AIRPORTS NEWSLETTER

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Ford Sumner Lawyers

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In this edition

Welcome to Ford Sumner Lawyers' Airports Newsletter

Welcome to our third airports legal update for 2025. In this issue we explain some new regulatory measures in the Civil Aviation Act 2023, we keep you up to date with the Government's proposals to reform current employment law, and we look at the possible impact on smaller airports if the Commerce Commission's jurisdiction is expanded to include them.

Employee vs contractor

Where the law on contractor status is going

Do you hire contractors to keep your airport working smoothly? A new Government Bill before Parliament could soon make it easier for you to hire genuine contractors – which makes now an excellent time to review your arrangements.

Uber goes to the Supreme Court: A potential landmark decision ... but for how long?

Parallel with the new Bill going through Parliament, Uber has appealed to the Supreme Court against earlier court rulings that four of its drivers were in fact employees, and not contractors as their contracts stated.

This is likely to be a landmark decision, as employee status is the gateway to minimum entitlements under the Employment Relations Act 2000, like holiday pay and sick leave and the right to use the personal grievance process.

The Supreme Court will be applying the current statutory test (in section 6), which focusses on the "real nature" of the arrangement, rather than just the words used in the agreement. The test is designed to prevent the formal description of an arrangement overshadowing its real substance.

But this test also creates some uncertainty, as the Uber case's progress through the lower courts showed. While the Employment Court and the Court of Appeal both decided the workers were employees, they applied different reasoning to get there. The new Bill before Parliament aims to reduce the uncertainty for the two contracting sides, so that they're less likely to find their arrangement later reclassified by the courts as employment.

The Government steps in with a proposed statutory "gateway" test

The Supreme Court heard the Uber case in July and is yet to hand down its decision. In putting pen to paper it will be racing against the Parliamentary timetable, as new legislation could quickly render the court's decision out of date.

Under the proposed new test in the Employment Relations Amendment Bill, a worker will definitively be a "contractor", not an employee, if the arrangement meets all of the following five criteria:

1. A written agreement specifies that they're an independent contractor.
2. The worker isn't restricted from working for someone else (except when working under the current arrangement).
3. The worker doesn't have to be available for work at any specific time or for a minimum period, or they're allowed to subcontract out any of the work.
4. The arrangement doesn't terminate if the employer offers the worker additional work and they turn it down.
5. The worker must have had a reasonable chance to get independent advice before they agreed to the arrangement.

Under the current law, a "contractor" arrangement that met all those five criteria could still be challenged in the courts by the worker under the "real nature" test, and the judge could potentially rule that the worker is an employee, not a contractor. The proposed new test would close that door.

What the new contractor test would mean for you as an employer-principal

A straightforward checklist like the one in the new Bill will likely make it easier for businesses to engage contractors for genuine contracting purposes, by helping them make sure the correct arrangements are set up and maintained.

The Bill is currently before a Select Committee, which is due to report back in November, and the Bill could be passed and in force by the end of the year. So now is a good time to think about your arrangements for your employees and contractors.

Check over your written agreements for both types of worker status, and look at the way the arrangements operate in practice to see if they meet the Government's proposed gateway test. If the test is met, the workers in question will be genuine contractors if the Bill is passed. Either way, you will have more certainty around your rights and obligations as an employer in relation to your wider workforce.

Are your airport's charges reasonable?

Signals from the Commerce Commission about what an expanded jurisdiction could mean for you

The Commerce Commission operates a light-touch regulatory framework when it comes to our three international airports, centring on disclosing financial information, and non-binding reviews of charges by the Commission. Its recent review of Auckland Airport's charges shows the approach the Commission might apply to other airports' charges if its jurisdiction is widened.

Recently, the Commission decided that Auckland Airport was overcharging customers. Its report demonstrated the approach it may take towards other airports in similar scenarios.

The Commission's jurisdiction currently only includes Auckland, Wellington, and Christchurch international airports, but the Government has signalled it is open to extending the jurisdiction to more airports, including Queenstown.

A light-handed regulatory approach, turning on transparency and scrutiny

Rather than the Commerce Commission imposing direct controls on pricing, its regulatory tools for our international airports rely mainly on transparency and scrutiny, with the airports having to disclose certain key information.

These are the key features of this legal framework (which is set out in Part 4, subpart 11 of the Commerce Act):

- The information the airports must disclose includes forecast and actual revenues, and capital expenditure plans.
- If disclosure alone is inadequate, the Commission can recommend stronger measures, such as negotiation/arbitration or price-quality regulation.
- The Government can also bring additional airport services under this regulatory framework, through an Order in Council.
- Publishing pricing methodologies and returns on investment.

This transparency opens up the airports to scrutiny by airlines, passengers, policymakers, and the wider public, giving the airports an incentive to act as if they were operating in a competitive market.

How airport charges are set

The Commerce Commission can't tell airports what to charge: the Civil Aviation Act 2023 gives all airports the power to set their own prices (see section 230). But airports do have to consult with "substantial customers" (such as airlines) when setting prices, particularly in relation to significant capital expenditure projects.

After pricing is set, the Commission assesses whether the prices and returns are reasonable. Its conclusions aren't binding, but they carry significant weight, and serve as a disciplining influence on airport behaviour because of the potential for direct government intervention.

The Commerce Commission also has the power (under sections 56G–56I of the Act), to inquire into whether further regulation is needed. These inquiries weigh the benefits of increased regulation against the costs, and they can result in a recommendation to the Minister of Commerce to impose more intensive regulatory tools.

Auckland Airport and "Price Setting Event 4" (PSE4)

A prime example of the Commerce Commission's oversight role is its review of Auckland Airport's "Price Setting Event 4" (or "PSE4"), covering the years 2022 to 2027. The Commission found that the airport's forecast revenues were excessive, with an unreasonably high targeted return of 8.73%.

This return far exceeded the Commission's mid-point estimate for the weighted average cost of capital (WACC) of 6.98%. It was also higher than the 7.28% WACC used by Christchurch Airport. Even when accounting for market conditions in Auckland, Auckland's rate was still high.

The Commerce Commission estimated the airport would earn excess profits of between $150.2 and $226.5 million over the five-year period due to this inflated return. In response, Auckland Airport discounted its prices, bringing the targeted return down to 7.82%, within the range the Commission found acceptable.

Recognising the value of investment and infrastructure resilience

In making its decision about the Auckland charges, the Commerce Commission wasn't ignoring the importance of long-term investment in airport capacity.

Auckland Airport is working towards replacing the existing domestic terminal building, a project requiring substantial capital. The Commission's final report acknowledged that the airport's substantial capital investment programme was reasonable and consistent with international benchmarks.

These investments, covering terminal upgrades, airfield resilience, and increased capacity, are critical to New Zealand's infrastructure future. The Commission recognises that investing in long-term capacity supports greater competition, better service for passengers, and a more resilient national economy.

What other airports can do to prepare for any potential regulation by the Commission

Airports that become aware they could be brought under Commerce Act regulation can do a number of things to ready themselves, including evaluating their pricing methodologies, their capital expenditure planning, and their processes for consulting their various stakeholders such as airlines, industry bodies, and local government.

As seen in the Auckland Airport example, if airports' pricing strategies aren't in line with reasonable returns, this can earn them a lot of scrutiny and, potentially, damage to their reputation – as well as the possibility of direct government intervention.

To meet the information disclosure requirements if they're introduced in your case, you'll need to develop sound internal systems for financial forecasting and cost allocation, as well as for developing and recording the rationale for investments.

Equally important is fostering transparent relationships with airlines and your other key stakeholders.

Consider also how your long-term infrastructure planning fits with national economic and resilience objectives. The Commerce Commission has shown it's willing to support investment when this is clearly justified and it benefits the broader transport network.

Engaging proactively with the Commerce Act framework

Ultimately, if the Government does extend the Commission's regulatory oversight to other smaller airports, those airports will be in a stronger position if they engage proactively with the principles underpinning the Commerce Act, anticipate the Commission's expectations, and update their internal practices accordingly.

Taking on CAA Decisions

Different appeal and review options in the Civil Aviation Act

Different kinds of decisions under the Civil Aviation Act can be subject to different kinds of challenges. This article first looks at a recent High Court appeal concerning a pilot's medical certification, with the case illustrating the strict, quite narrow appeal procedure that applies to court challenges. We then highlight the new independent review process in the Act – this provides a more practical route for taking on some regulatory decisions.

A narrow appeal: McCarthy v CAA

Mr McCarthy had been a commercial pilot since 1976. In January 2018 he applied to renew his medical certificate, a requirement for retaining his Commercial Pilot's licence.

In June 2019, the CAA refused his application, citing a number of relevant medical issues, particularly "exophoria", an eye condition that can cause double vision and dizziness, among other effects.

The legal framework for CAA decisions on medical certificates

The CAA decision had followed the process set out in the Civil Aviation Act (see Schedule 2 of the Act). The applicant first has a medical examination, and the medical examiner sends their findings to the CAA. If the CAA is satisfied the person meets the relevant standards in the Civil Aviation Rules (in Part 67), it must issue a medical certificate, unless the person has characteristics that could interfere with aircraft safety.

Even if the person has those characteristics, the Act also gives the CAA "flexibility" to issue the medical certificate if certain criteria are met (clause 5 in Schedule 2). The criteria include making the certificate subject to any conditions or restrictions that are necessary to ensure the person can work safely.

This legal framework prioritises aviation safety but also recognises that not all medical conditions need be disqualifying, so long as there is sound expert medical judgment and appropriate safeguards.

How the challenges were decided in the McCarthy case

Mr McCarthy applied for a review by the "Convener", a doctor appointed under the Civil Aviation Act to represent the public interest in aviation safety. They must be experienced in or knowledgeable about civil aviation. In this case, the Convener supported the CAA's decision.

Mr McCarthy appealed to the District Court in 2020. After unsuccessful efforts to resolve the appeal, the case eventually went to a hearing in 2024. The judge ruled that this kind of appeal has a narrow scope, and so refused to admit any new evidence beyond that before the CAA when it made the original decision. Mr McCarthy then appealed to the High Court, arguing for a broader consideration of his case.

The High Court upheld the narrow scope of the appeal. The judge said that if Mr McCarthy wanted a "wholesale" examination of the CAA's process, the proper route may have been judicial review.

You can read the High Court's decision here: McCarthy v Civil Aviation Authority of New Zealand [2025] NZHC 1393

Judicial review of officials' decisions: A focus on process, not the merits

The judge in McCarthy mentioned Judicial review, which is where the High Court reviews a decision made by an official under a statutory power.

However, the judge can only look at whether the decision maker followed the process set down, either explicitly or implicitly, in the relevant legislation. For example, the judge can look at whether the decision maker took irrelevant factors into account.

The High Court can, among other options, decide to quash the relevant decision and order the decision maker to consider the issue again. But that could very well end up with the same substantive decision being made again.

Cleared for review: A more practical way to challenge some CAA decisions

In response to longstanding concerns around accountability, the Civil Aviation Act 2023 introduced a new independent review function for some regulatory decisions (see sections 443–452).

The new review process isn't an option in a medical certification case like McCarthy v CAA. That case is a reminder of the high threshold and strict procedural rules that govern court appeals of CAA decisions, particularly decisions involving health and safety.

But for those CAA decisions that can be reviewed under the new independent process, it gives a more practical route for challenging them – one that balances procedural fairness with the ultimate imperative of aviation safety.

What kinds of decisions can be reviewed?

- You can challenge decisions such as the suspension or cancellation of pilot licences, air operator certificates, maintenance licences, and airworthiness certificates.

Who can apply for a review?

- A person who the decision is made against
- The owner, operator, or person in charge of the aircraft or aeronautical product that is the subject of a decision.
- Individuals and organisations can apply.

How to apply?

- You must apply in writing within 20 working days after the relevant decision.
- You must clearly identify the aspects of the decision you're challenging.
- The fee is $1,000 for individuals, and $1,500 for organisations.

What is the review process?

- The independent reviewer can seek expert advice and can require you, the CAA, or any other person to provide evidence.
- The reviewer must act promptly and transparently.
- They must issue give their final decision within 10 working days after completing their review.

A welcome development

The new review option is a welcome development for aviation operators, especially smaller airports, as a further mechanism if they feel a regulatory decision affecting them was unfair or disproportionate.

The process is more accessible and expert-driven than full court litigation, offering faster resolutions while still preserving aviation safety as the core objective.

If you have any questions about a specific matter or would like advice on how these legal appeal and review mechanisms might apply to your operations, please get in touch with our aviation law specialists, Sarah Churstain and Jaesen Sumner.

What your airport should do if concerned about a pilot's fitness or competence

If you've got cause to be concerned about a pilot operating out of your airport or aerodrome, here are two bits of advice for managing the situation proactively:

- **Report your concerns promptly** – Notify the CAA of any safety concerns you have, including any behavioural, medical, or operational red flags.
- **Keep good records** – Keep records of any incidents, observations, or third-party complaints that could be relevant when the CAA is considering a pilot's continued fitness to operate.

Are you a "DAMP Operator"?

A new regulatory framework for drug and alcohol risks in aviation

Drug and Alcohol Management Plan operator – or "DAMP operator" for short – is a key function in the new framework in the Civil Aviation Act 2023 for managing drug and alcohol use in aviation. The role comes with some important obligations that airports need to be aware of – including developing a plan, doing random testing, and keeping records.

But your first question will of course be: Is my airport a DAMP operator?

Who is a DAMP operator?

Most, but not all, airports will be a Drug and Alcohol Management Plan operator and so have important new obligations to comply with. This part of the Civil Aviation Act says that if your organisation is carrying out an activity that could significantly impact the health and safety of someone on a plane, and you hold a specific certificate under the Civil Aviation Rules, then you are a DAMP operator (see Part 4, subpart 6 of the Act).

There's a lengthy list of relevant aviation-sector certificates – the list includes an aerodrome operator certificate, and so essentially any operational small airport. It also includes airlines, the Aviation Security Service, aircraft maintenance operators, aircraft design organisations, and others.

But even if you don't hold an aerodrome operator certificate, check the full list of certificates on the CAA's website to see if you're captured by any of the others. The CAA sets out the relevant Part of the Rules, Part 99, and see in particular Rule 99.5.

Your airport may also have other organisations operating out of it who are DAMP operators, and so it would be wise for you to be familiar with the new DAMP framework and what the obligations of DAMP operators are.

What obligations do DAMP Operators have?

DAMP operators have several statutory obligations, including:

- developing and implementing a Drug and Alcohol Management Plan
- carrying out random testing, and
- record keeping.

These obligations are all set out in Part 4, subpart 6 of the Civil Aviation Act.

Developing a Drug and Alcohol Management Plan

DAMP operators must develop a Drug and Alcohol Management Plan to deal with risks involving workers doing "safety-sensitive activities" – which means work that could significantly affect the health or safety of any person on board an aircraft, including the person doing the activity (see section 114).

In developing your plan, you must consult with the affected workers and follow any processes set down in the Civil Aviation Rules.

The plan must:

- provide for random testing of safety-sensitive workers (see below)
- specify the drugs to be tested for
- set permissible levels of alcohol or drugs (if any), and
- include a response plan for workers who refuse to be tested or who return a non-negative result.

A transition period for developing a DAMP

DAMP operators have to submit their plan to the CAA for approval. There's a transitional period for this, ending on **4 April 2027.**

The CAA will set the implementation date for the DAMP, which can't be later than the end of the transition period, 4 April 2027.

Random drug and alcohol testing

Random testing can only be done with the worker's consent (see section 115).

If the worker refuses to do the testing, the DAMP operator must ban the worker from doing the safety-sensitive work and implement their response plan.

The CAA can also carry out drug and alcohol testing, again only with the worker's consent, and this is also subject to various restrictions to ensure the process is reasonable (section 116). This includes giving the affected workers reasonable notice (if this is practicable).

Any test results obtained through your random testing or through testing ordered by the CAA can't be admitted in a criminal prosecution in the courts, except for offences under the Civil Aviation Act itself or under the Health and Safety at Work Act 2015.

Record Keeping

As a Drug and Alcohol Management Plan operator, you have to maintain records related to the DAMP, including records of testing and any actions in response, as prescribed by the Civil Aviation Rules (see Rule 99.17).

The DAMP must also be treated as part of your aviation documentation.

Getting pro-active

As usual, when it comes to being aware of and complying with statutory obligations, it's best to be pro-active.

If you'd like to review your DAMP processes and what you're doing to comply with the requirements in the Act and the Civil Aviation Rules, please get in touch with one of our aviation experts, Sarah Churstain or Jaesen Sumner.

Reform of the Holidays Act

What all employers should expect

On 23 September 2025, the Government announced it will replace the Holidays Act 2003 with a new "Employment Leave Act". According to Workplace Relations and Safety Minister Brooke van Velden, the reforms are intended to bring simplicity, transparency, and fairness to leave entitlements, for both sides. Here we summarise the key changes, and list some risks and uncertainties that employers should watch out for.

The key proposed changes

The existing Act has long been criticised for its complexity and inconsistent rules, which have exposed many employers to the risk of significant back-pay liabilities. The Government's reforms are designed to simplify administration and reduce those compliance risks, as well as making entitlements clearer for workers.

Here is a summary of the main changes announced by the Government:

- Annual and sick leave will accrue based on hours worked, rather than on weeks of service.
- Sick leave will accrue from Day 1, instead of after six months.
- Casual employment and extra hours worked will attract a 12.5% Leave Compensation Payment (replacing the current 8% loading).
- Employees returning from parental leave will receive their full pay for annual leave.
- Bereavement leave and family violence leave will be available from the first day of employment.
- Employers will be required to provide clear pay statements for each pay period, showing leave and pay entitlements.
- Employees will be able to cash-up up to 25% of their annual leave balance (if their employer agrees).

Reform of the Holidays Act (continued)

What all employers should expect

Risks, uncertainties, and areas to watch

While the policy direction has been generally well-received, employers should be mindful of the following:

- The precise drafting of the Bill will determine many of the practical details.
- Payroll and HR systems will need to be updated and tested, and staff will need training.
- Some employers may face higher costs, particularly for casual employees.
- Employers may need to manage transitional arrangements for existing leave balances.
- The expanded cash-up provisions, although they require the employer's consent, may create new expectations from employees.

Five things employers should do now

1. **Review** your current payroll, rostering, and leave policies to identify potential gaps.
2. **Talk** to your payroll provider to confirm that they're well-placed to support you if the Bill is passed.
3. **Model** the financial impact of the proposed accrual rules on your workforce.
4. **Review** your employment agreements and leave policies to ensure they're ready for the new rules.
5. **Monitor** the progress of the Bill and any opportunities to make submissions to select committee.

Planning for the transition

Replacing the Holidays Act is a significant proposal that will, if it's progressed, affect all employers. The shift to hours-based accruals, new entitlements from Day 1, and greater transparency will require you to prepare carefully. Many of the reforms should make compliance easier in the long run, but the transition will demand planning.

If you'd like tailored advice on how these reforms could affect your organisation, or if you need help updating your employment agreements, payroll processes, or workplace policies, please feel free to contact Jaesen.

Welcome Rebecca Richter

Meet our new construction-law specialist

We're delighted to welcome construction-law specialist Rebecca Richter to the Ford Sumner team. Rebecca has a wealth of experience advising on infrastructure and construction contracts across a wide range of projects, and has particular expertise in drafting contracts, negotiation, and managing risk.

Rebecca has recently returned from the UK, where she worked on major projects across the construction industry, including advising on significant airport projects. She understands the challenges and opportunities clients face in delivering large-scale projects.

Rebecca is especially passionate about contributing to innovative, forward-looking work within the construction sector, and she's looking forward to helping our clients ensure their projects succeed.

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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.

Sarah Churstain, Partner

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 that arise in the airport legal environment, from airline agreements to property development, including renewable energy projects.

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Working for our commercial and corporate practice, Jordan has a strong focus on property, company, construction matters. He has particular experience assisting airport clients with large projects, commercial leasing matters and Local Government Act issues.

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An experienced litigator with significant expertise in civil litigation and employment law, Jaesen leads Ford Sumner's Dispute Resolution Team. He has acted for airports over a number of years, advising on a wide range of matters including construction disputes, complex restructures, civil aviation, environmental protection and trespass issues.

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Working in the Employment and Litigation Team at Ford Sumner. Emily has experience drafting contracts for clients in a variety of sectors. Emily has also been involved in litigated matters, particularly construction disputes.

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