

We spoke with PRIP's CEO, David Scott, about this exciting project:

- **David, congratulations on the solar farm announcement. What prompted PRIP to explore this opportunity?**

There were two main drivers for us. First, like all airports and anyone in the aviation industry, we are on a journey to see how we can improve our sustainability. Having available land made solar something worth investigating. As it turns out, we had a good opportunity to utilise some of the land adjacent to the airport for a solar farm. Secondly, we were looking for opportunities to diversify our income streams and after completing a robust due diligence process, solar is a good fit for us.

Spotlight on: New Plymouth Airport (continued)

- **Pulling off a solar farm is a complex task, particularly when large scale solar farms are still novel in the airport space. What team of advisers have you got in place for the project and what are their roles?**

  You're right, it is a complex task! Luckily, we have a lot of expertise in the region that we were able to call upon. In addition to the wraparound legal support Ford Sumner have provided, we have also been assisted by Jeff Kendrew, an experienced project consultant, who has been with us from the start and will continue as the project director throughout the project. We appointed Infratec as the EPC after the tendering process and Hollinger Aviation have provided advice around the aeronautical aspects of the project. We also engaged with Iwi early on as the land is part of the Puketapu Hapu ancestral home and they have been supportive throughout this journey.

- **From a legal perspective, what have been the key areas to understand as part of the feasibility process?**

  From understanding the complexities of the electricity industry (including the Electricity Act and Electricity Code), deciding which "hats" to wear (generator, distributor, and/or retailer) and understanding the extent of our compliance obligations, we've come to appreciate it's important to ensure you get the right advice before you make decisions in this space. Solar energy is definitely not without complexity, but the industry is growing fast and there are now plenty of people out there with expertise in this space, like Jeff Kendrew, Infratec and Ford Sumner, who can help with the type of project we are undertaking.

- **What have been the greatest challenges on the project to date? How have you overcome them?**

  One of the bigger challenges we faced was understanding the grid and whether or not it has the capacity to take the load the solar farm will produce. We always hear about challenges with the grid and the electrical network, but I had no idea just how complex those problems are. We had to be a bit creative because one of the connections is limited with regards to how much electricity load it could take, so we are essentially building two separate farms for two separate connections. One farm will provide power for the airport terminal and a microgrid, the other will feed directly into the grid. So, we will be getting the benefit of renewable energy for our own purposes, as well as selling the remaining generation.

- **Renewable energy is at the forefront of considerations for a lot of airports now. Do you have any advice/final thoughts you would like to share for any other airports who are currently considering renewable energy projects, including an idea of the timeframe for investigating and completing the initial feasibility stage?**

  Every airport is different but the first thing I would do if you were considering a solar installation is look at the status of your supply and what the capacity is for uploading any electricity generation. You really have to work back from there. The process for us from conception to financial investment decision has been approximately two years. The other key step is to engage legal, construction, and feasibility experts as early as possible.

- **What do the next few years hold for PRIP?**

  The solar farm will be commissioned in December 2025 if everything goes according to plan, which we are expecting it will. We also have a number of other projects that are currently underway that are designed to improve the customer experience as well as generate additional non-aeronautical income. The industry is at an interesting point and we need to insure that we are really for what lies ahead.

How the Updated Retentions Regime is Changing the Construction Industry

Historically, retaining a proportion of the contract price has been a common approach to securing the performance of a party's obligations under a construction contract. However, recent updates to New Zealand's construction law framework have prompted a growing shift away from "retentions".

With regional airports often undertaking upgrades and developments, we've dedicated the first in a series of construction-focused articles to the new retentions regime.

Background

New Zealand's retentions regime is contained in the Construction Contracts Act 2002 ("CCA"). In October 2023, the Construction Contracts (Retention Money) Amendment Act 2023 came into force ("2023 Act"). The 2023 Act bolstered the existing CCA retentions regime in several key respects, the need for which became apparent following the collapse of Ebert Construction Limited and the position many of the company's subcontractors were left in.

New Retentions Regime

The 2023 Act addresses the deficiencies in the existing retentions regime exposed by the Ebert collapse, including:

- **Scope of "retentions"** – retentions now encompass all amounts withheld as security for the performance of a payee's obligations under the contract (whether or not the contract provides for the amount to be withheld).

How the Updated Retentions Regime is Changing the Construction Industry (continued)

- **Deemed trust** – a trust is automatically created over retention funds. Under the previous regime, positive steps had to be taken by the payer to create a trust (which, as in the case of Ebert, did not always happen).
- **Separation of funds** – retention funds must be kept in a separate trust account and may not be commingling with other non-retention funds.
- **Using retentions** – as trust property, the payer can only use retentions in accordance with the purpose of the trust. The 2023 Act clarifies the circumstances where retentions will cease to be trust property (e.g., if the payee gives up its claim to the retentions in writing; if the retentions are used to remedy actual defects in the performance of the payee's contractual obligations (provided the contract permits such use and the retentions holder has provided the other party with an opportunity to remedy the defects)).
- **Reporting and record-keeping** – a mandatory reporting and record-keeping regime applies for the benefit of the payee.

Effect on Construction Industry

There are several industry concerns regarding the new retentions regime and we are aware of a trend away from retentions towards other forms of security (e.g., contractor's bonds) because of the perceived complexity of the new regime. Concerns include:

- In some instances, the record-keeping requirements imposed under the new regime may require the retentions holder to employ an individual(s) specifically to administer the retentions funds. Accounting software may be also required. This may result in smaller entities moving away from keeping retentions because of administrative/resourcing constraints.
- The trust obligations referenced above may mean that retentions holders have to comply with the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. These obligations can be onerous.
- Often, there are prolonged disputes over whether or not works are defective. This may result in a party holding retentions for much longer than initially anticipated until it can be determined if those funds can be applied to the purported defect.

Key Takeaways

Airports, which often have reasonable resourcing depth, are perhaps better positioned than most retentions holders to respond to the enhanced compliance obligations in the 2023 Act. However, with significant penalties for non-compliant parties under the CCA (fines of up to $200,000 may be issued), familiarity with these obligations is crucial when engaging a contractor to undertake construction work which might involve retentions.

About Ford Sumner Lawyers

Ford Sumner is a commercial law firm based in Wellington that services a national and international client base. We are passionate about working with airports. We have a wealth of experience across airport legal matters, including commercial contracts, property, construction, employment, dispute resolution and legislative compliance matters. Please contact us if we can be of assistance to you and your airport.

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An expert corporate and commercial lawyer, Sarah leads Ford Sumner's Commercial Team. Acting for several regional airports, Sarah is an expert in the commercial contracts and regulatory issues that arise in the aviation sector. Sarah's experience includes the full spectrum of issues in the airport legal environment, from airline agreements to property development, including renewable energy projects.

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